



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 477

APPLICANT EI

APPLICANT OI

RESPONDENT TS

RESPONDENT NS

The Tribunal orders:

1. NS is added as a respondent to this claim.
2. The claim is dismissed.

Reasons:

3. The applicants, EI and OI, purchased a house at [Address] (“the house”) from the respondents, TS and NS on 11 January 2023.
4. Within a couple of days of moving into the house, they noticed water had pooled on the garage floor coming from the bathroom above.
5. After an investigation, EI and OI discovered that water from the shower was flowing down the wall into the floor underneath the bathtub. There was significant damage to the area underneath the bathroom floor and above the garage ceiling. They claim a repair cost of \$8500 from TS and NS on the basis that they did not disclose this issue prior to the purchase.

Issues

6. An applicant seeking a remedy in the Tribunal has the onus of proving his or her claim on the civil standard of proof which is the balance of probabilities (that is, that it is more likely than not). When assessing whether the onus of proof has been discharged by an applicant, I need to consider and evaluate the evidence presented by the parties.
7. In this case, there is no dispute that the damage was pre-existing since EI and OI discovered the leak two days after moving in and were in contact with the real estate agent immediately to investigate the problem.
8. Nonetheless, in order for the claim to be successful, EI and OI have the onus of proving the following on the balance of probabilities:
 - a. That TS and NS breached vendor warranties under the sale and purchase agreement; or

- b. That TS and NS were aware of the damage at the time of sale;
- c. They misrepresented the property to EI and OI who were induced to purchase the house; and
- d. EI and OI have suffered a loss.

Was there a breach of vendor warranty under the sale and purchase agreement?

9. The sale and purchase agreement was not before the tribunal, but the standard ADLS agreement was used for the sale. Accordingly, the law of contract applies. Once a contract is formed, the parties are bound by the terms they have agreed to, and those terms are enforceable by one party against the other. This means that if one party breaches a term of the contract, the other party may seek a remedy.

10. The standard ADLS sale and purchase agreement includes the following vendor warranty under cl7.3(1):

“The vendor warrants and undertakes that at settlement: (1) The chattels included in the sale listed in Schedule 2 and all plant, equipment, systems or devices which provide any services or amenities to the property...are delivered to the purchaser in reasonable working order, but in all other respects in their state of repair as at the date of this agreement (fair wear and tear excepted) but failure to do so shall only create a right of compensation.”

11. So a question before me is whether the leak resulting from the shower use represents a failure of a plant, equipment, system or device under this clause.

12. To consider this point I looked at the case of *Reid v Taylor*¹ where Associate Judge Paulsen considered whether cl7.3(1) applied sewer and storm water systems on the property. While he did not definitively say the clause did not apply, he found that there was an arguable case that it does not. The circumstances of the matter before me are similar where I am left with more than an arguable doubt that a leak from a bathtub would fall within the scope of the vendor warranty under cl7.3(1).

13. In this case, there is no dispute that the damage has been caused by water going into the bathroom floor cavity instead of draining as it ended up on pooling on the garage floor when the shower was in use. The shower system and the bathtub, in my view, are more aptly described as integral fixtures within the house. I do not believe that this clause has been drafted to shift the onus on the vendor to ensure quality and fitness of fixtures such as the bathtub and showers within the property. In *Reid v Taylor*, Associate Judge Paulsen said at [47]:

Under the common law the onus lies on the purchaser of land to ensure the property bought meets their requirements. There is no duty upon the vendor to disclose matters of quality or use of the land. The position is described in Sale of Land as follows:

Unless the property is being bought from the builder while the building is in the course of construction, there is no implied warranty that the property has any particular quality or fitness for any particular purpose. In the absence of any actionable misrepresentation or express or implied warranty, the vendor incurs no contractual liability for failure to disclose defects of quality, whether patent or latent, whether rendering the property dangerous or unfit for occupation, or even if the vendor has created the defect or is aware of its existence, though the vendor may not deliberately conceal a defect.

14. Therefore, I do not find on the balance of probabilities that the vendor, that is, TS and NS have breached this clause. A purchase of a house, especially one that is a few years old is subject to the principle of caveat emptor (buyer beware) whereby the purchaser is responsible to undertake their own investigation to discover any matters they consider important when buying a property.

Were TS and NS aware of the damage?

15. As there is no breach of contract, we now look to determine whether TS and NS had knowledge of the issues and deliberately withheld it from EI and OI.

¹ *Reid v Taylor* [2023] NZHC 1231

16. NS gave evidence that prior to selling their house, he was aware of a leak from the upstairs bathroom. He got a plumber to investigate who found a leak in the pipes below and fixed it. There were no more leaks afterwards.
17. He said his kids only used the bathtub in the upstairs bathroom and they used the brand-new shower downstairs as it had better water pressure. He said they were surprised to hear about the leak from EI and OI. Upon hearing about the issue they asked the same plumber who had fixed the previous leak to go around and check.
18. The plumber did a water test and found no leak which was recorded in the notes for his visit. But the plumber did not turn on the shower above the bathtub so did not come across the issue which was causing the problem.
19. TS and NS accordingly say they had no knowledge of the damage to the area below the shower.
20. EI and OI's evidence is that the extent of damage was such that anyone living in the house would be aware. They say they had one shower upstairs and found water had leaked onto the garage floor. They added that the insulation was wet and there were signs of water damage everywhere once they looked under the bathtub.
21. EI and OI had obtained a building report prior to purchase and no issues had been identified in that report.
22. I am not satisfied EI and OI have established on the balance of probabilities that TS and NS were aware of this damage.
23. I note that it took two separate visits by tradesmen to uncover the full extent of the damage. Furthermore, since the leak was only apparent when the upstairs shower was used and not the bath, it is important to consider the manner of use by the parties.
24. TS and NS submit they used the shower downstairs and bathed their kids in the bathtub upstairs. As a result, they never saw any leaks onto the garage floor. I find their explanation plausible and accordingly, I find that EI and OI fail to establish this point.

Have TS and NS misrepresented the property which induced EI and OI in the purchase?

25. While I find above that TS and NS were not aware of the damage, it is still important to consider whether they made any representations about the property that were false, even if made innocently.
26. I turn to section 35 of the Contract and Commercial Law Act ("CCLA") which provides that if a party is induced to enter a contract by misrepresentation, whether innocent or fraudulent, then the party suffering the loss is entitled to claim the damages.
27. In terms of section 35 of the CCLA, I need to consider whether the agent or the advertisement for sale made any claims about the condition of the house or in particular the bathroom. During the hearing, I accessed the listing for the sale which has the following description:

[REDACTED]
28. I note that the ad does not make any representations that I find to be misrepresenting the property. There is mention of bathroom upgrades, but NS explained this was in reference to the bathroom downstairs.
29. There was also no evidence before me to suggest the selling agent had made any such representations that would fall foul of section 35 of the CCLA.

30. Accordingly, I do not find there were any misrepresentations by TS and NS about the property.

Have EI and OI suffered a loss which can be claimed from TS and NS?

31. There is no question that EI and OI have suffered a loss. They were unable to use the shower upstairs and while they always had plans to upgrade the bathroom upstairs, the damage led to extra costs for the upgrades.

32. But since it has not been established that TS and NS have breached the sale and purchase agreement or that they were aware of the damage and thereby misrepresented the property for sale, they cannot be held liable for the loss.

33. Accordingly, the claim is dismissed.

Referee: S. Malaviya

Date: 28 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>.