

**BETWEEN**

**ACG LTD**

**APPLICANT**

**AND**

**ZXX LTD**

**RESPONDENT**

Date of Order:

9 May 2011

Referee:

Referee A Davidson

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that the Respondent, ZXX Ltd, is to pay the Applicant, ACG Ltd, \$8,400.00 (incl GST) within seven days of today's date.**

## **Facts**

[1] ACG Ltd produces algeacidal products for the reduction of algae in swimming pools. In late November 2009, ACG Ltd enquired about purchasing 1,000 kgs of copper sulphate from ZXX Ltd for use in its algeacidal products. ZXX Ltd provided ACG Ltd with a certificate of analysis specifying the composition of a copper sulphate product that it had available. Relying on the certificate of analysis, ACG Ltd ordered the product and introduced it into production as soon as it was received. Several days after introducing the copper sulphate into production, ACG Ltd discovered that it incorporated an insoluble silica free flow additive which precipitated out of the products shortly after production.

## **Law**

[2] The law governing this claim is the law of contract and s 13(a) of the Fair Trading Act 1986.

[3] Section 13(a) of the Fair Trading Act 1986 provides that no person shall make false or misleading representations in relation to the composition of any good:

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

- (a) make a false or misleading representation that goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use...

## **Decision**

[4] ZXX Ltd provided ACG Ltd with a certificate of analysis prior to ACG Ltd placing its order. The certificate of analysis specified the composition of the copper sulphate that ZXX Ltd had available. ACG Ltd considered the certificate of analysis and concluded that

the proposed supply of copper sulphate did not contain any insoluble agents, in particular silica, that may precipitate out of solution and ruin the end product. In placing its order, ACG Ltd relied on the certificate of analysis. I find that the certificate of analysis provided to ACG Ltd was a representation as to the composition of the product that ZXX Ltd could supply.

[5] Silica had been added to the copper sulphate; however, there was no silica specified in the certificate of analysis. Silica is not an impurity; it is an additive specifically added to copper sulphate to enable it to flow freely. Silica is insoluble and, as such, copper sulphate with a silica additive is unsuitable for use in the production of aqueous products as after a time the silica will simply precipitate out of the solution. Copper carbonate, which was specified in the certificate of analysis, is also a free flow agent. Copper carbonate is soluble in acidic solutions, however, and provided the end product is acidic (such as ACG Ltd's algeacidal products) the presence of a copper carbonate additive will not cause the same problems as a silica additive. According to the certificate of analysis, copper carbonate comprised 0.3 – 0.5% by weight of the copper sulphate provided. Typically copper carbonate would not be added to a product where silica had already been added and vice versa. Subsequent analysis by ACG Ltd of the copper sulphate provided did not determine the actual amount of copper carbonate present, or whether in fact any was present at all, but it did determine that silica was present and that it comprised 1.6 per cent of the copper sulphate by weight.

[6] On the basis of the foregoing, I find that ACG Ltd relied on the certificate of analysis provided by ZXX Ltd to determine the composition of the copper sulphate and hence its suitability for use in ACG Ltd's products. I find that the certificate of analysis falsely represented the composition of the copper sulphate by not specifying the presence of silica and that this representation was reinforced by the express specification of an alternative free flow agent. I find that the failure to correctly specify the composition of the copper sulphate in the certificate of analysis breached s 13(a) of the Fair Trading Act 1986, entitling ACG Ltd to a remedy under s 43(2) of the Act.

[7] During the hearing, RT, representing ZXX Ltd, argued that ZXX Ltd had itself relied on the certificate of analysis provided by its supplier and that it was not aware that silica had

been added to the copper sulphate at the time it was supplied to ACG Ltd. I accept ZXX Ltd's claim that it had no knowledge of the silica additive; however, the Fair Trading Act 1986 does not distinguish between innocent and intentional misrepresentations. That is to say, ZXX Ltd made a representation regarding the composition of the copper sulphate which turned out to be false, and that representation in itself is sufficient to be a breach of the Act irrespective of what knowledge ZXX Ltd may or may not have had at the time it made the representation.

[8] There appears to have been considerable discussion at the first hearings of this claim and the subsequent appeal in relation to the applicability of the shipping labels and the two per cent allowance for impurities noted on them. The applicability of the labels was also discussed at today's hearings and I had the benefit of hearing from Mr JN, a chemist, who conducted the analysis of the copper sulphate. Some time was spent considering whether the two per cent allowance was in fact an allowance for impurities not specified on the certificate of analysis, or whether it was merely intended to indicate the minimum proportion of copper sulphate being shipped and to provide information to emergency services should there be an accident involving the product during transport or otherwise. As will be evident from the analysis undertaken in the preceding paragraphs, I have preferred a simpler contractual analysis over the approach previously taken. That is to say, I have taken as my starting point what representations were made leading up to the formation of the contract, what terms and conditions were in place at the time the contract was formed, and whether the product supplied conformed with the specifications for the product ordered. When viewed through this framework, it is not apparent to me that the shipping label and the two per cent allowance for impurities potentially implied by it, falling as they do after the formation of the contract, have the significance previously placed on them, and I find that a detailed consideration of them is not necessary in order to reach a decision in this case.

[9] Some time was also spent during today's hearing going through ZXX Ltd's processes and its terms and conditions regarding fitness for purpose. ZXX Ltd has made a particular effort to ensure that it provides customers with no assurances that any product supplied will be fit for any particular or specific purpose. ZXX Ltd requires customers to satisfy themselves that a product will be fit for the purpose for which the customer intends. RT

argued that ACG Ltd was required to satisfy itself that the copper sulphate ZXX Ltd provided was fit for purpose and as such that, as per its terms and conditions, ZXX Ltd should not be liable for the costs that arose when it turned out that the copper sulphate it supplied was not fit for purpose. In this context, it is important to distinguish between fitness for purpose and conformance with description. Where a customer orders a product of specific composition, as was the case here, it is not open for the supplier to substitute it (knowingly or unknowingly) with a product of a different composition. In this respect, the argument is not whether or not the product was fit for purpose but rather whether or not the product supplied was in fact the product that was ordered in the first place.

[10] The bulk of ACG Ltd's claim for compensation comprises consequential losses arising out of rebottling affected product. RT argued that ZXX Ltd's terms and conditions, which ACG Ltd agreed to when it applied for a trading account with ZXX Ltd, expressly excludes liability for indirect and consequential losses. ZXX Ltd's terms and conditions also expressly state that the purchaser agrees that the purchaser does not rely on any representation, information etc when purchasing goods from ZXX Ltd. That is to say, ZXX Ltd's terms and conditions seek to prevent documents such as the certificate of analysis being characterised as representations for the purposes of Acts such as the Fair Trading Act 1986. It is not possible, however, to exclude the provisions of the Fair Trading 1986. This was held in *Smythe v Bayley's Real Estate Limited* (1993) 5 TCLR 454 per Thomas J:

I do not consider, however, that these clauses have the effect of excluding the operation of the Fair Trading Act. The requirements of the Act are mandatory. In enacting the legislation, Parliament sought to protect the consumer from unfair trading and it would be inconsistent with that objective to permit a person engaged in trade to exempt him or herself from liability under the Act. In effect, this would be to allow such persons to opt out of the operation of the Act and the regime decreeing fair trading in the public interest (see *Henjo Investments Ply Ltd v Collins Marackville Ply Ltd* (supra) and *Clark Equipment Australia Ltd v Covcat Ply Ltd* (1987) ATPR 40-768).

[11] The exclusions and limitations set out in s 8 of ZXX Ltd's terms and conditions are well drafted and I find them effective in contracting out of the Sale of Goods Act 1908, Contractual Remedies Act 1979 and Consumer Guarantees Act 1993. I find that the limitations and exclusions specified in ZXX Ltd's terms and conditions do not apply to

breaches of the Fair Trading Act 1986, however, as it is not possible to contract out of this Act.

[12] Pursuant to s 43(2)(d) of the Fair Trading Act 1986, I find that ACG Ltd is entitled to compensation for losses arising out of ZXX Ltd's breach of s 13(a) of the Act. ACG Ltd's claim comprises compensation for time spent emptying, rinsing and refilling bottles of affected product; separating useable product with no silica from product contaminated by silica; the cost of replacement boxes; loss of benefit of freight charges; cost of contaminated product disposed of, and the cost of having the product supplied analysed.

[13] Claimants are required to mitigate their losses and, having discussed its costs at the conclusion of the hearing, I accept that the losses claimed by ACG Ltd are reasonable. In particular, I accept that it was reasonable for ACG Ltd to empty, rinse and refill the affected bottles, as the cost of a new bottle is \$1.05 while the cost of rinsing and refilling is \$1.00. Further, I accept that ACG Ltd had no practical alternative to reusing the bottles as it had a large order that required near immediate shipping to Australia and there were no spare bottles available as they require special printing. I also accept that it was reasonable for ACG Ltd to separate the already mixed product into contaminated and uncontaminated lots, as the cost of the ingredients used in the batch exceeded the cost of separating out the contamination from the batch. I accept the need to replace the cartons in which the contaminated product had been packed, and also the 20 per cent wastage specified by ACG Ltd in relation to the proportion of the product that it had already mixed that could not be separated. I accept ACG Ltd's cost to analyse the copper sulphate provided to it as reasonable and that it was necessary for ACG Ltd to have the product analysed in order to prove its claim.

[14] ACG Ltd initially submitted a claim of \$8,400.00 (incl GST). Subsequent to filing, it appears that ACG Ltd has endeavoured to increase its claim to \$9,121.00 plus GST. However, this change was never finalised by notifying ZXX Ltd. While ACG Ltd's claim amounts to more than \$8,400.00, I find that it is limited to \$8,400.00 (incl GST) and, on this basis, I order that ZXX Ltd pay ACG Ltd \$8,400.00 (incl GST) within seven days of today's date.