(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2023] NZDT 215**

APPLICANT **DX**

APPLICANT **QX**

RESPONDENT **T Ltd**

The Tribunal orders:

The claim is dismissed.

Reasons

[1] The applicants, QX and DX, claim from T Ltd, represented by DT, compensation for what they consider a misleading building report prepared by DT. DT denies liability.

[2] The essential facts were not in dispute. In May 2020, the applicants purchased a [house], which had been constructed in the 1970s. Before completing the purchase, the applicants engaged T Ltd to carry out a building inspection. The report included the following statements:

> ***Overview***
> Floor levels were carried out with a Zip level showing the levels are out however the house has been constructed this way …..
>
> **Levels**
> We found an approximate difference of 76mm across the house.
> MBIE guidelines are 50 mm over 10m, or a slope greater than 0.5% (1 in 200), therefore this house is over the tolerance however the doors and windows generally operate as they should. There are no signs of significant movement within the dwelling and given the multiple split levels, in my opinion this is all constructed this way from the original build and is of no concern.

[3] In late November 2022, the applicants wished to sell the property. A prospective purchaser obtained a building report which noted the floor levels. The purchasers were unable to obtain insurance for the property because the floors were not level, and the sale was held up. The applicants contacted DT, who advised them to obtain engineering reports, which they did.

[4] The applicants provided two reports from structural engineers. Each of them commented on the floor levels; the report from QG's structural engineer, CT, stated that he had recorded the levels as -66mm and so outside MBIE's guidance of – 50mm. CT's opinion was that the levels were not the result of earthquake damage, but that the house had probably originally been constructed out-of-level to some degree, and had then sustained some static settlement over time. He did not consider that the degree of floor differential affected the structural integrity of the house, or made worse the likely

performance of the house and its foundations in the event of a significant earthquake. The second report, written by a representative of MT, stated that ".. we are of the opinion from a structural perspective that even though the foundation settlement is not a direct result of the [earthquake] sequences, if required, the foundation can still be releveled for serviceability purposes".

[5] The applicants had repair work done, and the sale of the house proceeded. The floors were revelled at a cost of $27,914, and they incurred other costs as a result, including replastering, repainting and the rebuilding of a deck. These costs totalled $52,217.00.

[6] The applicants consider that DT's report was misleading, and they said that they had been misled by it. In particular, they noted DT's stated opinion that the uneven floor levels were "of no concern". Because of these words, they said, they had bought the house in 2020 without attempting to renegotiate the purchase price with the vendors, or considering other options. The applicants had not been obliged to provide a building report to their own insurers, and so had been unaware that an insurer would, or could, regard the out-of-level floors as a reason for declining insurance. It was only when they came to sell to the property and their potential purchaser had been unable to obtain insurance that the significance of the uneven floor levels became apparent to them.

[7] DT, in response, said that he did not consider his report to be misleading in any way. He had, he said, stated clearly his findings regarding the floor levels in his report, and the applicants had therefore been made aware of them when they had bought the property.

[8] DT noted that he was a builder, and his report was written from a builder's point of view. His comments related to the integrity of the building and, he said, he could not have been expected to comment on the significance that an insurer might attach to aspects of the report. He noted that the housing market tended to change over time, and that the attitude of insurers varied in regard to the importance of defects in buildings. These matters were not, he said, within his area of expertise.

[9] DT observed that the two reports from structural engineers, described above, agreed that the uneven floors had not been caused by earthquake damage.

The issue

[10] The question for me to decide is whether the report provided by T Ltd was misleading and, if so, whether the applicants suffered loss by reasonably relying on it.

The law

[11] The Fair Trading Act 1986 forbids misleading and deceptive conduct in trade. Whether the report included misleading statements must be looked at from the point of view of, in this case, the class of people such as the applicants, who have commissioned a building report.

Decision

[12] I have considered all the evidence provided to me, including the material from the parties' solicitors that was provided to me. Having done so, I do not consider that DT's report contains any statement that can be regarded as misleading. The report states clearly the fact that the floors are not level and includes DT's opinion for the reasons for that. The structural engineers' reports also comment on the uneven floors. All three reports state the writers' opinions that the out-of-level floors did not result from earthquake damage. The reports indicate that the integrity of the building is not affected at all by the fact that the floors were outside the guidelines provided by MBIE.

[13] I do not think that DT's comment that the flooring was "of no concern" can be considered as misleading, or that people in the applicants' position should have been misled by it. DT was a builder, and the applicants asked him in that capacity to provide a report. He had carried out measurements, recorded them, and commented on them from the point of view of a builder. He included his findings clearly in the report he provided to the applicants. He could not be expected to speculate, or comment, on what might be the opinion of an insurer, either at that time or over two years later, as to the relevance of the floor levels. The fact that the applicants did not disclose to their own insurer the details

of the out-of-level floor indicates that they themselves did not consider that an insurer would want, or need, to take the condition of the floors into account when providing insurance to them.

[14] Thus, as I consider that DT's report was not misleading, I do not consider that T Ltd is liable to compensate the applicants for the costs they incurred in levelling their floors.

Referee: C Hawes

Date: 27 April 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.