



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

**District Court**

**[2020] NZDT 1385**

**APPLICANT**      **HM**

**RESPONDENT**    **BTO Limited**

**RESPONDENT**    **UU Limited**

**SECOND**          **KN**  
**RESPONDENT**

**The Tribunal hereby orders:**

1. UU Limited is to pay HM \$4,148.00 by Wednesday 3 June 2020.
2. On receipt of the sum referred to above, UU Limited is to collect the wood fired hot tub at a time mutually agreed between the parties (but before Wednesday 10 June 2020); and from HM's property on [Redacted location].
3. If UU Limited fails to comply with order 2. above in relation to collection of the wood fired hot tub HM may keep or dispose of the wood fired hot tub as he thinks fit.

**Reasons**

1. HM purchased kitset wood fired hot tub from UU Limited (UUL). He was unable to assemble it. He later engaged BTO Limited (BTO) to assemble it but it leaked. UUL say HM allowed the wooden components to get wet and that's why it leaked.
2. The issues to be determined are:
  - a. Who is the correct respondent?
  - b. Whether the tub is of acceptable quality/fit for purpose.
  - c. What remedy is available to HM.
3. An applicant (in this case HM) in the Tribunal must establish the elements of his claim to the required standard to be successful. That standard is the balance of probabilities (based on the evidence before the Tribunal) which means what is more likely than not.

*Who is the correct respondent?*

4. HM joined BTO in this claim. The owner of BTO is KN. BTO also filed a counter claim (under the same court case number). However, at the hearing HM clarified that the claim was against UUL for the cost of the hot tub, BTO's invoice and the plane fare for HM to get to [Redacted location].
5. Accordingly, this claim should be against UUL only. I have separated claims so that BTO's claim is under court file number CIV 20 094 321.
6. BTO's claim has been determined first as that has a bearing on any consequential losses UUL may have to pay. I determined in that claim (CIV 20 094 321) that HM must pay the full amount of BTO's invoice being \$748.00.

*Whether the tub is of acceptable quality/fit for purpose*

7. The provisions of the Consumer Guarantees Act 1993 (CGA) apply. UUL is in trade (as a supplier of hot tubs and other consumer goods) and the hot tub is of a kind ordinarily acquired for personal, domestic, or household use or consumption. HM is therefore a "consumer" for the purposes of the CGA.
8. Under the CGA where consumer goods are supplied to a consumer, those goods must be of acceptable quality and fit for a particular purpose.
9. HM and a friend tried putting the tub together but the gap for that last 2 boards was 78mm and the width of the last 2 boards together was 130mm. They disassembled and started again trying different spacing at bottom but still didn't fit. HM then arranged for BTO to assemble it on the recommendation of UUL.
10. It is more likely than not that the issue in putting together related to product sizing and/or the instructions. The instructions are not clear. For example, the fire box (though not necessarily the cause of the issue but I cannot discount that in terms of the determining the reliability of the assembly instructions). Looking at page 6 of the instructions it does not seem right where the fire box was located and as HM says it would mean the water would only come up to his knees. It would be more likely than not, as HM pointed out, that the fire box should have sat at just under the top ledge not where it ended up. This suggests the 120mm from the base as shown in the instructions is incorrect. KN pointed out it couldn't be 120cm otherwise it would be very high. SU (representing UUL) did admit at the hearing that there could be an instruction issue in relation to the fire box.
11. That gives me little confidence that the instructions are reliable or that the product sizing was correct. Hence this could be why HM and his friend were unable to put the last 2 pieces in.
12. KN says he followed the process in the instructions but made the sides wider so he could fit the last 2 pieces of wood. It still leaked. He said it may have swelled.
13. UUL says the fault lies with MN as MN had mentioned to them (when he was discussing the assembling issues) that it was covered with a tarpaulin. UUL say there was bad weather and as the tarpaulin had come off the wood got damp so would have swelled and hence the tub leaked when filled with water. UUL explained that when the tub is assembled when dry and water then filled the boards would expand which means the tub would not leak. If, however it is assembled when the boards are swollen and then filled the tub cannot expand anymore and therefore would leak.
14. I note that nowhere in the instructions does it have a warning about wood getting damp. In fact, there is nothing written just diagrams. I would have thought the issue regarding swelling would be such a significant issue that it would have (and should have) been highlighted – it wasn't. Most consumers are lay people who would not be privy to chemical and physical elements of materials.
15. In any event even if it was covered with a tarpaulin the whole time, the wood could still be affected by moisture with condensation forming under a tarpaulin. Ideally the wood should be kept in a dry shed for example. Again, there is nothing in the instructions.

16. MN could not assemble the tub. That was not his fault. The instructions were poor as mentioned above.

17. For the reasons above, the tub was not of acceptable quality and not fit for purpose.

*What remedy is available to MN?*

18. Having found that the tub not fit for purpose nor of acceptable quality the question then is whether MN is entitled to cancel the contract for the purchase of the tub and get a full refund of the price he paid.

19. Under the CGA where the failure of the goods is of "substantial character" (in other words serious enough) the consumer can cancel and has the option for a refund or replacement of the goods. Clearly MN would not have purchased the tub had he known the nature and extent of the issues. Accordingly, he is entitled to his money back.

20. He is also entitled to consequential losses (being losses as a result of the failure of the tub). This is the amount of BTO's invoice MN has to pay and the \$200.00 airfare MN paid directly for KN to fly to and from [Redacted location]. I am satisfied the \$200.00 was the amount paid as KN said he checked the fare and was quoted \$240 return but MN got a cheaper discounted fare. There is no reason for KN to say this if that was not the case.

### **Conclusion**

21. For the reasons above UUL must pay HM \$4,148.00. This is made up as follows:

- a. \$3,200.00 (purchase price of the tub);
- b. \$748.00 (BTO's invoice); and
- c. \$200.00 (airfare)

### **Other Information**

22. The issuing of this order has been delayed as a result of New Zealand being placed into COVID 19 Level 4 lockdown on Thursday 19 March 2020.

23. I find it reasonable given the lockdown that four weeks is allowed for payment from the date of this order.

**Referee: Ms G Jaduram**

**Date: 4 May 2020**



## 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 28 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 28 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 28 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>.