NCAT
NSW Civil &
Administrative Tribunal
Consumer and Commercial Division

NOTICE OF ORDER

Matthew Lesso
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File No: GEN 17/26210
Quote in all enquiries
eNumber: 36057FB69

Application to the Tribunal concerning MATTHEW LESSO - RENTAL CAR HOLDINGS PTY LTD T/A EAST COAST CAR RENTALS

Applicant: Matthew Lesso
Respondent: Rental Car Holdings Pty Ltd t/a East Coast Car Rentals

On 08-Sep-2017 the following orders were made:

1. Rental Car Holdings Pty Ltd t/a East Coast Car Rentals 80 Ferny Avenue Surfers Paradise QLD 4210 is to pay Matthew Lesso 172 Coogee Bay Road COOGEE NSW 2034 Australia the sum of $31.20 immediately.

Failure to pay any instalment in this order by the due date will result in the whole of the balance being payable immediately.

Reasons:
The applicant is a "consumer" and the respondent a "supplier" who "supplied " (as those terms are defined under the consumer legislation that bestows jurisdiction on this Tribunal) to the applicant a motor vehicle for hire.
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On 19/3/17 the applicant and respondent entered into a contract (the contract) and the applicant took possession of the vehicle . On that same date, 19 March 2017, the applicant later reported to the respondent that the axle of the vehicle had separated from a tyre. As a result the vehicle was towed back to the respondent's premises; and the applicant returned to the respondent's premises and signed a damage claim form.

The respondent then invoked the "Acceptance of Loss/Damage Liability" clause under the contract and deducted $5500 from the applicant's credit card.

The applicant disputes the respondent's entitlement to this excess and has brought these proceedings seeking reimbursement of the $5500 and reimbursement for the towing fee he incurred in the sum of $225.

The above is not controversial.

Section 62 (2) of the Civil and Administrative Tribunal Act 2013 provides the following:
Any party may, within 28 days of being given notice of a decision, request the Tribunal provide a written statement of reasons for it's decision. The request should be, in writing, addressed to the Registrar.

What is controversial is whether the separation of the wheel from the axle occurred as a result of mechanical failure (as alleged by the applicant) or as a result of the applicant having an accident while driving (as alleged by the respondent)

In finding that the applicant has failed to establish his case that he should be reimbursed the full $5550 excess and the towing fee, I have been particularly persuaded by the following:

1. The applicant signed both the contract and damage claim form and has provided no compelling reason or substantiating evidence as to why he should not be bound by those documents he signed.
2. The applicant's claims that immediately upon starting to drive the vehicle he "sensed it was not in the best condition" and that he "felt in his own mind" that the vehicle was not roadworthy, are not substantiated by any other evidence.
3. In any event, notwithstanding these claims, the applicant did not return immediately to the respondent's premises but continued to drive the vehicle upon leaving those premises in Mascot until he reached Anzac Parade, where the incident occurred
4. The applicant seeks to have clauses(b) and (d) of the Acceptance of Loss Damage Liability clause struck out, arguing that they are unfair contract terms because they make him liable irrespective of whether he is at fault or not. Yet on my reading these clauses, as far as is relevant here, only apply where there is a "single vehicle accident" (cl b) or an "underbody accident" (cl d).
5. While I agree with the applicant's argument that cl 3 (ix) of the contract appears unfair in that it on its face it attaches liability for damage irrespective of the cause, the respondent is not relying on that clause and as such it is not necessary for me to make any ruling on it.
6. The applicant's argument that he should not have been automatically deducted the maximum excess ie $5,500 is not persuasive given that the unrefuted evidence is that the cost of repair is within the vicinity of that figure (I return to this issue below).
7. The applicant's evidence that even if he did hit something (for example the "construction barrier" he refers to in his handwritten note of 19/3/17, which was later transposed into the Damage Claim form he signed) this occurred after he lost control due to the mechanical failure of the car, is not substantiated by any objective evidence
8. The Geary Repair quote on which the respondent relies , stems from an inspection on 21/3/17 as noted in that document. The respondent pointed out that this document raises an issue with the "suspension" .
9. The Landau opinion, although unsworn and unsigned, does support the respondent's case that that the incident arose from a "massive hit" as shown in the photos Mr Landau took and on which the respondent also relies. What is more this evidence is not directly refuted. Nor is the respondent's evidence that Mr Landau actually inspected the vehicle.
10. The respondent also relies on the document from Kia Rockdale , registered Kia repairers, who examined the vehicle. Again while unsworn and unsigned this document supports the respondent's case that the subject damage was caused by "impact" and is not directly refuted
11. The Alliance Insurance assessors report although unsworn and unsigned also supports the respondent's case as to the damage being caused by impact while the car was driven as well as supporting the respondent's costing of the damage. Although the respondent conceded that this document was created after a "desk top"evaluation, the author not having examined the vehicle, the respondent's evidence that the author was provided with photographs, prior reports and invoices , adds some weight to this document, which is not directly refuted by evidence from the applicant.

12. While the Landau, Rockdale Kia and Alliance documents may not be quite at "arms length" in the sense that these entities are known to the respondent, there is nothing to substantiate the applicant's claims of bias. In any event they stand unrefuted by the applicant who has not brought weighty evidence to counter them and there is no reason why I should not accept this evidence.
13. While in an ideal world, it may be preferable for those opining on the vehicle to see it as soon as possible after the event, as the applicant claims, there is no evidence to show that the opinions provided, given the state and type of damage in issue, would have been any different
14. Cl 5 of the contract, on which the applicant relies in seeking a refund of the towing costs he paid, confines free roadside assistance where there are "inherent mechanical faults". For reasons already given, the applicant has failed to show that this was the case.

In light of the above I decline to order a repayment of the entire $5500 excess fee and the towing cost. I do however, propose to order the respondent to pay the applicant $31.20 being the difference between the $5,500 excess deducted and the $5468.80 repair costs the respondent incurred. I am not satisfied that the other costs set out in the respondent's letter of 1 June 2017 fall within sub- clause b of the Acceptance of Loss/Damage Liability clause which is in the contract prepared by the respondent and which should therefore be read strictly against the respondent.

If you do not receive the money payable to you as directed by this order, you can get a certified copy of this money order from NCAT. You can then register it with the Local or District Court to enforce the order. For more information about enforcing money orders, visit the NCAT website www.ncat.nsw.gov.au.

Note: Failure to pay the money owed by this order in the time directed can result in enforcement action being taken in the Local or District Court. If this happens additional costs and interest can be added to the amount payable.

C Paull
Tribunal Member
08/09/17

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