



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

District Court

[2023] NZDT 155

**APPLICANT** SM

**RESPONDENT** D Ltd

**APPLICANT'S** GN  
**INSURER**

**The Tribunal orders:**

D Ltd is to pay \$28,569.28 to SM on or before 7 June 2023; **and**

D Ltd is to pay \$1430.72 (being \$1130.72 insured loss and \$300.00 uninsured loss) directly to GN on or before 7 June 2023.

**Reasons**

1. SM engaged D Ltd to carry out a repair to her leaking deck in January 2021. She says a drain on the deck had become blocked and water pooled, finding ingress behind the waterproof layer in one corner of the deck, which had caused damage to the ceiling and walls of a downstairs bedroom at her property.
2. D Ltd attended the job, NP for D Ltd saying that they ripped the vinyl floor surface out and found the plywood underneath to be ok, but that they could not see where the leak was coming from. They applied their surface coating — NP says they are not waterproofing experts, they simply did what they were paid to do, a 'bandaid fix'.
3. Following D Ltd's work, water ingress occurred to two of SM's downstairs bedrooms. Based on an independent inspection she had carried out of the work to the deck, she claims that D Ltd have caused a significantly worse problem than was there originally, because they cut the perimeters of the existing butanyl waterproofing material around the base of the deck in order to apply their coating (which would not stick to butanyl) which left the waterproofing for the deck below the level of the cladding.
4. SM's insurer GN covered the damage caused in both leaking events, and claims the insured costs of \$5690.35 for the second event after D Ltd's work. SM claims further uninsured losses as follows: \$300 insurance excess for the ceiling damage and associated works, a refund of the \$3335 paid to D Ltd, the cost of an independent site visit and inspection report of \$856.75, temporary leak prevention work \$269.53, remedial building work to address the cause of the leaking \$24,720.00, lost rental income \$860 and compensation for stress \$3000.00. The total claims come to more than \$30,000.00 and the amounts over \$30,000.00 are abandoned by the applicants to bring the claim within the jurisdiction of the Disputes Tribunal.

5. The issues to be determined are:

- Did D Ltd carry out its service with reasonable care and skill as per the Consumer Guarantees Act 1993 (CGA)?
- Was any failure of CGA guarantee one of substantial character?
- What remedy is available to SM/GN?

*Did D Ltd carry out its service with reasonable care and skill as per the Consumer Guarantees Act 1993 (CGA)?*

6. I find that D Ltd has failed to carry out its service with reasonable care and skill. NP did not attend the second hearing where SM's witness JI from [redacted] gave evidence about the cutting of the waterproof membrane. He says that rather than properly inspecting the deck for the source of the leak, the method of D Ltd's work not only trapped the existing defect in, but removed waterproofing across the whole deck because they cut around the edge of the waterproof membrane, below the level of the cladding and removed what was visible of the membrane before applying their coating over the top, causing water to run down the face of the cladding and get in between joints between the cut existing membrane and the new coating as well as under the doors where existing membrane was torn out.
7. Considering NP's response to the claim for D Ltd at the first hearing, I consider that it is not a reasonable defence to say "we only do coatings and are not water-proofing experts", particularly in the context when D Ltd got the job by responding to a request SM placed on [redacted] describing the problem as "leak from inner deck". It was not the case that SM called up D Ltd and said "please apply a coating to my deck", she was relying on D Ltd for advice on how best to address her leaking deck. If they did not have the skill or knowledge to undertake that work and give that advice, they should not have taken the job. However, I also note that D Ltd's quotation states the 'Scope of work' is 'remove waterproof sheet, apply permaflox waterproof layers x2, domino flake and seal'. D Ltd was clearly attempting to carry out waterproofing work, not just 'apply a coating'. Based on what it says on the quotation, I do not accept NP's claim at the first hearing that there was no waterproof membrane on the deck when they first attended (because he has quoted to remove one).
8. SM says in retrospect, that a much simpler fix than D Ltd proposed would probably have worked, but instead she ended up with an extensively damaged deck which leaked from all edges in ordinary rain (with no blocked drain outlet) whereas the previous leak had occurred only when water had pooled on the deck due to a blockage. She says there had never been previous leaks (prior to the blocked outlet) – this was not a leaky building/balcony-type situation.

*Was any failure of CGA guarantee one of substantial character?*

9. Based on all the evidence available, I accept SM's contention and supporting evidence that the original problem was relatively minor in nature and likely easily addressed at no significant cost, and also that the problem caused by D Ltd's work was much more significant. I therefore find that D Ltd's failure of guarantee of reasonable care and skill was of a substantial character. This means that SM was not obliged to give D Ltd any further opportunity to remedy their work.

*What remedy is available to SM/GN?*

10. As it is not possible to reinstate the cut waterproofing membrane, D Ltd's failure cannot be remedied. SM therefore has remedies available to her under section 32(b) and (c) of the CGA. The bulk of claimed damages are for consequential losses, being the cost of restoring the deck to a water-proof, non-leaking state – those are costs that were reasonably foreseeable as liable to result from D Ltd's failure of reasonable care and skill, given the nature of that failure. Other associated costs such as inspections and temporary repair work are also foreseeable

consequential losses, as is the cost, mostly borne by the insurer, of repairing the water damage caused to the bedrooms downstairs.

11. There is also the question of the reduction in value of the work done by D Ltd, as SM has claimed a full refund of the **\$3335.00** paid to D Ltd. I am satisfied that the amount paid should be reduced to zero in this case, because the problem caused has necessitated a dismantling and rebuilding of the deck so that D Ltd's work will be destroyed in that process and SM is left with no value from the work itself.
12. JI said that the remediation process involved removing the cladding, doors and taking the deck apart and rebuilding it, in order to achieve the waterproofing that had been in place originally. SM obtained a quotation from a supplier independent of JI for that work and it was quoted at \$24,720.00. In fact, she spent more than that on a different solution which involved closing in the deck, but as this involved betterment, she claimed the lesser of the two quotations. Although D Ltd's actual work was of no value to SM, there was a problem with the deck originally that she would have paid something to have fixed, all going well. As the cost of an effective fix is unknown, I set it at 10% of the remedial building work needed on the deck, being a reduction of the \$24,720.00 claimed of \$2472.00, leaving **\$22,248.00** payable by D Ltd.
13. D Ltd are also liable to pay the associated costs of inspection and temporary repairs to the deck of **\$1126.28**.
14. Total repairs to the interior were \$5990.35, of which \$5690.35 was GN's insured loss and \$300.00 was SM's insurance excess (uninsured loss). D Ltd's faulty work caused that damage so D Ltd is liable to pay **\$5990.35** to GN (and GN is liable to reimburse to SM the first \$300.00 of that payment). However as section 33 of the Disputes Tribunal Act 1988 provides that an applicant is to have priority in respect of uninsured loss, and I take that to include any uninsured loss which was never the subject of an insurance policy/claim (the bulk of the claim in this case), GN will only be entitled to an order for the difference between \$30,000.00 and whatever uninsured losses are payable to SM by D Ltd.
15. SM includes a claim for lost rent of \$860 (she rents one of the downstairs bedrooms to a boarder for \$430 per week and the bedroom was uninhabitable for 2 weeks while repair work was carried out) – I consider this loss reasonably foreseeable and D Ltd is liable to cover the **\$830.00**.
16. In addition, while monetary claims for stress are rarely awarded in Tribunal cases, D Ltd's actions in this case have caused SM and her family significant worry and stress, beyond that which might ordinarily be expected in a 'job gone wrong', and I award a nominal sum of **\$1000.00** that D Ltd is to pay SM as further compensation.
17. The total that D Ltd is liable to pay to SM (excluding her insurance excess which is payable in the first instance to GN) is \$28,569.28.
18. The total that D Ltd is liable to pay to GN is \$5990.35, however the maximum order able to be made by the Disputes Tribunal, so this limits the ordered sum payable to GN to \$1430.72 (of which the first \$300.00 to be paid must be forward by GN to SM as per section 33 of the Dispute Tribunal Act 1988).

**Referee Perfect**  
**Date: 10 May 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>.