

BETWEEN

AGN

APPLICANT

AND

**ZVH, ZVG and ZVF Ltd
as Trustees of LN Trust**

RESPONDENTS

Date of Order: 23 July 2013

Referee: Referee Lusk

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that both the claim and counterclaim are dismissed.

Facts

[1] LN Trust accepted a quote of \$1,500.00 from AGN t/a QP to lay some 20m of vinyl in commercial premises at [place name], due for opening on 1 December 2012.

At the first visit, AGN found the floor preparation was not ready. At the second trip, it was found that the vinyl available was insufficient to complete the job. AGN returned a third time with a little extra vinyl and black coving to make up the short fall. LN Trust was not happy with either the standard of the job or the use of the black coving. On 26 November 2012, having located an additional piece of the vinyl, AGN returned to fix up the job. AGN considered the job complete and issued an invoice on the same day.

[2] LN Trust has refused to pay anything because of the standard of the workmanship and a slight mismatch in the colour of the different vinyl lots.

[3] There has been communication between the parties but the matter has not been resolved.

[4] AGN has lodged a claim for \$1,000.00, the amount of their amended invoice. LN Trust has counterclaimed for \$15,000.00 for 59 days loss of trading, stress and humiliation, and time spent on unnecessary meetings and administration costs.

Issues

[5] To resolve the dispute the Tribunal needs to decide, in respect of the claim:

- (i). Was the service carried out with reasonable care and skill?
- (ii). Was the product reasonable fit for the particular purpose?
- (iii). Was it completed within a reasonable time?
- (iv). Has the service provider been given the opportunity to remedy the problems?
- (v). Has he done so?
- (vi). What remedies does LN Trust have under the Act?

[6] In respect of the Counterclaim:

- (i). Has LN Trust proven that they have suffered a loss?
- (ii). Is the loss a proven amount?

[7] In conclusion:

- (i). On the substantial merits of the case, what should be ordered?

Law

[8] Because the laying of vinyl is a service ordinarily acquired by a consumer for personal, domestic or household use, the Consumer Guarantees Act 1993 (CGA) applies.

Decision

Was the service carried out with reasonable care and skill? (s 28 of the CGA)

[9] No. AGN relied on quantities determined by another party and found themselves with insufficient vinyl when additional supplies were no longer immediately available. Most of the problems experienced on the job were due to this shortcut. They neglected to measure the job for quantities when they were on site the first time. They chose to install black coving to make up the shortfall without getting LN Trust's approval. They installed mismatched vinyl lots without LN Trust's approval. I accept that the quote was at the lower end of market rates but this should not mean that the client has to accept something other than what was clearly offered in the quote – “supply and install vinyl in kitchen and server area ...” with the implied condition that the vinyl would be of uniform colour.

Was the product reasonable fit for the particular purpose? (s 29 of the CGA)

[10] No. By the evidence of Mr CK who saw it on 29 November 2012, it was not sufficiently finished for him to install the stove; parts appeared old and sun bleached and there were air bubbles.

Was it completed within a reasonable time? (s 30 of the CGA)

[11] No. Even if it had been fully completed by 26 November 2012 as AGN claims, this would not have allowed sufficient time for LN Trust to arrange to have TF Council in to inspect it before any possible opening on the 1 December 2012.

Has the service provider been given the opportunity to remedy the problems?

[12] Yes. The third and fourth visits were both opportunities to finally remedy the problems.

Has he done so?

[13] No. By evidence of Mr CK, the job on 29 November 2012 was still not fit for the purpose.

What remedies does the Trust have under the Act? (s 32 of the CGA)

[14] LN Trust has the right to have the failure remedied elsewhere and recover from the supplier all reasonable costs incurred. In the circumstances, this would involve costs of removal of the vinyl and replacement with new matching product.

Has LN Trust proven that they have suffered a loss?

[15] I am satisfied that LN Trust was prevented from opening when they intended and therefore, suffered a shortening of their commercial season. However, there is a legal obligation for parties to mitigate potential loss. This means that there was an obligation on LN Trust, if the flooring job was holding up their business and causing losses, to have an alternate service provider in to fix the job. It is not acceptable to let their losses mount up in the expectation of being able to claim them all against AGN. The fact that they have not

opened for business at all over the season suggests that it was more than just the problem with the flooring affecting their decisions.

Is the loss a proven amount?

[16] No. The figures submitted are gross takings for the past two seasons, not net profit.

On the substantial merits of the case, what should be ordered?

[17] There is a proven failure of guarantees under the CGA by AGN which justify LN Trust having the work redone at AGN's cost. This fact means that it would be unfair to order any payment to AGN for the work done.

[18] It is proven that LN Trust has losses due to a shortened season but they are not quantified. LN Trust has possession of the vinyl which they have not chosen to pull up.

[19] On the substantial merits of the case, I cannot justify making an order that either claim of counterclaim should succeed in whole or in part. Both claims are dismissed.