IN THE DISPUTES TRIBUNAL **[2011] NZDT 295**

BETWEEN	**AEB**
	APPLICANT
AND	**ZVT LTD**
	RESPONDENT

Date of Order:	30 May 2011
Referee:	Referee Benson

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the claim by AEB is dismissed.

Facts

[1] AEB sought a remedy on his claim that ZVT Ltd supplied different shades of bricks for a house which he built in Auckland.

[2] Whether he was entitled to a remedy was determined on the evidence (balance of probabilities, i.e. what most likely happened) and the law (contract and the Sale of Goods Act 1908).

[3] The evidence established the following facts. On 16 November 2010, ZVT Ltd provided AEB with a quote for 7,500 bricks (Warrego style). On 22 November, AEB ordered 4,032 Warrego bricks from ZVT Ltd; and, on about 23 November, ZVT Ltd delivered the bricks to AEB. On 1 December, AEB ordered a further 4,336 bricks (Warrego) from ZVT Ltd; and, on about 2 December, ZVT Ltd delivered these bricks to AEB.

[4] On 13 December, AEB's bricklayer (having put up a significant portion of the second batch of bricks) advised ZVT Ltd that the second batch were not acceptable because they were visibly lighter than the first batch. ZVT Ltd attended the site and offered replacement bricks which, on 20 December, they delivered to AEB at no charge.

[5] AEB filed a claim seeking the cost to plaster over the bricks ($11,509), as a solution for the difference in shades. At the hearing, AEB said this was not a viable option because of the building issues created by plastering.

[6] ZVT Ltd accepted that there was a difference in shades in the bricks but argued that this was in the nature of the product – the Warrego brick was a combination of five different shades of natural colour bricks and different batches of bricks had variations in shade which occurred during the firing of the bricks. Further, the difference in shades should not have been a problem because a competent bricklayer in the normal course of his work would have mixed the bricks when laid to eliminate any noticeable differences in shade between batches

of bricks. The Respondent claimed that the difference in shades could still be remedied by a chemical treatment ($3,680).

Law

[7] The Consumer Guarantees Act 1993 did not apply as AEB was not a "consumer", given that he was building a house for immediate sale and was therefore using the bricks for resupply in trade on sale of the house.

[8] The Sale of Goods Act 1908 ("SGA") therefore applied and provided that:

(i) There was an implied condition, in a sale of goods by description, that the goods corresponded with the description (s 15).

(ii) There was no implied warranty or condition as to the quality or fitness for purpose, except where the buyer made known to the seller the particular purpose for which the goods were required (therefore, showing reliance on the seller's skill or judgment) (s 16(a)).

(iii) There was an implied condition that goods were of merchantable quality where there was a sale by description, except as to defects which examination of goods by the buyer ought to have revealed (s 16(b)).

(iv) A breach of condition entitled the buyer to reject the goods, unless the buyer had accepted the goods after a reasonable opportunity for examination (s 36); and "acceptance" meant a buyer intimating acceptance to the seller or doing any act in relation to the goods which was inconsistent with the ownership of the seller or retaining the goods for a reasonable time (s 37).

(v) A buyer who had accepted goods was still entitled to damages for breach of warranty (s 13(3)); and the measure of damages was usually the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. A purchaser who received goods not up to contract description could go into the market and purchase goods answering the warranty and,

at the same time, sell the defective goods for their market value (*Laws of New Zealand* Sale of Goods (online ed) at [285]).

Decision

[9] There was no breach of any condition as to sale by description because, in both deliveries, ZVT Ltd supplied Warrego bricks, as requested by AEB (s 15, SGA).

[10] The bricks were fit for their purpose of being used in the construction of a house and therefore complied with any condition as to fitness for purpose (s 16(a), SGA).

[11] The goods were of merchantable quality, despite any difference in shades, because bricks had a natural variation in shade from batch to batch; the quote supplied to AEB stated that "variation in size and shade can occur in manufacture of clay products", and AEB ordered two lots of bricks, not one delivery in two parts (which would have ensured supply of bricks from the same batch with the same shades) (s 16(b), SGA).

[12] AEB accepted the bricks supplied because on both occasions, following delivery, the bricks were incorporated into the house he was building, which was an act inconsistent with the rights of ZVT Ltd as owner (s 37, SGA). Therefore, AEB could not reject the goods and was only entitled (if he had a remedy) to damages (s 13(3), SGA).

[13] Even if there had been a breach of warranty, there was no loss or damages suffered by AEB caused by the shade of the bricks supplied because the value of the bricks in the first and second deliveries was the same, regardless of the shade. Further, any loss suffered by AEB was caused by his bricklayer who did not follow a proper process to mix the bricks supplied to ensure no visible difference in shade when laid.

[14] The claim was therefore dismissed.