(Disputes Tribunal Act 1988)

ORDER OF DISPUTES TRIBUNAL

District Court **[2020] NZDT 1455**

APPLICANT **PF Limited**

RESPONDENT **QI**

SECOND RESPONDENT **MI**

The Tribunal orders:

QI and MI are to pay PF Limited the sum of $757.00 on or before 10 May 2021.

Reasons:

1. PF Limited purchased a property from QI and MI in 2018. Settlement occurred on 5 September 2018. Since settlement Ms C (for PF Limited) has experienced a number of problems with the property, including with the roof, rangehood and gas regulator. She claims she has suffered loss of $62,056.58, but has reduced her claim to $30,000.00 to fit within the Tribunal's jurisdiction.

2. Although Ms C identified a number of issues in her claim form, at the hearings on 22 October 2020 and 25 March 2021 she confirmed that she was restricting her claim to four items: rangehood; gas regulator; windows; and the roof.

3. QI and MI deny liability for any loss suffered by PF Limited.

4. The issues to consider are:

    a. Was there a breach of clause 7.2 of the agreement for sale and purchase that chattels are delivered in a reasonable working order with regard to the:
        i. Rangehood; and
        ii. Gas regulator?
    b. If so, what is the appropriate remedy?
    c. Was there a misrepresentation that induced PF Limited into the contract with regard to the:
        i. Windows; and
        ii. Roof?
    d. If so, what is the appropriate remedy?

Was there a breach of clause 7.2 of the agreement for sale and purchase that chattels are delivered in a reasonable working order with regard to the rangehood?

5. When QI and MI sold the house to PF Limited, the parties signed an agreement for sale and purchase. That contract sets out the terms of the agreement, which is what each party agreed to do. One of those terms is clause 7.2(1) which states that:

> [t]he vendor warrants and undertakes that at settlement, the chattels and all plant, equipment, systems or devices which provide any services or amenities to the property…..are delivered to the purchaser in reasonable working order.

The clause goes on to state that in all other respects, these items will be in the state of repair as at the date of the agreement.

6. As the applicant it is PF Ltd's obligation to prove its case on the balance of probabilities. In this case, it means that they must show that more likely than not, the rangehood was not in reasonable working order at settlement.

7. I find that the rangehood was not in reasonable working order at settlement. QI and MI stated that although the rangehood was old, it was sucking before they left the property. However, Ms C said that when she turned the rangehood on shortly after settlement, it was not sucking anything out of the room and the room filled with fog.

8. I accept the evidence from Ms C that she arranged for [Company A], an appliance repair specialist, to come and assess the rangehood on 2 October, a month after settlement. The evidence was that [Company A] came and cleaned the rangehood but was not able to fix it. That is because there was a build-up of grease in the venting which caused the motor to fail. Subsequently Ms C purchased a new rangehood and organised [Company B] to install the rangehood.

9. While QI and MI questioned [Company B]'s expertise as being joiners, rather than kitchen repairers, I am satisfied that [Company A] who first assessed the rangehood did have the necessary expertise to conclude that the rangehood required replacement. Ms C stated that she was referred to [Company B] by [Company A] for the installation of the new rangehood.

10. I accept Ms C's point that the fact the work was carried out and a new rangehood installed supports an inference that the rangehood was not in reasonable working order. I also accept that she would not have arranged for [Company A] to check the rangehood if she had simply decided to replace it.

11. I find that it is a reasonable inference that the rangehood was not in reasonable working order at settlement. That is because it was less than a month after settlement that [Company A] assessed the motor as being unable to be fixed. The evidence was that the failure was due to a build-up of grease in the venting, which is an ongoing issue, rather than a sudden failure. While the rangehood may have been working in the sense that it turned on at settlement, clause 7.2 requires that it be in reasonable working order. In my view, Ms C has shown it is more likely than not that this was not the case.

If so, what is the appropriate remedy?

12. The remedy for a breach of contract is for the breaching party to put the other party back in the position they would have been had the contract been performed.

13. In this case I accept Ms C's claim for $757.00, consisting of $92.00 for the original clean and repair, where the issue with the motor was discovered, $349.00 for a new rangehood and $316.00 for dismantling and replacement of the rangehood. In my view, those were the

necessary costs to put PF Ltd into the position it would have been in if the rangehood was in a reasonable working order at the time of settlement.

Was there a breach of clause 7.2 of the agreement for sale and purchase that chattels are delivered in a reasonable working order with regard to the gas regulator?

14. I find that PF Ltd has been unable to show that the gas regulator was not in reasonable working order at the time of settlement. I say this primarily because Ms C stated that she changed the gas bottle approximately one month after settlement. She then stated that after six days it emptied and required another refill. At that point it was clear that there was something wrong, and the regulator was fixed.

15. QI and MI stated that they had had the gas regulator fixed on 6 November 2017, approximately ten months before settlement. They said that usually they changed bottles every six weeks, but realised they had a problem that required this repair when they were going through gas very quickly.

16. It is clear that there had been a problem with the gas regulator prior to settlement, which had been repaired. The indicator of that problem was going through gas very quickly. PF Ltd experienced the same problem approximately one month after settlement. In my view, that indicates that the particular problem that required repair in 2017, and again one month after settlement in 2018 was not present at the time of settlement. Therefore, PF Ltd has been unable to prove that the gas regulator was not in reasonable working order at the time of settlement.

17. In reaching this conclusion I have taken into account the evidence from Ms C that when the plumbers came to repair the gas regulator, they told Ms C that it was at the end of its life and replacement was a better solution. Clause 7.2 only requires that a chattel is delivered in reasonable working order, but otherwise in the state of repair as at the date of the agreement. In some respects, Ms C is right to characterise this as unfortunate timing that the regulator failed after settlement, rather than before.

18. Ms C also said she had smelt gas on the day of the walk around before purchase, and that she discussed this with MI. She said that supported a finding that the gas regulator was not in reasonable working order, both before the contract was signed and at settlement. However, MI's evidence was that the discussion about the gas smell took place at the kitchen table and related to a gas smell that was present when QI and MI bought the property. MI said she told Ms C that that issue had been resolved when QI and MI replaced the stove. In any event, any evidence about gas smells does not assist in establishing whether the regulator was in reasonable working order at the time of settlement, as it is not possible to conclude with any certainty the source of any smell.

19. As I have found there was no breach of clause 7.2 regarding the gas regulator, there is no need to consider a remedy.

Was there a misrepresentation that induced PF Limited into the contract with regard to the windows?

20. 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 and may be innocent or fraudulent. A statement of opinion is not generally considered to be a misrepresentation, except if it carries with it representations of past or present fact. A seller is not obliged to point out faults or problems, but statements made and answers to questions by the seller can be relied on and can amount to a misrepresentation, if false or misleading.

21. Ms C said that when QI and MI were asked if there was any deferred maintenance or if the maintenance was up to date, they responded that maintenance was up to date and that they

addressed anything they needed to. Ms C noted that she asked two or three times, and the answer was always the same. Ms C said those responses induced her to be confident about confirming the agreement, thinking that everything was up to date.

22. QI and MI agreed that when they talked about maintenance with Ms C they would have said something like that, as they did not believe they had any major issues with maintenance. They said that maintenance was ongoing, and that when they came across things that required fixing, they did so. However, they did not say that they were completely on top of all issues. In other words, QI and MI said any statements they made were true.

23. I find that PF Ltd has been unable to show that QI and MI misrepresented the state of maintenance of the house. That is because PF Ltd has been unable to show that the statements made by QI and MI were false.

24. Ms C acknowledged that there can be different ideas about what up-to-date maintenance meant. She said that as a property investor, her standards were probably higher. She said that if QI and MI had been vigilant about maintenance, they would have noticed the problems with rot in the windows in the laundry, landing toilet and the maple room that she was now claiming for.

25. While more vigilance might have resulted in those issues being discovered, the statements made by QI and MI did not amount to an assurance that they were "vigilant" about maintenance. Instead, QI and MI expressed their opinion that when they noticed issues, they fixed them. That did not amount to a representation that there was no maintenance required on the property at the time of purchase.

26. This conclusion is supported by Ms C's evidence that she was not saying QI and MI knew the maintenance needed to be done, but rather that she was surprised that they would be that unobservant with their own property. However, she also accepted that it was surprising that she had not noticed the fallen glass in the window in the maple room during her inspections of the property.

27. In reaching the conclusion that PF Ltd has failed to prove that statements made by QI and MI were not true, I also rely on the building report obtained by Ms C prior to settlement. That report identified a number of issues that required remedy (and on the basis of which PF Ltd negotiated a reduced purchase price), but went on to conclude:

> This Grade 2 listed house was found to be in a good condition both inside and out and has been very well maintained for a house of its age. Once maintenance items listed above have been attended to, only normal ongoing maintenance will be required in the future for a house of this age.

28. While Ms C said that she did not agree with this statement in the building report and questioned the overall quality of the building report, it does supply independent expert evidence from the time of the sale that indicates that, on the whole, the property had been maintained.

Was there a misrepresentation that induced PF Limited into the contract with regard to the roof?

29. Ms C said that when she spoke to QI and MI after she had received the building report, she asked them specifically about the roof, or whether there were any leaks or any problems and they responded that it was fine. She said that this, in combination with their representations that maintenance was up to date induced her into the contract as she felt confident the roof had been maintained. Ms C said she knew that the south side of the roof had been replaced by QI and MI because of the building report, and that QI and MI may also have told her it had been replaced.

30. QI and MI said that to the best of their knowledge, the rest of the roof was fine and they had not had any problems with it. They stated that they had the south side of the roof replaced in 2014

when they purchased the property because it was identified as needing replacement in the building report they obtained prior to purchase. QI and MI gave evidence that they had been told in 2014 by the roofers replacing the south side of the roof that the rest of the roof was fine.

31. However, I accept the evidence from Mr KU, the roofer who undertook repairs in 2014 and again in 2019 that the roof was in poor condition and needed replacement. He said that in 2014 the roof was falling to pieces and rusting, and it was his observation of it at that time which lead him to conclude that it would require replacement soon.

32. This evidence was in contrast to the building report obtained by Ms C, which outlined the repairs made to the south side of the roof (and some other aspects), but went on to say that "the rest of the roof appears to be in a good condition". I reject this evidence about the state of the roof in the building report. That is because I consider that KU's evidence, as a qualified roofer, rather than a builder, is likely to be more accurate. I also accept KU's opinion that you probably could not tell if the rest of the roof needed to be replaced from the ground. Although it is not clear whether the building report relied on a visual inspection from the ground, I consider KU's evidence, in combination with the fact that the roof has now been replaced, to establish that the roof was not in good condition at the time of the sale of the property.

33. However, I find that PF Ltd has been unable to establish that QI and MI made a misrepresentation about the state of the roof. That is because, when I consider the meaning that could be taken from the statements made by QI and MI, it has not been established that there was a clear and unequivocal statement by them that the roof did not require any work.

34. I say that because while Ms C said that she was told by QI and MI that the roof was fine, QI and MI did not accept that those were their exact words. QI said that when Ms C asked about the condition of the roof they responded by reiterating that when they bought the house the south side needed attention, which they got fixed and that they did not have any other problems and they had never had any problems with the roof leaking at all. Both QI and MI said that there was nothing wrong that they were aware of.

35. Obviously this evidence differs from Ms C's evidence about what she was told. In essence, the only available evidence before me about what was said at the time is the oral recollections of the parties, which differs on the key point. In this situation, I am unable to find that Ms C has proven that it is more likely than not that QI and MI made an unqualified statement that there were no problems with the roof.

36. In addition, I have found that the statements made by QI and MI regarding the maintenance being up to date did not amount to a misrepresentation. As outlined above, I have found that those comments did not amount to a clear representation that there was no outstanding maintenance, but rather was a statement of QI and MI's opinion that as they became aware of issues, they fixed them. QI and MI's evidence was that they had been told when the south side of the roof was fixed in 2014 that the rest of the roof was fine, and therefore they were not aware of any problems with it.

37. At the second hearing on 25 March 2021 Mr KU, the roofer who replaced the south side of the roof in 2014 appeared by telephone. He gave evidence that at the time the roof was replaced in 2014 he said in passing to the owner, QI, who was up on the scaffolding painting the fascia boards, that in the next five years the rest of the roof would need replacing.

38. QI did not agree with this version of events. He said that he was afraid of heights and so would not have been on the scaffolding painting fascia boards. He said that one of the roofers asked him to come up on the scaffolding to look at a squashed downpipe, and that his wife, MI, agreed to come with him. They went up onto the scaffolding and asked about the rest of the roof. The response was that it was fine.

39. Clearly there are two differing versions about what was said in 2014. KU did not appear in person at the hearing, so it was not possible for KU to confirm that it was actually QI he spoke to, or vice versa. Given the disparity in the evidence, I am unable to find that PF Ltd has

proven it is more likely than not that QI and MI were told that the rest of the roof required replacement. Therefore, PF Ltd has not been able to show that any statement made by QI and MI to the effect that they did not know of any issues, was a misrepresentation.

Referee: Souness - DTR
Date: 19 April 2021

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 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 days of the decision having been made. There is a $200 filing fee for an appeal.
You can only appeal outside of 20 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.