



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 661

APPLICANT **NE and SE**

RESPONDENT **JI**

The Tribunal orders:

The claim is dismissed.

Reasons:

1. NE and SE (“the purchasers”) bought a house from JI (“the vendor”) in January 2023. The house is about 37 years old. They say JI failed to fulfil an undertaking to fix a leak prior to sale, and they claim \$30,000.00 towards the cost of replacing the roof.
2. Both parties attended the hearing. Due to JI’s age, I approved representation by her power of attorney Mr C.

Background

3. The sale and purchase agreement was dated 21 December 2022, and names NE as purchaser. It was conditional until 11:00am on 23 December on the purchaser being satisfied with all inquiries he deemed appropriate (clause 22.0).
4. On 22 December, the purchasers’ solicitor emailed the vendor’s solicitor to say the purchasers had identified a leak in the kitchen. The solicitor suggested that, if the purchasers wished to go unconditional, it would be on the basis that either the leak was professionally repaired prior to settlement or \$20,000.00 was held back from settlement.
5. The vendor arranged for repairs to be carried out on 23 December. The purchasers’ solicitor emailed the vendor’s solicitor the same day saying that the purchasers wanted to see a copy of the plumber’s invoice and have the right to inspect. The solicitor said that it would be a term of settlement that the leak was fully repaired at the vendor’s cost. The vendor’s solicitor replied:

 ... Our client agrees to the following
 1. She will provide a copy of the plumber’s invoice.
 2. Your client’s tradesmen may inspect the works prior to settlement.
 3. She will use her reasonable endeavours to repair the leak at her cost prior to settlement.
6. The purchaser’s solicitor replied that, on the basis of those undertakings, the due diligence condition was satisfied, and the agreement was unconditional.

7. On 18 January 2023, the purchasers' solicitor emailed the vendor's solicitor concerned that the area was still leaking. On or about 20 January, the purchasers' plumber inspected the roof above the affected area and identified water ingress issues. The vendor's plumber did further repairs on 23 and 25 January.
8. On 23 January, the purchasers' solicitor requested a price reduction of \$5,000.00 to fix the leak and any consequential damage. The vendor's solicitor replied the same day that the vendor's plumber had found no evidence of water ingress at the premises that day. The solicitor said the issue had been remedied and the vendor did not agree to a price reduction.
9. On 26 January, the purchasers' solicitor emailed the vendor's solicitor saying the purchasers were concerned that *"they cannot confirm whether or not the leak has actually been fixed"* and that they reserved *"their rights as claimants pursuant to the General Terms of Sale of the Sale and Purchase Agreement"*. The vendor's solicitor responded that the vendor's plumber *"considers that all the concerns stated in the new owner's plumber's report have been addressed, and no further action needs to be taken"*.
10. On settlement date, 27 January, the purchasers' solicitor emailed the vendor's solicitor that the purchasers were moving in and had noticed water *"is now entering inside the house around the chimney"*.
11. Several months after settlement, the purchasers replaced the roof at a cost of \$35,960.50.

Did the vendor breach the settlement undertakings?

12. The law of contract applies. There is no dispute that the vendor complied with the first two undertakings. The disputed issue is whether she used *"reasonable endeavours"* to fix the leak prior to settlement. The undertaking is not an absolute one, it just required her to take reasonable steps.
13. The vendor's representative was present when repairs were carried out on 23 December. Two rusted sheets of roofing iron were replaced, some wet insulation was replaced, and a section of the hot water cylinder overflow was replaced.
14. The purchaser's plumber subsequently inspected the work. His invoice reports water dripping from the guttering by the kitchen window. The plumber lifted flashings and the two new sheets of roofing iron and cut back the building paper. The report says both the front and back of the roof were wet. The insulation had water in it, and the plastic underneath had pools of water. The plumber closed the roof up again. The report recommended removing the new sheets and flashings, removing the sheets on either side of the exhaust pipe to see where the leak was coming from, repairing, replacing insulation, fitting new building paper, refitting roofing sheets and flashings, and fitting a new 'deklite' and cone to the exhaust pipe.
15. The vendor's plumber went back on two further occasions. The two invoices describe the work carried out as:
 - ... travel to site, check and replace sink mixer. Check the roof for leaks, replace sheet fixings and seal doubtful areas above the advised leak as required [23/01.23].
 - Remove 3 sheets of iron, replace wet insulation batts ... investigate source of water leaks ... batts were wet but I couldn't see where any water was getting in ... looks like water from old leak that has been trapped in between black paper and plastic membrane [25/01/23].
16. At the second visit, the vendor's plumber hosed the roof for 30 minutes, but could not get the roof to leak. Following the final visit, the plumber concluded that the leak in that area was remedied.
17. The purchasers say the vendor's plumber must have noticed that the roofing paper was severely degraded on either side of the repair site and must have been aware there were wider issues with the roof. They believe the plumber and vendor had a duty to disclose this information, but turned a blind eye, and that the plumber's work was negligent. The report from the contractor who replaced

the roof says there was no 'change of pitch' flashing and the roof was "*not in good shape overall*". The contractor found that water was penetrating the roof cavity, insulation was covered with water, and there were other signs of water damage.

18. While the purchasers' concern at incurring the cost of replacing the roof is understandable, it is necessary to keep in mind the limited nature of the settlement undertakings. The vendor was not warranting that the roof was in a good state of repair, she was only undertaking to use "*reasonable endeavours*" to fix a leak. Following the first repair, the purchasers' plumber identified several issues and made recommendations for identifying and fixing the source of the leak. The vendor's plumber did further work and was unable to replicate the leak.
19. The issues identified by the purchasers after settlement relate to areas of the roof not covered by the undertaking, and the undertaking is certainly not broad enough to cover replacement of the roof as a whole. The purchasers say the vendor's plumber must have been aware of the need for more extensive repairs. However, their plumber had an equal opportunity to assess the condition of the roof, and its recommendations were limited to the area of the leak.
20. In summary, I find the purchasers have not proved on the balance of probabilities that the vendor failed to use reasonable endeavours to repair the leak covered by the undertaking. The purchasers' solicitor accepted the limited scope of the undertaking, and the purchasers are bound by its terms. The claim is therefore dismissed.
21. The vendor said in her submissions that the claim was frivolous and vexatious, and that the Tribunal should award costs against the purchasers. Although I have found the claim not proved, it raised a legitimate issue to be determined and there are insufficient grounds to make an award of costs.

Referee: J P Smith

Date: 31 October 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>.