(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 534

APPLICANT **BN**

RESPONDENT **MV**

SECOND RESPONDENT **KT**

The Tribunal orders:

1. MV is to pay BN a total of $20,000.00 on or before 26 October 2023.

2. The claim against KT is dismissed.

Reasons:

1. BN purchased a property from MV in February 2022. KT acted as the real estate agent on the sale.

2. A few months after settlement occurred, and following heavy rain, BN discovered flooding in the garage. Further investigation revealed that there is a sub-surface stream (also known as an under-runner or "Maori drain") above the property which floods in heavy rain, causing erosion of fine particulate which dries and hardens blocking drains and sumps.

3. BN now claims $30,000.00 from MV on the basis that the issue with water entering the garage should have been disclosed to him at the time of purchasing the property. In particular, he said he asked specifically about water tightness of the garage and any issues with the retaining wall which forms part of the garage walls but was told by KT that nothing had been disclosed to her.

4. MV accepts that she and her husband had experienced one situation where water entered the garage but had installed a drain to deal with the problem. She said she did not consider this was something that required disclosure, but that if it had, KT had a responsibility to check with her when BN asked a specific question about water in the garage.

5. KT said that MV had competed a comprehensive disclosure document which she was entitled to rely on when answering questions from potential purchasers.

6. The issues I have to consider are:

    a. Was there an issue with flooding or water at the time the property was sold that should have been disclosed?
    b. Did KT have an obligation to refer any specific question back to MV or could she rely on the disclosure document?
    c. Was there a misrepresentation that induced BN into the contract?

d. If there was a misrepresentation what is the remedy? Who is responsible for any loss?

Was there an issue with flooding or water at the time the property was sold that should have been disclosed?

7. I am satisfied there was an issue with water ingress into the garage that should have been disclosed at the time of the sale of the property.

8. MV said that she and her husband bought the property in 2015 and in the first or second winter they were there, there was heavy rain which resulted in water and mud in the garage. She said that they installed a drain outside the garage and no further water entered the garage.

9. MV also said that they cleared the drain after every heavy rain as well as on a regular basis to ensure that there were no issues with build up of clay or silt.

10. I accept that the installation of the drain meant that MV and her husband did not experience any further water in the garage. However, as BN said, the installation of the drain did not remove the underlying cause of water entering the garage, which is a dry sub-surface stream that fills with water during heavy rain and runs off into the property. This means that the drain, while ameliorating the risks, did not remove the potential for further damage.

11. In addition, it is relevant that the drain required clearing after heavy rain, as well as at other times to ensure that it did not get clogged up. While that might have become a normal part of the maintenance on the property, as MV said, it also confirms that the issue of water ingress had not been completely removed.

12. I also accept the evidence from BN that there is efflorescence present on the retaining wall after heavy rain, which indicates that water behind the retaining wall builds up and cannot drain. The installation of the drain has not fixed this problem.

13. KT said that she considered there were at least five questions in the disclosure document she went through with MV which should have elicited a disclosure in these circumstances, including a number of specific references to flooding or water damage. She said she underscored the importance of disclosure to MV and went through the document carefully.

14. In response to this MV said that she would not consider water and clay in the garage to be flooding, but rather that it was seepage from a heavy rainfall. She also said that there had never been water in the house, but only the garage and that no permanent damage had occurred.

15. However, in other parts of the hearing MV referred to the water that she and her husband had seen in the garage as being “flooding”. While it might be possible to make a technical argument about the level of water that can be termed a flood, it is important to keep in mind the purpose of the disclosure document when assessing whether MV should have said anything about what she had experienced.

16. I accept that there were a number of questions in the disclosure document which should have alerted MV to the need to disclose the issues she and her husband had experienced with water in the garage, including most relevantly clause 8 b) entitled WATER and referring to “water damage issues (leaks, mould, dampness, flood damage, failed offers, remedial action applied to any problem area(s) or any matter related to water ingress or damage affecting any building forming part of property)” and clause 14 “Has any building or any part of the property suffered from flooding? Have there been any blocked pipes, drains or services?”.

17. These questions make it clear that the property as a whole need to be considered, not just the house and that any level of water ingress, as well as any action taken to remediate any issues (such as putting in a drain) should be disclosed. In my view, the questions clearly cover the circumstances in the case, which were known to MV and which should have been disclosed as part of the discussion MV had with KT when listing the property.

Did KT have an obligation to refer any specific question back to MV or could she rely on the disclosure document?

18. MV said that at the point KT received a specific question from BN about the garage and retaining wall, she should have referred back to MV before responding. MV said that this would have prompted her memory and meant that the information was disclosed to BN.

19. I find that KT did not have any obligation to refer back to MV. That is because, as discussed above, the disclosure document completed by MV was very detailed and there were several references in that document to water, flooding and weathertightness that should have prompted MV to discuss what she knew about prior flooding in the garage.

20. While there is something in MV's point that a specific question passed on through KT may have prompted her to recall or disclose further information, that submission must be seen in the context of the previous dealings between MV and KT. I accept KT's evidence that she went through the disclosure document carefully with MV, emphasising the importance of answering all questions accurately and explaining that the document served as a form of protection for them both.

21. In addition, while marketing a property an agent is likely to encounter a number of specific enquiries from potential purchasers. It is partly for this reason that agents and vendors have a comprehensive discussion at the outset.

22. I consider KT was entitled to rely on the comprehensive disclosure document when answering BN questions about the retaining wall and the garage. After all, there were a number of references in that document that should have prompted MV to disclose the issues they had previously incurred with flooding, and to outline the remedial action that had been taken and nothing to suggest to KT that she could not rely on MV's answers.

Was there a misrepresentation that induced BN into the contract?

23. Section 35 of the Contract and Commercial Law Act 2017 states that where a party is induced to enter into a contract by a misrepresentation, they are entitled to damages as if the representation was a term of the contract that had been breached. A misrepresentation is a false statement of fact.

24. I consider it was a misrepresentation when KT told that BN that there had been a disclosure document completed which asked specifically about water or flooding and that nothing had been disclosed with regards to those issues. That answer implied that there was nothing to disclose and no issue with the retaining wall or garage, which is clearly not true. KT's statement was in response to a specific question by BN about the retaining wall (which forms part of the garage) and whether there were any problems such as seepage or other water issues.

25. Although the statement was made by KT, section 35 refers to misrepresentations made "by or **on behalf of** another party to that contract" (emphasis added). KT was not a party to the contract between BN and MV. She was clearly making statements about the retaining wall and garage on behalf of MV, who, as the vendor, was in the best position to have knowledge about any defects or issues. I have found above that KT did not have an obligation to refer back to MV at the point BN asked a specific question.

26. For these reasons I accept that there was a misrepresentation made on behalf of MV that induced BN into the contract. BN said he specifically asked about the retaining wall as part of his due diligence as it was the only part of the property that he could not see to assess whether there were any issues.

If there was a misrepresentation what is the remedy? Who is responsible for any loss?

27. BN is entitled to damages from MV in the same manner and to the same extent as if the representation were a term of the contract that has been breached. As I have outlined above, the misrepresentation was made on behalf of MV and there is nothing to indicate that KT has gone outside her authority as an agent in answering the questions from BN. For these reasons, KT is not liable for any loss and the claim against her must be dismissed.

28. There are a number of different ways of assessing loss in this situation. One would be to assess the likely cost of repairing the garage and retaining wall so there are no issues. However, BN was not able to provide that information as he was unable to get any tradespeople to price the work up – partly as it was complicated and speculative work, and partly as it was difficult to get tradespeople in to provide quotes.

29. However BN said that a remedy could involve a number of steps such as relocating the doors on the garage to ensure water can no longer enter in that matter, injecting epoxy resin as an impermeable layer, grinding off paint and repainting with an epoxy barrier and digging down the driveway.

30. BN said that, regardless of the cost of any possible repair, he had suffered a loss. If he was to sell the property tomorrow he would have to disclose the issues, which would be likely to have an impact on the price he could sell for.

31. I accept that BN has suffered a loss in value of the property. That view was supported by KT, who said that disclosure of this nature would definitely affect the price. Although she was reluctant to identify a figure by which the property might drop in value, she accepted that it would be considerable, and that potential purchasers may well be thinking about building another garage on the property or making adjustments to the existing garage. She noted that to put in a new garage would be well in excess of the $30,000.00 claimed.

32. KT also said, with some reluctance given the difficulty of establishing a valuation in these circumstances, that given the range of the value of the property at sale time (being $845,000.00), if disclosure had been made, it would have amounted to around $45,000.00 difference. She said that if there had been no garage on the property, the value would definitely have been around $45,000.00 to $50,000.00 less than what it sold for.

33. BN may also have suffered losses in terms of his potential to convert the garage into a sleepout as he had done with another property. Those losses are also speculative, given the cost of conversion has to be weighed against the potential revenue as [holiday rental].

34. I accept MV's point that any assessment of loss had to be reasonable, taking into account the problem was with the garage (rather than the house) and that the flooding was intermittent.

35. Taking into account the evidence I have heard and discounting the $30,000.00 figure claimed by BN to represent the uncertainty in such a calculation and lack of firm evidence provided by him about the precise level of loss, I assess that a figure of $20,000.00 accords with the substantial merits and justice of the case.

Referee: Souness - DTR
Date: 5 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.