(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2023] NZDT 44**

APPLICANT **N Ltd**

APPLICANT **KI**

APPLICANT **SI**

RESPONDENT **Estate of HB**

RESPONDENT **YA**

The Tribunal orders:

YA and the estate of HB is to pay $2,646.91 to N Ltd, KI and SI on or before Monday 27 February 2023.

Reasons:

1. YA and HB jointly owned a property they sold to SI by way of auction on 25 June 2021. SI appears to have signed as a Trustee for the nominee purchaser N Ltd. He said that after settlement he found that neither the gas stove nor the heat pump were in reasonable working condition. Additionally, SI was told that the roof had been leaking, but that it was repaired. However, the roof leaked after the first rain after settlement. Finally, SI said that the day before settlement one of the neighbours brought an unresolved fencing issue to his attention. The fence encroached on the neighbour's property by 500mm and needed to be rebuilt on the boundary. SI said the vendors were aware of the issue but did not give him notice of the potential claim which could be made. SI claimed to be compensated for the expenses he incurred to remediate the issues he outlined.

2. On 29 November 2022 CS, solicitor for YA, advised that HB died in December 2021. The intituling has therefore been changed to reflect that change.

3. The issues to be resolved are:

   (a) Was the stove in reasonable working order and if not, what loss can SI prove he incurred as a result?

   (b) Was the heat pump in reasonable working order and if not, what loss can SI prove he incurred as a result?

   (c) Did the vendors represent the roof had been repaired when it was still leaking? If so, what loss can SI prove he incurred as a result?

   (d) Did the vendors receive notice concerning a fencing dispute that they failed to bring to the purchaser's attention? If so, what loss can SI prove he incurred as a result?

Was the stove in reasonable working order and if not, what loss can SI prove he incurred as a result?

4. Clause 9 of the sale and purchase agreement provided that the vendor warranted that at settlement, the chattels included in the sale listed in Schedule 2 and 'all plant, equipment, systems or devices which provided any service or amenities 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'.

5. SI said that on the day after settlement when they moved into the property, they discovered that the gas cooktop could not work because the connector to the gas bottle leaked. He had to arrange to have the leak repaired for a cost of $245.44, and he provided the invoice in support of that cost.

6. YA wondered if someone else had intervened because on settlement day she was told that the stove was tested and it was working.

7. I find that it is more likely that the only reason why SI engaged Q Ltd to repair the gas connection was because they could not use the stove as he claimed. It was found that the gas regulator hose needed to be replaced.

8. SI is therefore entitled to be compensated to reinstate him to the position he would have been in had the regulator hose not leaked. I am satisfied that to get a gas certificate for the repair, a chain and hook and a concrete paver needed to be installed. I find that was part of the required work to obtain the certificate necessary for the work to replace the regulator hose and therefore the amount of $245.44 is added to the amount of this order.

Was the heat pump in reasonable working order and if not, what loss can SI prove he incurred as a result?

9. SI said that the heat pump in the living area could only be turned off by using the outdoor isolator switch. He said the heat pump was otherwise working but considered that having to stop the unit by going outside to activate the isolator switch was not a chattel that was supplied and warranted to be in 'reasonable working order'.

10. YA said she had no knowledge of the issue with the heat pump as it was HB who dealt with all issues relating to the house.

11. As the vendors warranted that the heat pump, being a chattel listed in schedule 2 of the sale and purchase agreement, was in reasonable working order, it is not a defence that YA had no knowledge of the issue. SI provided a quote from D Ltd for the replacement of the heat pump dated 7 October 2021. I find that the issue with the heat pump not turning off with the remote most likely existed at the date of settlement as SI said.

12. It is finely balanced between the parties whether a heat pump that is working, but needs to be turned off by the outdoor isolator switch, can be described as being 'in reasonable working order'. It is an old heat pump, and it was heating and cooling as it should. I find that for a heat pump to be in reasonable working order, it must also operate by the usual mechanism that the manufacturer designed it to be operated with, which is by a remote. I therefore find that the heat pump was not in reasonable working order.

13. SI is therefore entitled to be reinstated to the position he would have been in had the heat pump been able to be turned off using the controller. D Ltd wrote that the fault was with the printed circuit board, and that Mitsubishi did not have the indoor circuit board for that heat pump anymore. D Ltd noted that the unit was sold in September 2004 and therefore it was 17 years old when SI purchased it.

14. SI has replaced the heat pump and claimed to be compensated for the total cost of $2,415.00. It is reasonable to conclude that a heat pump that is 17 years old is most likely past its expected life and therefore SI must have expected that he would soon need to replace it. He was, however, not expecting that he would have to immediately replace it.

15. SI would therefore be entitled to a replacement with another old heat pump with a working remote. The new heat pump that he has claimed for would clearly reinstate him to a better position than he was in when he purchased the house. I have therefore determined that he should be compensated 15% of the value of the replacement heat pump. In arriving at the amount of $362.25, I have taken into account the unanticipated cost of having to immediately replace the heat pump. However, it was an expense that SI chose to bear as he also could have born the inconvenience of having to go outside to turn off the heat pump until he was in a position to replace it. I therefore find that $362.25 is a reasonable amount of compensation for the inconvenience of having to go outside to turn off the heat pump until it could be replaced.

Did the vendors represent the roof had been repaired when it was still leaking? If so, what loss can SI prove he incurred as a result?

16. SI said that during one of the pre-auction visits to the house he saw contractors working on the roof and was told they were fixing a leak. In June 2021, SI purchased the property and had a pre-purchase inspection on 6 August 2021. At that inspection he asked about water on the laundry floor. HB replied through his agent that it was from disconnecting the washing machine or from emptying the fridge bins. However, after the first heavy rain after moving into the property, SI found water pooling in exactly the same place where he saw the water which he asked about.

17. SI claimed that he trusted the vendor's representation for the reason the water was pooling by the washing machine when he decided to settle, but the representation was not true.

18. A misrepresentation is a false statement of fact that one party relies on when they enter into the contract. When SI asked about the water on the laundry floor, he was already bound to complete the settlement. Although he had been told that work had been done repairing the roof, there was no promise or representation made that the roof did not leak. When SI conducted a pre-purchase inspection, it was to satisfy himself that the property was in the same condition, reasonable wear and tear excluded, as when he purchased it. Although HB did not think the water was from a leak, even if that was incorrect, I do not think anything can turn on that. SI was already bound to complete the purchase regardless if a leak existed. The leak was an issue of maintenance and not damage caused by the actions of the vendors.

19. As SI has not shown that the vendors' represented that the roof had been repaired of all leaks, he has not shown that he was induced to settle due to a misrepresentation and therefore there is no basis on which he could be awarded the costs he claimed for the repair of the leaks.

Did the vendors receive notice concerning a fencing dispute that they failed to bring to the purchaser's attention? If so, what loss can SI prove he incurred as a result?

20. At a final pre-purchase inspection the day before settlement, SI said he was informed by a contractor working on the adjourning property that the fence was not in the correct position as it was encroaching into the neighbouring land by half a metre.

21. Clause 9.1 of the contract provides that *"the vendor warrants and undertakes that at the date of this agreement, the vendor has not received any notice or demand and has no knowledge of any requisition or outstanding requirement…which affects the property and which has not been disclosed in writing to the purchaser".*

22. Clause 9.2 further provides that *"the vendor warrants and undertakes that at the date of this agreement the vendor has no knowledge or notice of any fact which might result in proceedings being instituted by or against the vendor or the purchaser in respect of the property".*

23. The date of the agreement was 25 June 2021. SI provided an email from TI, the neighbour on whose land the fence encroached. TI wrote that in August 2020 he investigated constructing two townhouses on his land and obtained a survey. The surveyor discovered that the fence was within his boundary by 500mm. He wrote that he "spoke with HB about the issue of the position of the fence (including that it would need to be replaced) on a number of occasions between late 2020/early 2021".

24. YA said she had no knowledge of the fencing issue.

25. TI telephoned the vendor's real estate agent asking for the new purchaser's details so he could discuss the fencing issue. His details were not passed on and he could not make contact with SI. I find that YA's agent was therefore aware of the issue. Neither YA nor HB instructed her to reply. I therefore find that it is more likely that YA knew there was an issue with the placement of the fence but wanted HB to deal with it.

26. I find that YA and HB had knowledge of a fact which could result in proceedings being taken against the purchasers in respect of the property. YA and HB therefore breached the warranty in clause 9.2 by failing to bring that to SI's attention.

27. YA, through her solicitors, provided the High Court decision of *Kaitaia timber co Ltd v alternative enterprises Ltd*[1] where it was held that what a vender must disclose under the equivalent of clause 9.1. Associate Judge Bell held that the vendor must disclose a notice or demand if it that contained a directive, where some action must be taken or avoided. However, SI' claim was for a breach of clause 9.2 which only requires that he prove that the vendor had knowledge or notice *of any fact which might result in proceedings*.

28. As I have found that YA more likely had knowledge that there was an issue with the fence, there was an obligation on her and HB to ensure that it was not an issue that could result in proceedings being brought against the purchasers, which they were obliged to disclose. As the issue concerned the need to reinstate the fence to the correct position, and as HB and YA had not reinstated the fence and had not made any agreement with the neighbours, then proceedings *might* be initiated. HB and YA had been given verbal notice of the issue and the requirement that it be rectified. The fence did not need to be replaced due to its state of repair, but rather because it had not been built on the boundary. The best evidence that it was not built on the boundary was from the surveyor, and YA did not provide any evidence that challenged the accuracy of that survey. Knowledge that a structure encroached on a neighbouring land is an issue that might give rise to proceedings and therefore potential liability. That knowledge therefore fell within the intention of clause 9.2 which the vendor's warranted that they had disclosed. HB and YA however had not disclosed that knowledge of a potential proceeding.

29. SI is entitled to be reinstated to the position he would have been in had the fencing issue been brought to his attention before he signed the contract. Had SI been provided with that information, he would have had an opportunity to ensure that the cost of any fencing was to be borne by the vendors before settlement. As that did not occur, SI is entitled to be reinstated to that position. He claimed the cost of $2,039.22 for his share to reinstate the fence to the position it ought to have been built on. As the only reason the fence needed to be removed was so it could be built on the boundary, I have not deducted any sum for any betterment SI may have a received. YA did not submit that SI had received any betterment. Even if SI had been reinstated to a better position, that is more than offset against the damage to the shrubs and garden along that fence line that he had not included in his claim. The amount of $2,039.22 is therefore added to the amount of the order.

[1] [2012] NZHC 2497 at [53] and [57]

Conclusion

30. As I have found that SI has proven he is entitled to be compensated for the cost to repair the gas leak for $245.44, 15% per cent of the cost of the new heat pump for $362.25 and $2,039.22 to reinstate the fence, an order is made for the total of $2,646.91.

Referee: K Cowie DTR
Date: 13 February 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.