

In the London Arbitration Centre

Case no. IC4920

Between;

The seat of Arbitration is in England & Wales

In accordance with the London Arbitration Centre Rules of Procedure

Date of Award; **[insert date]**

Mr XXXXX XXXXX

claimant

And

XXXXX XXXXXtrading as Daemoness Guitars

trader

### **Final Order**

#### Introduction

The trader manufactures to order custom made electric guitars. The initial order appears to have been placed by the claimant in 2014 and the guitars were finally delivered in 2017. The claimant brings a claim against the trader in relation to alleged defects in both the guitars supplied by the trader.

The claim was lodged at the London Arbitration Centre (LAC) as a consumer dispute, however, it is clear that the 'claimant' is a professional musician who purchased the two electric guitars in the course of a business. Technically, the claim falls outside the scope of the Alternative Dispute Resolution for Claimant Disputes (Competent Authorities and Information) Regulations 2015.

The only other point to be made in the introduction is that the trader is located in the United Kingdom. The claimant is based in Quito, Ecuador.

#### The dispute

On about 5<sup>th</sup> October 2020, the trader filed a response to the claim. Essentially, the claim was disputed. Without repeating the response word by word, I have extracted and set out below the trader's comments in relation to his offer to rebuild the guitars. This is because this might otherwise have been an implied admission that the guitars were not of satisfactory quality. The trader's explanation for the offer to re build the guitars is as follows;-

*I did offer to rebuild both guitars for Mr XXXXX, based purely on his information. I did this because I trusted him, and I knew from having made the guitars(myself) that they were fundamentally sound. I would simply have them returned, make replacements for Mr XXXX, and then sell them to someone else after undertaking any remedial work that might be required for any reason. This was something Mr XXXXX requested and I proceeded construction on, and was working on at the beginning of this*

year before the effects of the Covid -19 pandemic had the most profound negative effects on every area of my industry.

I have not therefore construed the offer to rebuild the guitars as an implied admission of liability although I am not sure how the trader proposed to sell on the guitars to a third party if he was making the rebuild for the claimant.

#### The Interim Order dated 17<sup>th</sup> October 2020

More important, the parties had appeared to have reached an agreement between themselves and this was not disputed by the trader in his response to the claim.

The claimant stated in the claim form;-

*I try to negotiate with him in a very polite, respectful and professional manner. On 26 August 2020 I send him an ultimatum, in which I request the full refund of £6,436.03 (which is the price of the guitars not including shipping or taxes), to be paid on or before Friday 25 September 2020. And I agree to return the guitars back to him once I can verify the money is in my account.*

*To that communication he replies on 2 September 2020 and agrees. Only to write to me again later, claiming he "misunderstood" the terms that were agreed upon, and refusing to pay the deposit unless I return the guitars to him first.*

I therefore made the Interim Order which essentially provided that the trader pay into the LAC £6,436.03 and the claimant send the two guitars to the LAC. A final order would then be made releasing the guitars back to the trader and making the refund to the trader.

#### Matters arising after the Interim Order dated 17<sup>th</sup> October 2020

By email dated 21<sup>st</sup> October 2020, the claimant confirmed that the guitars had been dispatched. He states he incurred the 'shipping' cost of \$1,099.32 USD or £850.00. The claimant also stated that no agreement had been reached between the parties as to the cost of shipping. In legal terms, the claimant appears to be suggesting that the agreement made between the parties on about 26<sup>th</sup> August 2020 was an incomplete agreement and therefore there was no agreement.

In his email dated 21<sup>st</sup> October 2020, the claimant states;-

*In other words, (he) had agreed to return the guitars, provided Mr. XXXXX paid for courier charges..... Mr. XXXXXX should be obliged to pay me back for the costs of shipping the guitars from Ecuador to the UK... I also sincerely hope your Final Order is thorough and adjudicates on all the issues raised by my complaint and throughout this process. Especially those major failings from Mr. XXXXXX, like: a) the huge delay in completing and delivering the guitars the first time; b) the fact that he delivered products that were not of satisfactory quality, not fit for purpose, and not as described; c) the fact that he promised to re-build both guitars and deliver them by March 2020, deadline he set himself and never met; d) the fact that Mr. XXXXXX' actions (or lack thereof) have hindered my ability to work and make an income for a very long time; etc.*

On 23<sup>rd</sup> October 2020 the trader paid into the LAC the sum of £6436.03.

#### The law

I have considered the claim by the claimant on the basis that the claimant alleges that the trader is in breach of the implied term set out in Section 14 of the Sale of Goods Act 1979 which states;-

*Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.*

For the purpose of understanding the relevant law, I have assumed that the two guitars were not of satisfactory quality. If this had been a contract between a consumer and a trader, the right to reject the goods is qualified under section 24 of the Consumer Rights Act 2015 as follows:-

*(8) If the consumer exercises the final right to reject, any refund to the consumer may be reduced by a deduction for use, to take account of the use the consumer has had of the goods in the period since they were delivered, but this is subject to subsections (9) and (10).*

*(9) No deduction may be made to take account of use in any period when the consumer had the goods only because the trader failed to collect them at an agreed time.*

*(10) No deduction may be made if the final right to reject is exercised in the first 6 months (see subsection (11)), unless—*

*(a) the goods consist of a motor vehicle, or*

*(b) the goods are of a description specified by order made by the Secretary of State by statutory instrument.*

*(11) In subsection (10) the first 6 months means 6 months beginning with the first day after these have all happened—*

*(a) ownership or (in the case of a contract for the hire of goods, a hire-purchase agreement or a conditional sales contract) possession of the goods has been transferred to the consumer,*

*(b) the goods have been delivered, and*

*(c) where the contract requires the trader to install the goods or take other action to enable the consumer to use them, the trader has notified the consumer that the action has been taken.*

It is clear under the Consumer Rights Act 2015, the right to reject goods not of satisfactory quality by a consumer is tempered by a reduction in the sums liable to be returned to the consumer to take into account the use the consumer has had of the goods.

I have already determined the claimant is not a consumer. The claimant does not have a right to reject the two guitars except as provided by common law. The question, I have to decide is whether the claimant has elected to continue with the contract with full knowledge of the defects alleged. To put the question in legal context, I have to consider whether there has been an affirmation of the contract. The leading case here is *Tele2 International Card Company SA v Post Office Limited [2009] EWCA Civ 9*. I set out the relevant paragraphs of that judgement;

*53 Lord Goff's analysis of the doctrine of affirmation of a contract by election can be summarised, for the purposes of the present case, as follows: (1) if a contract gives a party a right to terminate upon the occurrence of defined actions or inactions of the other party and those actions or inactions occur, the innocent party is entitled to exercise that right. The innocent party has to decide whether or not to do so. Its decision is, in law, an election. (2) It is a prerequisite to the exercise of the election that the party concerned is aware of the facts giving rise to its right and the right itself. (3) The innocent party has to make a decision, because if it does not do so then "the time may come when the law takes the decision out of [its] hands, either by holding [it] to have elected not to exercise the right which has become available to [it], or sometimes by holding [it] to have elected to exercise it". (4) Where, with knowledge of*

*the relevant facts, the party that has the right to terminate the contract acts in a manner which is consistent only with it having chosen one or other of two alternative and inconsistent courses of action open to it (ie. to terminate or affirm the contract), then it will be held to have made its election accordingly. (5) An election can be communicated to the other party by words or conduct. However, in cases where it is alleged that a party has elected not to exercise a right, such as a right to terminate a contract on the happening of defined events, it will only be held to have elected not to exercise that right if the party "has so communicated [its] election to the other party in clear and unequivocal terms".*

54. *It is clear from Lord Goff's analysis that when a party to a contract is put in a position where it has to decide whether or not to exercise a right to terminate that it is given by the terms of a contract and it is disputed whether that party has terminated or has elected to abandon the right to terminate, then a court has to make a finding one way or the other. Whether a party has elected to terminate or to affirm the contract is a question of fact: either a party has affirmed the contract or it has not. If the innocent party has not affirmed the contract, then the right to terminate will be exercisable still.*

The claimant states he received the guitars on 25<sup>th</sup> September 2017. He states *"Through September 2017 up until November 2019 I am constantly noticing problems with the guitars."* And that *"On 3 November 2019 I finally run out of patience and change my mind about keeping the guitars."*

#### Conclusions

I find that the claimant elected to affirm the contract after he became aware of the alleged defects. I find that when *"On 3 November 2019 (the claimant) finally run out of patience and change my mind about keeping the guitars"* it was too late to exercise his right to terminate the contract. The two year period between when the claimant first became aware of the alleged defects is just too long not to come to the conclusion that the contract has been affirmed. I find that the claimant has lost the right to reject the guitars because the contract was affirmed.

I find that the parties reached an agreement on about 26<sup>th</sup> August 2020 which is much more favourable to the claimant than might otherwise have been the situation under common law. I also find that the claim is outside the Alternative Dispute Resolution for Claimant Disputes (Competent Authorities and Information) Regulations 2015 and as such the claimant has availed himself to process which should not have been free of cost to him. The trader has paid the ADR fee on behalf of the claimant.

I make no finding on the quality of the guitars sold by the trader to the claimant because I do not need to do so. My view is that the repayment of the full purchase price (as opposed to a partial refund to cover the cost of any remedial works) makes this task unnecessary.

On the basis of the law and the findings above, I propose not to make the trader liable to refund the claimant the cost of the courier (or the shipping cost) of the two guitars to the LAC pursuant to the interim order. I believe the claimant has achieved better outcome by way of agreement with the trader than he would have done under the strict application of the law.

This means even if there was no agreement or an incomplete agreement made between the parties on about 26<sup>th</sup> August 2020 then the claimant has still obtained a better outcome by virtue of the Interim Order dated 17<sup>th</sup> October 2020.

#### Incidental matters of law raised by the parties

The following issues have been raised by the parties which I propose to clarify below. These comments do not add to or change the final order. They are intended to clarify matters of law.

*'Shipping' costs of goods purchased at distance.*

There is no implied term that the seller pay the cost of shipping. Unless the trader agrees to meet these expenses, the sale price is net of delivery charges. Where goods are defective, the cost of shipping is recoverable as a separate head of damages. If the guitars are returned to be made good, then the claimant recovers only the cost of shipping. If the trader pays the shipping, then there is no recoverable loss incurred by the claimant.

*Compensation payable on a breach of contract*

The principle was established in the case of *Hadley v Baxendale [1854]*. Basically, a breaching party is liable for all losses that the contracting parties should have foreseen but is not liable for any losses that was not in the contemplation of the parties when the contract was made.

The question of refunding taxes paid by the claimant only arises if the claimant had a right to reject the guitars. My view is that the tax should be refundable by the tax levying authority to the claimant if the goods had been returned to the trader.

The claimant's claim to compensation "*.....plus at least 10% (£740) in compensation for all of the reasons described above*" is not be recoverable under English law.

#### Final Order

The final order is as follows;-

1. The trader pay the claimant £6,436.03 by way of a payment from the sum of £6,436.03 presently held by LAC with such sum being paid by LAC (less any bank transfer fee) on behalf of the trader to the claimant directly into the claimants bank account as follows;

BANK DETAILS (XXXX BANK):

Account Name: XXXXX XXXXX XXXXXXXXXXXXXXXxxx

Sort Code: XXXXXXXXXXXXXx

Account Number:XXXXXXXXXX

Bank Address: XXXXXXXXXXXXXXXXXXXx.

2. The trader take possession control and ownership of the two guitars sent to the LAC by the claimant by collection using by courier after giving reasonable prior notice of when such collection will take place.

Signed.....

Ayub Sadiq

ADR Official appointed by the London Arbitration Centre Limited