



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 436

APPLICANT NQ

APPLICANT OR

RESPONDENT CN

The Tribunal orders:

CN is to pay NQ and OR the sum of \$4,799.95 on or before 25 September 2023.

Background

1. NQ and OR were the owners of a residential property in [City] which they sold under an agreement for sale and purchase dated 12 May 2023 to CN. The sale was to be completed and possession to be provided on 9 June 2023
2. In accordance with the terms of the agreement for sale and purchase, CN carried out a pre-sale inspection of the property on 7 June 2023. Following this inspection, CN formed concerns as to whether the property would be able to be vacated and cleaned before settlement.
3. He raised this concern via his solicitor on the morning of settlement and the parties reached an agreement that the house would be emptied by 3:00pm that day. It was also later agreed, following delays in settlement of NQ and OR's purchase of their new property, that NQ and OR's belongings could be stored in the garage at the property so that the house was provided vacant by 3pm in accordance with the agreement. CN in any event had indicated that he did not intend to come to the property until approximately 6:00pm.
4. At 1:51 pm on the date of settlement CN's solicitors then wrote to NQ and OR's solicitor and stated:

Our client would like to hold back \$5,000.00 from settlement today pending the furniture being removed from the garage today and that the property has been cleaning (sic) to an acceptable standard. This is to allow for the worst case scenario that our client would need to employ cleaners to clean the property and arrange for the furniture to be removed. This will be paid in (sic) your trust account within seven days following settlement on satisfaction from our client.
5. At 2:17pm NQ and OR's solicitors replied stating:

Our clients are agreeable to the \$5000.00 retention to enable settlement to proceed today. Our clients note that the property was not required to be professionally cleaned and believe that the property has been cleaned to "an acceptable standard".

6. Due to the delays in settlement on their new house, NQ and OR vacated the garage at 9:30pm. Around this time they also removed a padlock which had been on the gate that accesses the front door of the property.
7. The parties attempted to resolve the question of the retention without success. The following claims are before the Tribunal to resolve.
 - a. NQ and OR seek \$5,422.14 which is:
 - i. return of the \$5,000 retention;
 - ii. \$242.14 which is calculated as interest and penalty for late settlement on the \$5000; and
 - iii. \$180 filing fee to bring the claim in the Tribunal.
 - b. CN seeks to retain the sum of \$1,994.65 from the \$5,000 retention which is made-up of the following:
 - i. \$210.00 for accommodation;
 - ii. \$200 for carpet cleaning;
 - iii. \$602.60 for professional cleaning of the house;
 - iv. \$782 for his legal fees in dealing with post settlement issues; and
 - v. \$200.05 for failure to provide possession on 9 June 2023 in accordance with the agreement for sale and purchase.
8. At the hearing it was agreed by CN that there is no dispute that \$3,005.35 of the \$5,000 retention belongs to applicants and should be returned to them immediately. He agreed he would issue instructions to this effect to his solicitor.
9. The issues to resolve claim are:
 - a. Are NQ and OR entitled to the return of the \$5,000 retention money in full?
 - b. Are NQ and OR entitled to penalty/interest on the \$5,000 which was retained?
 - c. Can NQ and OR claim for the Tribunal filing fee?
10. The issues to resolve counterclaim are:
 - a. When was possession to be given?
 - b. When did NQ and OR provide possession?
 - c. What loss, if any, has CN suffered if possession was not provided in accordance with the agreement between the parties?
 - d. Is it a condition of the agreement for sale and purchase that NQ and OR must clean the property, and if so to what standard?
 - e. If there was an obligation to clean, was the property sufficiently clean?
 - f. If it was not sufficiently clean, what is the loss that CN has suffered?
 - g. Can CN claim for his legal fees in dealing with post-settlement issues?
11. Because of the crossover in issues between the claim and the counterclaim, it is convenient to deal with the combined issues in three categories – possession date, cleaning, and costs.

POSSESSION

When was possession to be given?

12. Settlement and possession were to be provided on 9 June 2023.
13. As is common, the parties negotiated the specific timing and details of when and how this would practically occur, taking into account the complications that arise as a series of settlements often need to occur.

14. The parties agreed that the house was to be vacant no later than 3pm and that CN would be at the property at around 6pm. I therefore find that this is when possession was to be given.

When did NQ and OR provide possession?

15. Due to an oversight on their part a padlock was left on the gate that provided access to the front door, the door for which CN had a key. NQ and OR accept that the existence of the padlock meant that when CN attended the property at 6:00pm he was not able to access it.

16. He returned to the property at approximately 8.30am on Saturday, 10 June 2023 and was able to enter the house.

17. I therefore find that possession was provided on the morning of 10 June 2023.

What loss, if any, has CN suffered if possession was not provided in accordance with the agreement between the parties?

18. It is clear CN was not able to access the property on the evening of Friday 9 June 2023. Fortunately he was not intending to move significant amounts of his belongings in, but he nonetheless lost the opportunity to do this.

19. CN was honest before the Tribunal and indicated that he was able to stay at his existing accommodation on the Friday night, and that it had been his intention always to do so.

20. In his counterclaim, CN claimed the amount of \$210 for accommodation, however this was for the Sunday evening. He also claims the amount of \$200.05 which he says is due under clause 3.13 of the agreement for sale and purchase which relates to late settlement or failure to give possession.

21. Under clause 3.13 (2), where vacant possession is not available, the purchaser is entitled either to the reasonable costs for temporary accommodation and storage, or an amount equivalent to the interest at the interest rate for late settlement on the entire purchase price during the period of default.

22. In this circumstance, CN did not incur any temporary accommodation costs nor any additional storage costs due to the default in providing vacant position, so he is therefore entitled to interest at the contractual rate.

23. He has calculated this as amounting to \$200.05 for the single night which he did not have possession, and I therefore find that he is entitled to this sum.

24. I do not find that he is entitled to claim for the Sunday evening accommodation as this is unrelated to the timing of possession.

CLEANING

Is it a condition of the agreement for sale and purchase that NQ and OR must clean the property, and if so to what standard?

25. Parties who enter a contract can negotiate for conditions which cover issues which might be important to them. A party can only insist the other party carry out an obligation if it is part of the contract.

26. The ADLS agreement for sale and purchase of real estate is an extensive document which provides the rights of the vendor and the purchaser.

27. The agreement for sale and purchase provides the purchaser with the right to “vacant possession.” This only requires occupants to ensure that their furniture and belongings, as well as any rubbish be removed. It does not carry with it any obligation to clean the property.
28. There was no specific condition in the agreement which would require NQ and OR to clean the property at all, and certainly no requirement that they needed to clean it to the standard which CN would consider to be acceptable.
29. I therefore find that there was no obligation on NQ and OR to clean the property.

If there was an obligation to clean, was the property sufficiently clean?

30. Because I have found there is no obligation to clean, this question does not need to be addressed.
31. I do note that there was evidence that NQ and OR did undertake cleaning of the property, even though CN was not satisfied.

If it was not sufficiently clean, what is the loss that CN has suffered?

32. Because I have found there is no obligation to clean, this question does not need to be addressed.
33. In terms of the counterclaim amounts, this means that CN has not established he is entitled to \$200 for carpet cleaning, \$602.60 for general cleaning, nor \$210 for accommodation on the Sunday evening.

COSTS

Are NQ and OR entitled to a penalty/interest on the \$5,000 which was retained?

34. NQ and OR claim under the agreement for sale and purchase for late settlement at the rate of 12% on the retention. The applicable clause is clause 3.12. They also claim for the interest they are paying on their mortgage (7.64%) on the extra \$5,000 borrowing that was required to finance the purchase of their new home. Together this is calculated as \$242.14.
35. Clause 3.12 is intended to cover the situation where the vendor does not complete. That is different from this situation where the parties agree to a retention on settlement. If the vendors wanted interest to run on the retention, this is something that could have been negotiated.
36. Clause 3.12 sets out the remedy for purchaser default – interest at the contractual rate. It is therefore not possible to also seek interest in respect of mortgage costs. The interest rate in the agreement is above the market rate and intended to compensate a vendor fully for any late settlement.
37. I therefore find that NQ and OR are not entitled to any interest or penalty payment from CN for the retention.

Can NQ and OR claim for the Tribunal filing fee?

38. The provisions of section 43 of the Disputes Tribunals Act 1988 prevent the Tribunal from awarding the filing fee except in certain circumstances. As this claim does not fall within the circumstances stated by the Act, the filing fee cannot be awarded.

Can CN claim for his legal fees in dealing with post-settlement issues?

39. Because CN sought a retention on settlement date, he has incurred additional costs with his solicitor in trying to resolve the issues related to the retention.
40. The section 43 limitation on the award of costs would apply to this claim also. CN's claim will fail unless there is some contractual entitlement to be reimbursed these costs.
41. Clause 3.13(6) does allow for the purchaser to claim for any additional expenses or damages. However, clause 3.13 relates to the failure to give possession. There was a default by the vendor but this was only of a minor nature and quickly resolved.
42. It was apparent that it is the question of cleaning that has been the focus of the dispute between the parties and therefore this clause does not assist CN. There is no contractual obligation to clean, and CN, accordingly, is not entitled to any compensation from NQ and OR for his legal fees in pursuing this issue.

Conclusion

43. Of the \$5,000 retention, CN is entitled to retain \$200.05. The balance, being \$4,799.50 is to be returned to NQ and OR.

Referee: S Simmonds

Date: 11 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>.