



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 402

APPLICANT **BN**

APPLICANT **HH**

RESPONDENT **HT**

SECOND **BB**
RESPONDENT

The Tribunal orders:

The claim by BN and HH against HT and BB is partially proved. HT and BB are jointly and severally liable and are to pay BN and HH a total of \$500.00 on or by 5:00 pm on 14 September 2023.

Reasons

1. The applicants BN and HH (the applicants) purchased a house from HT and BB (the respondents). The applicants now bring a claim against the respondents for \$10,613.30.
2. The applicants claim that the Sale and Purchase Agreement (the agreement) did not specify that the fireplace was unusable and needs replacing. The applicants rely upon Clause 7.3(1) of the standard agreement, that the fireplace is a fixture and provides heating and should be in “reasonable working order”.
3. The issues to be resolved are:
 - (a) Is the fireplace a service or amenity?
 - (b) If so, can the respondents rely on “due diligence”.
 - (c) Was the condition of the fireplace in breach of the warranties?
 - (d) If so, what is the remedy?

Is the fireplace a service or amenity?

4. The respondents explained that the fireplace was not an amenity because the heating for the house is provided for by the heat pump which was noted as a chattel.

5. The respondents explained and it was not disputed that the heat pump was in working order and checked and accepted by the applicants. They said that the heat pump was the amenity that supplied the heat to the house.
6. I am satisfied that the applicants have proved that it is more likely than not that the fireplace is a service or amenity. I make my finding when I consider the wording of Clause 7. 1 (3) which along with chattels, refers to "*all plant, equipment, systems or devices which provide any services or amenities to the property, including, without limitation, security, heating, ...are delivered to the purchaser in reasonable working order...*".
7. The clause is not qualified by limitations about which device or chattel is better source of service or amenity.

If so, can the respondents rely on "due diligence".

8. In summary the respondents said that if the applicants had completed their due diligence, then they would have discovered the fireplace had issues.
9. The respondents explained that they had never used the fireplace. They did not know that the fireplace was in poor condition and did not conceal anything. They were not advised by the Real estate agent that they needed to specifically refer to the fireplace in the agreement.
10. The respondents said that it was up to the purchasers (the applicants) to get a sweep and confirmation of the quality of the fireplace pre purchase.
11. The respondents explained that they had tried to organise a sweep but the fireplace company that they contacted had misplaced their email and the sweep had never happened.
12. The respondents referred to clause 22 of the agreement in relation to the purchaser relying on their own judgement.
13. I am not satisfied that the respondents can rely on "due diligence". I make my finding when I consider that generally speaking due diligence refers to making sure finance, paperwork, titles and so forth are in order.
14. Further, the agreement refers in clause 22 to the purchaser relying on their own judgement but read in its entirety refers to the structural integrity and watertightness of the building.
15. Further, as a matter of contractual interpretation, a requirement for due diligence does not mean that the warranties section has no force.
16. For these reasons I am satisfied that the applicants can rely on the warranties section in the agreement and are not prevented from doing so because they didn't get their own sweep of the fireplace pre purchase.

Was the condition of the fireplace in breach of the warranties?

17. It was not disputed that the fireplace needs replacing.
18. The applicants supplied a quote for a replacement inset fireplace which also states that it is to "replace unsafe Masport due to fire box failure and flue failure. Customer to remove timber mantel before install".
19. I am satisfied that the applicants have proved that because the fireplace needs to be replaced as described then it is not "in reasonable working order and therefore in breach of the warranties.

If so, what is the remedy?

20. The applicants claim for \$4,947.00 for a replacement fireplace. They also claim for installation at \$1,180.00 and a further \$720 for obtaining council consent. Finally, the applicants claim \$3,866.30 for a replacement mantel because the old one will need to be removed.
21. The normal measure of damages for breach of contract is to put the wronged party into the position they would have been in if the contract had been performed.
22. I am satisfied that if the contract had been performed the applicants would be in possession of an elderly inset fire box and flue with an out of date wooden mantel in reasonable working order.
23. I am not satisfied that the applicants have proved that they are entitled to an award of damages for the purchase of a brand-new fireplace and the purchase of a brand-new mantel.
24. Further, I do not accept that the applicants are entitled to an award for council consents.
25. I am satisfied the sum to be awarded should reflect the value of an elderly inset fireplace in reasonable working order with an elderly mantel.
26. The applicant supplied a quote of a new fireplace, and the respondents provided a copy of an advert for a cheaper version which may or may not be the right size and so forth.
27. I find that an inset fireplace of some vintage in "reasonable" working order is not going to be worth much. I set the value at \$500.00.
28. Further, I do not consider that the applicants are entitled to an award for the remaining sums claimed as those sums do not reflect compensation for the value of an elderly fireplace in reasonable working order.
29. For these reasons I find the claim by the applicants against the respondents is partially proved and the respondents are to pay the applicants \$500.00.

Referee: K Johnson
Date: 23 August 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>.