

**BETWEEN**

**ADJ**

**APPLICANT**

**AND**

**ZWQ**

**RESPONDENT**

Date of Order:

16 August 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, ZWQ, must pay the Applicant, ADJ, \$164.00 within seven days of the date of this order. Upon receipt of payment, ADJ must make the chainsaw available for collection from the specified Auckland address or such other address as the parties may agree.**

## **Facts**

[1] On 15 March 2011, ADJ purchased a chainsaw from ZWQ on Trade Me for \$164.00 including freight. When ADJ received the chainsaw, it would not start and so he returned it to ZWQ to be replaced. ZWQ repaired the chainsaw and returned it to ADJ. When ADJ received the chainsaw he discovered that it had been repaired, not replaced, and that it was now in a damaged condition. ADJ sought to reject the chainsaw and obtain a refund of the purchase price from ZWQ.

## **Issue**

[2] The issue is whether or not the chainsaw supplied by ZWQ is of merchantable quality.

## **Law**

[3] The law governing this claim is the law of contract and s 16(b) of the Sale of Goods Act 1908.

## **Decision**

[4] ADJ claims that ZWQ supplied him with a chainsaw in damaged condition and that as such it is not of merchantable quality and he may reject it.

[5] Section 16(b) of the Sale of Goods Act 1908 implies a condition of merchantable quality into certain contracts for the sale of goods:

Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality.

[6] ADJ purchased the chainsaw on the basis of its description in ZWQ's Trade Me listing. ADJ did not have the opportunity to inspect the chainsaw before purchasing it. ZWQ has sold a number of chainsaws. On this basis I find that ADJ's purchase falls within the scope of s 16(b) and that the condition of merchantable quality applies.

[7] Merchantable quality is not defined in the Sale of Goods Act 1908. Salmond J in *Taylor v Combined Buyers* [1924] NZLR 627 (SC) at p 647 found that the question as to whether goods are of merchantable quality may be framed as follows:

Are the goods of such a quality and in such a state and condition as to be saleable in the market, as being goods of that description, to buyers who are fully aware of their quality, state, and condition, and who are buying them for the ordinary purposes for which goods so described are bought in that market?

[8] When ADJ received the repaired chainsaw it had a gouge in its cowl and a broken catch. ADJ did not try and start the chainsaw. ZWQ stated in correspondence with ADJ that the chainsaw was undamaged when shipped. ADJ presented the packaging at today's hearing, which was undamaged so it does not appear likely that the chainsaw was damaged in transit. On the balance of probabilities, I prefer ADJ's evidence that the chainsaw was in damaged condition when he received it and that it was most likely in that condition when shipped by ZWQ.

[9] Applying the *Taylor v Combined Buyers* description of merchantable quality, I find that no buyer fully aware of the damaged condition of the chainsaw would consider it saleable in the market. On this basis, I find that the chainsaw is not of merchantable quality and as such that ZWQ, by supplying it to ADJ in damaged condition, breached the implied condition specified in s 16(b) of the Sale of Goods Act 1908 that the chainsaw would be of merchantable quality.

[10] The remedy for breach of a condition is cancellation of the contract. On this basis, I find that ADJ is entitled to cancel his contract with ZWQ and that ZWQ must refund the money paid to him by ADJ.