IN THE DISPUTES TRIBUNAL **[2019] NZDT 1217**

BETWEEN	**HY** APPLICANT
AND	**RB** RESPONDENT
	YR SECOND RESPONDENT
Date of Order:	7 October 2019
Referee:	Referee: J Robertshawe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that RB and YR are to pay to HY the sum of $15,000 on or before 30 October 2019.

Facts

[1] On 4 December 2018, Ms HY purchased a rural property at X Road, Suburb, City from Mr RB and Mr YR (the vendors) for $1.7 million (the "Contract").

[2] Settlement took place on 18 December 2018.

[3] In January 2019, Ms HY noticed the arrival of heavy machinery on her boundary. She became aware that a road was being constructed on the back boundary of her property. This was to enable a neighbouring farm operated by BN Limited to re-open a quarry to supply the aggregate rock required for completion of the Works (the "Works"). Investigations revealed that, on 1 July 2018, the vendors had given their unconditional consent to the Works by signing a form for the purposes of s95B of the Resource Management Act 1991 ("RMA") (the "Consent"). However, the vendors had not notified Ms HY of either the Works or the Consent.

[4] Ms HY states that she would not have purchased the property, or would have negotiated a lower price, had she been notified. Ms HY has filed a claim seeking $15,000.00 in compensation from the vendors. The vendors defend the claim on the grounds that the Works do not have a material impact on the property, and do not affect its value or any business being operated from the property. They view the proceedings as an opportunistic "try on" to extract a windfall at their expense.

Issues

[5] The issues to be resolved are:

a. Did the vendors have a duty under the Contract to advise Ms HY of the Consent?

b. If so, is Ms HY entitled to compensation for the breach?

Did the vendors have a duty to advise Ms HY of the Consent?

[6] I find that the vendors had a duty under the Contract to advise Ms HY of the Consent.

[7] Clause 7 of the Agreement for Sale and purchase warrants (among other things) that the vendors have not received any notice under the RMA or given any consent which directly or indirectly affects the property and which has not been disclosed in writing to the purchaser.

[8] The vendors had received a notice under the RMA, and had given the Consent to Works that directly or indirectly affected the property. This was not disclosed to Ms HY.

[9] Having considered the evidence presented, I am satisfied that the property is directly affected by the Works, and thus the Consent, in the following ways:

a. The first stage of the Works was to construct a 5km, 10m wide road which provides access from SH58 to the quarry. This road has been under construction since January and is not yet complete. It cuts through a paddock that is immediately to the rear of Ms HY's property. Ms HY's property had a quiet rural aspect, which has now been fundamentally altered.

b. Whilst the road is being constructed, the contractors are entitled to generate noise and vibrations levels within NZ standard for construction noise and the British Standard for vibration. These standards are noted as being high on the premise that the noise is "short term". The allowable noise levels on affected properties alter throughout the day. Between 7:30 a.m. and 6:00p.m., the limits are an average of 75 decibels (e.g., for general machinery noise) but with allowable bursts up to 90 decibels (e.g., when unloading rock). Ms HY is at home during the day, and has endured constant loud noise from engines, machinery scraping and digging and the removal and delivery of material.

c. Whilst the road is being constructed, heavy vehicles associated with the Works have accessed the quarry via X Road, which is a small rural road not suited to heavy vehicles. This has caused compromise to the road and has made it unsafe for walking.

d. The quarry has a consent to operate from Mondays-Saturdays 6:30am-7:30pm in summer and 7:00a.m.-5:00p.m. in winter. Whilst the quarry is operating, the consents allows for 64 return movements of large trucks (128 trips per day past the boundary of Ms HY's property) between 10:00a.m. and 3:00p.m. from Monday to Friday. Consent to extract aggregate has been granted until the motorway is complete, or December 2020, whichever occurs first. However, there is no guarantee that the Consent will not be extended if completion of the motorway is delayed, or if other roading projects require the aggregate. The quarry operations will require blasting. Residents in the area have been notified that this blasting will take place up to 20 times per year.

e. Ms HY grazes horses on her property that have been stressed by the noise and activity over the fence. One grazier has left. Ms HY also operates an AirBnB from standalone accommodation on the property, and has had to constantly manage the noise and disruption so as not to compromise her guests.

[10] The tranquil rural landscape that Ms HY encountered when she viewed the property is compromised by the Works. As the property is directly affected by the Consent, the vendors had a duty to disclose it.

[11] Neither the Works not the Consent appeared on the property LIM which was obtained in August 2018. There was no other avenue by which Ms HY became aware of the Works or the Consent.

[12] The vendors did not participate fully in the Tribunal process. Mr YR did not attend. Mr RB attended the hearing by cell phone for a short time, having elected not to attend by teleconference from his nearest Court. Having heard the submissions of Ms HY and articulated a short response, he requested an immediate decision. When this was not forthcoming, he indicated he did not wish to participate in discussions and hung up. It is therefore not clear upon what basis he considers that the property was not directly or indirectly affected by the Works, or why notice was not given about the Consent. The property had been on the market since April 2018. In the absence of any other explanation, it is hard to escape the inference that the vendors decided that notice of the Consent would have an impact on who would want to buy the property, and at what price.

[13] Regardless of the reason for the omission, the failure to advise was a breach.

Is Ms HY entitled to compensation for the breach?

[14] Where a contract is breached, the innocent party is entitled to a reasonable sum to compensate for losses that arise naturally and in the usual course of events from the breach.

[15] The vendors expressed the view in their documentation, and in Mr RB's short submission, that the Works have caused no loss in the value of the property, and no loss to Ms HY's grazing and AirBnB businesses. Mr RB stated that the property has gone up in value.

[16] On the contrary, I find that Ms HY has suffered measurable loss and is entitled to compensation of $15,000.00, being the maximum sum that can be awarded in the Tribunal. I have reached this conclusion for the following reasons.

[17] As a result of the breach, Ms HY has incurred legal fees of $3,553.50. I am satisfied that this is a direct consequential loss from the lack of notice. Ms HY needed to investigate whether the Contract had been breached, and to address that breach with the vendors. On a contract of this significance, and with the degree of compromise to the property, it is reasonable and foreseeable for Ms HY to have immediately engaged her lawyer to assist her with the dispute. Ms HY should not be left out of pocket for this sum.

[18] Whilst I am satisfied that the Works have compromised Ms HY's property for grazing horses and running her AirBnB business, I agree with the vendors that it is not appropriate to award any sum for this loss. Only one horse is no longer grazing at the property. It has not been proved that there is any loss of revenue from the AirBnb. Mr RB supplied evidence prior to the hearing of AirBnB reviews that talked of the peaceful and pleasant surroundings. Whilst the stays to which the reviews applied occurred after the Works began, the timing and extent of them is unknown. These reviews are insufficient to displace the other evidence supplied of detriment. Ms HY explained that she has had to go to some lengths to manage her guests' expectations and the impact of the Works on their stays. Whilst this is likely, no finding could be made of financial loss to her business.

[19] I also agree with the vendors that no loss has been proved to the value of the property. Neither party supplied valuation evidence. Common sense dictates that there would be less interest in the property whilst the Works were at their peak on the boundary, but the road and the quarry will not be in operation permanently.

[20] However, the most significant loss arising naturally from the breach was not a direct financial loss, but a loss of what was contracted for, or a loss of the bargain, with resulting distress and disappointment.

[21] In relation to the loss of the bargain, the surroundings of the property were different in nature from what was viewed at the time the contract was negotiated. This resulted in a loss of amenity in the property from what was contracted for, and a lost opportunity to either elect not to purchase or to negotiate on a stronger footing for a lower price. The unexpected compromise to the property also caused mental distress, disappointment and physical inconvenience.

[22] Claims of this nature are a challenge to address for two reasons. First, the loss is of a subjective nature and the extent of intangible harm is difficult to prove and to price. If measured, any award is open to criticism on the basis that the outcome is unpredictable, or

contains a punitive element not permitted in calculating loss for breach of contract. Leaving aside these practical issues, there is a more fundamental policy concern against such awards. Contracts often give rise to stress, particularly where personal, social or family interests are affected. This is generally a risk borne by those who transact, and, if recognised, would add a layer of uncertainty and subjectivity to every claim for breach. Claims for distress on its own are therefore generally unsuccessful.

[23] However, a non-pecuniary loss is still a loss arising from the breach, and where it is the primary nature of the loss, and can be reasonably measured, the Tribunal should not shy away from addressing it. Whilst there must naturally be a conservatism in how such awards are calculated, Courts have long recognised that contracts that have as part of their purpose the provision of pleasure, relaxation, peace of mind or the purchase of amenity values can give rise to claims for distress or disappointment upon their breach. Successful applicants for damages of this kind include passengers on the ill-fated Mikhail Lermontov, the owner of a swimming pool that was not dug to a sufficient depth, a person who was unfairly expelled from a social club, a traveller who received substandard accommodation on a ski holiday and, in England, a property owner who asked for a report on airport noise for a rural property and was incorrectly advised that the property would not be greatly affected. In the latter case, it was noted by the House of Lords that the applicant suffered direct physical discomfort produced by ongoing noise, and whilst the nuisance did not affect the market value of the property, it was appropriate to award £10,000 in damages for the breach: *Farley v Skinner* [2002] 2 AC 732.

[24] I find that the vendors decision not to tell Ms HY about the Consent took away her right to negotiate on different terms, and this alone is likely to have caused her losses far in excess of $15,000.00. The property had been on the market since April 2018 for a significant sum above its RV of approximately $1,650,000. Ms HY had made an offer of $1,500,000.00, and in December, the vendors countersigned at $1,700,000.00, seeking quick settlement within two weeks. This timeframe for settlement is unusual for a property of this nature, but not surprising, given that the Works would begin in the New Year. Ms HY was, unbeknownst to her, in the box seat to get a much better deal, and the vendors knew this. Ms HY was disadvantaged by the lack of knowledge in a manner that the contract did not contemplate.

[25] In the alternative, if I am wrong about that, or damages cannot be quantified on the basis of the “what if”, then there is equally the loss from distress and disappointment caused by the reduced outlook from the property, the loss of peace of the surroundings, and the

physical inconvenience and nuisance from dust, traffic and noise. This will continue to varying degrees throughout 2019 and 2020. It may continue past that date. I consider this loss is objectively and reasonably valued at the balance of the recoverable claim in the Tribunal (less the legal fees already awarded), amounting to just over $15.00 a day for those two years. I would expect Ms HY would have happily paid that sum to have been released from the ongoing circumstances into which she was led.

Conclusion

[26] The vendors breached their undertaking to disclose the Consent.

[27] Ms HY has suffered losses that are at least equal to the maximum sum allowed in the Tribunal, whether viewed as loss of the bargain, plus legal costs, and/or measurable damages for mental distress, disappointment and inconvenience. As a result, an order has been made for the vendors to pay Ms HY the sum of $15,000.00.