



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 543

APPLICANT **ST Ltd**

RESPONDENT **FS**

The Tribunal orders:

The claim is dismissed.

Reasons

1. FS lives in one of three residential units that share a driveway. She engaged ST Ltd, on behalf of herself and her neighbours, to replace the entire concrete driveway, including each unit's carport area. A final contract price of \$36,267.10 was agreed and 50% payment of \$18,133.55 was made.
2. The work was commenced in March 2021 and the neighbours report experiencing problems with multiple aspects of the job, including inconsistent site attendance, use of residents' tools for the job, mess and holes left upon removal of the old concrete, breaking the internet fibre cable, poor levelling resulting in pooling, concrete laid with brush strokes at perpendicular angles (this was later pulled up and remedied by ST Ltd), and unsightly concrete splashes on various parts of the property. In addition to these issues, and a major issue in dispute in this case was ST Ltd's failure to lay steel reinforcing mesh in parts of the driveway, contrary to what was stipulated in the contract.
3. ST Ltd do not dispute that steel reinforcing mesh was left out of the entire top part of the driveway – from the carports up to the street. They later credited \$2500.00 for the absence of steel mesh in that part of the driveway, and now claim the balance of the concrete price, being \$15,636.55 (after deduction of \$2500.00 for the mesh).
4. FS claims set-off to the amount ST Ltd claims, based on breach of contract and failure of Consumer Guarantees Act 1993 guarantees for services.
5. The issues to be determined are:
 - Did ST Ltd carry out its work in accordance with the contract?
 - Were ST Ltd's concreting services carried out with reasonable care and skill and is the product of the service fit for purpose?
 - What remedy is available to FS?

Did ST Ltd carry out its work in accordance with the contract?

6. The quotation for the work specifically included steel reinforcing mesh at FS's request. It is agreed by all parties that the mesh was not put in in the top half of the driveway, which is both the sloping part and the most curved part of the driveway.
7. ST Ltd's quotation also specified that 25MPa strength concrete would be laid to 150mm thick. The residents specifically wanted a driveway that was built stronger than a standard residential driveway because of how badly their old driveway had cracked and moved.
8. ST Ltd contended that although the mesh had not been placed as contracted, the driveway's strength was unaffected. If this were the case, then damages for the breach in contract in relation to mesh would be limited to the cost of the mesh and the labour to place it which would fall within the deduction already made by ST Ltd on its final invoice. However, if the driveway strength/fitness for purpose was affected, further damages would need to be considered.
9. For that reason, there was an adjournment to allow for strength testing of the driveway to be carried out. ST Ltd brought those results to a further hearing and the testing company, BD, provided a written statement that the driveway achieved a compressive strength of 30MPa (higher than required under the contract). However, there was considerable disagreement between the parties about the method used (Schmidt-Hammer testing) along with the fact that it was ST Ltd's concrete supplier that carried out the testing.
10. The parties therefore agreed to a further adjournment in which core sampling of the driveway would be carried out. The results of the core sampling were presented at the final hearing (the T report) where measurements for both MPa strength and for concrete thickness at each of the 6 drilled sample locations were discussed.
11. Based on the T report, compressive strength was generally satisfactory, with only 2 of the core samples under the contracted-for 25MPa strength and only by a small amount (at 23.5 and 24.5 MPa). However the length of the 6 drilled samples (representing the thickness of the driveway) was, on the whole, significantly under the 150mm specified requirement in the contract.
12. ST Ltd argued that T's method of measuring the core sample itself (which produced 6 measurements of 92.1mm, 72.4mm, 115.1mm, 98.2mm, 131.8mm and 127.8mm) was not accurate because the bottom of the drilled-out sample often breaks off in the process. ST Ltd provided alternative figures obtained from measuring the depth of the holes left in the driveway after the core sampling, which resulted in measurements of 115mm, 100mm, 130mm, 110mm, 132mm and 150mm (taken from the photos ST Ltd provided of a measuring tape in each hole).
13. Given that the point of core sampling was to have a reliable and independent measure of the strength and thickness of the driveway, I prefer the evidence contained within the T lab report. I do note though, that even based on ST Ltd's thickness measurements, 5 out of 6 locations on the driveway are less than the contracted-for thickness, 3 of those to a significant degree.
14. ST Ltd also argued that the driveway thickness must have been adequate because the volume of concrete they ordered and placed on site was sufficient to achieve the 150mm thickness (except in the carports where 100mm had been agreed). Whether or not ST Ltd can provide evidence to support that contention, it does not change the fact of the figures in the T report as to thickness and I rely on those figures in my finding that there was a further breach of contract and in my findings below.

Were ST Ltd's concreting services carried out with reasonable care and skill and is the product of the service fit for purpose?

15. The Consumer Guarantees Act 1993 ('CGA') provides statutory guarantees to consumers, the relevant guarantees in this case being that a supplier will carry out its services with reasonable

care and skill and that the product resulting from a service will be fit for purpose (sections 28 and 29, CGA).

16. I find that ST Ltd's services were not carried out with reasonable care and skill and that the driveway is not fit for purpose. FS has provided many photographs of problems resulting from poor workmanship throughout the job, but the major issue is with the likely performance of the driveway over time given the contractual breaches described above, of the lack of mesh and the inadequate driveway thickness. Those issues are not aesthetic or minor, they relate directly to the overall strength and longevity of the driveway.
17. As a result of the absence of reinforcing mesh and inadequate driveway thickness, while I accept that the compressive strength of the concrete itself mostly meets the required contractual standard, I am not persuaded that the driveway is fit for the particular purpose that the residents made known to ST Ltd at the outset (that they wanted a driveway that was higher-spec/stronger than a standard residential driveway).

What remedy is available to FS?

18. The remedy available to FS is damages resulting from the breach of contract, which could be either the cost of having the driveway redone so that it meets the specifications of the original contract or a reduction in value of the driveway based on the difference between the life-expectancy of the existing driveway and one that complied with the contract.
19. The remedies available as a result of the failure of CGA service guarantees are similar – the failure of guarantee cannot be remedied so FS's options are to have the driveway pulled out and redone by another contractor, or to live with the existing driveway as long as it lasts.
20. FS provided a quotation at the final hearing from DD Ltd to remove and redo the top part of the driveway (150sqm of the original 250sqm job) – the price being estimated at \$33,000.00-\$35,000.00+GST. The price was based on the same specifications as ST Ltd's original quotation. ST Ltd took the opportunity at the final hearing to generate its own renewed price for comparison (acknowledging that prices had increased significantly since their original quotation was provided in early 2021) – ST Ltd's price for re-doing the top part of the driveway came to \$21,085.00+GST.
21. FS indicated at the final hearing that she and the neighbours have found the process of having their driveway replaced so stressful and exhausting, that they have little collective appetite for going through it again, at least in the near future. They therefore intend to live with the existing driveway for now.
22. Based on that intention, the actual cost of re-doing the work would not be appropriate measure of damages and reduction in value will be considered instead. However, in assessing reduction in value, because there is no evidence available about the how long the existing driveway might last in a reasonable state compared to a driveway that had met the contractual specifications, I consider the actual costs of redoing the driveway a useful benchmark in assessing reduction in value. That is, because FS would have been able to claim actual costs had she wished to immediately go ahead with replacing the driveway, the 'reduced value' assessment should be less than those costs but not by a significant degree.
23. Using ST Ltd's lower figure for re-doing the part of the driveway, I consider the difference between \$24,248.00 (\$21,085+GST) and ST Ltd's claimed balance outstanding of \$15,636.55 more than enough of a reduction from an 'actual' redo cost, to recognise that an actual redo will not be occurring in the near future.
24. For all the above reasons, I find that FS is not liable to pay ST Ltd's outstanding invoice and the claim is therefore dismissed.

Referee Perfect
Date: 31 October 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>.