



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 48

APPLICANT LG

RESPONDENT OE

The Tribunal orders:

1. OE is to pay LG \$12,250.00 on or before 20 February 2023.
2. LG is to make available for collection by OE the spa pool she purchased from OE, provided that:
 - i. collection shall occur at a reasonable time and date to be agreed between the parties; and
 - ii. such date shall be agreed, and the spa pool collected, no later than 27 February 2023; and
 - iii. any costs of collection shall be borne by OE. If the spa pool is not collected by 27 February 2023 (other than by mutual agreement), then the spa pool shall become the property of LG and she may dispose of it as she sees fit.

Reasons:

1. LG saw OE advertising spa pools on [the Internet]. OE used to work for [Spa Business] but now buys spa pools, does them up, and sells them on.
2. LG travelled to OE's property in [City] and purchased a spa pool that had been done up with all new components fitted. She paid \$12,000.00 for the spa pool, which was delivered to her property by OE.
3. LG said that the day after the spa pool arrived she noticed it was leaking. She had several text and telephone exchanges with OE in an attempt to find and fix the leak. These were unsuccessful and OE arranged for a technician to visit LG's property and view the spa pool. This too was unsuccessful, and the spa pool is still leaking.
4. LG now wishes to return the spa pool for a full refund of the \$12,000.00 she paid for it. She has claimed an additional \$1,000.00 for costs relating to the leak, such extra electricity for heating the pool and extra chemicals that have needed to be added. She also claimed the filing fee of \$180.00.
5. The hearing was scheduled to be held by telephone conference at 9.15am on Monday 23 January 2023. An attempt to contact OE by telephone was unsuccessful. LG had an alternate number for OE. Despite several attempts between 9.15am and 9.30am to contact OE on both telephone numbers, OE did not appear and the hearing went on without him.
6. The issues I have to consider are:
 - a. Was the spa pool of acceptable quality?
 - b. If not, was it remedied within a reasonable time?
 - c. If the failure was not remedied, can LG reject the spa pool and obtain a refund?

Was the spa pool of acceptable quality?

7. The Consumer Guarantees Act 1993 (“CGA”) applies when goods are supplied to a consumer in trade. I am satisfied that OE was “in trade” for the purposes of the CGA as LG described him as undertaking a business of buying old spa pools, doing them up, and selling them on. She said OE had four spa pools for sale in his property. This suggests that OE was in the business of refurbishing and selling spa pools so that the CGA applies.
8. Section 6 of the CGA requires that goods supplied to a consumer are of an acceptable quality. Section 7 of the CGA outlines what amounts to acceptable quality, including that the goods are fit for the purpose for which they are commonly supplied; acceptable in appearance and finish; free from minor defects; safe; and durable. In assessing acceptable quality, I must have regard to the nature of the goods; the price; the nature of the supplier and the context in which the supplier supplies the goods; and any other relevant circumstances of the supply of the goods.
9. I find that the spa pool was not of acceptable quality. I say that because I accept that the spa pool has had a consistent, albeit intermittent, leak since the day after it was delivered to LG. I accept that the ongoing nature of the leak, although minor at times, means the spa pool is not free from minor defects and therefore not of acceptable quality.
10. LG described the leak as only occurring sometimes, but that when it occurred, it leaked into the well containing the pipes and motor of the spa pool, as well as out onto the concrete the spa pool was sitting on.
11. Although this was a second-hand spa pool, I am satisfied that the ongoing nature of the leak means that the spa pool was not of acceptable quality. I say that because LG was told that the parts had all been replaced with brand new parts, and that OE would provide a full cover 3-month warranty for everything. Those things tend to suggest that the spa pool would perform at a higher level than a second-hand spa pool which had not been reconditioned, which would include the absence of a persistent leak.

If not, was it remedied within a reasonable time?

12. Section 18 of the CGA states that where goods do not comply with a guarantee, the consumer may require the supplier to remedy the failure within a reasonable time.
13. I find that the failure was not remedied within a reasonable time, despite initial attempts between the parties to resolve the problem.
14. LG said that she contacted OE the day after she purchased the spa pool, when she first noticed the leak. OE responded with some suggestions to locate and fix the leak, which were unsuccessful. This included watching the water level to see how much it was dropping and involved emptying and refilling the pool.
15. When LG and her husband were unable to stop the leak by following OE’s suggestions and advice given by telephone and text message, OE arranged for a technician, TI, to come and look at the spa pool.
16. TI attended on 19 October 2022. He changed some valves and added some silicone to places. However, the leaking continued, and TI told LG that there was nothing further he could do. He suggested that the next step was to take the spa pool to his workshop, strip it back and fix it. He said that as the spa pool was fully insulated, it was difficult to find the leak.
17. After TI visited the property LG began to have difficulty in obtaining responses from OE. She said that around 28 October, nearly three months after she received the spa pool, she indicated to OE that she wished to return the spa pool.

18. The leak in the spa pool had not been remedied within three months of purchase, and I accept that this meant it was not remedied within a reasonable time. The spa pool had leaked from the time it was delivered to LG's property and although attempts had been made to fix it, these were unsuccessful. It is clear that further, more intensive efforts were required to remedy the failure, which were not undertaken by OE. Although OE was initially constructively engaged with remedying the problem, I accept that this did not continue and LG was unable to get further responses to her attempts to resolve the problem.

If the failure was not remedied, can LG reject the spa pool and obtain a refund?

19. Under the Consumer Guarantees Act 1993 where a supplier has not remedied a failure of goods to comply with a guarantee within a reasonable time, the consumer may reject the goods (section 18(2)(b)).

20. I find that LG is entitled to reject the spa pool and obtain a full refund of the purchase price, being \$12,000.00.

21. LG said that TI told her it would cost "a couple of thousand" to strip and fix the leak, but that she no longer wished to have the hassle of the spa pool and preferred to return it. Given the failure to remedy the leak within a reasonable time, she is entitled to make that choice under s 18(2)(b).

22. Section 22 of the CGA states that where a consumer rejects goods, the consumer shall return the rejected goods to the supplier unless they cannot be returned without significant cost to the consumer that is due to the size, height, or method of attachment of the goods.

23. I find that there is likely to be significant cost to LG if she had to return the goods. She said she had initially suggested to OE that she would return the spa pool to him at her own cost, and when she had researched those prices, it would be \$1,000.00. I accept that this is a significant cost to LG that is due to the size of the spa pool, and that therefore, OE must collect the spa pool at his expense.

24. LG also claims \$1,000.00 of consequential loss, such as the extra electricity required to heat the water in the spa pool each time it was emptied in an attempt to fix the leak, and the extra chemicals added each time the spa pool was refilled.

25. I accept that LG has suffered losses of this nature, and that those losses were reasonably foreseeable as likely to result from a leaking spa pool (s 18(4) of the CGA). However, LG has not provided any evidence of the quantum of her loss and I decline to order her the \$1,000.00 claimed. I assess that it is reasonable to award \$250.00 on this basis.

26. LG also claims the filing fee of \$180.00. Section 43 of the Disputes Tribunal Act 1988 states that costs such as the filing fee shall not be awarded against a party except in certain specific circumstances. None of those circumstances are present in this case, and so the \$180.00 claimed on this basis cannot be awarded.

Referee: Souness - DTR

Date: 30 January 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>.