



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 510

APPLICANT **MW**

APPLICANT **NW**

RESPONDENT **SL**

SECOND **TE**
RESPONDENT

The Tribunal orders:

SL and TE are to pay MW and NW \$2,737.31 on or before 12 October 2023.

Reasons

1. In March 2023, MW and NW bought the property at [Address] by auction from SL and TE. Settlement date was 27 April 2023. A day or two after moving in, and using the hot water, it ceased working. After obtaining advice MW and NW discovered that a pin hole leak that had been in place for some time had caused the hot water to break down. They discussed the matter with the vendors who offered to pay for some of the cost of repair. MW and NW however believed that the vendors were obliged to pay the entire cost pursuant to the terms of the sale and purchase contract. MW and NW filed a claim in the Disputes Tribunal.
2. This is a claim for damages for the alleged breach of clause 9.3(1) of the sale and purchase agreement between the parties (Sixth Edition 2022), for the cost of replacement of the hot water system, in the sum of \$3,220.37.
3. The issues to be decided were as follows:
 - a. Does clause 9.3(1) of the sale and purchase agreement require the Respondents to contribute to the costs of replacing the hot water cylinder?
 - b. If so, how much is required to be paid?

Does clause 7.3 of the sale and purchase agreement require the Respondents to contribute to the costs of replacing the hot water cylinder?

4. The standard contract for the sale and purchase of land used in New Zealand is the Auckland District Law Society and Real Estate Institute of New Zealand Agreement (ADLS/REINZ agreement) which has been through various iterations and amendments. The version of the clause which is 9.3(1) in the agreement between the parties in this case provides as follows:

The vendor warrants and undertakes that at settlement

(1) the chattels included in the sale listed in schedule 2 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 in their state of repair as at the date of the agreement, fair wear and tear excepted).

5. The hot water system clearly falls within the definition of things to which the clause applies, even though it is not referred to directly, because it is a system that is related to heating. The categories included are to be interpreted liberally, when the clause provides “without limitation”. This clause in effect required, in this case, that the water heating system was in reasonable working order on settlement.
6. The hot water system ran for about a day and then failed. SL and TE queried whether this meant that it had been delivered to the purchasers in working condition, particularly because they had done some cleaning using the hot water in the days before the settlement.
7. However I am of the view that the problem with the hot water system pre-dated the purchase. The house had been empty for some time prior to the Applicants taking possession (the Respondent had used it as a rental and the last tenants had moved out some time before). The problem with the hot water was that there was one or more pin-hole leaks, which allowed water to get into the electrical part of the heating system. It was not until the use of the hot water was significantly increased that the problem became apparent and actually caused it to break down completely, as well as causing other electrical problems.
8. MW and NW’s plumber, UI, who diagnosed the problem gave evidence at the hearing. He is a very experienced plumber, I found his evidence to be impartial and credible, and he was clear that the leak had been present for some time. He said the increased load on the system when the purchasers had moved in, and the non-use of the system during the months prior to settlement, most likely explained why it had not broken down prior to the settlement date. In other words, the cause of the breakdown was most likely pre-existing at the time of settlement.
9. SL and TE noted that the problem would also have been present therefore at the time that the contract was signed, and that clause 9.3(1) provides that the state of repair at the time the contract was signed is the significant date. The implication appeared to be that the hot water system was supplied on settlement day in the condition it was in at the time the contract was signed, relieving them of liability.
10. I am unable to accept this line of argument however. It does not take account of the primary requirement, which is that the hot water system must be in reasonable working order. The way the clause is drafted, the existing state of the system must be “in reasonable working order”, before “in all other respect in their state of repair as at the date of the agreement” is applicable. In effect, that generally means that when a problem pre-dates the settlement date, which prevents the system, plant or equipment being in reasonable working order, then it is the responsibility of the vendor to repair or replace it, as is required. Considering UI’s evidence, which I accept, I find that the vendors are required in this case to do that.
11. I note that it was clear that this was unknown to SL and TE, and it was accepted by all parties in the hearing that what occurred was not anyone’s fault. Lack of knowledge or fault though does not relieve the vendors of liability under the clause.

If so, how much is required to be paid?

12. When a term of a contract is breached, the party that has suffered a loss because of the breach can claim compensation to put them into the position they would have been in if the breach had not occurred.
13. I have found that clause 9.3(1) is engaged or breached by the vendors with respect to the hot water system. The purchasers are entitled to claim the amount reasonably necessary to have a

working hot water system. SL made the point in the hearing that if the system could have been repaired that is all he and TE should pay and this is correct, in theory. However UI's evidence was that repair would not have been a realistic way of dealing with the problems. He noted that because of where the pin hole leak had occurred would have been an expensive repair job, requiring dismantling and reassembling of other parts. He also noted that where there was one such leak, other pin hole leaks are likely. He said that the hot water system was really at the end of its life, and even if this problem had not occurred it would probably have needed to be replaced within a relatively short time anyway. There was also a discussion about the second hand market for hot water systems, but I was satisfied by UI's evidence that this is not really a realistic method of replacing such systems, in terms of availability of second hand items that are worth purchasing.

14. However there is also an argument that the Applicants are in effect ending up in a better position than they might have been otherwise. I acknowledge, as the parties did, that what occurred was no one's fault, and the decision was left to me on the basis of applying the clause in the contract correctly. I am nonetheless persuaded that a small discount for the Respondents is appropriate, as they did not have the chance to source another, perhaps cheaper, version because of the way events unfolded. I consider that a 15% discount is appropriate, or in other words MW and NW should be reimbursed for 85% of the expense.

15. SL and TE are to pay MW and NW \$2,737.31.

Referee: M Wilson
Date: 20 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>.