IN THE DISPUTES TRIBUNAL **[2010] NZDT 20**

BETWEEN **AAB**

APPLICANT

AND **ZZY**

RESPONDENT

Date of Order: 21 July 2010
Referee: Referee Robertshawe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the applicant's claim and the respondent's counterclaim be dismissed.

Facts

[1] On 24 April 2010, AAB entered into an agreement for the purchase of ZZY's takeaway business for $10,000.00 (the "Agreement"). AAB paid a deposit upon signing the Agreement of $1,000.00. Settlement was to take place on 1 June 2010.

[2] However, in late May 2010, shortly before settlement, AAB realised that the deep fryer and fan on the premises were not part of the sale. He was unhappy with this, and sought to cancel the Agreement and get his deposit back. ZZY agreed to cancel the deal, but would not return the deposit. AAB brought a claim for the deposit of $1,000.00. ZZY counterclaimed for $9,000.00, seeking completion of the purchase.

Law

[3] The law of contract, the Contractual Remedies Act 1979 ("CRA") and the Contractual Mistakes Act 1979 ("CMA") apply.

Issues

[4] To succeed in his claim, AAB has the onus of establishing that it would be just to return the deposit for one or more of the following reasons:

(i) *Breach of contract*: That ZZY was in breach of the Agreement for promising to sell the business "*as a whole including furniture and fittings*" when in fact the main furniture and fittings were landlord chattels not owned by him;

(ii) *Misrepresentation*: That AAB was induced to enter into the Agreement by a misrepresentation made by ZZY that the fixtures were included in the sale (ss 6, 7 and 9, CRA); or

(iii) *Mistake*: That AAB was influenced to enter into the Agreement by a different mistake about the same matter of fact, which then resulted in a substantially unequal exchange of values (ss 6(1)(a)(iii) and 7, CMA).

[5] To succeed in his counterclaim, ZZY had the onus of establishing that it would be just for the Agreement to be enforced notwithstanding the purported cancellation of it by AAB (ss 7 and 9 CRA).

Decision

[6] I find that neither party can succeed in their claim against the other for the following reasons.

Breach of contract

[7] AAB was unable to establish that the Agreement, construed objectively, obliged ZZY to supply all the furniture and fittings in the shop. The plain meaning of the words is that ZZY is selling his whole business, and all chattels he owns in that business, it does not state that he is promising to supply all chattels in the leased premises. I cannot imply that the latter was intended, as a reasonable person would not construe the Agreement to mean that ZZY could sell something he did not own, and could not imply from the words used that ZZY owned all the chattels in the shop. AAB needed to make a list of the furniture and fittings, or make the Agreement subject to approval of the lease, before signing it.

[8] I have had regard to AAB's argument that the price was too high to justify sale of only the chattels ZZY owned without the key chattels in the shop. AAB considered the price should be closer to $5,000.00 - $6,000.00. The chattels being sold in fact only included two microwaves, a chiller and a table. However, ZZY was selling the business, with its location, rights under the lease and customer base. AAB may not consider this to be as valuable as ZZY, but this was the negotiated price to which AAB was bound by executing the Agreement.

Misrepresentation

[9] AAB was unable to establish on the balance of probabilities that ZZY had ever represented that he owned the deep fryer, fan and other chattels. All conversations regarding this were oral and the parties disputed what had been said. I consider it most likely that both parties are correct, in the sense that ZZY did explain the position, but that AAB never heard or understood what was said. In this situation, there is no misrepresentation, but a misunderstanding, or mistake. The parties have contracted at cross-purposes.

Mistake

[10] However, the fact that the parties negotiated at cross-purposes does not entitle AAB to relief under the CMA. There was no unilateral mistake that could give rise to relief under s 6(1)(a)(i) of the CMA as it was not established that ZZY knew of the misunderstanding . There was also no common mistake about the property being sold, as ZZY always knew the deep fryer was not included (s 6(1)(a)(ii) of the CMA). The only other type of mistake that would provide grounds for relief would be a mutual mistake (being a different mistake about the same fact: s 6(1)(a)(iii) of the CMA). A mutual mistake exists where there has been a different erroneous belief about some matter related to the contract (that is, where neither party has correctly appreciated the position). However, where the parties have talked at cross-purposes, but one party is in fact correct, there is no mutual mistake. ZZY was not mistaken about the subject matter of the Agreement. He was only mistaken as to the state of mind of AAB. Whilst this is a matter of fact, it is not the same matter of fact about which AAB was mistaken, and s 6(1)(a)(iii) cannot apply. Such mistakes, where they relate to the specific contents of the Agreement, are effectively a mistake by one party in their interpretation of the Agreement, for which relief is expressly precluded (s 6(2)(a) CMA).

[11] It should also be noted that AAB is primarily responsible for the misunderstanding, signing up to buy a business with no due diligence process, inadequate conditions in the Agreement and without reviewing the lease.

Counterclaim

[12] I do not consider that it would be just for ZZY to now enforce the Agreement and require payment of the balance owed under the Agreement. The parties have clearly negotiated at cross-purposes, and ZZY did not take steps to enforce the Agreement once he realised the situation. I am satisfied that the retention of the deposit provides adequate compensation for ZZY's time and costs, having had to re-establish his business at the last minute and re-hire staff unexpectedly when the deal fell through. ZZY has also lost the bargain, but he must take some responsibility for the misunderstanding, neither party being careful in the preparation of the Agreement. It is noted that ZZY also signed the Agreement without getting his landlord's consent under the lease. Nothing turns on this, as consent was subsequently given, but it indicates that neither party conducted the transaction with reasonable care.

[13] ZZY is free to sell the business to another buyer and the matter should now rest as it stands.