

BETWEEN

AGA

APPLICANT

AND

ZVV Ltd

RESPONDENT

Date of Order:

10 February 2014

Referee:

Referee Tunncliffe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZVV is to pay \$1,000.00 to AGA on or before 20 February 2014. AGA is to return the hopper elbow to ZVV Ltd on or before 20 February 2014.

Facts

[1] AGA purchased a mini chipper/shredder from ZVV Ltd by auction on Trade Me. On first use, the blade assembly came loose, damaging the blade and discharge chute. ZVV Ltd repaired the machine. Within a short time, the blade assembly failed again. AGA returned the machine and requested a refund. ZVV Ltd discovered a weld was missing. ZVV Ltd has repaired the machine and it is ready to be returned.

[2] AGA seeks a refund of \$1,000.00 on the basis that the machine did not do what it was advertised as being capable of, the machine is unsafe, and is not fit for purpose.

Issues

[3] The issues for the Tribunal to determine are:

- (i) Whether the implied conditions as to quality or fitness in the Sale of Goods Act 1908 (SoGA) apply to this transaction;
- (ii) If so, whether the chipper/shredder is of merchantable quality or fit for purpose; and
- (iii) If not, whether AGA is entitled to reject the goods in favour of a refund.

Decision

Do the implied conditions as to quality or fitness in the Sale of Goods Act apply?

[4] Section 16 of the SoGA applies to goods bought by description. Section 16 of the SoGA states:

“Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller’s skill or judgement, and the goods are of a description which it is in the course of the seller’s business to supply... there is an implied condition that the goods shall be reasonably fit for such purpose.”

In addition, for goods bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality.

[5] There is an exclusion of implied terms and conditions under s 56 of the SoGA:

“Where any right, duty or liability arising under a contract of sale by implication of law may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage if the usage is such as to bind both parties to the contract.”

[6] Mr TY (Director, ZVV Ltd) pointed to the store policy for items sold at auction by \$1 reserve, which states, no warranty is offered and caveat emptor applies. However, there has to be express agreement that the implied conditions in the SoGA are not to apply to the contract. For there to be express agreement, I would expect to see reference to s 16 of the SoGA in the store policy and a statement that it did not apply. In addition, the store policy in this respect would need to be clearly drawn to the attention of the buyer before the contract was formed. To see the store policy in this case, a buyer had to click on the heading at the foot of the auction page: “About our Store”. This is not sufficient because a buyer could not reasonably know that there would be a term of contract under that heading that excluded s 16 of the SoGA.

[7] I find that there was no express agreement that the implied conditions in s 16 of the SoGA did not apply to this transaction. In addition, there were no other dealings or conduct between the parties that would negate the conditions in s 16 of the SoGA.

[8] ZVV Ltd does sell chipper/shredders in the course of its business. AGA purchased the chipper/shredder on the basis that it was suitable for the home user and capable of chipping branches up to 3 inches (76 mm) as stated in the advertisement. In purchasing on the basis of the description in the advertisement, I am satisfied that AGA has made known the particular purpose for which he was purchasing the machine. AGA relied on the seller’s judgement because he deliberately purchased from a business rather than a private sale. A seller in trade can reasonably expect that a purchaser is likely to rely on the seller’s judgement as to use and suitability for purpose.

[9] For the reasons set out in paragraphs four to eight, I find that the implied condition as to fitness for a particular purpose applies to this transaction. The implied condition as to merchantable quality also applies to goods sold by description.

Is the chipper/shredder of merchantable quality?

[10] To determine whether chipper/shredder is of merchantable quality, it is necessary to consider the description, purpose, condition and price, and to consider whether the item was of such quality and condition that the reasonable person would have purchased the item.

[11] AGA paid \$1,000.00 for the machine - not an inconsiderable sum. He used the machine approximately six times over a period of months. The machine failed in the area of the blade (or “hammer”) on first use. ZVV Ltd replaced the blade but it failed in the same area on approximately the sixth use. The machine was being used for home garden purposes and was not being used outside the use specified. ZVV Ltd also discovered a weld was missing.

[12] It seems to me that the reasonable purchaser is unlikely to have purchased the machine for \$1,000.00 knowing that a weld was missing and that it would fail twice with the result that the housing has been (and remains) damaged.

[13] I find that the machine was not of merchantable quality at the point of sale because an essential weld was missing, resulting in two failures and damage to the machine housing.

Is the chipper/shredder fit for purpose?

[14] It is not necessary to make any finding as to whether the chipper/shredder was fit for purpose because I have found the chipper/shredder was not of merchantable quality. AGA is entitled to a remedy.

Is AGA entitled to reject the goods in favour of a refund?

[15] There was an implied condition that the goods are of merchantable quality. A condition is something that goes to the heart of the contract. Breach of condition gives rise to a right to reject the goods. There was a hidden defect that could not have been apparent to AGA on a visual inspection when he first received the goods. The defect would not become apparent to a buyer until it revealed itself with use. When the machine failed a second time, AGA returned the goods and requested a refund. This constitutes rejection of the goods. AGA rejected the goods as soon as he was reasonably aware that there must be some defect with the goods, rather than simply something loose.

[16] I find AGA is entitled to reject the goods and to receive a refund of the purchase price. ZVV Ltd is to pay \$1,000.00 to AGA.

[17] Due to an oversight, AGA did not return the elbow to the hopper. Under the SoGA there is no obligation on the buyer to return goods that have been rejected; it is for the seller to collect them. However, this part is currently at AGA's son's place in Blenheim and that address is not known to ZVV Ltd. Therefore, I have directed that AGA arrange for the part to be delivered to ZVV Ltd at either the place of business or the address above.