(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2022] NZDT 88**

APPLICANT **NL**

APPLICANT **UN**

RESPONDENT **ME**

The Tribunal orders:

ME is to pay NL and UN $15,000.00 on or before Wednesday 6 July 2022.

Reasons:

1. On 19 August 2020, ME provided a pre-inspection report on [Address] that NL and UN relied upon when bidding on the house. This report stated at page 15 that the concrete side wall of the carport was "structurally sound". The following year a crack was identified in the wall and remedial work to stabilise the carport and the wall was performed.

2. NL and UN (the Applicants) claim $30,000.00 to repair the wall.

3. The issues to be determined are:
    a. Did ME exercise reasonable care and skill when he produced the pre-inspection report and was the report reasonably fit for the particular purpose?
    b. If not, what is the remedy?

Did ME exercise reasonable care and skill when he produced the pre-inspection report and was the report reasonably fit for the particular purpose?

4. The law of contract and the Consumer Guarantees Act 1993 apply. Sections 28 and 29 of the CGA provide guarantees to a consumer that the supplier will carry out its service with reasonable care and skill and that the outcome will be fit for purpose.

5. ME's position is that he exercised reasonable care and skill when he produced the report and that it was fit for purpose. In particular he says that:
    a. His inspection was 57 pages long and was produced in accordance with the Residential Property Inspection standard NZS 4306:2005 (NZS) so he was only required to identify significant visual defects and the principal focus of the report was on the main building and not on the ancillary buildings;
    b. The crack was not visible, and under his terms and conditions his inspection was visual and non-invasive, which was consistent with paragraph 2.3.3.2 of the NZS which requires the inspector to inspect and assess the general condition of construction types (where visible) as set out in Table 4.
    c. He stood by his statement that the wall was structurally sound at the time of the inspection, 9 months prior to the event, because the size of the crack as reported by UN's lawyer was initially 50 cm but had enlarged to 150 cm by July 2021; that all concrete walls will crack but according to the NZ Concrete Masonry Manual cracks less than 0.5mm

in width are generally of cosmetic concern only; and he said that the impact will depend upon the severity of the crack versus how the crack is triggered. He pointed out that the function of a retaining wall is to hold back material and therefore it should be expected to bow and deform within its capacity and there was no evidence of a major crack which would impact on structural integrity.

d. He did not accept the opinion from ES of Q Landscaping of an immediate structural issue, and he did not consider he was qualified or competent to make this assessment as a landscaper and not an engineer.

6. On balance, I find there was an absence of reasonable care and skill exercised when ME made the statement that the carport wall was structurally sound. I say this for reasons which include:
    a. ME acknowledged that it is one of the functions of a building inspector under the NZS to inspect and assess the general condition of construction types, and that this does include ancillary buildings. Also, under paragraph 2.3.3.2 this inspection and assessment of the general condition (where visible) includes cracking in structural concrete as set out in Table 4.
    b. I prefer the evidence in the MPS report that the crack was pre-existing at the time of the purchase, and could be seen through the paint, which ME acknowledged;
    c. I accept that the positive statement he made that the wall was structurally sound was inaccurate as I preferred the evidence that the crack was more than cosmetic and the wall not structurally sound. I say this for reasons which include:
        i. I accept the Vero report identified steep cracking down to the mortar; and
        ii. while I accept that ES is not a structural engineer, in tandem with the other reports, I preferred his opinion that the wall was so unstable and unsafe that it required immediate repairs during the Level 4 lockdown. I also found that he was sufficiently qualified as a landscaper who has been doing structural engineering work for 18 years, over ME's who did not assess the crack ahead of this remedial work.

7. Also, while the Applicants acknowledged that the balance of the report was reasonably fit, I find that this incorrect statement that the wall was structurally sound impacted on the reports overall fitness for its particular purpose, which was to inform the Applicants when making the decision to purchase at the price paid.

If not, what is the remedy?

8. Where there has been a failure of a guarantee, the remedy under s32 of the CGA depends upon whether or not the failure can be remedied or if it is of a substantial character. Also, a consumer is entitled to reasonably foreseeable consequential losses under s32(c) of the CGA.

9. ME's position is that if there was a failure of the guarantee, he ought not to be liable for the repair costs because he was not given the opportunity to review the wall prior to any remedial repairs as required by the terms and conditions. Also, if he is liable, then he says there should be a deduction for contributory negligence as the crack got worse over time due to UN's contributory negligence and/or there should be a reduction for betterment as the Applicants were now in a better position with a new wall than they would have been in.

10. In this case, I find it was not possible to remedy the failure in the provision of the report, as it was not apparent until post purchase when the issue with the structural soundness arose. Further it is the consequential loss, that the Applicants seek to recover.

11. On balance, I accept that it was reasonably foreseeable that the failure of the guarantee would result in a consequential loss, namely payment of a higher purchase price, when a lower price might have been negotiated, and/or the cost to remediate the faulty wall. I accept that the former cannot be quantified and it is the latter that the Applicants claim.

12. I also accept that owing to the Level 4 lockdown, urgent remedial repairs had to be undertaken because of the impact on the main house, and in that there was limited opportunity to shop around for alternative options. Also, on balance, I do not accept that the Applicants contributed to the loss by failing to report an increase in the cracking as I prefer UN's evidence that he was not

concerned as the report had stated that the wall was structurally sound, which ME acknowledged was fair.

13. However, while I acknowledge UN's position that owing to the urgency of the repairs the Applicants were forced to accept the anchor solution which means that they have now lost use of some of their land, on balance I find that they are now in a better position with a new structurally sound wall than they were in previously when they bought an aged property.

14. So, having regard to all the above factors, and the substantial merits and justice of the case, I find that a reasonable contribution for ME to pay is $15,000.00.

Referee: GM Taylor
Date: 8 June 2022

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 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.