**IN THE DISPUTES TRIBUNAL** **[2010] NZDT 14**

| | |
|---|---|
| **BETWEEN** | **AAR** |
| | FIRST APPLICANT |
| **AND** | **AAS** |
| | SECOND APPLICANT |
| **AND** | **ZZI** |
| | RESPONDENT |

Date of Order: 21 July 2010
Referee: Referee Robertshawe

---

**ORDER OF THE DISPUTES TRIBUNAL**

---

**The Tribunal hereby orders that the Applicants' claim be dismissed.**

**Facts**

[1] On 16 November 2009, AAR entered into an Agreement for Sale and Purchase to buy a property in [a town] for $120,000.00 from ZZI Ltd (as represented by JR in these proceedings). AAR signed the Agreement as nominee for himself and AAS.

[2] AAR and AAS paid a deposit of $12,000.00. Settlement was scheduled to take place on 30 November 2010.

[3] However, settlement never took place. Throughout the negotiations, AAR and AAS had thought that they were buying both a garage (with a vacant building and forecourt) and an adjacent building that is tenanted by the local library. However, the Agreement in fact only related to the garage. After paying the deposit, but before settlement, the Applicants realised that the Agreement did not include the Library and sought to terminate their obligations. JR of ZZI Ltd agreed to release the applicants from their obligation to settle, but did not return the deposit.

[4] AAR and AAS brought a claim in the Tribunal seeking the return of their $12,000.00 deposit.

**Law**

[5] The parties have negotiated an agreement at cross-purposes. As a result, the Applicants agreed to pay far more for the Garage than they thought it was worth, believing that for $120,000.00 that they were getting the garage and the library.

[6] The law of contract, the Contractual Remedies Act 1979 ("CRA"), the Contractual Mistakes Act 1977 ("CMA") and the plea of *non est factum* apply.

**Issues**

[7] To succeed in their claim, the Applicants have the onus of establishing that it would be just to return the deposit for one or more of the following reasons:

(a) *Misrepresentation*: That they were induced to enter into the Agreement by a misrepresentation made by JR or his solicitor that the library was included in the sale (ss 6, 7 and 9 of the CRA); or

(b) *Mistake*: That they and JR acting on behalf of his company were both influenced to enter into the Agreement by a different mistake about the same matter of fact, which resulted in a substantially unequal exchange of values (ss 6(1)(a)(iii) and 7 of the CMA); or

(c) *Non est factum*: That they executed the Agreement in a form radically different from what they intended because they were under a mistake as to its effect arising from an erroneous explanation as to its contents and meaning, and that this mistake occurred despite taking reasonable care to determine the contents of the Agreement.

**Decision**

*Misrepresentation*

[8] The Applicants believe that JR or his solicitor made two misrepresentations that the library was included in the sale:

(i) The first arose from the initial negotiations between AAR and JR, during which the applicants believed that JR had talked about the rental for the library, thus intimating that the library was included.

(ii) The second arose from a copy of the title in which part of the deposited plan for the title was coloured in with green highlighter showing that both the garage and library were included in the sale.

[9] However, I find that the Applicants were unable to establish any actionable misrepresentation. JR denied he ever talked about the lease of the library other than to compare its rental with that of the garage, and the contents of those discussions, being entirely oral, cannot be proved. Also, it was established as being more likely than not that the plan was coloured in by the Applicants' solicitor or employee, not by JR or his solicitor.

[10] JR also noted that the only signage put out was a "For Lease" sign that hung on the garage site, not the library.

[11] For these reasons, whilst I accept the sincerity of the Applicants' belief that JR misled them into believing they were buying both properties, there was insufficient evidence to establish this.

*Mistake*

[12] I also find that the Applicants were unable to establish any mistake entitling them to relief under the CMA. I am satisfied that JR never knew of the Applicants' mistake until they sought to get out of the deal just prior to settlement. This rules out any unilateral mistake that could give rise to relief under s 6(1)(a)(i) of the CMA. There was also no common mistake about the property being sold, as JR always knew it was only the garage that he was selling (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).

[13] 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). In a case very similar to this one, an early Court of Appeal decision took the view that where a purchaser and a vendor were mistaken as to the amount of land being sold that it could be said that one party was mistaken as to the amount of land being sold, whilst the other party was mistaken as to the other's intention, and that this was sufficient to create a mutual mistake for which relief could be granted.

[14] However, there have been a number of more recent cases in which this is no longer viewed as the proper interpretation of s 6(1)(a)(iii) of the CMA. Later decisions have held that there is no mutual mistake where parties are at cross-purposes in this way, as only one party is mistaken about the subject matter of the agreement. The other party is simply mistaken as to the state of mind of the other. Whilst this is a matter of fact, it is not the same matter of fact about which the other party is mistaken, and s 6(1)(a)(iii) cannot apply. Such mistakes, where they relate to the specific contents of the agreement, are instead now viewed as a mistake by one party in their interpretation of the agreement, for which relief is expressly precluded under s 6(2)(a) of the CMA.

[15] Applying these principles in this case, I am satisfied that the Applicants were mistaken about what was for sale, but JR was not. The Applicants are therefore not entitled to the return of any of the deposit under the CMA.

[16] It is also noted that if there had been a mistake to which s 6(1)(a)(iii) applied, there would be two further challenges for the Applicants to overcome to obtain relief under the CMA.

[17] Firstly, the Applicants would be required to show a substantially unequal exchange of values. Whilst AAS suggested that on its own the garage was only worth $60,000.00 – $80,000.00, JR presented two valuations (one in January 2010) at $115,000.00, this being only $5,000.00 less than the sale price under the Agreement.

[18] Secondly, the extent to which a party seeking relief caused the mistake is one of the considerations to be taken into account in deciding whether relief should be granted. The Applicants' failure to read the Agreement properly was the major cause of the mistake. As a result of the mistake, JR has suffered substantial legal costs and the loss of the deal. It is noted that he did not pursue the Applicants for completion of the purchase and has indicated that he will not make any claim for damages.

*Non est factum*

[19] A plea of *non est factum* may enable an agreement to be set aside for lack of consent where a party has executed an agreement in a form radically different from what they intended because they were under a mistake as to its effect arising from an erroneous explanation as to its contents and meaning.

[20] However, this plea can only be relied upon where a signatory has acted with reasonable care. It has been held that it is not adequate care to rely on the ability or judgment of a professional advisor to have presented the right documents without making adequate inquiry as to their effect. Thus, if a signatory's mistaken belief arises because, acting in reliance on a solicitor, he did not take steps to read and understand it prior to signing, the plea is not available. The appropriate course in such cases is not to undermine the commercial efficacy of signed documents by allowing them to be unilaterally disavowed, but for the signatory who did not understand the legal consequences of the document to seek legal redress against the person who advised them inadequately.

[19] To succeed under this heading against JR's company, the Applicants would therefore need to satisfy the Tribunal that they had taken reasonable care to establish the contents of the Agreement beyond relying on their solicitor to advise them correctly. However, I am satisfied that the Applicants did not exercise reasonable care, and therefore cannot rely on this plea for the return of their deposit.

[20] I have had regard to AAS's argument that they were misled by the green coloured-in plan; however, there is no evidence that this was coloured in by JR or his solicitor. I have also had regard to AAS's argument that the title was more complicated to interpret than average, containing reference to two lots on separate deposited plans. However, the Agreement clearly indicated the address of the garage (not the library), showed no tenancies (which it would if the library was included) and contained the correct title, lot and DP references. JR owed no further duty to explain the Agreement or the title to the Applicants. It was up to the Applicants to be satisfied that they were buying the land they intended.

**Conclusion**

[21] The parties in this case have unintentionally negotiated a deal at cross-purposes and both have regrettably suffered a loss as a result. I acknowledge that the Applicants were sincere in their misunderstanding, just as JR was completely unaware of it until settlement date approached.

[22] However, notwithstanding this setting, I am unable to allow the Applicants' claim. The applicants had insufficient evidence of any misrepresentation or actionable mistake, and they failed to correctly ascertain the contents of the Agreement. This is not something for which JR is responsible, and there is accordingly no obligation on him to return the deposit.

[23] For these reasons, an order has been made dismissing the claim.