

BETWEEN

ABY

APPLICANT

AND

ZYF Ltd

RESPONDENT

Date of Order:

17 September 2013

Referee:

Referee Hannan

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the Respondent, ZYF Ltd, pay directly to the Applicant, ABY, the sum of \$610.00 on or before 17 August 2011. The Respondent is entitled to retain possession of the Acer computer in question.

Facts

[1] The Applicant purchased an Acer computer from the Respondent on 2 April 2011. The Applicant claims that the computer has a fault of a substantive character as it failed four times in 8 weeks. The Applicant seeks to cancel the contract and get a full refund of the purchase price, \$610.00 including \$52.17 plus GST for data transfer.

[2] The Respondent admits that the computer failed once, in that a cable was loose, but denies liability for the three subsequent failures, claiming that these were the result of software failures caused by the Applicant's use of the computer. The Respondent is willing to repair the computer at no cost but does not accept that it must cancel the contract and return the purchase price.

Law

[3] The relevant law is the law of contract and the Consumers Guarantees Act 1993 (CGA).

[4] A contract is a legally binding promise or agreement; an act in law where two or more persons declare their consent as to any act or thing to be done or forborne by one side for the benefit of the other side.

[5] The transaction is governed by the CGA because the goods supplied by the Respondent to the Applicant were of a kind ordinarily acquired for personal use. In terms of the CGA, goods supplied to a consumer must be of acceptable quality. They must be fit for the purpose for which goods of this type are commonly supplied, acceptable in appearance and finish, free from minor defects, safe, and durable.

[6] Further, the Act provides that where the consumer has a right of redress against the supplier he/she must provide the supplier with an opportunity to remedy the failure within a reasonable time. It is only after the supplier has failed to remedy the fault that the consumer is

entitled to have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred. For the consumer to be able to reject the goods, the fault must not be able to be remedied or must be of a substantial character.

Decision

[7] I have carefully considered this matter. The Applicant does not wish to have the computer repaired as she claims to have lost trust in it. The Respondent is clear that it is willing to repair but not refund.

[8] The CGA is clear that the supplier must be given an opportunity to remedy, but the test is measured by reasonableness. In this case, I find that the computer did develop faults and that the Applicant returned the computer four times for repair. Whereas I accept that the Respondent repaired the computer three times within a reasonable time, overall I accept the evidence of the Applicant that four fails over eight weeks does render the computer's failures as of a substantial character. This failure allows the Applicant to reject the goods in accordance with the CGA, and she is entitled to recover a refund of any monies paid to provide the goods.

[9] I have considered the Respondent's claim that the later failures were due to the Applicant's use of the computer. I am not persuaded by this. The Respondent's witness could only give the Tribunal general evidence of what was likely to be the computer's condition at sale. He had no direct knowledge of this particular computer prior to sale. His memory of the repairs was also unclear at times. Further, as the Respondent refused to fully investigate the cause of the last failure before the outcome of this hearing, it is not in a position to determine why the computer failed yet again. It is merely drawing a likely conclusion, not necessarily an accurate one.

[10] I accept the evidence of the Applicant that she has some knowledge of computers and that she did not delete files as alleged. Further, I am satisfied that she had adequately protected the computer from outside viruses. It is more likely to me that this computer failed four times because of some serious but as yet undiagnosed fault. I do not accept that the Applicant must wait until this fault is diagnosed to have the benefit of a working computer.

[11] I find that the Respondent is liable in terms of its contract with Applicant. It must return the purchase price, including the cost of data transfer, to the Applicant. The data transfer has no value to the Applicant in the absence of the computer and so she cannot be required to pay for it. The Respondent is entitled to retain possession of the purchased computer. However, I note the parties' agreement that the Applicant may uplift from the Respondent her earlier computer left in the Respondent's care.