



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 391

APPLICANT HC

RESPONDENT X Ltd

The Tribunal orders:

X Ltd is to pay \$7,889.57 to HC on or before Friday 13 October 2023.

Reasons:

1. In December 2019 HC purchased a house owned by X Ltd by auction. Prior to the marketing of the property the vendor renovated an upstairs ensuite bathroom and a downstairs bathroom. Both bathrooms had identical tiled showers. In 2022 HC noticed some cracked tiles in the shower, which he later discovered was due to a leak. HC said both showers were incorrectly installed so they each had the same leaking issue.
2. HC claimed the vendor's breached the contract by failing to obtain building consent for the work on the showers. He claimed to be reimbursed for the work he had performed in both bathrooms.
3. The issues to resolve the claim are;
 - (a) Did X Ltd breach the vendor's warranty that it caused works to be done without obtaining a building consent when one was required?
 - (b) If so, was the loss that HC incurred caused by the breach of the vendor's warranty?
 - (c) If so, what loss can HC show he has incurred as a result of the breach that he is entitled to be compensated for?

Did X Ltd breach the vendor's warranty that it caused works to be done without obtaining a building consent when one was required?

4. HC claimed X Ltd breached clause 9.2(5) of the agreement where the vendor warranted that for any works it had done, it had obtained 'any permit, resource consent, or building consent required by law'.
5. NN, director of X Ltd, considered a building consent was not required because the existing bathrooms were only renovated prior to the sale and there was no movement of the water services.
6. ND, a senior building consent officer with the [Council], attended as a witness. He said that the replacement of a shower is building work that always needs Council consent, or a request for exemption from obtaining consent. He said it would ordinarily have two inspections, the first on

tanking and the second on completion. An exemption is approved if the Council has assurance the work was being done by a tiler and waterproofing applicator who was accredited to perform that work.

7. LK, the licensed building practitioner who HC engaged to do building work on his house, also provided evidence as a witness. He said that the shower base was well installed and had a waterproof membrane, but the upstand of the shower had not been flexi-taped around the membrane and so it allowed for no movement. Water then penetrated a crack that developed and caused the tiles to lift.
8. I am persuaded by the evidence of ND that when each of the showers were replaced a building consent should have been obtained from the Council. It is possible that the Council may have allowed the works to be performed and granted an exemption, however, that application was not made to the Council and so the work done on the showers did not have Council consent or an exemption.
9. I therefore find that X Ltd had allowed work to be done that required a building consent and had not obtained that consent from the Council and therefore it breached its warranty in clause 9.2 that it had obtained a building consent.

Was the loss that HC incurred caused by the breach of the vendor's warranty?

10. ND said the most important inspection was the one done after tanking. HC considered that had the inspection occurred, then the work would have failed as it had not met the building code. NN considered it would not have made any difference because the tiller was fully qualified.
11. I find that the vendor warranty is for the benefit of the purchaser and must be interpreted to give the purchaser the benefit that was intended in that clause. Once the purchaser has shown the vendor has breached its warranty, then it falls to the vendor to show that the damage that occurred was through no connection with the failure to get building consent. On the facts of this case, I could not be satisfied that the Council inspector would have approved the existing waterproofing without the flexi-tape applied. I therefore find that as X Ltd did not obtain consent, it prevented the possibility that the showers may have failed an inspection on the waterproofing issue. The agreement, however, provided that HC could have confidence that the work had been inspected. The fact the shower leaked and was discovered two years after installation is some evidence the shower was not correctly installed and without a building consent, X Ltd are not able to show that the loss would have occurred even if consent had been obtained.

What loss can HC show he has incurred as a result of the breach that he is entitled to be compensated for?

12. HC was inconsistent in his evidence of other building work he had performed by his builder at the same time as he had the bathroom work performed. He said he was not claiming for any costs relating to any other work done and his builder had put an 'x' next to those costs on his invoices that were not related to the work on the showers. Altogether HC claimed \$53,065.48 for the repair of both showers, but limited his claim to the monetary jurisdiction of the Tribunal.
13. NN disagreed that the invoices were only to remediate the leak from the two showers, even once the crossed out lines were deleted. All of the work on the house after the sale was invoiced together so that it became difficult to know what work was only related to the remediation of the leak in the showers.
14. Further, NN considered the remedial work was excessive. HC guttered both bathrooms and had them rebuilt. He had the floors relevelled, had the walls straightened, retiled not only the shower, but the whole floor and walls of both bathrooms.
15. X Ltd provided two quotes to have the repair remediated, one from the original tiler who installed the waterproofing for \$4,473.50 and one from [tiling company] for \$5,083.00.

16. I prefer the evidence of the cost to remediate the leaks based on the quotes provided by X Ltd because:

- (i) From the invoices provided by HC's builder, LK, it is evident he was engaged to perform other building work in addition to the bathroom work. In an email dated 14 June 2023 he wrote that he marked with an 'x' costs that were for other works. However, he has not allocated the incidental costs such as, travel, materials cost or rubbish removal to any of those other jobs. There was no breakdown of what 'materials' were purchased for a total of \$4,312.58, a price that excludes the shower trays, painting and plastering costs, the tiles, silicone, waterproofing or the underfloor heating kit with touchscreen thermostat. There was no breakdown of the plumbing cost of \$4,650.62 and the plumber's invoice for those on-charged costs was not provided. U Ltd invoice was not provided and no plan or explanation of the work it was engaged to do for \$1,774.68.
- (ii) Very few photos were supplied of the resulting damage that needed to be rectified, and the few that were provided show substantially less damage to the bathroom than what HC claimed for. LK said the reason why he striped everything back in the bathrooms was because he needed to sign off based on his original quote and the work would have his name on it. It was not because LK found damage to those other areas. OQ, X Ltd's builder, attended a meeting with the parties and inspected the bathrooms. He wrote that:

“upon inspection I found that the upstairs bathroom had been completely ripped apart totally unnecessarily. The leaks in the showers could have easily been remedied without ripping the whole bathroom apart... when I confronted HC's builder as to why the bathroom had been ripped apart, he replied that HC did not like the tiles in the bathrooms and wanted them replaced. I then showed HC's builder the photos of all the waterproofing, and he stated that if he had known that he would not have ripped the bathroom apart, he was acting on HC's instruction. I have seen many leaking showers in my time as a builder and ripping a whole bathroom to pieces to fix a leaking shower is not necessary”.

- (iii) I find that there is insufficient evidence on which I could conclude that both bathrooms needed to be fully gutted to fix the leak from the showers. LK noted in his evidence that the leak in the upstairs shower had not gone through the ceiling. I am not persuaded that although it had not gone through to the ceiling, that nevertheless all the wall linings had to be removed and the timber walls straightened and the floor levelled. HC only obtained one quote to have the work performed and I find it included work that was in excess of the reasonable work needed to be performed to remediate only the leak from each shower.
- (iv) LK agreed that the installation of the shower base was to a good standard, and that the only issue with the waterproofing was the lack of flexi-tape around the waterproof membrane. There was therefore no reason why LK would remove wall linings and gut the bathroom when the water damage was confined to one isolated area in each of the showers.

17. The estimate for the repairs from [Tiling company 1] at \$5,083.00. It is close to the quote provided by [Tiling company 2] for \$4,473.50. HC's provided written submissions that the estimates provided by X Ltd did not include the associated building costs. However, I have found those costs were more likely to be unnecessarily incurred on the basis of the evidence provided. However, I do agree with those submissions that it is reasonable for HC to have appointed a different tiler than the one who installed two showers that both leaked. Accordingly, I find that the estimate provided by [Tiling company 1] that the cost to remediate the leak for both showers is \$5,083.00 and therefore that amount is added to the total of this order.

18. Neither party provided evidence of the cost to obtain Council consent or acceptance of the work done on the shower. [Building company] invoiced \$1,440.07 for the consenting costs on 28 June 2022, and then a further cost of \$1,366.50 to uplift the consent. The best evidence I have of the cost to obtain Council consent is that provided in those invoices and so the total cost of \$2,806.57 is added to the amount of this order.

19. As I have found that HC has inflated the work that was required to fix the two leaks, I find that he has provided insufficient evidence so I can be satisfied that any additional costs he incurred were necessary and only incurred to remediate the leak. I gave HC an opportunity to provide evidence of what those costs were if I was to make a finding that additional or unnecessary work was performed, but HC has not provided that evidence and told me he had nothing to add. Accordingly, from the evidence provided, I cannot find on balance of probabilities that any other costs will necessarily be incurred or what those costs would be. An order is therefore made on the basis of the costs I find reasonably compensates HC for X Ltd's failure to obtain the consent of the Council for the work it had performed.

Conclusion

20. As I have found that HC has incurred the loss of \$7,889.57, an order is made that he be reimbursed for that amount.

Referee: K Cowie DTR

Date: 13 September 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>.