

BETWEEN

ACN

APPLICANT

AND

ZXR Ltd

RESPONDENT

Date of Order:

26 September 2013

Referee:

Referee Meyer

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZXR Ltd is to pay to ACN and YR the sum of \$2678.67 by the 5th October 2012.

Facts

[1] The Applicant claims damages for breach of contract in the sale and purchase of a farming tractor.

[2] The Respondent advertised a New Holland TL90A tractor for sale on a [trading website]. The sale was apparently on behalf of the owner, SA, although this was not disclosed in the advertisement or subsequent discussions leading up to the sale but was advised on the invoice for the sale price through the words:

This Tractor is Sold on Behalf of Owner and does not come with any Warranty.

[3] The Applicant paid the purchase price of \$53,475.00 on receipt of the invoice. The purchase price included implements being a bale fork at a cost of \$1,207.50, and a bucket at a cost of \$2,012.50. The price also included delivery to [North Island city] but an additional amount of \$172.50 was paid for delivery to the farm on an [East Coast road].

[4] The Applicant did not inspect the tractor prior to purchase but relied on the detail in the advertisement, which included a photo. The Respondent maintains that there were a number of photos. The advertisement described the condition as “tidy”. The photo on the web shows minor damage to the front of the left rear guard. Other photos also show minor damage.

[5] Prior to agreeing to purchase, YR asked the Respondent’s employee, TW, to walk around the tractor and advise him if there was any damage. He reported that, apart from a crack in the canopy cover, the tractor was in “very tidy condition”. He also sent an email to YR stating that:

After a workshop check over all oil levels are correct and oil looks in good condition. Also all other operations are working and no Faults found.

[6] When asked if its 1200 hour service had been carried out, he replied it had not, so YR requested that this work be done at his expense. This was carried out by the Respondent and charged for separately at a cost of \$925.37.

[7] On delivery on 9 June 2011, ACN noted that the right hand arm rest was missing; there was a broken cover on the two-speed gear change allowing water into the electric; the rubber surround where the gear lever penetrates the floor was broken, and there were two cracked indicator lights full of water and another hanging by only by its wires. The implements arrived later on 23 June. In the meantime, the tractor was used and the Applicant noticed that the three-point hydraulic arm on the rear of the tractor was sluggish. On receipt of the implements, she found that it could not lift a standard packet of fence posts.

[8] This was reported to JD, the Respondent's owner, who agreed that the problem could be investigated by a local contractor. This was carried out and it was found that there were faults with the hydraulic system. This was remedied along with problems with the three point hitch. Subsequently water was found in the gearbox oil and the source was identified as the split boot around the gear lever.

Issues

[9] The issues to be decided are:

- (i) Whether the Respondent is liable for all or any of the faults found with the tractor subsequent to delivery; and
- (ii) If so, what amount should be paid in damages?

Law

[10] The relevant law is the law of contract, the Sale of Goods Act 1908 ("the SGA"), the Contractual Remedies Act 1979 ("the CRA"), and the Fair Trading Act 1986 ("the FTA"). Where I make a finding of disputed fact I do so on the balance of probabilities; that is, which party's account I find the more probable.

Decision

[11] I find that the Respondent is liable for repairs to the hydraulics and gear box water/oil issues, but not the other amounts claimed. My reasons are set out below.

Liability in general

[12] The Respondent claims that it should not be liable at all for any of the items claimed because the sale was on behalf and no warranties given.

[13] My finding on this point is that the Applicant is relying on misrepresentations made by the Respondent itself, and not on warranties that might have been made by the previous owner. The representations specifically relied upon are those in the advertisement, the oral and email representations made by TW, and the implication that the Respondent had carried out the 1200-hour service.

[14] Section 16 of the SGA provides that there is no warranty of quality or fitness for purpose in such a sale. Section 36 provides that a buyer has the right to examine goods before acceptance. In this case, the goods were accepted. However, s 6 of the CRA provides:

6 Damages for misrepresentation

- (1) If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract—
 - (a) He shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken...

[15] Section 6(2) of the CRA goes on to provide that the section applies to contracts for the sale of goods.

[16] Further, s 13 of the FTA provides:

13 False or misleading representations

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...

[17] Therefore, if the Applicant can prove on balance that a misrepresentation was made she may be entitled to damages under either of those Acts.

[18] Clearly, in terms of s 6(1) of the CRA, the Applicant relied on TW's representations and I find she was induced by them to enter into the contract. To establish liability under s 13(a) of the FTA, it simply must be established that a person in trade made a misrepresentation in connection with the supply of goods.

The hydraulics

[19] The Respondent says that the hydraulics were functioning properly upon delivery, and functioned without complaint for some 113 hours after delivery. The jammed hydraulic valve could have occurred after delivery and during the 113 hours of use. The hydraulics would not have worked at all had they been jammed at the time of delivery.

[20] The Applicant's position is that while the hydraulics were sluggish to begin with, they did not get the chance to fully use them until the arrival of the implements after it was found that a standard pack of posts could not be lifted. While damage could have occurred in the meantime, I find on balance that the Applicant's account of their experience of the hydraulic functions of the tractor establishes that the hydraulics were not functioning properly at the time of delivery.

[21] This means that TW's representation that "all other operations are working" was incorrect, and amounted to a misrepresentation. Further, if the purpose of a 1200-hour service was to carry out the manufacturer's recommended service and to identify any areas where the tractor's operations were deficient, the carrying out of such a service without identifying that there were deficiencies in the operation of the hydraulic system was breach of the basic contractual duty to carry out such work in a proper and workmanlike manner. The consequence of the failure to carry out this work in such a manner was that further work had

to be carried out. Therefore, the Respondent is liable for the costs of the subsequent work carried out on the hydraulics by [tractor mechanic].

Three-point linkage cable

[22] The issue of the three-point linkage cable again relates to the operation of the tractor. JD concedes in his response that: “[it] may well have been stiff prior to delivery and could have stiffened after delivery”. I am giving the benefit of this doubt to the Applicant, and find that the Respondent is liable for the cost of rectifying this issue under both s 6(1) of the CRA and s 13 of the FTA.

Missing arm rest, broken cover on gear lever, and lighting issues

[23] The Applicant states that there was only the one photo in the advertisement. On balance, I accept her position on this point. This is because the only evidence on this point came from the Applicant in the form of the online advertisement, which shows just the one photo and makes no reference to more. JD has supplied more photos taken prior to the sale but no evidence that they were on the advertisement. There is also the fact that YR had to phone TW to get a detailed description of the condition of the tractor.

[24] Therefore, the description in the ad that the tractor was “tidy”, TW’s oral advice that it was in “very tidy condition”, and his email that there were “no faults found”, were misrepresentations in terms of s 6(1) of the CRA and s 13(a) of the FTA. The Applicant is therefore entitled to damages.

[25] However, JD relies on pre-sale photos to establish that these faults were either visible so the tractor must be regarded as having been purchased in that condition, or in the case of the gear cover, the photo shows no damage. They were also visible on delivery and the tractor was accepted.

[26] If the SGA was the only statute applying to the sale, it could be argued that under s 36 the damage should have been discussed upon delivery as it was clearly visible at the time.

However, neither s 6(1) of the CRA nor s 13(a) of the FTA require any action to be taken at acceptance. Obviously action must be taken reasonably quickly to avoid allegations that damage has occurred during use after delivery. It is on this point that I must decline the Applicant's claim. Sufficient time went by before these items were notified, which raises the possibility the damage could have occurred during operation by the Applicant. It is over to her to prove her case on balance and this area of doubt means she has not succeeded.

Gear lever surround/boot

[27] JD responds that the gear lever surround and boot may have deteriorated since purchase, or may have been perished prior to purchase. On balance, I find that it must have been perished prior to purchase because there would have been insufficient time after the sale for it to have suddenly perished to the point where water was able to enter the gear system. This is an issue I would have TW to have picked up during the inspection, and particularly during the 1200-hour service. It must have been known to the manufacturer that a perished boot would allow water to enter the gearbox, and that the machine was intended to be used outside in all weather conditions.

[28] Therefore, TW's assurances were misrepresentations and breached s 6(1) of the CRA and of s 13(a) of the FTA. The service was not up to a reasonable workmanlike standard, and as a result, the Respondent is liable for the consequential losses.

Conclusion

[29] In summary, the amount due under each heading is as follows:

<i>Hydraulic repairs (less credit of \$165 from [tractor mechanic])</i>	\$935.25
<i>Repairs to 3 point linkage (less credit of \$340 from [tractor mechanic])</i>	\$444.40
<i>Replacement of rubber boot and oils</i>	\$949.63
<i>Indicators/armrest and gear lever</i>	Not established
Total	\$2,329.28

Plus GST

\$349.39

Total amount to be paid to ACN:

\$2,678.67