

BETWEEN

ABH

APPLICANT

AND

ZYV Ltd

RESPONDENT

Date of Order:

28 May 2013

Referee:

Referee A Davidson

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ABH's claim is dismissed. Pursuant to s 11(2)(b) of the Disputes Tribunals Act 1988 ABH must pay ZYV Ltd \$80.00 (incl GST) within 10 days of today's date.

Facts

[1] In 2010, ABH purchased a roller blind from a third party called JI Ltd. JI Ltd's name is confusingly similar to ZYV Ltd's name and ZYV Ltd explained in its submissions that ZYV Ltd was, at one point, in fact part of JI Ltd.

[2] ABH had a problem with her roller blind which JI Ltd fixed under warranty. When ABH had another problem with the blind in October 2012, she meant to call JI Ltd again so that it could once again be repaired under warranty. ABH confused ZYV Ltd and JI Ltd's Yellow pages listings however and mistakenly called ZYV Ltd instead. ZYV Ltd, unaware of the mistake, attended to the issue with ABH's roller blind and issued her with an invoice.

[3] ABH has refused to pay the invoice. Firstly, she argues that she was misled by the similarity between the two companies' names into believing that she was dealing with the original supplier, JI Ltd. Secondly, she claims that she quoted the JI Ltd reference number when she called ZYV Ltd and so ZYV Ltd would have known that she had called them by mistake. Finally, she argues that ZYV Ltd did not disclose to her over the phone, or at least in advance of their visit, that there would be a callout fee.

[4] ABH seeks a declaration of non-liability from the Tribunal under s 10(1)(b) of the Disputes Tribunals Act 1988.

Issues

[5] The issues are:

- (i) Is ABH obliged to pay ZYV Ltd's invoice?
- (ii) Can ZYV Ltd charge ABH a late payment fee?

Decision

Is ABH obliged to pay ZYV Ltd's invoice?

[6] ABH argued that she should not have to pay ZYV Ltd's invoice because she did not mean to call ZYV Ltd. I find that ABH is obliged to pay ZYV Ltd's invoice because she entered into an agreement with ZYV Ltd, albeit mistakenly, and ZYV Ltd undertook work on the strength of that contract and accordingly is entitled to be paid.

[7] It was suggested during the hearing that ABH may receive some protection under the Contractual Mistakes Act 1977. I find that the Contractual Mistakes Act 1977 does not apply in this case as ABH's mistake was not one of the types of mistake covered by s 6(1)(a) of that Act. ABH argued that ZYV Ltd should have appreciated that she was mistaken as to whom she was talking to because she mentioned that the blinds were still under warranty and provided a reference number. ZYV Ltd disputes that either were mentioned and notes that if ABH did have the reference number from JI Ltd's invoice she would also have had their phone number and would not have had to look it up in the Yellow Pages. As the applicant, the burden of proof lies with ABH and, in the absence of any evidence to substantiate what was said, I find that she has been unable to show on the balance of probabilities that she told ZYV Ltd that the blinds were under warranty or provided a reference number.

[8] ABH argued that there may have been a misrepresentation for the purposes of the Contractual Remedies Act 1979, or that ZYV Ltd engaged in misleading conduct or made a false representation for the purposes of the Fair Trading Act 1986. I find that there was no misrepresentation under the Contractual Remedies Act 1979; ZYV Ltd never represented that there was any company other than themselves. For the same reason, I find that there was no false representation under the Fair Trading Act 1986.

[9] Misleading conduct in relation to services is addressed by s 11 of the Fair Trading Act 1986 which provides:

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.

[10] I accept that ZYV Ltd and JI Ltd's names are confusingly similar and it is inevitable I think that members of the public will in fact mistake one for the other. ZYV Ltd may have invested heavily in advertising to distinguish themselves but, even so, there will still be many people, such as myself for example, who had not worked out that there were actually two separate and unrelated companies. While the two companies' names may be confusingly similar, I find that this does not fall within the scope of s 11 of the Fair Trading Act 1986. That section is only concerned with conduct liable to mislead the public as to the nature, characteristics, suitability or quantity of a service. Section 11 does not extend to conduct liable to mislead the public as to the supplier of the service which is ABH's complaint. Such conduct falls more into the realm of the law of passing off; however, that falls outside the Disputes Tribunal's jurisdiction. On the basis of the foregoing, I find that ABH does not have a remedy under the Fair Trading Act 1986.

[11] ABH also argued that she should not be required to pay ZYV Ltd's charges as they were not discussed in advance. The law does not require parties to have agreed a price in advance. Where a price is not agreed in advance, the law has always been willing to imply a term that the price charged will be reasonable. This is reflected in more recent consumer protection legislation, such as the guarantee as to reasonable price under the Consumer Guarantees Act 1993. I find that ZYV Ltd's failure to mention its charges does not mean that it is unable to charge for its services, and, in the absence of any evidence to the contrary, there is no basis for finding that ZYV Ltd's charge of \$80.00 (incl GST) to attend ABH's home and repair her blinds is unreasonable.

Can ZYV Ltd's charge ABH a late payment fee?

[12] ZYV Ltd has sought to charge ABH a \$20.00 late payment fee. The terms of the agreement between the parties crystallised when the contract was formed. This was when ZYV Ltd agreed to repair ABH's blinds. At that point, charges had not been discussed and no reference was made to a late payment fee. For this reason, I find that payment of a late payment fee was not part of the agreement. A late payment fee is not necessary for the commercial efficacy of the arrangement between the parties and so I find there is no reason that it should be implied. On this basis, I find that ZYV Ltd's attempt to charge a late payment fee amounts to a unilateral attempt to revise the terms of the agreement and, as such,

is unenforceable. For this reason, I find that ABH is not liable to pay the \$20 late payment fee.

Conclusion

[13] Pursuant to s 11(2)(b) of the Disputes Tribunals Act 1988, I find that ABH must pay ZYV Ltd's charge of \$80.00 in relation to the repairs that ZYV Ltd made to her fallen blind.