(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2021] NZDT 1354**

APPLICANT **BD and NQ**

RESPONDENT **R & Co Limited**

The Tribunal orders, on the claim and counter-claim:

R & Co. Ltd is to pay the sum of $393.00 directly to NQ on or before 5 March 2021.

Reasons

1. BD (as a director) and NQ engaged R & Co Ltd ('RCL') in May 2020 to provide conveyancing services. They had purchased a property [Property 1] and settlement date was to be 24 July 2020.

2. RCL points out that, of the two applicants, only NQ was a purchaser of [Property 1] directly, BD being a director of the company (GX Ltd) that is Trustee of GG Trust, which was nominated as a purchaser by Memorandum of Variation of the Sale and Purchase Agreement. As a result BD does not have a cause of action personally and I have therefore referred to NQ as the sole applicant throughout this decision.

3. On 23 July NQ carried out a final inspection of [Property 1] and, on the morning of 24 July, communicated to RCL that there were some issues which they required the vendor to address prior to settlement (by 4pm at the latest that same afternoon).

4. RCL essentially gave NQ the advice that the issues were not ones which would breach the requirement that the vendor give vacant possession on settlement, and proposed that the matters be dealt with via retention of $5000.00 by the vendor's solicitor and a timeframe in which the vendor should have the matters attended to.

5. NQ claims $5130.00 being losses related to delay in moving into [Property 1] (and sought to add, at the hearing, $2000.00 costs of preparation for and attendance at the Tribunal).

6. RCL counter-claims $1400.00, being 2 hours attendance to property matters post-settlement and 2 hours preparation for and attendance at these proceedings.

7. The issues to be determined:
    - Was RCL's advice with respect to vacant possession/settlement on 24 July 2020 provided with reasonable care and skill?

- Was RCL's advice with respect to the matters raised by the pre-settlement inspection and the vendor's undertakings given with reasonable care and skill?

- Was RCL responsible for the late settlement (after 4pm) and if so, what remedy is available to NQ?

- Were any actual losses relating to delay moving into the property reasonably foreseeable as likely to result from any failure of CGA guarantee?

- Is NQ liable to pay for RCL's post-settlement attendance to further property matters at a cost of $700?

- Can either party claim costs of preparing for and attending the Tribunal?

Was RCL's advice with respect to vacant possession/settlement on 24 July 2020 provided with reasonable care and skill?

8. The Consumer Guarantees Act 1993 ('CGA') provides statutory guarantees to consumers, the relevant guarantee in this case being that a supplier will carry out its services with reasonable care and skill (section 28, CGA).

9. I find that RCL's advice to NQ that it was prudent to proceed with settlement on 24 July 2020 was provided with reasonable care and skill given the information RCL had been provided about the outstanding issues identified at the pre-settlement inspection. RCL had been sent a number of photographs of the different issues, none of which appeared to be a valid reason to delay settlement in that none appeared to prevent occupancy of the property immediately. The carpet issue was restricted to some of the rooms and could have been easily remedied.

10. While BD and NQ point out that they had emailed RCL in detail about the soiling and odour issues with the carpet, RCL's advice about it being advisable to proceed with settlement was practical in the circumstances, given the expense, time and stress involved in any litigation about breach of contract due to failing to settle on the agreed date.

Was RCL's advice with respect to the matters raised by the pre-settlement inspection and the vendor's undertakings given with reasonable care and skill?

11. On settlement day itself, I find that the absence of a clear explanation volunteered by RCL to the effect that NQ had the legal right to undertake his own remedy with respect to the carpet (and other issues) does not constitute a failure of reasonable care and skill,

    I note that NQ's claim that RCL went against his instruction by agreeing to a 7 day timeframe is incorrect as a timeframe was never actually agreed to, the vendor's solicitor instead coming back with the assurance that the vendor would attend to the outstanding issues by 4pm the same day. Only the $5000.00 retention was agreed to.

12. RCL contends that it is obvious that NQ could have attended to the carpet himself as soon after settlement as he wished, as it was his property at that point. This was not obvious to NQ and BD, but it is not a failure of the guarantee of reasonable care and skill for RCL not to have made that explicit, particularly in the context of a settlement day when RCL's focus was, appropriately, on whether or not settlement was going to proceed.

13. However, I find that inaccurate advice was given in a RCL email to NQ on Monday 27 July 2020, the advice being that "the vendor has 7 days to take care of all the rubbish and things on the list we provided to the vendor's solicitor", and that this does amount to a failure of

reasonable care and skill. This was the point at which NQ's inaccurate understanding of the situation (that he could not proceed to organise work himself) could have been and should have been corrected. As well as this not having been made clear to NQ at this point, it was simply inaccurate to communicate that there was a 7 day period agreed to by the vendor.

Was RCL responsible for the late settlement (after 4pm) and if so, what remedy is available to NQ?

14. I find that RCL failed to provide its service with reasonable care and skill by settling after 4pm on settlement day. Notwithstanding that there was a lot of back and forward communication as a result of NQ wanting initially to delay settlement due to the outstanding issues identified to RCL that morning, by 2.25pm on settlement day it appeared that an understanding had been reached that $5000.00 would be retained by the vendor's solicitor and that the vendor would attend to the items that day.

15. At 2.44pm, BD emailed RCL "Thank you for the clarification. Does it mean we settle at 4pm?" and Ms T for RCL replies at 2.52pm 'No, preparing to settle now'. If RCL were of the view at that point that they had not received confirmed instruction to settle, as Mr R submitted at the hearing (even though the emails just mentioned communicate that NQ/BD happy to go ahead and Ms T was confirming that settlement was going ahead straight away) it needed to communicate that around 2.52pm, not 3.45pm. This would have given ample time to complete settlement prior to 4pm, the time set by the contract.

16. Settlement occurred shortly after 4pm and interest of $393.00 was charged to NQ. RCL is liable to pay that amount under section 32(c) of the CGA.

Were any losses relating to delay moving into the property reasonably foreseeable as likely to result from any failure of CGA guarantee?

17. Section 32(c) of the CGA provides that a consumer may obtain losses from the supplier that were reasonably foreseeable as liable to result from the failure of guarantee. In this case, this means that RCL is liable for any actual loss suffered by NQ as a result of the delay in him attending to the carpet and other outstanding issues, from Monday 27 July to the expiry of the 7 day timeframe NQ was told was in place, on 31 July 2020.

    However NQ has not provided evidence of the family's intended move-in date such as furniture removal bookings etc, no evidence of a likely timeframe for getting the work done (that is, if they had attempted to get contractors in immediately upon settlement, would they have had to wait for a week for availability anyway?) and no evidence of what the compensation payment made by the vendors from the retention money was for or how much they received.

18. Further, even if the above or some of the above had been provided to prove that RCL's failure of guarantee caused them delay in moving in, the evidence provided to support the specific amounts relating to delay NQ seeks in his claim, does not prove an actual loss was suffered.

19. There is no evidence that tenants were already signed up for [Property 2], only a rental appraisal for that property, and no confirmed end date to the [Property 3] tenancy. I note that the [Property 3] tenancy was a fixed term tenancy so either another tenant had been arranged to pay rent from when NQ planned to move out or NQ was going to be liable to his landlord for rent anyway, whether he moved into [Property 1] or not, until another tenant was found.

20. The same principles outlined above apply to the claimed utility charges. Further, I do not accept that a portion of the mortgage for the new property is payable as an actual loss, because the mortgage was always payable from settlement onwards, irrespective of any delay in moving in.

21. While it is acknowledged that stress (or loss of quiet enjoyment) associated with this kind of situation can be considerable, the Tribunal does not address this by way of monetary compensation – CGA remedies are limited to actual monetary losses.

22. For the above reasons, I find that no actual loss relating to the 4-day period in question has been established.

Is NQ liable to pay for RCL's post-settlement attendance to further property matters at a cost of $700?

23. NQ contends that RCL agreed not to charge any additional legal fees because RCL proceeded with settlement after NQ's email to them stating that he agreed to settle provided there were no further legal costs for attending to the matter on settlement day and on coming days. I am not persuaded that that proposed condition is binding on RCL as it was obliged to act in its client best interest by proceeding with settlement, settlement was not something NQ was doing for RCL's benefit, and therefore the communication does not constitute a binding agreement.

24. However, in the context of RCL's inaccurate advice to NQ the following week, I consider it appropriate for a reduction in value of the entire amount of RCL's further legal fees be applied as a further CGA remedy (as per section 32(b)(ii)) as a result of the failure of guarantee of reasonable care and skill with respect to the carpet issue.

Can either party claim costs of preparing for and attending the Tribunal?

25. Section 43 of the Disputes Tribunal Act 1988 bars the award of costs to any party of preparing for and/or attending a Tribunal hearing, except in particular circumstances which do not apply here. Neither party's claim for costs can therefore be considered.

Referee:
Date: 12 February 2021

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 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 days of the decision having been made. There is a $200 filing fee for an appeal.
You can only appeal outside of 20 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.