

BETWEEN

DQ
APPLICANT

AND

VJ
RESPONDENT

AND

VJV LIMITED
SECOND RESPONDENT

Date of Order:

8 September 2015

Referee:

Referee Ashcroft

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the claim is dismissed.

Facts

[1] In April 2012 VJ listed his property at AAA Street, BBB for sale with VJV Limited. On 7 June 2012 DQ and VJ signed an agreement for sale and purchase of the property for \$179,000. Settlement took place on 6 July 2012. DQ is unhappy about water that lies on the driveway and footpath after heavy rain. On 5 July 2015 he filed a claim in the Tribunal for \$6,000 from VJ and VJV Limited.

[2] At the hearing CC appeared for VJ who was overseas and unable to attend the hearing.

Issues

[3] The issues are:

- a. Was the property misrepresented? and/or
- b. Was DQ misled by VJV? and
- c. If so; what damages are recoverable?

Was the property misrepresented?

[4] This is a contractual dispute. The Contractual Remedies Act 1979 and the Fair Trading Act 1986 apply. DQ as the applicant has the onus of establishing his claim on the balance of probabilities.

[5] Section 6 of the Contractual Remedies Act provides (1) If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract - (a) he shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken.

[6] Under that Act the other party to the contract VJ may be liable to DQ if VJ or his agent VJV Limited misrepresented the condition of the property and in doing so induced VJ to enter the contract on the basis of that misrepresentation.

[7] I have regard to DQ's argument that the property at AAA Street has a flooding or drainage issue that was not disclosed by either VJ or VJV Limited. DQ relies on the terms of the agreement for sale and purchase and a letter he received from VJ dated 10 August 2012, shortly after settlement, which states

"... One thing to be aware of – you might have discovered it already, it depends how much rain you've had – is that after a number of days of heavy rain the driveway and bottom of the lawn next to the concrete plinth and garage can get covered in water. So if you are planning on replacing the garage it would be a good idea to raise the floor by 2 or 3 inches and perhaps put a drain in running to the road. A project of mine that was 'in the pipeline' for me..."

[8] The property is a low lying flat section in BBB. There is no evidence that water tables, surface water, the potential for water to pond, to not drain quickly or to flood were discussed by any of these parties in 2012 prior to the agreement being signed.

[9] The agreement for sale and purchase was subject to DQ being satisfied with the report of a registered builder. He had independent legal advice at the time and the opportunity to do his due diligence. The reasonable consumer test and the principle 'let the buyer beware' apply.

[10] The eighth edition agreement for sale and purchase of real estate sets out the express terms and conditions of the sale and purchase between VJ and DQ. Clause 6 of the agreement sets out the Vendor (VJ's) warranties and undertakings. The terms of the agreement for sale and purchase do not provide blanket protection for a purchaser such as DQ in circumstances such as these where water lies on the drive and path after heavy rain as the surface water is not entering the garage or house.

[11] There is no evidence that the water that lies on DQ's property after heavy rain is any different to that which his neighbours in the same area experience.

[12] I am not satisfied on the evidence that the property was misrepresented. DQ cannot succeed in its action against VJ and VJV in that regard.

Was DQ misled by VJV Limited?

[13] DQ raised the Fair Trading Act. Section 9 of the Fair Trading Act provides that no person shall, in trade, engage in conduct that is misleading or deceptive or is likely to

mislead or deceive. A claim under the Fair Trading act must be brought within 3 years after the date on which the loss or damage, or the likelihood of loss or damage was discovered. This claim is within that time frame as loss, if there is any, would have been first discoverable on an occasion of heavy rain that persisted for two or three days continuously, after settlement on 6 July 2012.

[14] VJV Limited is in trade.

[15] VJ is not in trade; the Fair Trading Act argument does not apply to him.

[16] If VJV Limited engaged in misleading and deceptive conduct in trade then under section 43 of the Fair Trading Act DQ may be entitled to recover the loss or damage he suffers as a result of that conduct.

[17] VJ's listing agreement with VJV Limited warranted to them that he was unaware of any defect in the property that would affect its weather tightness, habitability or durability and that he had not withheld any material information known to him that related to the property.

[18] There is no evidence that VJV Limited had any prior knowledge of any defects with the property. No defects were disclosed by VJ when listing the property and there were no circumstances or occasions which could have alerted it to any issues with it.

[19] I find that VJV Limited did not engage in conduct that was misleading or deceptive or was likely to mislead or deceive in relation to the sale of VJ's house to DQ.

[20] The claim is dismissed.

[21] I do not therefore need to consider whether the damages claimed by DQ were reasonable or whether there were outstanding maintenance issues that had contributed to the deterioration of the driveway and path over the last three years,