



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 584

APPLICANT **KI**

RESPONDENT **X Ltd**

The Tribunal orders:

X Ltd is to pay the sum of \$29,953.29 to KI by no later than 15 December 2023.

Reasons:

1. KI purchased a property from X Ltd on 22 February 2018. X Ltd was the developer.
2. In 2021, KI removed a hedge from in front of a retaining wall on the property. When foliage was removed, KI noticed cracks in the retaining wall. The problem was referred to X Ltd however they denied liability. KI therefore claimed in the Disputes Tribunal for compensation to repair the wall.
3. The issues to be determined by the Tribunal are as follows:
 - i. Did the defective retaining wall need a Building Consent? Did X Ltd breach the terms of the Agreement for Sale and Purchase?
 - ii. What has caused the wall to fail? Was the wall built with reasonable care and skill?
 - iii. Is X Ltd liable to compensate KI to enable him to repair the wall? If so, what is a reasonable price to repair the wall?

Did the defective retaining wall need a Building Consent? Did X Ltd breach the terms of the Agreement for Sale and Purchase?

4. Clause 7.2(5)(a) of the Agreement for Sale and Purchase states the vendor warrants that they have obtained any permits and building consents required by law for any work that has been done on the property.
5. Following the failure of the wall, KI obtained a report from an engineer, NP, at B Ltd. The report states the wall is not shown on the building consent plans however a building consent is required in accordance with the terms of Schedule 1 of the Building Act 2004 as part of the wall supports the driveway and parking area.
6. UE, representing X Ltd, stated they didn't agree with the engineer's report and they dispute a Consent was required. UE stated the Council was in charge of the process and confirmed acceptance of the build when issuing a code of compliance. X Ltd however did not present any evidence to support their view a Consent was not required.

7. After consideration, I find the evidence presented in the Engineers report to be persuasive and find it likely the wall did require a Building Consent as part of the wall supported a driveway. As X Ltd failed to obtain a consent, I find they are in breach of Clause 7.2(5)(a) of the Agreement for Sale and Purchase.

What has caused the wall to fail? Was the wall built with reasonable care and skill?

8. The Building Act 2004, s362I, contains an implied warranty that all building work will be completed properly and competently, with reasonable care and skill, in accordance with all laws and legal requirements. The implied warranties are contained in all residential building contracts (s362H). Implied warranties are valid for 10 years (s393(2)).
9. In addition, the Agreement for Sale and Purchase, in clause 21, provides a 10 year warranty on workmanship.
10. The Engineer's report obtained by KI states the wall failures are due to errors in construction. The report stated geogrid reinforcing mesh is required when a wall supports a driveway, however they observed, through cracks in the blocks, that mesh had been omitted. They also noted incorrect foundation preparation and placement and insufficient surface water and subsoil drainage.
11. X Ltd disputes the conclusions put forward in the report and again refers to the fact the property obtained a CCC from the Council. In addition, UE stated they believe the reason the wall failed was because KI removed the row of trees.
12. X Ltd have not provided any evidence to rebut the conclusions of NP's report or to confirm removal of trees caused the problems. NP's report stated none of the damage was caused by the removal of the hedge. KI also presented a photo showing cracks visible before the stumps were removed.
13. I find no evidence tree removal was a factor, nor would I expect a hedge row to be required to support a retaining wall. I prefer the evidence presented by KI and find the failure was due to errors in construction.

Is X Ltd liable to compensate KI to enable him to repair the wall? If so, what is a reasonable price to repair the wall?

14. In view of the construction errors, I find X Ltd in breach of the implied warranties under the Building Act 2004 and the express warranty in the Agreement for Sale and Purchase. I further find X Ltd in breach of the Agreement for Sale and Purchase by failing to obtain a Building Consent for the works. X Ltd were given an opportunity to remedy the defects however failed to do so. I therefore find X Ltd liable in contract and under the provisions of s262M of the Building Act to compensate KI for his losses.
15. KI has obtained two quotes for the remedial work, one for \$31,334.00, the other for \$36,682.00. As remedial work should relate to the building structure only, the costs for landscaping are removed, reducing the quotes to \$28,544.99 and \$34,793.25 respectively. In addition, Council Consent is required for a further \$1,408.30, bringing the totals to \$29,953.29 and \$36,201.55.
16. Without evidence to the contrary, I find the lower of the two quotes to be fair and reasonable compensation for costs to be incurred to remedy the failed wall and order X Ltd pay KI the sum of \$29,953.29.

Referee: K. Edwards
Date: 20 November 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>.