

BETWEEN

**DO LIMITED
APPLICANT**

AND

**VL
RESPONDENT**

Date of Order:

11 February 2014

Referee:

Referee Paton-Simpson

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that VL is to pay \$770.00 to DO Limited on or before 19 February 2014.

Facts

[1] VL engaged DO Limited (“ABC”) to value two lifestyle blocks one was in Z Road, which she was selling and the other in Y Road, which she was purchasing.

[2] AA, a registered valuer from ABC, visited the properties on 12 September 2013, and produced a valuation report on each property.

[3] VL used both reports to obtain finance and paid the part of the contract price relating to the Y Road valuation. However, she has not paid the \$920.00 relating to the Z Road valuation due to various complaints about the work that was done on both properties.

[4] ABC now claims \$970.00, comprising the \$920.00 remaining unpaid together with debt collection costs of \$50.00.

Issues

[5] The issues to be decided are:

- a. Can VL’s complaints be considered by way of set-off?
- b. Were the valuations performed with reasonable care and skill?
- c. Did the valuer conduct herself in a professional manner?
- d. Did the valuer breach the contract by revealing confidential information?
- e. What deduction, if any, should be made from the sum owing?
- f. Can ABC recover debt collection costs?

Can VL's complaints be considered by way of set-off?

[6] In certain circumstances, a cross-claim can be relied on as a defence to a claim. This is known as a defence of set-off. A cross-claim can be treated as a set-off rather than a counterclaim if two conditions are met:

- a. It would be manifestly unjust for the claim to be enforced without regard to the cross-claim; and
- b. There was a close relationship between the dealings and transactions which gave rise to the respective claims.
- c. VL's complaints arise out of the performance of the valuations, and it is just for me to consider them as a defence to the claim for the remainder of the contract price.

[7] Although VL paid the part of the contract price relating to one property and not the other, her complaints relate to both valuations. She wishes to treat the \$920.00 still owing as the remainder of a lump sum for two valuations, and set off her claims relating to both valuations against the remaining debt.

[8] I accept that it is appropriate to treat the arrangements between the parties as a single contract to value two properties, since the valuations were arranged together, they were performed one after the other on the same day, and a discount was given for valuing two properties.

Were the valuations performed with reasonable care and skill?

[9] VL raised concerns about the thoroughness of the work performed, the time taken on site, and various errors and omissions in the reports.

[10] Section 28 of the Consumer Guarantees Act 1993 implies a guarantee that services will be performed with reasonable care and skill.

[11] VL pointed to various claims on the website of the ABC franchise about its very high professional standards. While I accept ABC's description of some of these claims as "marketing speak", there are also claims about the level of detail and itemisation in its reports. For example, the website stated that ABC reports "provide an exceptional amount of information" including "a detailed description of ... every feature of the property".

[12] These claims raise an expectation that reasonable care will be exercised not only in obtaining an accurate valuation figure but also in the detail of the reports.

[13] Some of the perceived inaccuracies listed by VL could be open to interpretation, such as whether a building is called a shed or a pumphouse, which ABC observed was a difference in use rather than structure.

[14] However, in some cases the issues raised revealed if not inaccuracies then inadequacies of description. And some items in the report did seem to be inaccurate, such as a reference to a single rather than double roller door on a garage. Also the table of site improvements, perhaps based on a template, listed a large pergola and stone fencing together with their condition, even though VL said the property did not actually have a pergola or stone fencing.

[15] There was conflicting evidence about whether the valuer “walked” the property, or just took photographs from the deck of the house. I was unable to determine this matter on the evidence before me.

[16] There was also discussion about the amount of time the valuer spent at each property. Based on the evidence ABC gave of the timing of photographs, it seems she spent around an hour at Z Road, and fifty minutes or more at Y Road. ABC pointed out that inspection time is a small part of the time spent on a valuation, and said that forty-five to ninety minutes is usual. The time spent may have been towards the lower end of this range, especially for lifestyle blocks, but I am unable to conclude that the valuation was rushed.

[17] There was no question raised over the level of skill employed. However, for the reasons given, I find that the valuer breached the contract by failing to take reasonable care over some minor matters of detail and description.

Did the valuer conduct herself in a professional manner?

[18] Under the Valuers Act 1948, s 11(2), registered valuers are members of the New Zealand Institute of Valuers, and are required to work under its Code of Ethics.

[19] The Code of Ethics Rule A6 provides: “Members shall conduct themselves in a manner and demeanour which is neither detrimental to their profession nor likely to lessen the confidence of clients or the public in the Institute or the profession.”

[20] I therefore find that there was an implied term in the contract that ABC valuers would conduct themselves in a professional manner.

[21] VL claimed that the valuer had been rude and abrupt. She produced an email she received from a property manager who was showing tenants through the Y Road property when the valuer arrived. The email was critical of the valuer's demeanour and attitude, and expressed the view that she was not very professional.

[22] It seems clear that a somewhat unpleasant interaction took place. However, ABC pointed out that there was some annoyance on both sides due to the timing to suit the sales agent. Taking that into account, and given the element of subjectivity in the evidence, I am unable to determine whether the valuer's conduct on this occasion fell short of the high standards of professionalism expected.

Did the valuer breach the contract by revealing information to the real estate agent?

[23] VL also complained about what she saw as a breach of her privacy by the valuer, and it was this issue which had most upset her.

[24] The valuer had measured VL's dwelling at Z Road and found it to be 348 square metres. This differed from the size shown on the rating database, and VL's real estate agent had advertised it as being 450 square metres. The valuer advised the real estate agent of the discrepancy.

[25] The Tribunal does not have jurisdiction under the Privacy Act 1993, and in any case I note that it is questionable whether information about the size of a residential property on the market qualifies as "personal information". However I have considered whether the valuer may have breached the terms of the contract by revealing the information.

[26] The New Zealand Institute of Valuers Code of Ethics Rule B6.1 provides: "Members shall not disclose to any other person or party any confidential information provided directly or indirectly by a client or to a client without the permission of the client except where there is a legal requirement for disclosure or the information is of public or common knowledge."

[27] I find that there is an implied term in the contract that ABC would abide by the Code of Ethics in regard to confidential information.

[28] ABC argued that the valuer advised the agent of the inaccuracy as a courtesy, since real estate agents are obliged to describe a property accurately. It pointed out that real estate agents and valuers often share information that is in the public domain, such as dwelling size, in the course of their work, and there is an important relationship and rapport between them.

[29] It is true that dwelling size is usually in the public domain. Although in this case the public information on the rating database was inaccurate, the correct size belonged in the public domain and could not constitute confidential information. It was also important that the public advertisement be corrected, since advertising the wrong size could leave both VL and her agent exposed to legal liability.

[30] However, VL acknowledged that what upset her most was that the valuer told her agent about the discrepancy without first consulting VL herself. Whether or not this breached the duty to properly handle confidential information, I find it to be a breach of the high standards of professionalism expected under the contract. The valuer should have first consulted VL as the client in case she had some relevant comment on the measurements, and to give VL the opportunity to decide how best to handle the matter, including the opportunity to contact her real estate agent herself.

What deduction, if any, should be made from the sum owing?

[31] The damage caused by ABC's failing to consult VL before disclosing the measurement information was in the nature of injury to feelings. In the hearing, ABC offered its unreserved apology for its handling of the measurement issue. Damages for injured feelings are generally regarded as too remote in breach of contract cases, and I do not find an exception in this case. I therefore find that nominal damages of \$10.00 should be deducted for this breach.

[32] Regarding the failure to take reasonable care over minor matters of detail and description, the appropriate measure of damages is the difference between the market value of the reports VL received, and the market value of the reports she should have received.

[33] I accept ABC's arguments that these were minor details in lengthy reports, that the detail did not materially affect the valuation figures, that details about features further from the main dwelling have a diminished effect on property value, that numerous photographs supplemented the detail, and that the reports served VL's purpose of obtaining finance.

[34] On the other hand, ABC holds itself out as offering “an exceptional amount of information” and might be expected to command a price premium for the higher level of service offered. VL was paying for a detailed report, not just an accurate figure for finance purposes, and she may have wished to use the report for other purposes for which valuations are commonly used, even if it was just to assure herself that the properties were correctly priced.

[35] Taking all these factors into account, I find that damages of \$140.00 should be deducted for this breach, bringing the total deductions to \$150.00.

Can ABC recover debt collection costs?

[36] I decline to grant debt collection costs on the grounds that this matter could have been brought directly to the Tribunal, since VL had disputed the debt.

[37] Therefore VL is required to pay \$770.00 to ABC, being the \$920.00 of the contract price remaining unpaid less deductions of \$150.00 for breaches of contract.