

**BETWEEN**

**AAZ**

FIRST APPLICANT

**AND**

**ABA**

SECOND APPLICANT

**AND**

**ZZE**

FIRST RESPONDENT

**AND**

**ZZD LTD**

SECOND RESPONDENT

Date of Order:

25 February 2013

Referee:

Referee Blake

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that the claim is dismissed.**

## **Facts**

[1] On 6 August 2012, AAZ and ABA visited BC in [a place]. ABA viewed several pieces, including a cast glass sculpture by FC, entitled XY. ABA discussed this piece and other pieces with the gallery owner ZZE. With ZZE's consent, ABA took photographs of XY.

[2] On 10 August 2012 ABA telephoned the gallery and agreed to purchase XY.

[3] The piece was delivered to ABA's home by the artist on 18 August 2012.

[4] AAZ and ABA were very surprised by the appearance of the piece when it was delivered, in particular by the appearance of numerous bubbles and "veiling" in the glass, and a marked difference in colour.

[5] Their claim seeks cancellation of the contract – return of the piece to BC and refund of the purchase price.

## **Issues**

[6] The issues are:

- (i) Was the piece that was delivered to ABA the same piece that she viewed and agreed to purchase at BC gallery?
- (ii) Did BC engage in misleading and deceptive conduct by displaying the piece in a manner so as to conceal the bubbling and veiling?
- (iii) Are the goods of "acceptable quality"?
- (iv) Does BC's duty to exercise "reasonable care and skill" impose an obligation on them to advise ABA about the bubbling and veiling?

## **Law**

[7] The law is the Consumer Guarantees Act 1993 and the Fair Trading Act 1986.

## **Decision**

*Was the piece that was delivered to ABA the same piece that she viewed and agreed to purchase at BC's gallery?*

[8] I accept that AAZ and ABA were genuinely astonished by the difference between how the piece appeared at the gallery and how it looked in their home.

[9] An explanation of that difference could be that the piece delivered to her was different to the piece that she viewed in the gallery.

[10] However, to the extent that it was suggested or implied that the gallery "swapped" the piece and delivered an inferior version to AAZ and ABA, I do not agree that this is proven. The suggestion amounts to an allegation of fraud (the "switch" could only be done intentionally) and I would require persuasive evidence before making such a finding.

[11] In my view, a more persuasive explanation for the genuine difference in appearance is that light has a significant effect on the visual characteristics of glass sculpture.

[12] Further, the suggestion that the piece was swapped is directly rebutted by FC's verbal evidence that the piece is unique.

[13] Therefore, I am satisfied that the sculpture delivered to AAZ and ABA was the same one that ABA saw in the gallery on 6 August.

*Did BC engage in misleading and deceptive conduct by displaying the piece so as to conceal the bubbling and veiling?*

[14] AAZ and ABA submitted that the gallery intentionally concealed the existence of the bubbling and veiling by use of underlighting, by failing to disclose the existence of the bubbling and veiling, and by failing to suggest that ABA view the piece in full sunlight.

[15] Section 10 of the Fair Trading Act 1986 states that “no person shall in trade engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods”.

[16] The question of whether there was a positive duty on the gallery to display the piece so that the bubbling could be seen, or to verbally advise ABA about the bubbling, is discussed further below.

[17] However, on the particular question of whether the gallery engaged in conduct that was liable to mislead, I do not agree that this is proven.

[18] It is true that the piece was displayed on an underlit plinth in the window of the gallery. It is also true that underlighting is less likely to reveal the bubbles in the piece than lighting from above. However, it is a long step from those facts to a conclusion that ZZE displayed the piece in a misleading way.

[19] I accept ZZE’s evidence that the pieces are rotated around the gallery in a fairly random manner and that her intent is to display and not to conceal.

[20] The language of s 10 – that no person shall engage in conduct that is liable to mislead the public – suggests that what is prohibited is a type of activity that is liable to confuse the public or encourage the public to believe something that is not true. Examples that have previously come before the courts are:

- (i) Bed heads that were advertised as brass, but were in fact mild steel with a brass coating (*Commerce Commission v A & W Hamilton Ltd* (1989) 3 TCLR 98);
- (ii) Jeans that were advertised as “Rodeo Tested” and had badges on them marked ‘1953 Mudgee Rodeo’ and ‘1957 Lithgow Rodeo’ but in fact the brand was first manufactured in 1983 (*Levi Strauss & Co v Robertsons Ltd* (1989) 3 TCLR 349);
- (iii) Easter eggs that were advertised as “real chocolate marshmallow eggs” but were in fact not egg-shaped but flat on one side (*CC v Sweetline Distributors Ltd* (1993) 5 TCLR 374).

[21] I do not agree that BC’s “conduct”, in lighting their shop and locating objects for sale within it, is analogous to the above examples.

[22] Therefore, I find that BC has not breached the Fair Trading Act.

*Are the goods of “acceptable quality”?*

[23] The goods are of a type that are ordinarily acquired for domestic or household use, and the seller is a person in trade. The Consumer Guarantees Act 1993 applies.

[24] That Act states that goods must be of acceptable quality, which is defined as follows:

**7 Meaning of acceptable quality**

- (1) For the purposes of section 6, goods are of **acceptable quality** if they are as—
- (a) fit for all the purposes for which goods of the type in question are commonly supplied; and
  - (b) acceptable in appearance and finish; and
  - (c) free from minor defects; and
  - (d) safe; and
  - (e) durable,—
- as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, having regard to—
- (f) the nature of the goods;
  - (g) the price (where relevant);
  - (h) any statements made about the goods on any packaging or label on the goods;
  - (i) any representation made about the goods by the supplier or the manufacturer;
  - (j) all other relevant circumstances of the supply of the goods.

[25] The Act also applies to the provision of services. The Act states that a service provider must exercise “reasonable care and skill” (s 28).

[26] AAZ and ABA submitted that the piece was not of acceptable quality because of the extent of bubbling and veiling which, in their view, rendered it an inferior quality piece.

[27] On this point, I have had regard to the evidence of NY and SD as well as to the submissions of the parties.

[28] Having regard to that evidence, I make the following comments:

- (i) A degree of bubbling in cast glass is inevitable, particularly in ‘closed cast’ as opposed to ‘open cast’ pieces.

- (ii) Whilst bubbles cannot be avoided, the process of casting the glass may have, as one of its purposes, the goal of reducing the amount of bubbles.
- (iii) As much as bubbles may be intentionally reduced, bubbles may be intentionally retained or intentionally increased. Bubbles can be one of the means of expression for the glass artist, just as texture or colour or form may be a means of expression.
- (iv) NY submitted that the general public perception of bubbles in glass is that they are a defect and they generally make a work less desirable. SD took a different view. It is unclear whether artists generally think of bubbles as a problem to be avoided, a feature to be emphasised, or a characteristic to be accepted.

[29] The obvious difficulty here is that the principle of acceptable quality requires a theoretical standard of “good” so that something can be compared against that standard and deemed to be “not good” or at least “not good enough”. That is relatively simple when the object is a lawnmower or a TV or an outboard motor. It is very difficult when the object is a piece of art.

[30] It is proper for this Tribunal to make a finding that a company should produce an outboard motor that does not rust after six months in the water. It is not proper for this Tribunal to make a finding that SD should have produced a sculpture that had fewer bubbles and no veiling, or that a sculpture with fewer bubbles would have been “better”, more desirable, or more valuable.

[31] Because of this genuine subjective disagreement as to whether bubbles in glass are a defect, I do not agree that it is proven on an objective basis that the goods are not of “acceptable quality”.

*Does BC’s duty to exercise “reasonable care and skill” impose an obligation on them to advise ABA about the bubbling and veiling?*

[32] Even if the question of whether bubbles are a defect is a subjective one and “beauty is in the eye of the beholder”, the essence of ABA’s dissatisfaction was that she was not given the opportunity to behold the bubbles and make an informed decision about whether she found them beautiful or not.

[33] She was not aware of their existence until after she purchased the piece.

[34] This raises the question of whether the law imposed a positive legal duty on ZZE to “disclose” the bubbles and veiling, either by lighting the piece so that the bubbles were obvious, or by talking to ABA about them, or by recommending that ABA take the piece into natural light before deciding whether or not to buy it.

[35] I am constrained by the terms of the relevant law. For the sake of this analysis I am prepared to assume that BC provided a combination of goods and services to ABA – the goods being the sculpture itself and the services being the advice and information provided by ZZE.

[36] The Consumer Guarantees Act 1993 requires service providers to exercise “reasonable care and skill”. Therefore, the question is not whether it would have been wise for ZZE to disclose the bubbles and veiling, nor whether it would have been good customer service for her to do so. The question is only whether her failure to do so amounted to a breach of her duty to exercise reasonable care and skill.

[37] I do not agree that it was a breach.

[38] ZZE does not know and cannot be reasonably expected to know the particular aesthetic concerns of her customers. She cannot know the details of the environment that the customer may put an artwork into. Light can affect glass in various ways, and it can also affect other types of art in various ways. To impose a duty on the seller to show a piece or explain how a piece may look in a range of different circumstances is to impose an unreasonable burden on a seller.

[39] ABA gave an example of purchasing some cushions from a store in [a town], which she found did not properly match her furnishings when she got them home. ABA used the example to illustrate her point that it is sensible and good commercial practice for the seller to allow for this and accept the goods back from the customer in those circumstances. I agree that it is. However, that is a different thing from imposing a legal duty on the vendor of the cushions to explain to its customers that the colour of the cushions may look different when put on different

coloured couches or in different light environments, or that the pattern on the cushion may look different when put on different patterned couches.

[40] There are too many possible variables in terms of the goods themselves, the environment in which the goods are to be put, and what the purchaser considers important or not important. Those judgments must be left to the purchaser themselves, and what cannot be judged must be treated as a risk that is assumed by the purchaser. To shift the burden to the seller to advise the buyer on those matters is, in my view, to impose an unreasonable burden on the seller.

[41] Therefore, I find that BC did not breach its duty to exercise reasonable care and skill.

[42] For the reasons given above I find that the claim is dismissed.