



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 597

APPLICANT **MH**

APPLICANT **QH**

RESPONDENT **I Ltd**

The Tribunal orders:

1. I Ltd to pay MH & QH \$18,422.44 by 30 November 2023.
2. MH & QH are not liable to pay the remaining balance of \$10,679.40 to I Ltd .
3. Provided that payment in order 1 is made by the 30 November 2023, MH & QH are to remove at their own cost the pergola and advise I Ltd that it has been removed by 21 December 2023. I Ltd will then have until the 1 January 2024 to uplift the materials.
4. If payment by I Ltd has not been made by the 30 November 2023, then MH & QH may remove the pergola and sell or retain the materials. Any proceeds of sale must be deducted from the amount owed by I Ltd.

Reasons:

1. MH & QH purchased a retractable roof pergola from the I Ltd (I Ltd) on the 14 March 2022 for \$26,698.40 (but have only paid a deposit of \$16,019.04). I Ltd sourced the pergola and installed it. MH & QH are concerned that the way that the pergola has been attached to the brickwork of their home is structurally unsound. They are also concerned that the height of the pergola at one end does not meet their specifications.
2. MH & QH wish to cancel their contract and have their deposit of \$16,019.04 repaid. They also are claiming the cost of reinstatement of their deck \$437.00 and brickwork \$851.00 once the pergola has been removed, and the costs of removal of the pergola \$920.00 and cost of electrician for disconnection of the wiring \$470.00 making a total of \$18,697.04 claimed. MH & QH also seek a declaration of non-liability for the balance owed to I Ltd of \$10,679.40.
3. I Ltd says that the way the method of affixing the pergola to the brick veneer is acceptable and has been approved by a BRANZ engineer. They say that they have installed the pergola in accordance with midland bricks technical detailing Figure 58- Attaching Lightweight Structures to Veneer. I Ltd say that even if there are problems with the installation, that these problems are minor and easily remedied. I Ltd also says that they have made the pergola in accordance with the only height specification that 2.2 metre blinds would be installed.
4. The issues for determination are:

- a) Is the pergola fit for purpose?
- b) Was the pergola installed with reasonable skill and care?
- c) What is the remedy?
 - (i) Are the defects of a substantial character?

Procedural issues.

- 5. Two hearings of the matter were held. The first was on the 21 March 2023 by phone with MH & QH and a representative from I Ltd on the telephone. Various witnesses were also spoken to. I completed a decision adjourning the hearing on that date.
- 6. The matter was then set down for second hearing on the 30 October. Before the hearing I received an email from I Ltd's Director saying that they did not wish to attend the hearing for health reasons. They did not seek an adjournment or ask to be heard by telephone or other such means. I have therefore proceeded to hear the matter without the Respondent being present. This is permitted pursuant to s42 of the Disputes Tribunal Act 1988. MH & QH attended today's hearing.
- 7. I confirm that I have reviewed all the evidence provided by I Ltd, including photographs, a report from Mr P, an email between Mr P and MH & QH, submissions from I Ltd dated 24 October 2023, and the "Brick Book".
- 8. I also have reviewed the report from Mr E the structural engineer who attended the site with both parties on the 28 March 2023. I have today spoken to Mr E and heard his response to the submissions made by I Ltd and to the points raised in Mr P's letter.
- 9. When a party does not attend the hearing, the Tribunal may still proceed to hear the matter, provided that it takes into account all of the evidence and submission provided by the absent party. I confirm that I have read those submissions and evidence and taken them into account before making any decision.

Is the pergola fit for purpose?

- 10. The installation of the pergolas is covered by the warranties in the Consumer Guarantees Act 1993 (CGA). These warranties require the installation of the pergola to be 'fit for purpose' and completed with 'reasonable skill and care.' These warranties are the same as those in s362(1)(b)(i) and (1)(d)(i) of the Building Act 2004.
- 11. Fit for purpose is described in s29 of the CGA, it says that the pergola must be reasonably fit for purpose of a pergola which I consider to be to provide shade and shelter from the elements and to be of such a nature and quality that it can reasonably be expected to achieve any particular result,—that the consumer makes known to the supplier, before or at the time of the making of the contract for the supply of the service.
- 12. Having considered all the evidence I am not satisfied that the pergola is fit for purpose for the following reasons:
 - a. The pergola is incorrectly attached to the brick veneer. Mr E, the structural engineer who inspected the pergola been attached to the brick veneer of the home in a way that does not comply with the Midland Brick Figure 58, Attaching lightweight structures to veneer, in that there is no continuous plate along the brick veneer, no masonry bolts at 800 CRS, connections to brick each side only, masonry bolts connected into bricks and not mortar joints, that figure 58 is for lightweight rigid roof structures not a flexible roof structure like this one.
 - b. The pergola is attached to a post on the deck without any structure under the post to spread the load to joists and bearers.
 - c. That the location of the pergola is in a high wind zone area because it is adjacent to a large field. This means that it is more likely to be subject to higher winds, which makes the structural integrity a greater problem.
 - d. That some of the masonry bolts can be removed by hand.
 - e. The problems the structural integrity of the pergola and makes it more prone to damage in winds, which in turn means that it cannot to be used in wind conditions it should be able

to withstand. MH & QH are not able to use the pergola in conditions or days that they should be able to as they are worried about wind damage.

- f. The height of the lower end is lower than the agreed specifications. MH & QH say that they agreed with I Ltd of a 2.4 height at the lower end, they say this was important to them because QH is very tall, and his family members are also very tall. He says that they wanted a 2.4 height as he didn't want to feel too enclosed. I Ltd says that the only height specification was the lower end blind was to be 2.2 meters, which I Ltd says it is. MH & QH say that the lower end having a full height of 2.4 metres means that the 2.2m blind could be fitted inside and the blind would be able to drop to its full height of 2.2 metres. MH & QH say that when the posts at the lower end were first installed, they appeared to be at the correct height, but that later they were removed and 'cut down' so that the fall of the roof was correct, this resulted in the lower end clearance height being about 2 meters not 2.2 meters cleared.
 - g. QH is 195 cm tall he says that there is only about 5 cm head clearance between him and the top of the blind. He provided photographs which showed this. Both MH and QH gave evidence that the blinds cannot be extended to their full length of 2.2 meters because of the way that have been fixed which changed due to the incorrect height of the roof, and that there is still some length of blind on the roller.
 - h. I am satisfied on the balance of probabilities that that the specifications for the lower end of the pergola was to be 2.4 meters which would have allowed for the full extension of a 2.2 meter blind and have taken into account the height lost from the fixing of the blinds. As the height clearance at the lower end is about 2 meters rather than 2.2 meters then I am satisfied that it is not fit the purpose of QH or his family, as it was not of a nature and quality that was reasonably expected to meet their requirements that it be of a certain height that they and their families could use it comfortably.
13. As I am satisfied that the pergola is not fit for the purpose, then I do not need to consider whether it was installed with reasonably skill and care. However, I record that I am satisfied that the pergola was not installed with reasonable skill and care because of the issues outlined in Mr E's report and set out here in paragraphs 12 a-h.

What is the remedy?

14. MH & QH are only entitled to cancel the contract if they prove that the defects are of a substantial character, or if they can show that they have given I Ltd and opportunity to remedy the problem and they have not done so.
15. Substantial character is defined in s36 CGA. when there has been a breach of s 29, then a defect will be of a substantial character if it is of such a nature and quality that the product of the service cannot be expected to achieve any particular result, made known to the supplier and the product cannot easily and within a reasonable time be remedied to make it fit for the particular purpose or to achieve the particular result.
16. I Ltd submits that any defects are not of a substantial character. They say:
- a) That any problems with the affixing of the pergola to the brick veneer are easily remediable, by the installation of further timber backing or by inserting long calvinized coach screws to the timber framing, or by installing a specially designed bracket.
 - b) That they have been prevented from attending the site and remedying the problem.
 - c) That the pergola has withstood two cyclones and inclement weather since it was installed, and nothing has happened.
 - d) That the never gave any indication that it would be of a height of 2.2 metres or above.
17. Having considered all of the evidence I am satisfied that the defects of the substantial character for reasons that include:
- a) I am satisfied that the I Ltd was aware that the height of the pergolas was to be at least 2.2 meters with the blind installed and fully extended because they recommended a 2.2 metre blind and it was detailed in the quote. The height of the pergola to allow the full extension of the blind can only be increased by removing the structure and affixing it again.

- b) There are numerous defects to the pergola, it is not just the way that it has been affixed to the brick veneer but also the attachment of a pole to the decking, both of which affect the structural integrity of the pergola.
- c) That there is evidence that the pergola is damaging the brickwork – there is cracking between the brick and mortar and the brick has moved.
- d) MH & QH are unable to use the pergola when it is windy (in conditions that the pergola should be able to withstand), for fear that it damages the brick veneer or become detached.
- e) Whilst Mr P suggests that the repair of the attachment to the veneer appears is relatively easy, it would involve the removal of the pergola (or the packing of the pergola), removal of the bricks, and installation of the timber. Mr E was unsure as to whether this would require Council signoff as it was permeating the membrane of the building. The nature and extent of the repair and the cost of remediation is uncertain, and MH & QH should not be expected to assume this risk.
- f) I Ltd has continually asserted that Mr E and MH & QH were wrong, in their assertions that the pergola was not attached correctly, and that QH was inflating the problems. The offers to remedy the situation have always been with conditions that QH did not wish and should not have had to agree to.

18. As I am satisfied that the defect is of a substantial character then MH & QH are entitled to cancel the contract. I award MH & QH back the amount they have paid to I Ltd \$16,094.44, and I declare that they are not liable for the remaining balance owed.

19. I Ltd made submissions that MH & QH have had the use of the pergola for 10 months since it was installed and that this should be taken into account. MH & QH tell me that they have used the pergola only 4-5 times in the last 10 months since installation, this is because the weather conditions, wind and rain have made them too worried to use the pergola, for fear it would become damaged or damage the house or deck. They submit that any use that they have had of the pergola has been far outweighed by the time that they have put into dealing with these issues and the stress of worrying about the pergola. I consider that the use that they have had is equal to the worry and stress.

20. MH & QH are also entitled to consequential losses. They do not want I Ltd to dismantle the pergola, they have provided quotes for removal of the pergola and reinstatement of the deck from their builder of \$1,357.00, bricklaying costs of \$851.00 and removal of the electrical components \$120.00. (All amounts inclusive of GST). I am satisfied that these are consequential losses that arise from the breach of the warranties and therefore award those amounts to MH & QH.

21. I have made orders regarding the payment of money and the dismantling of the pergola and the return of the materials, this recognises that there is likely some residual value in those materials and that MH & QH should not be expected to be put to the cost of dismantling the pergola until they have been paid by I Ltd.

Referee: T Prowse

Date: 2 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>.