

BETWEEN

FN
APPLICANT

AND

TMM Ltd
RESPONDENT

TM
SECOND RESPONDENT

Date of Order:

6 July 2018

Referee:

Referee ter Haar

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that FN's claim is dismissed.

Facts

[1] In March 2018 Mr TM, on behalf of TMM Limited responded to Mr FN's advertisement on Trademe relating to a softserve ice cream machine. It was agreed between the parties that TMM Limited would pay a non-refundable deposit of \$500.00, arrange and pay for the machine to be transported to XX for inspection and that if the machine passed that inspection then TMM Limited would pay the remaining \$6,500.00 for the machine.

[2] Mr TM arranged for a transport company, YY, to pick up the machine from Mr FN's address. However, the truck driver was unable to get the whole way up Mr FN's steep and narrow driveway and the truck driver and Mr FN then undertook to roll the machine down the driveway. The machine was successfully put onto the truck's tailgate but rolled off causing a considerable amount of damage to the machine. In spite of this the machine was taken to XX for inspection and the advice from that company was that TMM Limited should not purchase the machine because of that damage.

[3] Mr FN now makes a claim in the Disputes Tribunal against Mr TM and TMM Limited. He seeks \$6,500.00 being the remainder of the purchase price, and a further \$180.00 which is the price he paid for filing this claim in the Tribunal.

Issues

[4] The issues to be determined are:

- (a) Has ownership of the machine passed to TMM Limited?
- (b) If so, does TMM Limited owe Mr FN the \$6,500.00 he claims?
- (c) If not, has the risk passed to TMM Limited?
- (d) Is Mr FN entitled to be awarded the cost of filing this claim?

Has ownership of the machine passed to TMM Limited?

[5] Section 144 of the Contract and Commercial Law Act 2017 provides that under a contract for the sale of specific goods the property in the goods is transferred to the buyer at the time the parties intend it to be transferred.

[6] Section 146 contains some rules as to ascertaining the parties' intention. Rule 4 provides that if goods are delivered to a buyer on approval, or on sale or return or other similar terms, the property in the goods passes to the buyer when the buyer indicates the buyer's approval or acceptance to the seller or does any other act adopting the transaction.

[7] Mr FN states that he considered that TMM Limited had already purchased the machine when they paid the deposit of \$500.00 because he knew the machine was in good condition and would pass XX's inspection.

[8] However, I find that property or ownership of the machine has not passed to TMM Limited. This is because TMM Limited and Mr FN had specifically agreed that ownership would not pass until the machine had passed its inspection and because the machine was damaged TMM Limited did not accept the goods as required by s146.

[9] Given this finding there is no need to consider the second issue as outlined in 4(b) above.

If not, has the risk passed to TMM Limited?

[10] Section 148 of the Contract and Commercial Law Act 2017 provides that risk passes with property unless otherwise agreed. Unless otherwise agreed goods remain at the seller's risk until property in the goods has transferred to the buyer but once property in the goods has transferred to the buyer then risk also passes to the buyer.

[11] Mr FN states that TMM Limited assumed the risk because it was their agent, YY, which had damaged the machine while the machine was in their possession. Since it was in the agent's possession when the damage occurred, then TMM Limited could be deemed to have also assumed the risk.

[12] However, s148 is clear. Risk passes with property unless otherwise agreed. There was no agreement between the parties that risk would pass at the time the machine was picked up. Further to this, given that I have already found that property did not pass to

TMM Limited, then I also find that the machine remained at Mr FN's risk because it remained his property.

Is Mr FN entitled to be awarded the cost of filing this claim?

[13] Section 43 of the Disputes Tribunal Act 1988 precludes the Tribunal from awarding costs such as these except in certain specific circumstance. None of the specified circumstances occur in this case and so this part of Mr FN's claim is also dismissed.