



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 70

APPLICANT OO

APPLICANT UI

RESPONDENT QP

SECOND
RESPONDENT XP

THIRD OR
SUBSEQUENT
RESPONDENT M Ltd

The Tribunal orders:

The claim is dismissed.

Reasons

1. In October 2020, OO and UI purchased a property at [Address] from QP and XP. QP and XP's agent was QD of M Ltd. OO understood that the property could be used as a home office, and that at the time of sale was being used for residential purposes. After buying the property, OO found out that the property could not be used for residential purposes without applying for a resource consent.
2. OO claims \$28,207.75, which is the cost to convert the property for residential use. This includes: removal of concrete, [City] Council (CC) fees, loss of rent, architectural fees, resource consent consultant fees and rubbish removal.
3. The issues to be decided are:

Section 35 Contract and Commercial Law Act 2017

- a. Did QP and XP make a misrepresentation of fact by saying that the house at [Address] could be used for residential purposes?
- b. If so, did the misrepresentation induce OO and UI to enter into the contract?
- c. Did OO and UI suffer a loss of \$28,207.55 as a result of the misrepresentation? Is this the cost to put them back into the position they would have been in had the representation been true?

Section 14 & 43 Fair Trading Act 1986

- d. Did M Ltd make a representation in the course of selling [Address] that it could be used for residential purposes? Was the representation false or misleading?

- e. If so, did OO and UI suffer a loss of \$28,207.55 as a result of the false or misleading representation?

The issues outlined above in (a) and (d) will be considered together as they essentially require consideration of the same facts.

Did QP and XP make a misrepresentation of fact by saying that the house at [Address] could be used for residential purposes? Did M Ltd make a representation in the course of selling [Address] that it could be used for residential purposes? Was the representation false or misleading?

4. Section 35 of the Contract and Commercial Law Act 2017 (CCL) provides that if a party to a contract has been induced to enter into it by a misrepresentation (whether innocent or fraudulent), made by or on behalf of another party to that contract, they can claim compensation from that other party as if were a term of the contract that has been broken. A misrepresentation is a misstatement of past or present facts (and includes half-truths) but does not include an opinion. A misrepresentation need not be the sole inducement to the contract, but it must be a significant factor which influences a person to enter into the contract. Where there is more than one misrepresentation, a person only needs to prove that one or more induced them to enter the contract
5. The purpose of the Fair Trading Act 1986 is to encourage a trading environment where the interests of consumers are protected and businesses compete effectively. The Act prohibits certain unfair conduct and practices and promotes fair conduct and practices in relation to trade. The FTA applies where a real estate agent makes statements to a prospective purchaser in connection with the sale of land. Section 14 prohibits an agent from making false or misleading representations concerning the availability of facilities (such as a power supply) associated with the land.
6. OO states that when he looked at the house, he saw that it was set up with an office and with four bedrooms in use. He recalls the agent QD asking him what his intended purpose for the house would be. He told QD that he wanted to rent it out, either as long-term rental or for visitor accommodation, such as Air BnB. QD told him he should have no issues with Air BnB.
7. OO points out that the information pack provided by M Ltd contained a rental and market appraisal, which also suggested to him that it could be used for rental accommodation. The advertising brochure also referred to it as having four bedrooms and three bathrooms and referred to the rental appraisal. OO wanted to also have the option to live in the house himself and then to use his own house for Air BnB.
8. QP and XP state that there was no misrepresentation because their son was living there and also operated a home-based [redacted] business. The CC had not voiced any concerns about the residential use.
9. QD says that the house was built in the 1940s as a private residence. In 2006, it was consented to be converted to an office. Sometime after 2010, it was sold and used for residential purposes again. When QP and XP bought it in 2019, he asked the CC if it could be used for a home-based business and he was told it could be. This is why QP and XP's son lived at the property and operated a business from it.
10. QD says that the marketing material showed that the house could be used for multiple purposes, including business and residential use. This is why there was information such as the fact that 21,500 cars passed by each day. This showed that it had a good location for a business. The information pack for the house contained details about the CC requirements for the use of the ancillary unit and a home-based business. However, the most important piece of information was the Resource Consent which showed that in 2006, consent was granted to convert the building used as a residential dwelling "into an office in the Residential Zone". QD says that he told all people attending the open home that they needed to check with the CC to see if it was suitable

for their intended use. The words in the marketing brochure said “The current rental appraisal on the property is \$780.00 - \$850.00 per week (subject to Council Consents).” He points out that the reference to “Council Consents” is a qualifying statement which suggested to buyers that they needed to check out what consents were required for their intended use.

11. KP, Managing Director of M Ltd, said that a whole range of information was supplied in the pack, so that prospective buyers would know to ask the CC what consents were required. In addition, a due diligence clause (21) was inserted into the Sale and Purchase Agreement, to give buyers time to talk to CC. It said:

“This agreement is entirely conditional upon the Purchaser approving (in the Purchaser’s sole and unfettered discretion) all matters that the Purchaser considers may touch, concern or affect the property or the commercial viability of the transaction within 5 complete working days after the date of the agreement being signed by both parties ...”. (emphasis added)

KP says that OO had the five-day opportunity to talk to CC about his intended use for the property, to see if it was possible.

12. OO’s legal executive confirmed in a letter that she was aware that OO wanted to use the property as an Air BnB, and that the property currently had resource consent for an office in an existing dwelling.
13. I find that QP and XP did not make a misrepresentation of fact by saying (through their agent) that the house at [Address] could be used for residential purposes, and that M Ltd did not make a misrepresentation in the course of selling [Address] that it could be used for residential purposes. The promotional material was clear that using the property for residential purposes was subject to CC consent. In addition, M Ltd provided the resource consent which showed that the house was currently consented to be used as an office. This information was provided well before the agreement was signed. It should have raised a ‘red flag’ with OO’s legal team that the property might need a new consent to be used for residential purposes or visitor accommodation. OO had plenty of time to check out whether the property could be used for residential purposes or for visitor accommodation, before signing the agreement. The resource consent did not say anything about a business operating from a residential dwelling.
14. In conclusion, I find that there was no misrepresentation made regarding the purposes that this house could be used for. Therefore, the claims against QP and XP and M Ltd must fail and are dismissed.

Referee: Sara Grayson
Date: 20 February 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>.