



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 708

APPLICANT IP
APPLICANT OS
RESPONDENT L Ltd

The Tribunal orders:

L Ltd is to pay the sum of \$7466.38 to IP and OS by no later than 19 January 2024.

Reasons:

1. In May 2021, IP and OS purchased a section from L Ltd. A Geotech report was arranged by L Ltd in June 2021 which revealed topsoil to a depth of 300mm in the borehole, with a range between 100mm – 700mm. Prior to settlement, a completion report indicated a further Geotech report had been undertaken which confirmed topsoil depths remained unchanged from the previous report.
2. IP and OS contracted [Builder] to design and build a home. Costings were based on the information provided in the completion report. However when earthworks commenced in September 2022, it was found the site contained more topsoil than advised, ranging from 900mm to 1.1m in depth. Although [Builder] had provided for a significant contingency in their costings, IP and OS were required to pay an additional \$7466.38 for topsoil removal.
3. When the problem was discovered, IP and OS contacted TN, manager of L Ltd, for assistance. The problem was discussed in depth with all relevant parties, at a site visit. During the meeting, it was considered it would take a contractor approximately 2 days to remove the excess soil. TN agreed to pay this amount.
4. The actual works took longer than anticipated. As TN did not arrange payment, IP and OS claim in the Disputes Tribunal for compensation for the additional costs incurred.
5. The issues for the Tribunal to determine are as follows:
 - i. Did L Ltd misrepresent the depth of topsoil prior to settlement?
 - ii. Did L Ltd agree to pay for the removal of additional topsoil?
 - iii. Is L Ltd liable to compensate IP and OS for the additional costs incurred?

Did L Ltd misrepresent the depth of topsoil prior to settlement?

6. L Ltd had an obligation to ensure information provided to IP and OS at settlement was accurate so as not to be a misrepresentation.
7. TN agrees the information provided in the completion report was inaccurate and arose as the Geotech information was taken from the original report rather than obtain a new Geotech report.

TN stated he was also surprised to learn there had been excess topsoil left on the section as he had paid to have it taken away. Photos show a large pile of topsoil had at some point been dumped onto the section. Instead of being removed, it appears as if this has been spread over the section, resulting in the increased depths.

8. In view of the inaccurate Geotech information, I find L Ltd misrepresented topsoil depths when making a decision to settle. If accurate information had been provided, IP and OS could have discussed options available to them.
9. TN referred to clause 30.3 of the Agreement for Sale and Purchase under which the purchaser buys solely in reliance on their own judgement, however I find it was reasonable for IP and OS to also rely on representations made in the completion report provided prior to settlement about topsoil depths.

Did L Ltd agree to pay for the removal of additional topsoil?

10. TN agrees a site visit took place and that he had agreed to pay for the contractors time, however he has not done so as the contractor did not invoice him. TN indicated he was willing to pay for two days of the contractors time, however as the work took longer than expected, he is not willing to pay the amount claimed.
11. I have heard evidence with regards to the site meeting and the agreement reached with TN. I find TN had agreed the final completion report was wrong and that the excess topsoil should not have been on this site. I further find it was the expectation of those attending the meeting that the work would take approximately two days. No amounts were discussed. The contractor however completed the work over four days and invoiced \$7466.38. This is over and above expected earthworks and a large contingency for the unexpected provided for by [Builder].
12. After consideration of the above points, I find it was the intention of the parties attending the meeting that L Ltd would pay the costs incurred to remove the excess topsoil. Although two days was mentioned, I find this was merely the expectation of time needed, and not a limit on what L Ltd would pay.
13. TN stated clause 23.5 of the Agreement for Sale and Purchase enables them to do what was done. Clause 23.5 allows L Ltd or its contractors to enter the section to do works as necessary or desirable to complete the subdivision. However I do not consider the works undertaken fall within the meaning of clause 23.5 as TN agreed the topsoil should not have been on this site.

Is L Ltd liable to compensate IP and OS for the additional costs incurred?

14. In view of the above, I find L Ltd liable to pay IP and OS the sum of \$7466.38. I find this fair and reasonable in view of the misrepresentation and in view of the intention of the site meeting held to discuss the problem.

Referee: DTR Edwards
Date: 18 December 2023



Information for Parties

Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 20 working days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

Grounds for Appeal

There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact. Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 working days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 working days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.