

BETWEEN

BH
APPLICANT

AND

YH Limited
RESPONDENT

Date of Order:

24 April 2015

Referee:

Referee Tunncliffe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that YH Limited is to freight the exercise bike back to BH at its own cost on or before 10 May 2015 and is to pay \$90 to BH on or before 10 May 2015

Facts

[1] BH purchased an exercise bike online from YH Limited in December 2013. A fault developed in about March 2014. In September 2014, BH emailed a Warranty Claim to YH Limited. YH Limited asked for the bike to be sent to its base in Christchurch for examination and repair. BH advised YH Limited that under the Consumer Guarantees Act he was not liable to pay the freight. There was a stand-off between BH and YH Limited as to who should pay for the freight to return the bike that lasted some time. On 3 November 2014 BH sent a letter to YH Limited advising that he was rejecting the bike. BH eventually sent the bike to YH Limited's Christchurch base late December 2014.

[2] YH Limited examined the bike and discovered a minor wiring fault. YH Limited repaired the bike by replacing the whole console to ensure a lasting repair. The bike is ready to return to BH. YH Limited claims that under the warranty terms and conditions agreed to by BH before he purchased the bike, BH is responsible for the cost of returning the bike to YH Limited for repair and the cost of having it returned after repair.

[3] In his claim to the Tribunal, BH sought a refund of the \$1247 purchase price, \$90 to courier the bike back to YH Limited, compensation of \$52.26 for the unused portion of an iFit subscription, \$9 for the cost of sending the rejection letter by courier post, and \$392.70 for 510 km driven by BH to a local walking/biking track for alternative exercise over 25 weeks since August 2014.

Issues

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

- a. Whether BH was entitled to reject the bike;
- b. If not, whether BH or YH Limited should pay for freighting the bike to and fro for repairs;
- c. Whether BH is entitled to the other consequential losses claimed.

- d. Whether the terms and conditions about freight cost have any effect on this decision.

Was BH entitled to reject the bike?

[5] Under the Consumer Guarantees Act, if a defect is one that can be remedied, a consumer is obliged to give the supplier an opportunity to remedy. A consumer may only reject the goods if the supplier has refused or failed to remedy a defect that can be remedied within a reasonable time or the failure is substantial in character.

[6] The failure was one that could easily be remedied and was not substantial in character. YH Limited did not refuse to remedy. To the contrary, YH Limited agreed it would remedy any defect for which it was liable.

[7] A supplier is entitled to an opportunity to examine the goods in order to check that the failure is a defect in the goods and not damage. The Consumer Guarantees Act is silent on the issue of who should pay for the goods to be returned for that examination. However, it is reasonable that the consumer should pay the freight in the first instance until it can be established whether the failure is a defect or damage.

[8] BH refused to pay and therefore the bike was not returned for the reasonable examination by YH Limited.

[9] I find that BH did not give YH Limited a reasonable opportunity to examine the goods and to repair and therefore he did not have the right to reject the bike. That means that BH is not entitled to a refund of the purchase price.

Should BH or YH Limited pay for freighting the bike to and fro for repairs?

[10] If there has been a failure to meet one of the guarantees in the Consumer Guarantees Act, in addition to a repair, a consumer may obtain damages for any loss or damage to the consumer resulting from the failure which was reasonably foreseeable as liable to result from the failure (s.18 (4) CGA).

[11] The bike has failed to meet the guarantee of acceptable quality as it was not durable.

[12] In addition to the repair, BH is entitled to claim reasonably foreseeable losses or damage.

[13] The freight cost is a cost reasonably foreseeable as resulting from the failure. Therefore I find BH is entitled to receive the \$90 he paid to freight to bike back to YH Limited for repair. In addition, YH Limited is liable for the cost of freighting the bike back to BH and should pay to freight the bike back immediately.

Is BH entitled to the other claims for consequential loss?

[14] BH has claimed for 6 months subscription to an iFit programme for the bike, the cost of the letter of rejection sent to YH Limited, and the cost of driving a vehicle to a local park for walks and mountain biking activities for replacement exercise activities.

[15] I have dismissed BH's claim for the subscription to an iFit programme. BH has not provided any proof of cost. More importantly, BH is responsible for the delay in the bike being repaired by waiting for months after the defect occurred before advising YH Limited of the problem and by refusing to pay to have it freighted back to YH Limited.

[16] I have dismissed the claim for the \$9 courier cost. There is a general duty to mitigate loss. There was no need to send a letter by courier post when all communications had previously been successful by email. This cost was unnecessarily incurred.

[17] I have dismissed the claim for vehicle costs driving to a local park for walking and biking activities as alternative exercise. BH could have walked and biked from his home for alternative exercise. Furthermore, the fault occurred in March 2014 and BH did not return the bike to YH Limited until the end of December 2014. BH is responsible for the extended period of time he was obliged to find alternative exercise activities.

Do the terms and conditions about freight affect this decision?

[18] AA, the Service and Operations Manager, who attended the hearing by teleconference for YH Limited, argued strongly that the warranty terms and conditions about freight should prevail over the provisions of the Consumer Guarantees Act. That is because the terms and conditions about freight are highlighted to every customer and if a customer does not accept those terms, then the customer should not buy from YH Limited. YH Limited chooses to sell to customers who do accept the terms and conditions.

[19] The Consumer Guarantees Act is intended to provide a set of rules to apply to all consumer transactions except for some exceptions referred to in the Act. A supplier may not

contract out of the Consumer Guarantees Act. The provisions of the CGA shall have effect notwithstanding any provision to the contrary in any agreement (S.43 (1) CGA).

[20] If YH Limited's argument was to be accepted, it would mean that YH Limited had contracted out of the CGA with all of its customers and that is prohibited by S.43 CGA..