



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

**District Court**

**[2023] NZDT 459**

**APPLICANT**      **BM and OT**

**RESPONDENT**    **OE and DE**

**The Tribunal orders:**

OE and DE are to pay \$30,000.00 to BM and OT by 1/8/23.

**Reasons:**

1. This order should be read with that dated 17/3/23.

**Misrepresentation?**

2. The applicants rely on the applicable clauses in the sale and purchase agreement as to misrepresentation. It is important to note again that a representation to be a misrepresentation does not need to be intentionally false, it may be innocently made.
3. Here the statement/conduct relied upon is the respondents' disclosure to their real estate agent when they entered into a listing agreement contract with it. OE and DE confirmed that there were no known leaks in the property or anything material that should be disclosed as to the property. This is confirmed by the email from GH to the applicants dated 10/9/22 and was not contested by OE and DE.
4. That led to their agent GH, responding "no" to the applicants' question as to whether the property had any leaking issues.
5. That is a representation of fact made by OE and DE through their agent in reliance upon OE and DE disclosures and the listing agreement. It would clearly be an inducement to purchase the property at the agreed price.
6. The next question is whether that representation was false?
7. While there is no positive obligation to disclose all defects to a purchaser, if there is a known or reasonably suspected defect, the vendor (including through its agent) cannot make a statement that suggests otherwise. If asked, he may not make any false or half truthful statement.
8. After carefully considering all the evidence I find that the response to the applicants' question was at least a false half-truth and constitutes an actionable misrepresentation. There was at least a reasonably suspected defect that should have been disclosed to the agent and then on to the applicants.

9. That disclosure could have been as simple as words to the effect of our tenant has complained of a leak in the bottom bathroom, but our renovator couldn't find one, best you check for yourself.

10. I say that because:

- a. OE and DE had been advised of leaking issues in both of the property's bathrooms by their long-term tenant, BC.
- b. The upstairs leak was more substantial than the downstairs leak.
- c. BC gave evidence during the final hearing, which was frank, balanced, clear and convincing. It was in accordance with the written statements he gave to the applicants.
- d. BC had specifically reported a leak in the downstairs bathroom some time before the sale of the property. He says that early on in his tenancy it became "obvious" that there was a leak in the downstairs bathroom. That there were visible signs of it, being a wet patch on the carpet. He told OE and DE of this. That was addressed by OE and DE and BC agreeing that he would not use one of the double basins in that bathroom. That appeared to alleviate the problem and OE and DE decide not to do any repairs at that stage.
- e. At this point OE and DE were aware that both bathrooms leaked. Their tenant who lived in the property and knew it best, had specifically told them so.
- f. The applicants' evidence was that BC's reported wet patch was the same wet patch in the same place, that first alerted them to the leaking.
- g. Prior to the sale a person was engaged to investigate the two known leaks.
- h. After his first visit he reported his findings to BC who was at the property.
- i. BC has stated that he was told any leaking in the downstairs bathroom could come from the same problem as in the upstairs bathroom.
- j. DE asked BC by text what the outcome of investigation was.
- k. BC replied by text:

"Not great news I'm afraid. He'll give you the details, but it looks like waterproofing is stuffed in both bathrooms"
- l. DE replied:

"Yikes that's scary thanks for that."
- m. After that OE and DE contractor remediated the leak and its effects in the upstairs bathroom, at their expense.
- n. However, OE and DE took no further action in relation to the leaking in the downstairs bathroom which BC had also reported to them.
- o. They did not do so because on testing by a CD of [Renovations company] he could not replicate or identify the source of that reported leak.
- p. CD's evidence was contained in a short undetailed statement dated November 2022 which strangely started off by CD denying he had misrepresented state of property.
- q. It included:

- i. The tenant told him there “could have been a potential leak” in the downstairs bathroom.
- ii. He water tested the area and “no signs of leak were detected” and “no water leak to be found”.
- r. The stated basis of the testing was carried out is incorrect. It was clearly reported to OE and DE as a known, existing, and repeating leak. The tenant had never previously described the leak in CD’s terms. This casts substantial doubt on the efficacy of the testing he carried out. There is a great difference between looking for a could have been potential leak and a known leak.
- s. It is assumed OE and DE would have fully disclosed to CD the tenant’s previous advice to them as to the extent and nature of the leaking in the downstairs bathroom.
- t. The repairs that were later carried out by the applicants and pictures of what was discovered, shows long term water damage to the downstairs bathrooms floors and walls traced back to, amongst other things, puncture holes in water piping.
- u. The extent of OE and DE’ knowledge of the existing downstairs bathroom leak, directly from their tenant, who had observed it regularly occurring and told them of it and them jointly instigated measures to mitigate it, cannot reasonably be displaced by the questionable advice received from CD.

#### **The appropriate measure of loss?**

- 11. The applicants are entitled to compensation that puts them back into the position they would have been if the representation was true.
- 12. Here that is the cost of fixing the leak and its effects in the downstairs bathroom.
- 13. The applicants originally made a claim on their insurance for the leak. That was declined as it was deemed to be covered by the excluding clause of a gradual leak and not the covered sudden event. [Insurance Company] assessors estimated the repair cost at \$43,604.25.
- 14. Evidence was produced that confirmed the cost the applicants paid for repairing the leak and its effects was over \$32,482.00. There would also have been some other costs to that amount. After reviewing the detail of the invoices, they appear to be reasonable and appropriate. The monetary limit the Tribunal may award is \$30,000.00 so this decision is to that amount.
- 15. I have also considered and am satisfied that there was no betterment element to this claim that would warrant a reduction in the award as the bathroom renovation carried out by OE and DE was relatively recent and the already imposed jurisdictional limit.
- 16. I have also considered that if OE and DE had remained the owners of this property they would have incurred this repair cost themselves.
- 17. Finally, my apologies to both parties for the time it has taken to issue this decision.

**Referee: A Hayes**

**Date: 5/7/23**



**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 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 days of the decision having been made. There is a \$200 filing fee for an appeal. You can only appeal outside of 20 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>.