

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Treasured Memories In Home Nursing Care Limited v. I.M.P. Group Limited*, 2019 NSSM 43

CLAIM NO. SCY- 470785

DATE: 20190808

BETWEEN:

NAME:

Treasured Memories In Home Nursing Care Limited

CLAIMANT

ADDRESS: c/o Kiel D. Mercer

Pink Star Barro

[...]

and

NAME:

I.M.P. GROUP LIMITED

DEFENDANT

ADDRESS: c/o Mercy Mutale Motey

[...]

DECISION

[1] A hearing in this matter was held on the 14th day of May, 2019. The Claimant, Treasured Memories In Home Nursing Care Limited, (hereinafter referred to as "Treasured Memories") brought this claim against I.M.P. Group Limited, which was at the time operating under the trade name Harding Medical (hereinafter referred to as "Harding").

[2] Treasured Memories purchased a Savaria SL1000 Stair Lift from Harding which Harding installed at its property at 12 Elm Street, Yarmouth, Nova Scotia. Treasured Memories alleges that the stair lift was not fit for the purpose for which

it was intended and seeks damages pursuant to the *Consumer Protection Act*, R.S., c 92 and the *Sale of Goods Act* R.S., c. 408.

[3] The Defendant, I.M.P. Group Limited ("IMP Group"), argues that it did not manufacture the chair lift in question and is not responsible for defects in workmanship. They further argue that any mechanical problems, repairs or breakdowns of the chair lift in question resulted from mismanagement and misuse of the chair lift by Treasured Memories, intervening actions of employees and/or agents of Treasured Memories and normal wear and tear. Finally, IMP Group counterclaims for outstanding service fees.

[4] Shelly Reardon owns Treasured Memories and acts as the manager of two nursing home facilities operated by Treasured Memories. The initial facility is located at 10 Elm Street, Yarmouth. It has fourteen (14) bedrooms on two floors. Treasured Memories had Harding install a chair lift known as a B.07, made by Savaria, which has served the facility well.

[5] The second facility is located at 12 Elm Street, Yarmouth. It has eleven (11) bedrooms on two floors. Treasured Memories also had Harding install a chairlift at this property and it is this chair lift which is the subject of this proceeding. Ms. Reardon testified that she remembers commenting to the sales person from Harding how pleased she had been with the performance of the chair lift in her neighbouring property. Apparently, Savaria was no longer manufacturing the B.07 model and the Harding salesperson recommended another model known as a SL1000.

[6] Ms. . Reardon was adamant that she had advised the sales person for

Harding that the 12 Elm Street property included 7 bedrooms upstairs and that each resident would need to use the chair lift 3 - 4 times a day. She says she relied upon the expertise of Harding to suggest the right product. Harding sold her the SL1000 lift which is a battery operated chair lift. It charges its batteries while parked at the top and bottom of the stairs.

[7] Ms. Reardon advised there was no written agreement for the purchase of the chair lift. The price was \$9,988.00 and Treasured Memories paid it off over time.

[8] Unfortunately, the SL1000 did not provide the type of service Treasured Memories was hoping for. There were numerous complaints and breakdowns. These included blown fuses, prematurely worn out batteries, wiring issues , faulty control boards, strange noises and a burning smell. Harding sent service technicians out to the property on several occasions. The whole chair was eventually replaced but even this did not solve the problem.

[9] Mr. David Chaimberlain gave evidence on behalf of Harding. Mr. Chaimberlain was not involved in the sale of the unit in question. The individual who sold the unit no longer works with Harding. Mr. Chaimberlain explained that Harding is the exclusive dealer for Savaria products in the Atlantic Provinces. They have installed approximately 300 SL1000 model chair lifts and have not had significant problems with any other units. He went on to testify that the SL1000 has a 350 pound limit and is designed to provide a maximum of 30 cycles per day. I understand a cycle to be one trip up the stairs to the top and return to the bottom. He said that regular usage of the lift at more than 30 cycles a day would be excessive and that continued use with no " resting" or charging time in between would be excessive.

[10] Mr. Chamberlain testified that reports from his technicians indicated that staff at Treasured Memories were advising them that there were 2-3 residents using the lift. However, the technicians further reported seeing 4-6 residents line up to use the lift at meal times. Mr. Chamberlain suggested that the explanation for the difficulties being experienced by Treasured Memories, given the proven track record of the SL1000 in other institutions, was excessive use. While the SL1000 might do 2-3 cycles in a row, it is not designed to consistently do 4-3 continuous cycles without rest periods for charging.

[11] Paul Goguen, a technician for Harding, testified that he visited the Treasured Memories property to maintain the chair lift in question and to respond to breakdowns. He suggested that while Ms. Reardon would suggest to him the chair was being used by 2-3 people, Treasured Memories staff suggested there might be as many as 7 people regularly using the lift. Mr. Goguen testified to seeing 4-5 people line up to use the chair lift at meal time. This was consistent with the evidence of Laurynda Jo Masee, a former staff member of Treasured Memories who testified that while she was with Treasured Memories, they did not try to limit access to the chair lift by the residents.

[12] Given all the evidence taken as a whole, I am satisfied that the poor service provided by the SL1000 as installed at Treasured Memories' property located at 12 Elm Street, Yarmouth, was as a result of excessive use of the unit.

[13] The Claimant, Treasured Memories, in its pleadings relies upon the provisions of the *Consumer Protection Act*, R.S., c 92, and the *Sale of Goods Act*, R.S., c. 408. The relevant provisions of the *Consumer Protection Act* being as

follows:

26 (1) In this Section and Section 27, "consumer sale" means a contract of sale of goods or services including an agreement of sale as well as a sale and a conditional sale of goods made in the ordinary course of business to a purchaser for his consumption or use but does not include a sale

- (a) to a purchaser for resale;
- (b) to a purchaser whose purchase is in the course of carrying on business;
- (c) to an association of individuals, a partnership or a corporation; or
- (d) by a trustee in bankruptcy, a receiver, a liquidator or a person acting under the order of a court.

[14] I am satisfied that this transaction was a sale by Harding in the ordinary course of business to Treasured Memories, and that Treasured Memories acquired the chair lift for its own use or consumption. I find therefore, that the sale of the chair lift by Harding to Treasured Memories was a "consumer sale" as defined by the *Consumer Protection Act*.

[15] Accordingly, Subsections 26 (3) and (5) of the "*Consumer Protection Act*" also apply and state as follows:

26 (3) Notwithstanding any agreement to the contrary, the following conditions or warranties on the part of the seller are implied in every consumer sale:

- (a) a condition that the seller has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass;
- (b) a warranty that the purchaser shall have and enjoy quiet possession of the goods;
- (c) a warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made;
- (d) where there is a contract for the sale of goods by description, there is a condition that the goods shall correspond with the description; and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description;
- (e) where the purchaser, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the purchaser relies on the seller 's skill or judgement and the goods are of a description which it is

in the course of the seller's business to supply, whether he be the manufacturer or not, a condition that the goods shall be reasonably fit for such purpose; provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

(t) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, a condition that the goods shall be of merchantable quality, provided that, if the purchaser has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

(g) in the case of a contract for sale by sample

(i) a condition that the bulk shall correspond with the sample in quality,

(ii) a condition that the purchaser shall have a reasonable opportunity of comparing the bulk with the sample,

(iii) a condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample;

(h) a condition that the goods are of merchantable quality, except for such defects as are described;

(i) a condition that the goods, whether bought by description or otherwise, are new and unused unless otherwise described ;

(j) a condition that the goods shall be durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale.

26 (5) There shall be implied in every consumer sale of services a condition, on the part of the seller, that the services sold shall be performed in a skilful, efficient and competent manner.

[16] Section 17(a) of the Sale of Goods Act is also relevant to this matter and states as follows:

17. Quality or fitness for particular purpose

Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness, for any particular purpose, of goods supplied under a contract of sale, except as follows:

(a) where the buyer, expressly or by implication, 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, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose, provided that, in the case of a contract for the sale of a specified article under its patent or other trade-name, there is no implied condition as to its fitness for any particular purpose.

[17] Section 26(3)(e) of the *Consumer Protection Act* and Section 17(a) of the *Sale of Goods Act* create a condition that goods will be reasonably fit for the purpose for which they are intended, where a buyer has expressly or impliedly made known to a vendor the purpose for which the goods are intended. It is an essential requirement however, that the claimant make known the purpose for which the goods were required. Ms. Reardon, on behalf of the Claimant, testified that she told the Harding representative that there were 7 rooms in the upstairs of 12 Elm Street, and that each resident would need to use the lift up to 3-4 times a day. She said nothing to suggest that she advised that these cycles, which are within the 30 per day that Harding suggests the SL1000 can make, would have to be made in continuous succession around meal times and other social activities of the residents. The continuous use observed by Mr. Goguen was described as excessive by both witnesses for the Defendant, Harding.

[18] Unfortunately, there is no written agreement between the parties outlining the nature of the use which Treasured Memories intended to make of the chair lift. There is at least some suggestion that Treasured Memories sought to suggest to Harding that the use they were making of the chair lift was less intense than it in fact was.

[19] In all the circumstances, I feel that I am unable to conclude, on the balance of probabilities, that the claimant sufficiently made known to the Defendant the purpose and use to which it intended to put the chair lift in question. As a result, the claim is dismissed.

[20] Harding has counter-claimed for \$1,057.45, being an amount outstanding for service work. There is no dispute that these services were in fact provided to

Treasured Memories. I have not found any breach of an implied warranty as alleged by Treasured Memories. I find that the most likely cause of the difficulties Treasured Memories experienced with their chair lift is excessive use. I find no reason why Treasured Memories should not pay for the service calls in question.

[21] Treasured Memories will be required to pay to Harding the amount of \$1,057.45. No costs will be awarded to either party.

Brent H Silver
Small Claims Court Adjudicator