



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 645

APPLICANT SN

RESPONDENT G Ltd

The Tribunal orders:

1. G Ltd is to pay \$2,139.00 to SN on or before 4pm 13 November 2023.

Reasons:

2. In April 2022 SN engaged G Ltd to supply plumbing services in her house for which she was invoiced for \$3,017.63. SN said the shower tray was not levelled when it was installed and as a result, water did not flow to the waste outlet, there was a gap between the shower door and the base which would let water flow under.
3. SN paid \$1,400.00 off the invoice and is seeking the repair costs for another supplier to remedy the failure at \$2,139.00.
4. The issues to be determined are:
 - (a) Was the shower base level?
 - (b) If not, did G Ltd get an opportunity to remedy the failure?
 - (c) If yes, what remedies is SN entitled to?

Burden of proof:

5. Any applicant to the Tribunal has the task of establishing the legal and factual elements of its claim to the required standard. That standard is the balance of probabilities which means that it is more likely than not. When assessing whether the onus of proof has been discharged by a party I need to consider and evaluate the evidence presented to the Tribunal by the parties.
6. I would like to reassure the parties that all evidence presented to the Tribunal has been considered, but this order only refers to essential evidence material to the issues and is not intended to be a full record of the hearings or evidence presented.

Consumer Guarantees Act 1993

7. The supply of excavation services is subject to contract law and to the statutory guarantees set out in the Consumer Guarantees Act 1993 (the Act).

8. Section 28 of the Act gives consumers a guarantee that services will be carried out with reasonable care and skill. The degree of care and skill required is the supplier must exercise the standard of care and skill appropriate to his or her professional status. The guarantee requires the consumer to prove fault. Because the duty is to take only reasonable skill and care, there is no guarantee that a supplier will achieve a particular result unless that result would necessarily be achieved if reasonable care was taken.
9. Section 29 of the Act requires services and any products resulting from services to be reasonably fit for any particular purpose that the consumer makes known to the supplier, and of such a nature and quality as to be reasonably expected to achieve any particular result that the consumer makes known to the supplier. Unlike section 28, this guarantee does not burden the consumer with the requirement to establish fault. The guarantee is only that services are reasonably fit for the particular purpose made known by the consumer, so it is not always necessary that the services be 100 per cent capable of fulfilling their purpose. In determining whether a service is reasonably fit for its purpose, factors such as the nature of the services, reasonable consumer expectations and particular circumstances are all relevant.

Was the shower base level?

10. Based on the evidence presented, I am satisfied on the balance of probabilities that the shower tray installed by G Ltd, was not level. Therefore, G Ltd have breached the guarantees of the Act. The shower tray was not installed with reasonable care and skill, and it is not fit for the purpose.
11. I have regard for fact that G Ltd said it probably only required the door to be adjusted, and/or if it was defective, it could have been as a result of work SN's husband carried out when he put in the liner and/or caused by the builder. However, G Ltd did not provide any evidence on this point and I am unable to place any weight on conjecture.
12. Moreover, I prefer SN's evidence that the water does not drain away and the door is not aligned with the bottom of the shower tray. Whilst SN's alternative supplier did not answer my call during the hearing, I accept that he inspected the shower and has given SN an estimate cost for the repairs. This includes a short-written commentary from which it is clear that the existing shower liner, glass frame and shower tray have to be removed due to the base not being level.

If not, did G Ltd get an opportunity to remedy the failure?

13. It was not in dispute that G Ltd were notified of the failure soon after the job had been carried out. The owner of G Ltd was repeatedly called by SN over a six-month period in an attempt to get her shower remedied. I accept that SN asked the owner personally to inspect the shower as she did not confidence in those staff who had installed it. However, no one from G Ltd visited the house or offered an alternative which has resulted in SN and other house occupants being without the use of that shower.

If yes, what remedies is SN entitled to?

14. Where a breach is established, a consumer is entitled to the remedies set out in section 32 of the Act. Where a failure is minor, or can be rectified, section 32(a) provides that the remedy is one of repair, or where there is a failure to repair, the reasonable costs of repair elsewhere, or the right to cancel. Cancellation entitles a refund of sums paid (s38), unless there is some value retained in the work done (s39(4)). In either case, there is a right to reasonably foreseeable consequential losses.
15. Accordingly, I find SN is entitled to cancel the contract and be compensated for the estimated costs for the repairs by another supplier of \$2,139.00. She is not liable for the outstanding amount to G Ltd.

Referee: P Goddard
Date: 25 October 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>.