



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2019] NZDT 1438

APPLICANT **TI**

RESPONDENT **N Ltd**

The Tribunal hereby orders:

N Ltd trading as BCS is to pay TI the sum of \$10,000.00, by 5pm on Friday 1 November 2019.

Reasons:

1. In November 2018, TI engaged N Ltd trading as BCS ("BCS") to carry out a pre-purchase building inspection on a house, situated at X Road, [Suburb] (the property). BCS provided a 'House Inspection and Weather Tightness Report'. It highlighted a few minor issues but nothing of major concern. As a result, TI proceeded with the purchase of the house and it went unconditional.
2. Soon after, TI discovered that the tile flooring in the bathroom was uneven/sunken. This was not identified in the report provided by BCS. TI contacted WO of BCS to discuss the situation but received no answer. Her real estate agent, NB, (who had originally recommended BCS) contacted BCS on her behalf and he was referred to a tiler. Arrangements were made for the tiler to attend the property and assess the job. Upon inspection, the tiler advised that it was a bigger job than just replacing the sunken tiles. He considered the bathroom had no water proofing and that the problem of sunken tiles was a result of a bigger problem, being water damaged flooring.
3. TI claims the sum of \$15,000.00 from BCS (which is the maximum amount she is entitled to claim in the Disputes Tribunal) towards the cost of the remedial work.
4. The issues to be determined are:
 - a. Did BCS carry out its inspection services with reasonable skill and care?
 - b. If not, what remedies are available to TI under the Consumer Guarantees Act 1993?
 - c. Is TI entitled to remedial costs?

Did BCS provide its inspection services with "reasonable skill and care"?

5. Section 28 of the Consumer Guarantees Act 1993 (CGA) provides that suppliers of services must provide their service with “reasonable skill and care”. This generally means that any work done must be as good as the work of a competent person with average skills and experience for that type of work.
6. I find that BCS did not carry out its service with reasonable skill and care given the scope of the inspection service that it was contracted for.
7. TI stated candidly that she had already decided to purchase the property if there were no major problems identified in the pre-purchase inspection report. She read the report from BCS and as it did not describe such problems, she went ahead with the purchase. Soon after, a friend noticed that the floor was uneven/sunken in the bathroom. She also noticed that tiles in the shower were coming off the wall. Subsequent investigations revealed significant water damage issues in the bathroom. She contends that BCS failed to include in its report the presence of the uneven/sunken floor which she has since been advised is indicative of water damaged problems.
8. The director of N Ltd, WO, attended the hearing for BCS. He advised that the inspection was carried out by his son, who was a qualified engineer, despite the certificate of inspection recording his name as the inspector and signatory. He agreed that the bathroom flooring issue should have been picked up in its inspection. However, he says the scope of the inspection was based on a visual inspection only and it could not have identified the water damage problems with the bathroom which have now been identified, unless an investigation was undertaken under the tile flooring which was not part of the service and would require specialist investigation. He argued there is no evidence that the flooring issues would have turned the inspector’s mind to the possibility of water damaged flooring. He noted that non-invasive moisture meter readings in the bathroom were under the acceptable limit.
9. BCS’ inspection report dated 24 November 2018 provided as follows:
 - The purpose of the inspection was to assess the general condition of the building and identify major current deficiencies.
 - That the inspection was visual.
 - The report included: grounds, structure, exterior, roofs, plumbing, electrical, interior, and insulation/ventilation; the procedure for their inspection will be conducted in accordance with NZS 4306:2005, New Zealand Standard, Residential Property Inspections.
 - Various exclusions were noted, including latent or concealed defects, and “any buildings suffering from rotting homes, leaky homes, toxic mould situations. Areas that the inspector believes to be potential problem areas are checked with a non-invasive moisture meter. They can only detect rotting of framing by invasive testing i.e. which meant removal of wall linings.
 - Under “Summary Continued”, it noted the house was generally in good condition and no moisture was detected at any place in the house except for one place. The following issues were noted: “1) Higher level moisture found on ceiling in bedroom, 2) Damage glass of window needs maintenance, 3) Roof gutter needs cleaning, 4) Damage tile of roof needs to be fixed, 5) Rubber seal of windows needs maintenance, and 6) Minor Damage on door of wardrobe.”
 - Under “Limitations” the report read as follows:

Limitations: Any areas that are concealed, contained, inaccessible, or cannot be seen, due to walls, ceilings, floors, insulation, soils, vegetation, furniture, stored items, systems, appliances, vehicles, or any other object, will not be inspected or included in the report. The client agrees to assume all the risk, for any condition or problems that may be concealed at the time of the inspection.

Nothing will be dismantled during the inspection, and there will be no destructive testing performed. Appliances and spa/pool equipment special cycles or features are not inspected; none of the appliances or equipment will be dismantled, and no determination of their efficiency will be made.

The client understands that the house inspector has had a minimum of ten years' experience in the building industry and has had specific training in the procedures of house inspections by The BCS. The report is not a guarantee, warranty, or any form of insurance, and is not to be used as a substitute for a final walk-through inspection...

10. In my view, TI was entitled to read the report to mean that the incidence of defects requiring rectification at the property were not of major concern.
11. Whilst accommodating the disclaimers that the summary was not to distract the reader from the body of the report, nothing contained elsewhere within the report identified a defect with the flooring in the bathroom. The summary of the report records the internal "floors" as "Generally good". In my opinion, TI's reading of the report would have understood the bathroom flooring to be in a fair condition.
12. TI presented two quotes dated 13 January 2019 from qualified builders, MC and TW Ltd, which identify rotten bathroom particle board, including the shower base, and wall framing. Remedial work is extensive including removal of all bathroom fixtures including tiles, plaster board, light fittings and plumbing fittings, repairing joists where necessary and replacing with H3 plywood flooring, waterproofing the floors and shower walls, and installing gib board and new tiles.
13. I accept the evidence provided by MC and TW Ltd as qualified and experienced builders. I am satisfied that there was a flooring issue in the bathroom at the time of the inspection. The flooring issue (uneven and sunken tiles) was due to water damage supported by the evidence from MC and TW Ltd. Given the extensive nature of the water damage, it is apparent that this issue existed at the time of the pre-purchase inspection and purchase.
14. For the purchaser, a pre-purchase inspection report is to assist in avoiding unknown pitfalls and expensive mistakes. A building inspector has an active role to play in conveying information about the property to a potential purchaser and must be cognisant of that role and carry it out to the best of its ability. In view of this, an inspector should anticipate potential problems.
15. I consider BCS' "visual" inspection which it was contracted to perform would have included testing by applying some force to look at how aspects of the building (i.e. including the structure and flooring) was performing, the condition and to see if any problems were associated with it.
16. I find BCS' failure to pick up the presence of the uneven/sunken tile flooring in the bathroom is a deficiency in its inspection service constituting a failure of reasonable care and skill.
17. While I accept there is no evidence that it was reasonably apparent there was water damage to the flooring at the time of the inspection, the more critical question is whether the risk of purchasing a property with an unknown water damage issue in the bathroom could have been avoided by the exercise of reasonable care and skill by BCS. BCS' denial cannot be accepted. BCS presents itself as providing professional building inspection services and therefore owes TI a duty of care. The unavoidable conclusion is that the BCS' inspector, perhaps through distraction or pure mistake, failed to observe the vulnerability (uneven/sunken tiles) of the bathroom flooring. If this issue was

identified, the inspector would have been obliged to take further steps. The failure by BCS to exercise reasonable care and skill meant that TI lost the opportunity to undertake further enquiries about the flooring issue, including an internal investigation by a builder, to avoid purchasing a property with a water damage issue and expensive repair costs.

18. The burden of taking the precaution of conducting a prudent visual inspection, including applying testing force to the flooring, was minimal to insignificant because those activities were the very activities BCS were to perform and nothing impeded the inspector from performing them. Likewise, the activity of providing accurate advice identifying the flooring issue in the report was the very activity the BCS were retained to perform.
19. In summary, the failure to include the presence of the flooring issue in the BCS' pre-purchase inspection report constitutes a breach of the guarantee because although all agree it was not included, and should have been noted, its presence should have or would have alerted the inspector and TI to potential problems which would likely then necessitate a robust investigation, and avoid the purchase of a property with a major problem.

If not, what remedies are available to TI under the Consumer Guarantees Act?

20. The CGA provides remedies for the consumer, dependent on whether the failure to comply with the CGA is a failure of substantial character or not. The CGA describes a failure of substantial character in section 36, which is set out as follows:

“(a) the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; or (b) the product of the service is substantially unfit for the purpose for which services of the type in question are commonly supplied and the product cannot easily and within a reasonable time be remedied to make it fit for the purpose; or ... (d) the product of the service is unsafe”.

21. I find that the failure by BCS to comply with the CGA guarantee of reasonable skill and care was a failure of substantial character. This failure was substantial as no consumer would have engaged BCS to undertake pre-purchase inspection services, if they knew the inspection/inspection report would be deficient.

22. The CGA states that if a failure is of substantial character, then a consumer may cancel the contract with the service provider, or obtain from the supplier

“damages in compensation for any reduction in value of the product of a service below the charge paid or payable by the consumer for the service”. (section 32(b))

23. In addition, the consumer can seek damages for any loss resulting from the failure which was reasonably foreseeable as liable as a result from the failure. (section 32(c)).

Is TI entitled to remedial costs?

24. TI is entitled to the reduction in value of the service due to the failure below the price paid as well as any reasonably foreseeable consequential losses, under section 32(b) and (c) of the CGA.

25. I accept TI's evidence that but for the failure, she would not have purchased the property as she had a strict budget and being financially restricted meant she would not be able to pay for any repair costs of hidden deficiencies. I find the remedial costs sought by TI was foreseeable as liable to result from the failure by BCS.
26. TI has produced two quotations for the cost of \$20,125.20 + GST (MC) and \$24,905.35 (TW Ltd) . However, as noted above, TI is only claiming the sum of \$15,000.00 from BCS (which is the maximum amount she is entitled to claim in the Disputes Tribunal), towards the cost of the remedial work.
27. I have had regard to WO's argument that he considers the costs sought excessive and that at most, he would only accept being liable for costs relating to the flooring such as replacement of floor tiles and repairing joists. However, he did not produce any persuasive evidence to show that the quotes for remedial work were not reasonable. I am satisfied that the quotes presented by TI are actual and reasonable. I also accept the loss suffered was foreseeable and a direct consequence of the failure by BCS.
28. I find TI's claim for compensation of remedial costs justified. I accept remedial costs of \$10,000.00 as reasonable. I have taken into account that the provision of new tiles, bathroom downlights, bath, shower, toilet and vanity would provide an element of betterment and improvement to the property and value, and that an adjustment for that would be required.
29. I therefore find that N Ltd trading as BCS is to pay TI the sum of \$10,000.00 as damages for a foreseeable consequential loss.

Referee: J Setefano
Date: 30 September 2019



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 or a mistake was made.

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 28 days of the decision having been made. If you are outside of time, 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.

Ground for Appeal

There is only one ground for appealing a decision of the Tribunal. This is that 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.

A Notice of Appeal may be obtained from the Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 28 days of the decision having been made. There is a \$200 filing fee for an appeal. You can only appeal outside of 28 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, and 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>.