

BETWEEN

**EA
APPLICANT**

AND

**UZ LTD
AS AN AGENT FOR UZU
RESPONDENT**

Date of Order:

12 August 2015

Referee:

Referee Smallbone

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that UZ Ltd is to pay \$8,318.08 to EA by 5pm on Thursday 20 August 2015. Following payment to EA, UZ Ltd may arrange for the collection of the dismantled damaged engine from EA at UZ Ltd's cost.

Facts

[1] The licensed importer of Type A motor bikes in New Zealand is UZ Ltd.

[2] EA purchased a Type A factory bike from the original owner. The original owner purchased the bike in December 2011 for about \$40,000.00. It had had limited use and was still under guarantee when EA purchased it in October 2013.

[3] Regular servicing was carried out on the motorcycle by the importer's authorised dealers. This included the 10,000 km service when EA owned it.

[4] EA noticed a steadily increase in oil consumption after about 15,000kms. By 18,000kms the engine was using significant amounts of oil. It had sustained serious damage caused by dirt in the airbox. The 2 year express guarantee had concluded.

[5] EA believed he needed to purchase a new engine to get his bike back in working order. He did so and installed the engine himself. It was only when he was looking at the USA Type A authorised dealer's website called Site 1 that he was alerted to issues with the filtering system in the Type A airbox. He then went to the forums and found comments from owners of Type A motorcycles worldwide who also claimed to have issues with the bike's airbox construction allowing dust into the engine intake.

[6] Site 1 recommends a sealed filter be used and this was purchased by EA and used in his new engine. It is an oiled filter.

[7] EA contacted UZ Ltd about the engine failure. Their offer was to look at the engine but the company refused to have EA or his mechanic present during the investigation.

[8] EA decided to repair the bike himself and make a claim against UZ Ltd for his losses.

Is the Type A airbox (and therefore the engine) of acceptable quality under the Consumer Guarantees Act 1993?

[9] The Consumer Guarantees Act 1993 (the Act) defines 'acceptable quality' in section 7 of the Act. Within that definition it states that the goods must be 'fit for all the purposes for

which goods of the type in question are commonly supplied' and durable'. EA has claimed that the motorbike has failed to meet the guarantee of acceptable quality.

[10] UZ Ltd has stated that the Type A motorcycle EA purchased was of acceptable quality and had no design defects.

[11] UZ Ltd does not dispute that the engine was damaged by 'dust' entering engine. However the company stated that it has not experienced any similar problems with this model in New Zealand and has not been informed by UZU of any faults that require modification to the air filtering system. The technical advisor for UZ Ltd does not accept that Site 1's recommendations regarding the airbox had credibility. He questioned whether the comments made by forum users should be believed because UZ Ltd had not been advised by UZU that there was any issue with the airbox.

[12] EA demonstrated at the hearing how the design of the filter and clamps allows unfiltered air to enter the intake of the engine. The filter is not only too flexible but is not oiled. Under engine acceleration the air forced on the filter is such that the filter distorts and lets unfiltered air into the engine. The alternate filter recommended by Site 1 is sealed and oiled to catch 'dust' and prevents unfiltered air getting past it.

[13] UZ Ltd was not able to provide any evidence about the cause of unfiltered air entering the engine on EA's bike.

[14] I am satisfied that the considerable number of forum supporters commenting about Type A's airbox problems adds weight to the evidence given by EA. Forum supporters in such numbers are unlikely to be fictitious or have invented their problems with the Type A airbox.

[15] In response to UZ Ltd's statement that there have been no other Type A's with the same problem, EA provided footage for UZ Ltd of a friend's bike sent to the dealer where dust was also evident on the intake. At the service the authorized dealer removed the dust but did not supply any service to avoid the problem reoccurring. The experience of EA and his friend suggest that, it is most likely that UZ Ltd's authorized agents are not addressing the cause of the problem, simply mopping up the result of the problem with the air intake.

[16] This evidence shows that the filtering system is inadequate, the problem is not unique to EA and that while the problem may not be reported to UZ Ltd it does exist.

[17] Therefore on the issue of whether the Type A motorbike owned by EA was of acceptable quality I find that the motorbike is not of acceptable quality. The design of the airbox filter system is inadequate and has compromised the durability of the bike. This is a higher end motorbike being sold for over \$40,000.00 new. It is not of acceptable quality if the engine fails before 18,000kms use because its airbox design.

Can EA claim against the manufacturer for the losses relating to the engine failure?

[18] UZ Ltd was the importer and distributor of the motorbike engine and therefore under s.2 of the Act is defined a 'manufacturer'. Section 25 of the Act sets out the circumstances where consumers have a right of redress against manufacturers. Section 25(a) states that a consumer has a right to claim against a manufacturer where goods fail to comply with the guarantee as to acceptable quality. EA is able to bring this claim to the Tribunal against UZ Ltd.

Was EA required to return the engine to UZ Ltd to give UZ Ltd an opportunity to remedy the problem?

[19] UZ Ltd stated that it should have been given the opportunity to examine the engine under the Consumer Guarantees Act 1993.

[20] If EA had purchased the bike from a supplier who was seller in trade he would have had to return the bike to give opportunity to remedy a defect unless the failure was 'of a substantial character'.

[21] However under section 25 of the Act, no such requirement exists. A consumer doesn't have to send the goods to the manufacturer. EA was able to repair the bike himself and make his claim.

What was the amount of the loss EA had as a result of the failure of acceptable quality?

[22] I have considered the losses claimed by EA. The amount I have ordered has been calculated as follows:

Engine including freight and customs	\$7,218.08
Engine report	\$ 315.00
Air Filter	\$ 110.00

Labour	<u>\$ 675.00</u>
Total loss ordered	\$8,318.08

[23] I am satisfied that the engine and filter were necessary replacement items and that EA sourced the cheapest possible parts.

[24] The report carried out for \$315.00 was to establish the extent of damage. It is a foreseeable consequence that there will be a cost of establishing the extent of damage if the engine fails. This loss is able to be claimed under section 27(b) of the Act.

[25] EA claimed \$1,350.00 labour. He said he took two weeks off work to install the new engine. He is a motor mechanic. The amount claimed is the Company A charge for an engine replacement.

[26] EA is not able to profit from the failure of the engine. The price charged by Company A includes a profit and overheads that EA did not have. The work done did not go through his business books and be taxed. I have therefore ordered half the amount claimed to reflect these facts but also to take account of the fact that he should be compensated for time taken installing the engine.

Does there need to be an adjustment for betterment?

[27] I have given consideration to whether the amount ordered should be reduced because EA now has a new engine where his previous engine had about 18,000kms on it. There was no evidence given at the hearing by UZ Ltd about the amount that should be deducted for betterment.

[28] In his claim EA stated that he was not better off but worse off. He stated the bike has lost value because the engine serial numbers do not match with the original documents. EA is in a member of a motor bike collectors club. This factory Type A is a special issue and therefore has collector's value. He did not place a value on this loss and the amount claimed in total in the Tribunal did not allow for an amount to be ordered for that loss. It is quite possible that the new engine has increased the value but this has been nullified by the new engine number not matching the number on the original papers.

[29] There is insufficient evidence for a finding to be made about the value of the bike with the replacement engine and therefore the amount set out above has not been adjusted for betterment or loss of value.