



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 560

APPLICANT **LD**
RESPONDENT **BD Ltd**
SECOND **BT Ltd**
RESPONDENT

The Tribunal orders:

The claim against BD Ltd is withdrawn.

The claim against BT Ltd is dismissed.

Summary of Reasons:

- [1] The hearing was convened by telephone. All parties appeared at the hearing.
- [2] LD and his insurer, BJ Ltd confirm they wish to withdraw their claim against BD Ltd.
- [3] The applicant holds BT Ltd liable for damage to his driveway caused when a new spa pool purchased from BT Ltd was delivered by crane to his backyard by BD Ltd in October 2021. At hearing LD and BJ Ltd accepted BD Ltd had advised BT Ltd by email dated 7 October 2021 that it would accept delivery to LD's property, but it would not accept responsibility if there is damage to the drive.
- [4] The question then becomes whether BT Ltd advised LD of possible damage to his driveway before it agreed to deliver the spa. BT Ltd claims LD was clearly told BT Ltd would not take liability for any damage caused by delivery of the spa. The method of delivery was discussed with LD, it was determined a crane delivery would be required, a site visit was arranged and carried out by BD Ltd who provided a site plan that showed a crane delivery was possible but again only at the owner's risk. Further LD was provided with a full copy of BT Ltd terms and conditions by email dated 2 October 2021. These terms include a provision that the customer will need to ensure the accessway is able to withstand the weight of the truck and load.
- [5] LD is clear in his evidence that he was never told of any possible damage to his driveway, that there was no site visit before delivery, and he was not provided with a written contact. He does admit however that he received information via email and had telephone conversations with a salesperson from BT Ltd about delivery method. LD also admits that because the delivery was in October 2021, he cannot be sure a site visit did not take place before delivery, but he is sure the risk to his driveway was never discussed.
- [6] As discussed at hearing, the Tribunal is required to apply an evidential standard. The burden is on LD to prove his claim, that he was never advised of any risk to his driveway, on the balance of probabilities.

[7] On the evidence presented to the Tribunal, LD has not met the burden of proving this on the balance of probabilities. I am persuaded, despite LD stating there was no contract, that there clearly was a contract. BT Ltd emailed an offer to LD. This offer included its terms and conditions. One of the clearly expressed delivery terms is that the liability to ensure the accessway was able to withstand the weight of the truck and load remained with LD.

[8] Further given the site visit plan provided, I am persuaded there was a site visit before delivery despite LD claiming there was not. I accept BD Ltd's evidence that it does not send a large crane to site without first ascertaining the required work can be carried out. This view is supported by the email dated 2 October 2021 where BT Ltd advises LD that it had requested the dispatch team take a look at his property aerial photos and request a site check so a price for delivery could be determined.

[9] Someone from the household must have been present at his time because the place the spa was to be placed in the backyard is marked on the site plan. It is less clear that the risk of the driveway cracking was explicitly discussed at this time but given the evidential standard I must apply, LD must persuade me it was not and at best it may or may not have been explicitly discussed.

[10] Even if no site visit was arranged, a possibility raised due to the COVID-19 restrictions in place around that time, what is clear is that LD has received the written documents outlining the risk of delivery prior to purchase. He may have chosen not to read them or to visit the website for further information, but that does not pass the risk back onto the seller when the contract specifically assigns this risk to the purchaser.

Referee: Hannan DTR

Date: 24 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 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>.