



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 99

APPLICANT MB

APPLICANT NB

RESPONDENT G Ltd

The Tribunal orders:

G Ltd Limited is to pay MB and NB the sum of \$20,900.67 within 28 days of the date of this order.

Reasons

1. On 19 April 2022, the parties entered into a contract for the sale and purchase of a property at [Address]. Before purchasing the property G Ltd (or its agents) told MB and NB that repairs to earthquake damage to the interior of the property had been repaired by G Ltd.
2. Since purchasing the property MB and NB have experienced significant flooding in the yard and underneath the house. They engaged [drainage company] to conduct an inspection to determine the cause of the flooding. [Drainage company] found that "severe earthquake damage" throughout "the drainage system (sewage and storm water) and work completed on the system was of poor standard". They determined that the entire drainage system requires replacement.
3. MB and NB claim that G Ltd misrepresented to them, before they agreed to the purchase, that all earthquake repairs (including the damage to the drainage system) had been completed. They also claim that G Ltd is in breach of clause 7.2 of the Sale and Purchase Agreement with respect to the drainage system. They claim the sum of \$20,900.67 being \$18,773.17 to have the drainage system replaced plus \$2,127.50 to have the problem with the system investigated by [drainage company].
4. The issues to be decided are as follows:
 - (i) Did G Ltd make a misrepresentation regarding the condition of the drainage system which induced MB and NB to agree to the purchase and, if so, what is the affect, if any, of clause 21.1 of the sale and purchase agreement on MB and NB's rights?
 - (ii) Is G Ltd in breach of clause 7.3 of the sale and purchase agreement and, if so, what is the affect, if any, of 21.1(g) of the sale and purchase agreement on MB and NB's rights under clause 7.2?
 - (iii) Have MB and NB established the amount claimed?

Did G Ltd make a misrepresentation regarding the condition of the drainage system which induced MB and NB to agree to the purchase and, if so, what is the affect, if any, of clause 21.1 of the sale and purchase agreement on MB and NB's rights?

5. The relevant law is found in the Contract and Commercial Law Act 2017. Section 35(1) of that Act provides that if a party to a contract has been induced to enter it by a misrepresentation, whether innocent or fraudulent, made by him or her by or on behalf of another party to the contract, he or she is entitled to damages from the other party in the same manner and to the same extent as if the representation were a term of the contract.

6. A misrepresentation is a false statement of fact made by or on behalf of one party to the contract to the other party. Silence can be a misrepresentation when what is said is a half-truth which creates a misleading impression because of what is left unsaid.
7. I find that G Ltd made a misrepresentation by silence when it (or its agent) told MB and NB that the house had earthquake repairs completed to it because this misled MB and NB into believing that the house damage was the only damage to the property caused by the earthquake(s) when there was also earthquake damage to the drainage system. I accept OP's evidence (OP represented G Ltd) that he was unaware of any problems with flooding at the property and therefore unaware of any issues with the drains, but an innocent misrepresentation is still a misrepresentation for the purposes of the law.
8. However, the parties agreed to the following in the sale and purchase agreement (in the Further Terms of Sale):

"21.0 DISCLAIMER

21.1 The Purchaser acknowledges and accepts the following:

...

(b) The Purchaser acknowledges that its offer is made solely on its own judgment and not in reliance of any representation or warranty (other than the express warranties included in this Agreement) made by the vendor or its agent;

...

(d) No error, mis-statement or mis-description in any advertisement or in this Agreement or by the Vendor or its agent shall give rise to cancellation of the sale nor entitle the Purchaser to compensation;

...

(g) In making this offer, the Purchaser relied solely on its own judgment as to the structural integrity and repair status of the property, and has made or will make appropriate enquiries to satisfy itself with regard to those matters;

..."

9. Thus, while I have found that G Ltd did make a misrepresentation regarding the property, MB and NB have essentially agreed to not rely on any representations made. They have also agreed that they are not entitled to any compensation for any mis-statement (misrepresentation) made by G Ltd or its agent.
10. The claim for a remedy based on misrepresentation is therefore dismissed.

Is G Ltd in breach of clause 7.3 of the sale and purchase agreement and, if so, what is the affect, if any, of 21.1 of the sale and purchase agreement on MB and NB's rights under clause 7.3?

11. The relevant part of clause 7.3 states:

"The vendor warrants and undertakes that at settlement:

(1) The chattels and all plant, equipment, systems or devices which provide any services or amenities to the property, including, without limitation, security, heating, cooling, or air conditioning, are delivered to the purchaser in reasonable working order, but in all other respects their state of repair as at the date of this agreement (fair wear and tear excepted) but failure to do so to deliver them shall only create a right of compensation".

12. I am satisfied that a system of drainage that enables stormwater and sewage to pass from the property to the public stormwater and sewage system is a "system or device which provides any services or amenities to the property". I am also satisfied that G Ltd have not delivered the drainage system to MB and NB in "reasonable working order" as required by clause 7.3(1). In particular, I accept MB and NB's evidence that even in light rain the yard and under the house flooded and it is clear from the report by [drainage company] that the drainage system is extensively damaged.

13. OP claims that the warranty in clause 7.3 is excluded by clause 21.1 in the sale and purchase agreement, in particular clause 21.1(b) and (g) (set out in paragraph 8 above).
14. However, I do not agree. Clause 21.1(b) clearly excludes the application of the clause to the express warranties in clause 7.3. Clause 2.1(g) refers only to the purchaser making its own enquiries and judgments as to the structural integrity and repair status of the property, it does not exclude the operation of the express warranties made by the vendor in clause 7.3.
15. I am therefore satisfied that G Ltd is in breach of the warranty in clause 7.3 and clause 21.1 does not affect MB and NB's rights to a remedy because of the breach.

Have MB and NB established the amount claimed?

16. I accept MB and NB's undisputed evidence that the entire drainage system requires replacement. They provided quotations and invoices to support the costs claimed to replace the system and to investigate and determine the issues with the system. The amount claimed was not disputed by OP.
17. I therefore find G Ltd liable to pay the amount claimed.

Referee: R Merrett
Date: 10 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>.