



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 751

APPLICANT **NT**

RESPONDENT **ND**

**SECOND
RESPONDENT** **BQ**

**THIRD OR
SUBSEQUENT
RESPONDENT** **R Ltd**

The Tribunal orders:

1. R Ltd is to pay NT \$5,000.00 on or before 2 February 2024.
2. The claim against ND and BQ is dismissed.

Reasons:

1. NT bought a townhouse off the plans from R Ltd. NT says the townhouse as built is different from the plans she was shown when she entered into the contract. This is because the cladding on the south side of her townhouse is different from what was on the drawing of the proposed development she was shown when she entered into the contract. She seeks an order that R Ltd, and its directors, Mark and Adrian, are liable to pay her damages of \$30,000.00.
2. The issues to be resolved are:
 - a. Has this claim been settled?
 - b. Is NT entitled to damages under section 35 of the Contract and Commercial Law Act?
 - c. Has there been a breach of the Fair Trading Act?
 - d. Is NT entitled to any damages under the contract?
 - e. What if any remedy is appropriate?
3. R Ltd provided evidence from two registered valuers about the effect on the value of the property of the change in cladding on the south wall. At the end of the hearing NT indicated that she would like the opportunity to provide her own valuation evidence to the Tribunal in response to this.
4. The claim was adjourned on the basis that I would only make a decision on the claim if the issue of damages did not require a decision (if NT was unsuccessful in her claim). It was agreed that there would be a further hearing and an opportunity in the interim for the parties to provide more

evidence if damages needed to be determined. In the event my decision is that the claim cannot succeed and so there is no need for a further hearing of this matter.

5. At the hearing R Ltd made an offer to pay NT \$5,000.00 to settle this claim which NT rejected. R Ltd agreed to leave that offer on the table. This means that in the event that NT's claim was unsuccessful R Ltd consented to me making an order that it is liable to pay NT \$5,000.00. My finding is that there is no legal basis for an order that R Ltd is liable to pay any damages to NT, but despite this, because of R Ltd's agreement, my order is that R Ltd is to pay NT \$5,000.00.

Has this claim been settled?

6. I am satisfied this claim has not been settled and NT is entitled to bring the claim.
7. In around July 2021 NT entered into a contract to buy a townhouse off the plans from R Ltd. The townhouse was completed by early 2023. When NT did a final inspection of the property before settlement, she was unhappy with the cladding on the south side of her townhouse.
8. NT's townhouse is the end unit of three. On the promotional material for the development, most of the south wall of NT's townhouse was shown as being clad in a vertically applied brown coloured material, which contrasted with the rest of the townhouse, which is shown as being clad in shades of grey materials.
9. NT says on the basis of this depiction in the promotional material, she expected the south side of her completed townhouse to be clad in cedar weatherboards. In fact it is clad in a product called James Hardie Stria standard cladding (Stria) in a grey colour, which is the same as the rest of the townhouse. NT says she was very disappointed to find this, because she particularly liked the cedar feature wall shown in the promotional material.
10. NT raised this issue with R Ltd prior to settlement, and there were some discussions between the parties. There was a suggestion by NT that she should be entitled to deduct money from the purchase price to compensate for this change. In the context of this discussion R Ltd made an offer to pay NT \$5,000.00.
11. Eventually NT agreed to settle the sale of the townhouse and R Ltd agreed to pay her \$5,000.00. At the hearing R Ltd suggested that this payment of \$5,000.00 was in full and final settlement of any claim NT may have had in relation to the cladding on her townhouse.
12. NT says that the \$5,000.00 was not accepted on this basis and that she is still entitled to bring this claim.
13. I am satisfied that NT is correct in this. There is an e-mail from NT from 1 February 2023 in which she says:

"...I am therefore, reluctantly, prepared to accept the sum of \$5000 to be paid within two working days of settlement, in full and final settlement of my claim to deduct compensation from the settlement amount. As with your client, I am prepared to accept this settlement without prejudice to any other rights and remedies I might have..."

14. Also on 1 February R Ltd's lawyer replied and said:

"...our client has instructed us:

1. *to confirm it accepts the offer detailed in yellow below:*
2. *it agrees to make the good faith payment of \$5000 to you within two working days of settlement..."*

15. The reference in the lawyer's email the words in yellow is to the excerpt from NT's email which is set out above.

16. I am satisfied that R Ltd agreed to pay NT \$5,000.00 in return for NT's agreement not to deduct money from the purchase price, but that NT reserved her right to make a further claim for damages in relation to the cladding issue. For this reason, I am satisfied that this claim has not been settled and can go ahead.

Is NT entitled to damages under section 35 of the Contract and Commercial Law Act?

17. I find that NT is not entitled to damages under section 35 of the Contract and Commercial Law Act 2017 (CCLA). There are two reasons for this. First, the picture in the promotional material of the proposed units, which NT relies on as being the representation about the cladding, did not constitute a representation by R Ltd. Second, the contract contained a provision in which NT agreed that in entering into the contract she had not relied on any statement or representation by R Ltd made prior to the contract.

18. The CCLA provides in section 35 that where a buyer is induced to enter into a contract by a representation made by a seller, then if the representation turns out not to be true, the buyer is entitled to damages as if the representation were a term of the contract.

19. NT says that because she bought her townhouse off the plans, she relied on the promotional material supplied by R Ltd to know what she was buying. She says that the promotional material included a picture of the development which showed that the south side of her townhouse would have a brown coloured cladding, which she expected to be cedar weatherboards. She says this was a representation by R Ltd of what the cladding on the finished would be, and she relied on this when deciding to enter into the contract. She says she was particularly fond of the cedar cladding and that the grey Stria cladding that has been used on that wall is cheaper than cedar, and not as attractive.

20. R Ltd acknowledges that it intended to clad NT's south wall in cedar. However, it says that during the building consent process (which happened after NT entered into her contract) the local Council required that the cladding on the south wall be a fire rated product, because it is within one metre of the other half of the development. R Ltd says its architect made the decision to change the cladding on the south wall to grey Stria, in order to keep the cladding consistent with the rest of the development.

21. R Ltd says that the picture in the promotional material was only an artist's rendering of the proposed units and cannot by itself, constitute a representation about the nature of the cladding on the finished development.

22. The promotional material I have been provided with has two pictures in which the south exterior wall can be seen. These show brown coloured cladding on that wall. The promotional material does not contain any description of the exterior cladding. There are some specifications in the promotional material, on page 14, but there is no description of the exterior cladding. There is no evidence that NT was told by R Ltd or its agents that there would be cedar cladding.

23. For a representation to be capable of attracting legal liability under section 35, there must be a high degree of certainty about the nature of the representation. A representation effectively becomes a term of the contract, and if false, attracts the same consequences as a breach of contract. This means that the representation must be clear and certain enough to be a term of the contract.

24. In this case, the best that can be said is that the promotional material shows brown cladding on the south side of NT's townhouse. I do not consider that these pictures alone are sufficient to constitute a representation about the nature of the cladding NT could expect on her finished townhouse. I accept that R Ltd intended the wall to be cedar, but am not able to say, on the basis of the pictures alone, that there was a representation to this effect to NT.

25. Even if I am wrong on this point, and the pictures in the promotional material are a representation about the type of cladding that would be on the finished townhouse, I consider that clause 34 of the agreement for sale and purchase means that NT cannot now claim that she relied on that representation when deciding to enter into the contract.

26. Clause 34 of the contract provides:

“... 34.1 This agreement records the entire agreement and understanding between the Vendor and Purchaser in respect of matters relating to this agreement. This agreement supersedes any prior agreement, correspondents, discussions, marketing brochures, advertisements or undertaking between the Vendor and Purchaser and their respective agents.

34.2 In deciding to purchase the property the Purchaser has relied on its own judgement and not on any statement, warranty or representation (verbal or otherwise) made by the Vendor or any person on the Vendor's behalf. The Purchaser will raise no objection to, or requisition in respect of, the property, its condition or any measures affecting the property...”

27. R Ltd said that clause 34 is included in contracts for the sale of developments such as this specifically because of the possibility that changes might be required to the development in the building consent process.

28. I am satisfied that the effect of clause 34 in this case is that when she entered into the agreement for sale and purchase, NT agreed that she did not rely on any representations made prior to that point by R Ltd, including in any marketing brochures.

29. Section 35 of the CCLA requires not only that a representation must have been made, but also that it must have been relied on by the purchaser, so that it induced them to enter into the contract. In this case NT has expressly agreed that she has not relied on the promotional material in making her decision to enter into the contract, and I find she cannot now argue that she has.

30. At the hearing NT said that this interpretation of clause 34 would result in an absurd and unfair situation where she was effectively giving R Ltd free reign to build the development anyway it wished provided it adhered to the floor plan (which was included in the agreement for sale and purchase).

31. I do not think this argument accurately reflects the agreement the parties reached. The agreement for sale and purchase contains several pages of plans and specifications. These include floor plans which have details of landscaping and floor finishes, and a page of other specifications including the flooring, kitchen, bathroom and laundry fitouts, interior paint, and appliances. All of these details are included in the contract, and R Ltd could only change them if allowed to do so under the contract. I do not consider this means R Ltd had free reign to make any changes it wished.

32. However the agreement for sale and purchase does not include any mention of the exterior cladding specifications, which means R LTD was able, under the contract, to change the nature of the exterior cladding.

33. For these reasons I find that NT is not entitled to damages under section 35 of the CCLA.

Has there been a breach of the Fair Trading Act?

34. I find that the conduct of R Ltd, and of its directors of R Ltd personally, has not breached the Fair Trading Act 1986 (FTA).

35. The FTA in section 9 provides that no person shall in trade engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Section 13 and 14 of the FTA further provide that no person shall make false or misleading representations in connection with the sale of goods or land respectively.

36. I have already made a finding that the pictures of the south wall of NT's townhouse in the promotional material that R Ltd provided were not sufficient to constitute a representation that the south side of NT's townhouse would be clad in cedar. The pictures alone only show a different colour of cladding on that side of the house, and there is no evidence that NT's was given any details about the proposed cladding on the townhouse.

37. This means that there cannot have been a breach of section 13 or 14 of the FTA by R Ltd or its directors, because if there was no representation about the cladding, there cannot have been a false or misleading representation in this regard either.

38. I am satisfied that there has not been a breach of section 9 of the FTA by either R Ltd or its directors either.

39. The only thing that can be said with any certainty of the pictures in the promotional material is that the cladding on the south side of NT's townhouse is brown. The finished townhouse only has one colour. I do not consider that this difference can possibly be said to meet the standard of misleading or deception conduct required for a breach of the FTA.

40. For these reasons I do not consider that there has been a breach of the FTA by R Ltd or its directors personally.

Is NT entitled to any damages under the contract?

41. I find that NT is not entitled to any damages under the agreement for sale and purchase.

42. The agreement for sale and purchase provides, in clause 34, as set out above, that the agreement records the entire agreement between the parties, and NT agrees that she does not rely on any representations made by R Ltd prior to the contract. The contract does however contain some provisions about changes to the plans and specifications attached to the agreement.

43. Clause 22.4 of the contract provides:

"The Purchaser shall not be entitled to make any objection or requisitions or claim for compensation by reasons of ...

...(c) Any variation or alteration to the dwelling to be constructed on the property as may become necessary during the course of construction of the dwelling by reason of matters beyond the control of the Vendor which may result from (amongst other things), the requirements and directions of any territorial or governmental authority having jurisdiction or as may be required by practical exigencies of construction either by (without limitation, and by way of example), the dictates of good building practice or the availability of materials, provided however the Vendor shall take all reasonable steps to adhere wherever possible to the plans and specifications attached hereto (the plans and specifications)..."

44. NT said that she can make a claim for compensation in relation to the lack of cedar cladding on the south wall, because the proviso at the end of clause 22.4(c) meant that when R Ltd was required to change the cladding by the local council from ordinary cedar to a fire rated cedar, it had to take all reasonable steps to adhere to the plans and specifications, which meant it should have chosen a fire rated cedar cladding, rather than the grey Stria cladding.

45. I do not consider this is the case. Clause 22.4 provides that there is no claim for compensation for any changes required by the local council. The only exception to this is if the Vendor does not take all reasonable steps to adhere to the plans and specifications which are attached to the agreement.

46. As set out above, there is nothing at all in the plans and specifications attached to the agreement about the exterior cladding of the townhouse. This means the proviso does not apply to the exterior cladding of the townhouse at all, and so R Ltd was free to make its own judgement about what cladding it would change to when required to do so by the Council.

47. R Ltd says its architect chose to continue the grey Stria cladding on the south wall to make that wall consistent with the rest of the development. For the avoidance of any doubt I consider this was a reasonable decision to take in the circumstances.

48. Clause 32.1 of the contract provides:

“... in the event of any materials, as set out in the plans and specifications, being unprocurable or prohibited by law, or the consequences of strict adherence being financially impractical, or if it becomes necessary or expedient for the Vendor to undertake or incorporate an amendment in respect of anything shown or described in the plans or specifications, the Vendor may, in accordance with the building contract entered into by the Vendor and its builder, substitute such materials with materials that are of a value and quality as near as reasonably practicable to the specified materials, provided that the changes and amendments do not result in any material adverse effect on the use, occupation or enjoyment or value of the property by the purchaser...”

49. This clause only applies where there is a change to materials set out in the plans and specifications attached to the agreement because the materials were unprocurable, prohibited by law or financially impractical. In that situation NT would be entitled to make a claim for damages if the change resulted in a material adverse effect on the use, enjoyment or value of the property.
50. This clause only relates to changes in materials which are specified in the plans and specifications attached to the agreement for sale and purchase. The cladding is not mentioned in those plans and specifications, and so the clause does not apply to a change in cladding. Even if it were, the change of cladding was not required because the materials were unprocurable, prohibited by law or financially impracticable, and so the clause would not apply in this case in any event.
51. The agreement for sale and purchase sets out the entire agreement between the parties. It provides for NT to be able to make a claim for damages in tightly defined circumstances, in relation only to changes of materials included in the plans attached to the agreement. These plans do not include any mention or detail about the cladding of the property, and so under the agreement NT is not able to make any claim for damages about the change in cladding.
52. For these reasons NT's claim for damages and R Ltd and its directors cannot succeed. There is no need for me to consider the final issue which was what remedy is appropriate. This also means there is no need for any valuation evidence from NT.
53. However, because R Ltd has agreed to leave the offer made to NT during the hearing on the table as a gesture of goodwill, I order that R Ltd is liable to pay her \$5,000.00.

Referee: L Trevelyan
Date: 19 December 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>.