



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 688

APPLICANT AA

RESPONDENT N Ltd

The Tribunal orders:

N Ltd is to pay \$15,000.00 to AA on or before 3 February 2024.

Reasons

1. AA purchased a new townhouse off the plans at the [neighbourhood], developed and sold by N Ltd ('N LTD'). The sale and purchase agreement was signed on 15 October 2021 and some variations were agreed before it became unconditional. The townhouse was completed and AA and family moved in in mid-2023.
2. The claim relates to two separate issues – firstly, a protected pohutakawa tree at the boundary of the property, the location of which, AA says, was misrepresented on the plans provided at the time the contract was entered into, and, secondly, the substitution of a non-protruding sink for a butler's sink that had been agreed for the kitchen.
3. AA claims damages of \$25,000.00 in relation to the tree, calculated based on loss of useable land due to the fence-line having been altered to go around the tree trunk, and also citing costs of ongoing maintenance issues, and loss of amenity value due to the encroachment of the tree on the yard. He further claims \$15,000.00 being the estimated cost to fit a butler's sink to the kitchen, which involves removing the benchtop and re-designing. As the jurisdiction of the Tribunal is \$30,000.00, AA abandons his claim for amounts above that limit.
4. N LTD did not attend the second hearing of the matter. The first hearing, in September 2023, was adjourned at the outset because the N LTD representatives in attendance had both previously been enrolled as barristers/solicitors and could not therefore be approved as representatives under section 38(7) of the Disputes Tribunal Act 1988. An adjournment order was emailed to both parties with the direction "N Ltd is to please inform the Tribunal of their representative's name and direct phone number prior to the next hearing".
5. As N LTD did not provide a representative name/direct phone number, I had no N LTD representative to ring for the second hearing and the teleconference hearing proceeded without them. After the hearing, it transpired that one of N LTD's original representatives had emailed the Tribunal while the hearing was underway with the name and phone number of a new representative.
6. N LTD had provided written submissions prior to the first hearing and these were addressed at the second hearing (in their absence) and considered in the determination of the issues below.

7. The issues to be determined are:

- *Did AA serve notice of a claim for these matters on N LTD as per the requirements of section 10(2) and (3) of the sale and purchase agreement?*
- *Was the Pohutukawa tree incorrectly located on the site plan and in the marketing materials provided to AA?*
- *If so, does this amount to a misrepresentation by N LTD?*
- *What remedy is available to AA in relation to any misrepresentation about the tree?*
- *Under what terms was N LTD contractually entitled to substitute the kitchen sink?*
- *What remedy, if any, is available to AA in relation to the sink?*

Did AA serve notice of a claim for these matters on N LTD as per the requirements of section 10(2) and (3) of the sale and purchase agreement?

8. In N LTD's submissions they contend that AA did not serve notice prior to settlement alleging a breach of clause 26, as required by section 10(2) and (3) of the sale and purchase agreement.
9. AA has provided evidence in the form of an email from his solicitor to N LTD's solicitor dated 30 May 2023 which serves notice "in accordance with section 10", of disputes with respect to the tree and the sink. With respect to the tree, the correspondence alleges breach of clause 22(1)(b) of the agreement and false and misleading representations having been made. With respect to the sink, the correspondence alleges breach of clause 22.4 as varied by agreement.
10. I accept that AA cannot now claim breach of clause 26 or breach of Fair Trading Act provisions with respect to the tree because they were not specified in the notice as required by clause 10.3(2)(a). I do not consider clause 22.1 relevant because the amendment to the fence-line (the effect of the actual location of the tree trunk) is not an amendment to "the Dwelling, its layout" or "the facilities and amenities in the Dwelling". The claim about the tree will therefore be addressed in terms of misrepresentation.

Was the Pohutukawa tree incorrectly located on the site plan and in the marketing materials provided to AA?

11. Based on the evidence provided, I find that the site plan provided to AA incorrectly marked the tree trunk of the Pohutukawa tree as fully clear of his boundary, albeit with the canopy extending significantly over his yard.
12. However, photographs of the finished property show that the fence-line has had to be amended (from the plans) to go around the tree because the trunk of the tree sits on the boundary line. The difference cannot be explained by the growth of the tree over the two years since the signing of the agreement, as proposed by N LTD in their submissions, because the trunk could not have moved/expanded across that distance.
13. The mock-up drawing provided to AA in the original marketing materials shows a large tree well away from the finished dwelling. Although a mock-up should not be particularly relied on as an accurate representation of the finished development, the picture contributes to the inaccurate description of the tree location given by the site plan.

Does this amount to a misrepresentation by N LTD?

14. I find that the misleading representation in the site plan was relevant in AA's decision to enter into the contract, in that, if he had been given accurate information, he likely would not have purchased this property. I accept his statements in this regard as he explained, showing photographs to support his explanation, that it is not merely a question of the tree trunk being

closer to his property than the site plan shows, but also that the effect of this on the fence-line is significant.

15. The fence in the site plan cuts across the corner of the property in a straight line, but because of the actual location of the tree trunk on the boundary, an odd-shaped fence has had to be built around the trunk, inside AA's property. This has left approximately 2sqm of AA's yard, on the far side of the fence, completely unusable by his household. Another photograph shows that the fence now runs very close to the edge of the deck leaving small and difficult-to-maintain wedges of land between the deck and the fence. The impact of these issues in a small townhouse-sized yard are significant.
16. As the misleading representation has induced AA's entry into the contract, I find that it does amount to a misrepresentation by N LTD.

What remedy is available to AA in relation to any misrepresentation about the tree?

17. AA is entitled to damages representing the losses suffered as a result of the tree not being in the location represented by N LTD. He has calculated those losses based on the loss of use of 2 sqm of land, and arrived at a figure of \$25,000.00. He told me the property is 343 sqm including an easement – given that, I could not follow his calculations to understand how he arrived at claimed compensation of \$25,000.00. Based on a proportional loss of total area, and the equivalent proportion of the total property value (because I was not given a breakdown of land vs capital value), I arrived at a figure of just over \$13,000.00.
18. However I do not consider that the method of calculation is valid for determination of damages because AA has not lost the land – if for some reason in the future the tree was destroyed or removed as a result of weather or disease, for example, full use of the original yard could be restored.
19. I do accept that there has been a significant loss of amenity value. Determining damages for loss of amenity value is subjective and no particular cost evidence or arguments in this regard were made by either party. I therefore consider reasonable damages to be less than the \$13,000.00 figure for loss of (use of) the land in 17 above, but nevertheless significant, and set the amount at \$10,000.00. This also seems to me to be a reasonable difference in purchase price if, hypothetically, two identical townhouses in the location were compared, one with the tree issue and one without.
20. I do not accept that there would be much difference in on-going maintenance costs as a result of the encroachment because the site plan showed a large extent of tree canopy encroachment above the yard area in the original site plan, so AA would always have had to incur maintenance costs of trimming etc, even if the trunk had been well outside his boundary.

Under what terms was N LTD contractually entitled to substitute the kitchen sink?

21. Clause 22.4 of the sale and purchase agreement gave N LTD the right to substitute any materials, the use of which are prohibited by any statute or regulation. The butler's sink chosen by AA apparently could not be installed in compliance with the Building Code, so N LTD installed a compliant sink in its place. AA is not happy with the replacement sink because it does not protrude so has a different aesthetic than the wished-for butler's sink and, as the benchtop had been cut for the butler's sink, the benchtop edges are sharp and a safety hazard for his family. AA contends that the benchtop should not have been cut before checking that the chosen sink could be installed.
22. AA provided evidence of an agreed variation to the sale and purchase agreement at clause 22.4, which required N LTD to notify the purchaser in writing prior to any substitution and provided that any such substitution will not materially diminish the value of the dwelling.

23. N LTD submits that they notified AA of the requirement to change his chosen sink in an email (provided) dated 20 April 2023. However the correspondence appears to indicate that the change had already been made at that time, and that is certainly what AA says about the timing, that he was only told by N LTD about the substitution after the fact.
24. For the above reasons, I find that N LTD was in breach of clause 22.4 when they substituted the kitchen sink without prior notice to AA.
25. As stated, clause 22.4 also contains the proviso that any substitution made will not materially diminish the value of the dwelling. Based on the photographic evidence provided I accept AA's argument that the sink provided is not suitable for the space and detracts to a large extent from the quality of the kitchen, in what was at the time a \$2.3 million dollar property. The sink should have been a feature of the kitchen, instead it detracts from the quality of the kitchen and therefore the value of the dwelling.

What remedy, if any, is available to AA in relation to the sink?

26. As a result of the above finding, damages for breach of contract are available to AA. I find that the substitution could have proceeded without breach of the clause if N LTD had redesigned and reinstalled a benchtop in keeping with the replacement sink, taking into account AA's point that the issue with the sink could have been discovered before the benchtop was cut.
27. Based on that, I consider appropriate damages for the breach to be the cost of having a redesign and reinstallation of both benchtop and sink carried out. AA's claimed figure of \$15,000.00 for that work is a 'guess' he acknowledged at the hearing, and I therefore reduce the amount by two-thirds because the size and material cost of the benchtop is completely unknown to me, but I would be surprised if all the work could be carried out for less than \$5000.00.

Referee Perfect
Date: 22 December 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>.