



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 376

APPLICANT BC

RESPONDENT BB Ltd

The Tribunal orders:

BC's claim against BB Ltd is dismissed.

REASONS

1. BC and her daughter set up [redacted] ("the Club") during 2021. On behalf of the Club, BC wished to purchase a second-hand projector that could be used during the Club's fortnightly meetings. BC contacted Mr N of BB Ltd through an advertisement, explained why the Club needed to purchase a projector, and asked for his advice. Mr N viewed the clubroom where the Club holds its meetings and showed BC an ex-rental [projector] ("the Projector") that he was retiring from his rental stock and planned to sell. On 1 February 2021, BC purchased the Projector from BB Ltd for \$383.99. This purchase was made by BC on behalf of the Club.
2. The Club used the Projector at each of its fortnightly meetings between 1 February 2021 (when the Projector was purchased) and 17 August 2021. At each meeting, the Projector was used for about 90 minutes, so it was used by the Club for a total of 18 hours. The Club did not hold any further meetings after 17 August 2021 due to Covid restrictions and concerns, and the Projector was stored away in its box at the clubrooms. In October 2022, the Club decided to begin its fortnightly meetings again, so BC asked Mr N to check the Projector and make sure that it was ready for use at the first meeting. On 31 October 2022, Mr N visited BC at the Club's meeting rooms. While he was running the Projector to check it, there was a loud popping sound and the Projector dramatically stopped working. Mr N took the Projector away to assess it and work out the options. On 15 December 2022, Mr N sent BC an email stating his view that the Projector was not worth repairing and that she could pick it up. BC picked up the Projector, and a spare lamp that Mr N gave her, on 23 January 2023.
3. BC, on behalf of the Club, brings a claim against BB Ltd seeking compensation of \$300.00. BC says that she seeks reasonable compensation for the loss of the Projector after minimal use.
4. I held a teleconference hearing with the parties on 30 June 2023. BC attended as Applicant (on behalf of the Club). Mr N attended on behalf of BB Ltd and was appointed as its representative.

Issues

5. The issues I need to consider are:
 - (a) Does the Consumer Guarantees Act 1993 apply?
 - (b) Was the Projector not reasonably fit for purpose?
 - (c) Was the Projector not of merchantable quality?
 - (d) Did BB Ltd misrepresent the Projector to BC?
 - (e) Is BC entitled to a remedy and, if so, is the amount claimed proved and reasonable?

Does the Consumer Guarantees Act 1993 apply?

6. The Consumer Guarantees Act 1993 (“the CGA”) applies to the supply of goods and services by suppliers in trade to consumers. A person is a consumer under the CGA where they acquire goods or services from a supplier of a kind “ordinarily acquired for personal, domestic, or household use or consumption” (s2(1) definition of “consumer”). As explained to the parties at the hearing, I am satisfied that the guarantees implied into a sale of goods by the CGA do not apply to BC’s purchase of the Projector from BB Ltd because, although BB Ltd was a supplier under the CGA, BC was not a consumer. This is because the Projector cannot be said to have been ordinarily acquired for personal, domestic or household use as both Mr N and BC confirmed at the hearing that the Projector was a commercial projector which would not be suitable for personal, domestic or household use, and is a type of projector that is only suitable for use in commercial situations due to its bulk and the noise it makes.

Was the Projector not reasonably fit for purpose?

7. Where the CGA does not apply to a contract for the sale of goods, there is no warranty or condition as to the quality or fitness of goods supplied except as set out in s138 and s139 of the Contract and Commercial Law Act 2017 (“the CCLA”) which apply in certain circumstances and require goods to be reasonably fit for purpose (s138) and of merchantable quality (s139). Under s138 of the CCLA, there is an implied condition in a contract for the sale of goods that the goods are reasonably fit for purpose if the buyer 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 that it is in the course of the seller’s business to supply. Section 139 of the CCLA is discussed below.
8. BB Ltd sold the Projector to BC in trade, and it is in the business of selling and renting out audio visual equipment, so the Projector is of a description that it is in the course of BB Ltd’s business to supply. I am satisfied that BC made it clear what she needed a projector for and showed him the clubrooms that she wished to use it in, and she relied on his skill and judgment. Therefore, s138 of the CCLA applies.
9. I have taken into account that BC says she decided carefully what projector to buy because the Club does not have much money, and she asked for Mr N’s advice about which projector would be suitable and relied on the advice he gave. She met Mr N and showed him the clubrooms, and he recommended the Projector as suitable for the Club’s purposes. BC says that Mr N advised her at the time of purchase that the bulb, while second-hand, had probably used only 500 hours of its lifespan of 1,000 hours. Therefore, because the Club only intended to hold fortnightly meetings, the remaining 500 hours was appealing to her. However, she says that the Club only gained 3.6 percent of the lifespan of the bulb/projector as represented. She says that the Projector failed after minimal use: she says it was only used at 12 Club meetings for 90 minutes each time over the course of seven months (a total of 18 hours) before it was carefully stored at the Clubrooms in its original packaging during Covid times until October 2022, and the extension equipment was brand new as purchased by the Club. BC says that there was a misrepresentation of the value and life expectancy of the Projector because, when Mr N was checking the Projector in October 2022 it failed dramatically in front of him, and he now says that it is not economic to repair and has not told her why the Projector failed. She says that she relied on Mr N to give good sound advice and she relied on his skill and judgement when he recommended the Projector to her as suitable for the Club’s purposes, and it should not have failed after minimal use as it did.

10. Having carefully considered the available evidence and information, and having heard from the parties, I find that BC has not proved, on the balance of probabilities, that the Projector was not reasonably fit for purpose. I make this finding because:
- (a) The Projector operated well for BC's purposes when she purchased it, and it worked on 12 occasions (a total of about 18 hours) for the purpose for which she purchased it. I have also taken into account that Mr N, on behalf of BB Ltd, says that the Projector was working fine when he sold it to BC, and was still working fine the week before it blew up because he set it up for BC the week before it failed in front of him on 31 October 2022. Therefore, I am satisfied that the Projector worked for the purposes intended, and worked for BC's intended purpose, and its unexpected failure is not something that is covered by s138 of the CCLA.
 - (b) I am satisfied that BC was informed by Mr N that the Projector was an ex-rental, and that the bulb had been used for 500 hours, so she was aware that the Projector had been well used before she purchased it. This was reflected in the price she paid, because she paid \$383.99 for it and Mr N says that similar new projectors cost around \$13,000.00.
 - (c) I have taken into account Mr N's comment that new projectors only have a warranty of up to 2 years, and new bulbs have a 3-month warranty.
 - (d) I am satisfied that s138 of the CCLA does not provide an ongoing protection for a buyer from failure of second-hand goods such as the Projector. BB Ltd therefore cannot be held responsible for the Projector failing unexpectedly, particularly when it is unclear what caused it to fail, and Mr N and BC have conflicting recollections about that so I cannot make a finding either way based on the available evidence.

Was the Projector not of merchantable quality?

11. Under s139 of the CCLA, there is also an implied condition that goods are of merchantable quality if the goods are bought by description from a seller who deals in goods of that description (s139 of the CCLA). The courts have said that goods will be not of merchantable quality if they cannot be used for any purpose for which goods of that description would normally be used for, so are not saleable under that description. The courts have suggested that goods must remain of merchantable quality for a reasonable time after delivery, so that a buyer would expect to be able to use the goods for a period consistent with the type of goods involved (for instance, *Mash & Murrell Ltd v Joseph I Emanuel Ltd* [1961] 1 All ER 485 (QB) where potatoes were shipped in apparent good condition but were rotten on arrival).
12. BB Ltd sold the Projector to BC in trade and deals in goods of that description. I am satisfied that BC bought the Projector by description from BB Ltd even though she saw it prior to purchase. Therefore, s139 of the CCLA applies.
13. However, I find that BC has not proved, on the balance of probabilities, that the Projector was not of merchantable quality for the same reasons as I have found that s138 of the CCLA does not provide her with a remedy. In this regard, I do not regard the durability element of merchantable quality to extend to a guarantee that non-perishable goods will continue to operate. While s139 of the CCLA may have provided a remedy for BC if the Projector had failed immediately on delivery, I am satisfied that the Projector was sufficiently durable to satisfy the condition of merchantable quality.

Did BB Ltd misrepresent the Projector to BC?

14. Under s35(1)(a) of the CCLA, a party is entitled to damages if they prove that another party to a contract made a representation to them at or prior to the contract being formed; the representation induced the wronged party to enter the contract; the representation turned out to be incorrect (that is, there was a misrepresentation); and loss was suffered as a result. Further, under the FTA, no person shall, in trade, engage in conduct that is misleading or deceptive or is

likely to mislead or deceive (s9 of the FTA); and no person shall, in trade, in connection with the supply or possible supply of goods, make a false or misleading representation that the goods are of a particular standard or quality (amongst other things) (s13(a) of the FTA).

15. A representation is broadly defined as a statement of fact made by one contracting party to another regarding some existing fact or past event. A promise as to the future will not be a misrepresentation. Further, Silence will not usually amount to a misrepresentation unless it amounts to a half-truth (which is a statement that conveys only part of the truth, so that what is left unsaid makes what is said incorrect). It does not matter whether the misrepresentation is made innocently or fraudulently because the intention of the party who made the misrepresentation is not material to liability under s35(1)(a) of the CCLA or under the FTA.
16. BC says that the Projector failed to represent value and life expectancy under s35(1)(a) of the CCLA. She says that Mr N misrepresented the Projector to her as suitable for the Club's purposes which she relied on, and he told her that the bulb had used up 500 hours of its 1,000 life, so she was reassured by this as she knew that a bulb was an expensive to replace, and she was lead to believe that the Club would get good use from the Projector.
17. However, based on the available evidence and information, I am satisfied that Mr N did not make any misrepresentations that fall within s35(1)(a) of the CCLA or the FTA when BB Ltd sold the Projector to BC. This is because Mr N did not incorrectly advise BC about any aspect of the Projector that would amount to a misrepresentation.
18. I have taken into account Mr N's comment that he made no promises about how long the Projector would run for because he could not guarantee how long it would run but he had reasonable faith that it would have a reasonable life. I have also taken into account that Mr N informed BC that the Projector was a second-hand ex-rental which was true because BB Ltd had rented out the Projector as part of its business. Mr N therefore did not make any misrepresentation regarding the age of the Projector, and he was not required to spell out its exact age unless BC asked and he answered incorrectly (and there is no evidence that this occurred). In any event, the fact that the Projector was being sold at a very low price as an ex-rental reasonably suggests that it was quite old and also well used. Mr N also informed BC that the bulb had been used for 500 hours of its 1,000 hour expected life, and I am satisfied that this was true because Mr N had replaced the bulb himself and he was therefore able to correctly estimate the age of the bulb. I acknowledge that BC took comfort from knowing that the bulb had about 500 hours left of its life, however, a representation does not include a promise as to the future, and I am satisfied that the Mr N cannot be held responsible if the bulb lasted less than expected (if the bulb did in fact fail, which is not clear from the evidence) because bulbs are delicate consumable items which do not always last as expected, and can easily be affected by external factors. Mr N also advised BC that the Projector was suitable for the Club's purposes, which I believe was true because it was successfully used 12 times by the Club before it failed, and it is unclear what caused it to fail so dramatically.
19. For the above reasons, BC's claim is dismissed. It is therefore unnecessary for me to consider the final issue because no remedy is available. While I acknowledge that it is very unfortunate that the Projector failed and is now not worth repairing, I am satisfied that this was the risk BC took when she purchased a second-hand ex-rental projector at a low cost.

Referee: D. Brennan DTR
Date: 18 July 202



Information for Parties

Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 20 working days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

Grounds for Appeal

There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact. Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 working days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 working days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.