



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 682

APPLICANT TC

RESPONDENT N Ltd

The Tribunal orders:

N Ltd is to pay \$22,395.81 to TC on or before 2 February 2024.

Reasons

1. TC purchased a new-build house from N Ltd in 2021, with settlement date on 28 May 2021. N LTD was both the developer and vendor of the property (and the “on-seller” under section 362H(3) of the Building Act 2004).
2. In the days prior to settlement, TC inspected the house and discovered multiple issues, including incomplete work. She provided a list of issues, along with photographs, to N LTD. Following settlement, the list of issues was sent again to N LTD via TC’s solicitor.
3. Since that time, N LTD has attempted to resolve some of the issues, others are disputed (as to whether there is a defect) and/or TC is not satisfied with the attempted or proposed remedial solution.
4. TC has itemised the issues in dispute, and claims \$28,635.81 for remedial work to be carried out by contractors of her choice, based on N LTD’s alleged failure to remedy defects notified to them within the 1 year timeframe under the Building Act 2004. As explained to TC at the final hearing, costs associated with attending and preparing for the hearing, including the filing fee and the cost of obtaining reports for evidence, cannot be considered/awarded under section 43 of the Disputes Tribunal Act 1988.
5. The issues to be determined are:
 - Is each claimed item ‘defective building work’ as per section 362Q of the Building Act 2004?
 - For any/each defect, has N LTD been given the opportunity to remedy the defect?
 - Is N LTD liable to pay damages for each defect, what is the reasonable amount of damages?

6. Under section 362Q of the Building Act 2004, a building contractor or on-seller must remedy, within a reasonable time, a defect that is notified by the client within 1 year of completion. N LTD is an on-seller as per the meaning given in section 362H(3) of the Building Act.
7. The implied warranties at section 362I also apply, including that building work must be carried out in a proper and competent manner and with reasonable care and skill. The on-seller has the same obligations under the Act in relation to these implied warranties as the building contractor (section 362H(2)(b)). As application of this section would largely cover the same ground as 362Q, the issues have been determined under s362Q as that was the focus of the evidence and discussion at the hearings.
8. The dispute in this case related to whether or not each claimed item raised by TC was, in fact, defective building work. N LTD started from the position that because a certificate of compliance was obtained from Council, there could be no defective building work. However, consent and/or compliance with the Building Code are not the only relevant tests. As an example, building work may be considered defective if paint has been splashed extensively over joinery even though this is not something that would fail a building inspection. Many of TC's notified defects would fall into that kind of category.
9. In response, N LTD provided the MBIE document "Guide to tolerances, materials and workmanship in new residential construction 2015" which specifically addresses what constitutes a 'defect' for the purposes of the Building Act, and provides detailed criteria in relation to various aspects of building work. The Guide to Tolerances is particularly relevant to this dispute because it covers common building issues that are to do with 'acceptable industry standard/good practice' as opposed to non-compliance with building regulations/code.
10. It is important to note that section 362Q(4) puts the onus on the on-seller to prove that building work is NOT defective, rather than on the client to prove that it is.
11. Each of the above issues will be addressed under the 'Exhibit' headings used by TC in her claim.
12. **Exhibit 1- ceiling of downstairs living area** – this item relates to the plastering in this area. TC's independent house inspection report (prepared in May 2023) notes that there is a bow in the recessed ceiling, and I note that this is also visible in the photos provided by TC. It is particularly noticeable because this area has feature strip lighting, though TC says that it is visible whether the lights are on or off. TC's plasterer writes that there has been 'very bad plastering' and 'not enough sanding done where you can see every join when the lights are on' and 'some of it looks like a roller coaster'.
13. The Guide to Tolerances discusses 'critical' versus 'non critical' lighting at page 12 and notes that imperfections that are only visible under 'critical' light do not indicate defective workmanship.
14. N LTD state that this issue was the subject of a Disputes Tribunal claim, hearing and decision in case they took against their plasterer. They note that they were not successful in establishing that the plasterer had carried out defective work. However the decision appeared to be based on the fact that the plasterer had not been given any opportunity to rectify the issue. The decision in this case must stand alone, in that if the bowed ceiling and other plastering issues are deemed to be defective work under the Building Act, N LTD will be liable to their client for it, regardless of whether the cost can be recovered by N LTD from its sub-contractor. The residential building contract provisions of the Building Act 2004 do apply as between an on-seller/building contractor and their sub-contractors, only as between the on-seller (in this case) and their client.
15. In the photographic evidence provided, in which no lighting appears to be on, the bowed area by the recessed ceiling and the other plastering issues are visible. Combined with the

comments in TC's inspection report and her plasterer's comments, as well as the fact that N LTD have not established that the problems are only discernible under 'critical' lighting (in accordance with the burden of proof referred to at finding 10 above), I find that the area claimed for constitutes defective building work.

16. N LTD contends that TC did not notify them of the bowed area when she notified defects at/after settlement. However TC says she raised plastering as an issue and photographs sent to N LTD at that time show the bowed ceiling. I accept that this constitutes notification of the defect to N LTD. However, even if notification had not been given, TC would still be entitled to a remedy for this issue under the implied warranties at section 362I as the work was not carried out with reasonable care and skill.
17. As N LTD have not remedied the defective work within a reasonable time of notification, TC is entitled to damages, the cost of engaging another contractor to remedy the plastering being the most obvious and practical method of calculating damages. This remedy will involve consequential losses of repainting the areas once they are remedied and I accept the quoted amounts TC has provided for this work, totalling \$3680 inc.GST for the painting and plastering.
18. **Exhibit 2 – flooring and skirting downstairs** – during the course of the hearing, TC withdrew the claim for flooring after the house inspector she engaged advised that the flooring was not defective (various remedial works had been carried out on the flooring by that stage but not to TC's satisfaction). N LTD had never disputed that it would be liable to replace the skirting once the flooring issue was resolved, but TC does not want N LTD or any of their sub-contractors to return to her property, which is her right.
19. There is no itemised quotation to replace the skirting, rather it is included in the lump sum quotation of \$5175.00 for all 'other defects'.
20. I find that as the flooring was not deemed to be defective, N LTD is not liable for the skirting replacement beyond their agreement to return to replace it themselves, so no damages are awarded.
21. **Exhibit 3 – concrete, path, outside garage door and driveway** – TC provided a comprehensive range of evidence in relation to these issues (which included flooding and pooling on outside paths due to poorly laid concrete, cracks in concrete, unsightly and uneven surfaces and concrete 'splashes' onto building exterior), including evidence of communication between her and N LTD discussing these issues in 2021.
22. The Guide to Tolerances describes gaps in concrete driveways and paths of more than 3mm wide as unacceptable (and therefore defective building work) and in terms of finishes, describes as defective where there are "variations in surface texture (eg. discolouration, unevenness or pitting) that can be seen from normal viewing position" (page 16 and 17). Such variations are evident in multiple areas of concreting in the photographs provided by TC.
23. The third-party contractor who provided the quotation for \$8855.81 on which TC's claim for damages in relation to these issues is based, provided detailed comments on the standard of the work that was carried out by N LTD's sub-contractor, much of which, he stated, should not have been signed off by Council in his opinion.
24. The house inspection report refers to 'severe' cracks in the concrete, which I take to mean more than the 3mm cracks defined as acceptable in the Guide to Tolerances.
25. Based on the extent of evidence provided by TC on these issues, I am satisfied by a wide margin that these items constitute defective building work that N LTD was notified about within the first year, and has failed to remedy within a reasonable time.

26. The claimed amount of \$8855.81 is therefore awarded in damages, so that TC can have the problems rectified herself.
27. **Exhibit 4 – main entrance door** – TC played a video of the front door during the hearing, in which could be heard an obvious whistling sound when the door is closed. Her home inspection report states that “the entry door is very hard to close as it is hard up at the top and has a big gap down the bottom, this is poor installation for a new house”. N LTD planned to bring its door installer as a witness but did not do so – the installer who did the work would not have been an independent witness in any event.
28. The Guide to Tolerance lists as defective, where “doors are not straight or square”, and where “door binds on the jamb or flooring when opening or closing”. I consider both these issues are what is essentially described in the house inspection report and therefore find that this is defective building work.
29. N LTD has had ample opportunity to remedy this problem, but disputed that the installation was defective, although to their credit they did make multiple attempts to fix it anyway. However, because the remedial attempts were not successful, TC is entitled to the remedy claimed of damages in the amount of \$1200.00, based on the quotation provided.
30. **Fence** – TC describes the problems with the front fence as there being too large a gap left at the bottom of the fence as well as workmanship issues such as warping, rough/jagged timber and nails protruding. She obtained a quotation for both repair and full replacement of the fence, being \$1725.00 and \$7302.50 respectively.
31. N Ltd contends that the front fence is a design feature and, as such, the gap at the bottom of the fence is intended to be aesthetically pleasing rather than functional. Looking at the photographs, I concur that the front fence (where the gap at the bottom is) has the appearance of a design feature. The Guide to Tolerances does not cover fencing and I find, based on the evidence and submissions provided by the parties that the gap under the fence does not constitute defective building work.
32. However the other problems with workmanship, as photographed and also described in the fencing quotation provided by TC, do need to be remedied but have not been fixed in a reasonable time by N LTD. I am not persuaded that the fence needs to be rebuilt given my finding about the gap at the bottom, and as the only other cost evidence provided is for the repair of other remedial issues, I find that damages of \$1725.00 are appropriate.
33. **Kitchen cabinets** – N LTD did not dispute that scratched cabinetry needed to be replaced but stated that their kitchen supplier told them it had already been done. Ms K for N LTD showed correspondence from their supplier to that effect.
34. However at the final hearing, which N LTD did not attend, TC showed a date-stamped photograph of scratched cabinetry in place at her property currently. The claimed costs (quotation provided) for replacement of these damaged items is therefore awarded, being \$2760.00.
35. **Exhibit 5 - other issues** – finally, TC has grouped together a variety of what she has called ‘basic defects around property’ under this heading. They include poor wall/paint finish under the bathroom sink, faulty/cracked kitchen door frame, cracking around main bedroom window frame, nails popping in the ceiling in multiple locations around the house, cracks in the upstairs ceiling, ‘blistering’ of the plaster around locks on the glass in the stairwells and under a light switch, and damage caused to carpet due to plaster/paint remedial attempts.

36. All of these issues fall within the 'unacceptable' category of descriptions contained under their respective headings in the Guide to Tolerances document and correspondence shows that N LTD was both notified within the first year, and sent sub-contractors to attempt to remedy some/all of the issues, but was either unsuccessful in doing so and/or remedial attempts caused further problems. N LTD contends they were prevented from returning after lockdown, but my sense from the correspondence provided is there had been adequate opportunity to remedy already and because further problems had been caused, it was reasonable for TC to decline further opportunity.
37. I find that N LTD is liable to pay damages as a result. TC has provided two quotations, one for \$5175.00 and one for \$14,812.00. The second quotation is helpful as it describes in some detail why the problems have occurred and these explanations support the finding at 35 above. However it also provides a price for a Level 5 plastering finish and the Guide to Tolerances states that, unless a contract specifies otherwise (and I have no evidence that it did in this case), a Level 4 finish is considered standard and acceptable.
38. The first quotation is therefore considered the appropriate level of damages. I note though that it includes work on the skirting, which I have found that N LTD is not liable to pay another contractor to replace. This lack of breakdown in the quotation was discussed at the penultimate hearing, and as no breakdown/separate cost of skirting was provided by TC at the final hearing, I deduct \$1000.00 from the \$5175.00 quotation to ensure that an adequate deduction is made to account for the skirting costs. N LTD is therefore liable to pay \$4175.00 in damages for 'other issues', as listed.
39. Summary – as a result of all the findings N LTD is liable to pay damages of \$22,395.81, being the sum of all damages awarded in the sections above.

Referee Perfect
Date: 21 December 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>.