



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 651

APPLICANT K Ltd

RESPONDENT SK and TK

The Tribunal orders:

1. SK and TK are to pay K Ltd \$8,072.69 on or before 1 December 2023. This is calculated as follows:

Balance owed by SK and TK for pool install	\$9,971.69
<u>Less compensation for remedial work to the lawn</u>	<u>\$1,899.00</u>
Total	\$8,072.69

2. The balance of the claim and counterclaim is dismissed.

Reasons

1. SK and TK engaged K Ltd to install a pool at their home. The pool was set in the ground at a higher level than what SK and TK expected and what was stated in the contract. K Ltd offered to take the pool out and lower the height but said that it would invalidate the warranty. The parties agreed that the pool would stay at the same height and that K Ltd would contribute \$1,600.00 to some landscaping to raise the ground height around the pool. However, the remedial work was more expensive than expected by SK and TK and they asked K Ltd to pay a further \$8,131.69 for the remedial work. K Ltd refused to pay any more and SK and TK withheld the amount owing for the completion of the job.
2. K Ltd claims \$9,971.69 being the outstanding balance owing for the pool install, plus interest of \$4,450.04. SK and TK counterclaim; \$6,251.68 (amended from original claim) being the balance owing for the remedial work around the pool, and \$1,899.00 for remedial work on the lawn.
3. The issues to be resolved for the claim and counterclaim are:
 - a) What are the terms of the contract?
 - b) Has the contract been completed? If so, is the final payment of \$9,971.69 owing?
 - c) Is K Ltd entitled to charge interest of \$4,450.04 under the terms of the contract?
 - d) Did K Ltd carry out the pool installation with reasonable care and skill?
 - e) Did K Ltd reach an agreement to remediate the pool height by paying PY to carry out landscaping around the pool? Does this agreement prevent SK and TK from claiming \$6,251.68 for additional remedial work?
 - f) Is K Ltd obliged to fix the lawn under the contract? If so, does K Ltd have to pay \$1,899.00 compensation to fix the damage to the lawn?
 - g) Are SK and TK entitled to claim legal costs of \$4,000.00?

What are the terms of the contract?

4. A contract is an agreement that the parties intend to be legally bound by. It involves an exchange of promises and becomes binding when the parties agree on clear and certain terms.
5. I find that the contract was formed when SK and TK accepted the proposal for the [redacted] pool on 1 September 2022 and SK signed the Swimming Pool Installation Agreement. This stated that the estimated time for completion from commencement of excavation would be 2 - 3 weeks.
6. A key area of disagreement is the pool height. SK and TK state that they told EB from K Ltd that they wanted the pool to be the same height as their concrete patio. This was important to them because of TK's mobility challenges. K Ltd sent them a 'mock up' picture showing what the pool would look like in their back yard. This showed the pool level with the patio, so this confirmed to them that K Ltd understood what they wanted.
7. However, EB states that he told SK and TK that the pool had to be 150mm above the lowest point of the patio to avoid flooding risks. He determined an appropriate height using a laser beam and he also considered the bank behind the pool and how that might affect the flood risk. He set the finished height for the top of the coping (the pavers around the edge of the pool) as 170mm above the existing patio. He says that this was clearly communicated to SK and TK because it was written on the pre-construction form, signed by SK.
8. SK and TK strongly deny being told about any requirements for the height of the pool. They also state they did not agree that it would be set 170mm above the patio. SK doesn't recall seeing the height set at 170mm on the pre-construction form.
9. There has clearly been a miscommunication about the height of the pool. However, the fact that the height was written on a form signed by SK does lend weight to the K Ltd submission that the finished height was discussed with SK and TK. Therefore, I find that the finished height was 170mm above the patio.

Has the contract been completed? If so, is the final payment of \$9,971.69 owing?

10. SK and TK say that they were very disappointed with the completion of the project. It took 4 months instead of 2 - 3 weeks. They expected the pool to be finished by the end of September 2022, however it wasn't handed over until 25 January 2023. The heat pump was leaking, the pool shed was put in the wrong place, rubbish was left on site, the lawn was damaged, and the necessary documents had not been provided to get sign off by the council. However, they agree that all of these issues have been resolved.
11. I accept the submission of FC, representative for K Ltd, that the contract is complete. The pool was handed over on 25 January 2023 full of water, the appropriate water tests were done and the water was balanced and ready for swimming.
12. Therefore, I find that the final payment of \$9,971.69 must be paid by SK and TK.

Is K Ltd obliged to fix the lawn under the contract? If so, does K Ltd have to pay \$1,899.00 compensation to fix the damage to the lawn?

13. SK and TK state that in the course of completing the pool install K Ltd damaged their lawn by leaving rubbish, including gap fill on it, that became imbedded into the lawn. In addition, they left gouges in the lawn from vehicle wheels. EB from K Ltd promised to fix the lawn, but after he left, FC did not follow through on the promise. Therefore, they claim \$1,899.00 compensation to get [digging company] to scrape, level and backfill the area with soil.
14. FC points to the contract which states "*While every care will be taken to minimise damage to lawns and gardens, remedial works are not included. This said, the working area will be planned*

in a 'least impact' way and general site tidiness and clean up is allowed for". Therefore, FC says that the contract specifically excludes remedial work for the lawn.

15. EB gave evidence that he did discuss the state of the site after the install with SK and TK. He agreed that it was not left in a tidy condition. There was rubbish lying around and muddy tracks in the grass. He went back with some staff, and they picked up rubbish. He did promise to spread some topsoil to fix the tracks in the lawn.

16. I accept the evidence of SK and TK that the remedial work carried out by EB and his team did not remove all of the rubbish, and that rubbish was imbedded in the soil. Therefore, soil had to be removed and replaced in order to tidy the site. I find that K Ltd is obliged to remediate damage to the lawn as promised by EB. This complies with K Ltd's promise in the contract to allow for *general site tidiness and clean up*.

17. Therefore, I find that the claim for \$1,899.00 is proved. I am satisfied that the invoice provided shows the actual costs incurred by SK and TK.

Is K Ltd entitled to charge interest of \$4,450.04 under the terms of the contract?

18. FC points to clause 3 of the Swimming Pool Installation Agreement which states that if the client is in default, they will be liable to pay interest calculated on a daily rate at a rate of 2.5% per month from the due date to the date of payment. FC says that interest has been charged from 30/9/22 to 28/2/23. The holdups were not entirely the fault of K Ltd and included the fact that there were delays by PY in completing remedial work.

19. However, I accept the submissions of SK and TK that the pool wasn't handed over until 25 January 2023 and there was still a dispute about the payment for remedial work, therefore it was not fair for K Ltd to charge interest. I find that it was unreasonable to expect the 50% payment on 30 September 2022. This date is clearly the expected completion date of the contract however the pool wasn't handed over until 25 January 2023.

20. Therefore, I find that the claim for \$4,450.04 is dismissed.

Did K Ltd carry out the pool installation with reasonable care and skill?

21. The Consumer Guarantees Act 1993 provides implied guarantees for consumers that services purchased from suppliers must be provided with reasonable care and skill. If the services are not provided with reasonable care and skill, the consumer may ask the supplier to carry out remedial work.

22. I find that K Ltd did not install the pool with reasonable care and skill because it was 25mm above the 170mm height above the lowest point of the patio. Therefore, SK and TK were entitled to a contribution from K Ltd towards the remedial landscaping work to raise the level of the ground around the pool.

Did K Ltd reach an agreement to remediate the pool height by paying PY to carry out landscaping around the pool? Does this agreement prevent SK and TK from claiming \$6,251.68 for additional remedial work?

23. SK and TK say that the payment of \$1,600.00 was never a full settlement. It was only the cost of the sleepers, not the full cost to raise the ground up around the pool. When they got the final bill from PY for \$6,251.68, they considered it was a cost that K Ltd should pay because it was a consequence of their error.

24. FC says that an agreement was reached that the pool would stay at the installed height and that K Ltd would pay \$1,600.00 to PY as a contribution to the landscaping work with sleepers. He refers to an email from SK and TK on 14 September 2022 where they state "*There is a \$1,614.69 difference now with the cost of fencing and concreting due to the pool being placed too high. We*

see that this should not be at our cost, and request that K Ltd covers this difference to remedy the situation". K Ltd agreed to this request.

25. Having regard to the wording of the email, I find that K Ltd reached an agreement with SK and TK to pay \$1,600.00 to PY to settle their contribution to the remedial work. The words *cost of fencing and concreting* appear to cover the remedial work in their entirety and do not only refer to sleepers. In addition, there is no mention about the likelihood of further earthmoving and labour costs. I find that K Ltd was entitled to rely on this agreement as being a full and final settlement, therefore SK and TK are not entitled to claim \$6,251.68 for additional remedial work.

Are SK and TK entitled to claim legal costs of \$4,000.00?

26. Section 43 of the Disputes Tribunal Act 1988 sets out the grounds of when costs can be awarded. If a claim is brought that is frivolous, vexatious, or unnecessarily prolongs any proceedings by engaging in conduct intended to impede prompt resolution then costs may be awarded.
27. Legal fees fall into the definition of costs. The claim is not frivolous or vexatious nor has any party unnecessarily prolonged the proceedings. Therefore, the claim for \$4,000.00 is dismissed.

Referee: Sara Grayson
Date: 10 November 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>.