



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 118

APPLICANT HD

RESPONDENT NU

The Tribunal orders:

NU is to pay \$8,908.83 to HD on or before Friday 24 March 2023.

Reasons:

1. HD purchased a four hectare lifestyle property from NU pursuant to a written agreement dated 25 November 2021. On 28 January 2022 HD took possession and within two weeks the toilet overflowed when it was flushed. On 18 February MJ from T Ltd found that the septic tank was overflowing with sewerage. He found the soakage trench had slugged up and so water could not soak away and therefore the pump had burned out. He replaced the pump and found that when the endcap was removed water could flow, but when the cap was on, no water could discharge. He advised HD that she needed a new disposal soakage trench.
2. HD engaged Q Ltd to clear the pipes, but it was found they were fully blocked with tree roots and sludge and could only be replaced. The system was old and could now only be replaced with a new compliant system.
3. HD claimed for the cost to replace the septic tank system and the work performed to investigate the fault.
4. The issues to resolve the claim are:
 - (a) Was the wastewater system in reasonable working order?
 - (b) What loss can HD prove she is entitled to be compensated for? Does the proposed reinstatement place her in a better position that entitles NU to a deduction of the amount of the claim?

Was the wastewater system in reasonable working order?

5. Clause 7.3 of the sale and purchase agreement provides that the vender warranted that at settlement all plant, equipment or devise which provided any service or amenity to the property, were delivered to the purchaser in reasonable working order, but in all other respects in their state of repair as at the date of the agreement. HD said that NU breached that clause as within two weeks it was found that the disposal pipes were fully blocked.

6. NU, who is elderly, asked to be represented by her daughter TQ, and that request was granted. TQ disagreed that the septic tank sewerage system was not in reasonable working order on the date of settlement. She said that the system was working on that date and at the pre-purchase inspection, and considered that HD's evidence confirmed that.
7. I find that the sewerage disposal system was not in reasonable working order on the date of settlement because:
- (i) MJ inspected the system on 18 February 2022, three weeks after settlement, and provided a report of his findings. The date of his visit is consistent with HD's evidence that the issue became apparent soon after settlement.
 - (ii) MJ took a core sample using a glass tube, that showed the solids that had accumulated in the bottom of the tank was only 8cm. He said the tank had a lot of capacity to collect more solids. It was overflowing because the pipes were blocked so the pump had nowhere to pump the water to.
 - (iii) MJ has an extensive history of over 30 years working in the septic tank industry, installing, servicing and consulting on septic tank treatment issues. He found this soakage disposal was the worst failure he had come across, so bad that the users could not even flush a toilet. In his experience the system had failed to such an extent that it must have occurred over a long period of time. He described how it would begin in one area and over time the roots and sludge would build up slowly choking the pipes. The evidence of MJ was that it would take two the three years to get to the extreme sate that the pipes were fully blocked and in this case the failure was extreme. He said that HD was not really able to live in the property until the work was performed and the sewerage treated.
 - (iv) By 4 March 2022 HD engaged Q Ltd to inspect the effluent discharge. It was found that the discharge pipes were full of roots and black sludge. QI from Q Ltd said that the presence of sludge indicated that the system had not been working for some time. The black sludge was caused by effluent bubbling up to ground level.
 - (v) QI said that once cleaned out, a septic tank would operate for a month or two, but it would gradually fill to its capacity of 3,000 to 5,000 litres if the disposal pipes were blocked, and then the issue would become apartment. He said that it would usually begin with hearing the drains gurgling and progress to finding wet spots in the discharge area. His evidence was that the system had completely failed for at least ten months or more for the black effluent to build up in the way it was shown to in the photos taken in March 2022.
8. I therefore find that it is more likely that the septic tank system was not in reasonable working order on the date of settlement in breach of clause 7.2 of the vendor's warranties and undertakings.

What loss can HD prove she is entitled to be compensated for? Does the proposed reinstatement place her in a better position that entitles NU to a deduction of the amount of the claim?

9. HD claimed to be compensated for the cost to replace the septic tank system. MJ said it was not possible to repair the effluent drainage system as it was not possible to clear out roots and the built up sludge. Instead HD needed a new disposal system installed in a different area. It required an assessment of the site and a decision made about what system HD could install that would be compliant with the more stringent environmental requirements.
10. QI confirmed that HD would need to replace the entire system and not only the disposal pipes. He said the system was old and not even remotely compliant so that the Council would not allow HD to replace like for like.
11. HD provided an estimate from Q Ltd to replace the system. That estimate was between \$21,850 and \$28,750. She provided a second estimate from NE for \$21,850, with the addition of possible Hiab

costs and that HD would also need to obtain a consent for installing the new system and therefore would also incur the costs relating to that.

12. TQ enquired with PD what the average lifespan was for a soakage trench system. She provided an email from EB that stated the discharge field for any system depended on the usage and ensuring it was serviced. She estimated it could be anywhere between 5 and 15 years. QI disagreed with that estimate and said that in his experience it was much more like up to 30 years. Nevertheless QI agreed that this was an old septic tank system.
13. If HD was awarded the full amount to replace the septic tank system, then she would be in a better position than when she purchased the property because the system would have a guarantee of it operating for a reasonable period of time, and most likely 20 years without issues. HD purchased a system that was old and had a greatly reduced life expectancy. She did not however, purchase a system that was already broken, unable to be repaired and in urgent need for her to replace it to enable her to live at the property.
14. Although HD said that she did not know whether the disposal field had been recently installed or not, that was for her to determine during her period of due diligence and reflected in the price she considered the property was worth. From the evidence of QI, had HD made enquiries about the septic tank, she would have discovered it was old.
15. The parties agreed that the house was between 15 to 20 years old. From the evidence provided it is reasonable to conclude that the septic tank system was probably the one that was originally installed when the house was built. The best evidence provided is that the system was nearing the end of its expected life, however, HD was entitled to rely on the vendor's warranty that it operated and was in reasonable working order so that she would not have to bear the immediate expense of replacing it.
16. I found the evidence of MJ very helpful. He said that the disposal system does not fail fast as roots and sludge take time to slowly build up so that the system slowly loses its ability to discharge the waste. HD was entitled to rely on the warranty that the system was in reasonable working order so that it was not only just operating but struggling. Rather, the system had to operate in reasonable working order, so that it had some capacity to take further clogging before it stopped working and would need to be replaced. In this case however, HD has proven it had no capacity as the pipes were completely blocked. The evidence was that the effluent disposal pipes do not suddenly fail.
17. As the pipes are between 15 to 20 years old, then QI expected they may have another possible 10 or more years of use. I prefer the evidence of QI on the lifespan of the disposal field over that of EB as QI has extensive experience as a drainlayer, he made himself available to be questioned as a witness, and his comments were made in relation to HD's specific site.
18. I have therefore determined that HD should be reimbursed for one third of the cost of the least price that she would need to pay to get a new system. The best evidence provided is that the system was likely to be two thirds through its expected lifespan. The least amount HD will pay was estimated to be \$21,850.00 and therefore she is entitled to be compensated \$7,283.33. That amount reflects the fair compensation to HD for having to pay to replace a system on an urgent basis when the vendor promised that the system was working when it was not. It also reflects the value that HD will receive by installing a new system that the property did not come with and is therefore more valuable as a result. The amount of \$7,283.33 is therefore added to the amount of this order.
19. HD also claimed to be reimbursed \$760.25 for the urgent servicing and replacement pump that T Ltd performed on 18 February 2022. I am satisfied that cost was only incurred because of the vendor's breach of her promise that the septic tank was in reasonable working order on the date of settlement and therefore the amount of \$760.15 is added to the amount of the order.
20. HD also claimed to be reimbursed for \$865.25 for the work Q Ltd invoiced for it investigating the problem and to diagnose the cause and condition of the disposal pipes. I am satisfied that cost was directly caused by the vendor's breach of warranty and therefore that amount is added to the amount of this order.

Conclusion

21. As I have found that HD has proven that she is entitled to be compensated for \$8,908.83, an order is made for that amount.

Referee: K Cowie DTR

Date: 9 March 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>.