



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

**District Court**

**[2019] NZDT 1361**

**APPLICANT**            **KD**

**FIRST  
RESPONDENT**            **NI Limited**

**SECOND  
RESPONDENT**            **B Council**

**The Tribunal hereby orders:**

NI Ltd is to pay \$4999.00 to Mrs D on or before 20 December; and

The claim against B Council is struck out for lack of jurisdiction.

**Reasons**

1. Mrs D purchased a house from NI Ltd in August 2017. She was the first owner of the property after NI Ltd, the developer.
2. As soon as she moved into the property she noticed significant pooling of water at the rear between the house and the retaining wall. There is a cesspit on either side of the house immediately next to this rear path area but water is not draining away from the retaining wall effectively into the cesspits.
3. Mrs D claims \$4999.00 to remedy the drainage problem on her property, on the basis that NI Ltd has not met the implied warranties in the Building Act 2004.
4. The issues to determine are:
  - Does the Disputes Tribunal have jurisdiction to hear a claim against B Council in relation to this matter?
  - Does the drainage work at and near the retaining wall at the rear of the section comply with the warranties contained in the Building Act 2004?
  - If not, what remedy is available to Mrs D?

*Does the Disputes Tribunal have jurisdiction to hear a claim against B Council in relation to this matter?*

5. I find that there is no jurisdiction to hear a claim against B Council in relation to this matter because B Council was acting in its regulatory capacity in relation to the development in

question and there is therefore no cause of action that falls in the Tribunal's jurisdiction. The claim against B Council is therefore struck out.

*Does the drainage work at and near the retaining wall at the rear of the section comply with the warranties contained in the Building Act 2004?*

6. The Building Act 2004, at section 362I, implies warranties into contracts for building works that include the requirement that "the building work will be carried out in a proper and competent manner; and in accordance with the plans and specifications set out in the contract; and in accordance with the relevant building consent", and also "that the building work will be carried out with reasonable care and skill." Building work includes all siteworks associated with the new development including drainage.
7. B Council provided the plans for the retaining wall that were submitted by NI Ltd for the building consent and the producer statement provided by the drainlayer. The development passed all inspections and obtained a Certificate of Compliance. However Mrs D and her witness QW say the plans were not complied with, as the drainage coil at the base of the retaining wall was laid above ground whereas the plans show it is to be laid below ground.
8. QW, Mrs D's brother and a building inspector, stated that there should have been a connection between the discharge at the base of the retaining wall and the cesspits on either side of the house at the rear. It is not entirely clear whether or not this is what point 11 on the retaining wall plan refers to and whether its absence is therefore a failure to comply with the plan or whether it is an issue that relates to the warranty that requires that work be carried out in a proper and competent manner.
9. I accept, in the absence of any other obvious cause or explanation for the ponding of water evident in photographs provided by Mrs D, that the presence of a connection between draining provision at the retaining wall and the cesspits is necessary to prevent the ponding problems, and that its absence represents at least a breach of the warranty to carry out building work in a proper and competent manner, if not a breach of the warranty to carry out work as per the plans.

*If not, what remedy is available to Mrs D?*

10. Section 362M of the Building Act 2004 provides for options where a breach of warranty can be remedied. Mrs D had previously notified a director of NI Ltd of this drainage problem and they declined to remedy the problem, so she is entitled to recover the reasonable costs of having the problem remedied by another contractor.
11. Mrs D has provided a quotation from another contractor for \$4550+GST (\$5232.50) to install subsoil drains which will provide the connection between the base of the retaining wall and the existing drains by the house. As Mrs D's Tribunal claim was \$4999.00, the order is limited to that lower amount.

**Referee:**

**Date: 29 November 2019**



## 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 or a mistake was made.

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 28 days of the decision having been made. If you are outside of time, 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.

### Ground for Appeal

There is only one ground for appealing a decision of the Tribunal. This is that 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.

A Notice of Appeal may be obtained from the Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 28 days of the decision having been made. There is a \$200 filing fee for an appeal. You can only appeal outside of 28 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, and 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>.