

**NEW SOUTH WALES CIVIL & ADMINISTRATIVE TRIBUNAL
APPEAL PANEL**

NUMBER:
AP17/42124

Appellant: **MATTHEW LESSO**
AND
Respondent: **RENTAL CAR HOLDINGS PTY LTD**
ACN 129 240 268

ATTACHMENT TO REPLY TO APPEAL

Item 1: Details of Appeal.

1. See form.

Item 2: Respondent.

2. See form.

Item 3 A Orders Challenged on Appeal.

3. The Respondent supports the original orders made by Tribunal Member C Paull on 8 September 2017.
4. The original orders were:
 - a. Decline to order that the Respondent repay the entire \$5,500 excess fee to the Appellant.
 - b. Respondent to pay the Appellant \$31.20 immediately being the difference between the excess fee of \$5,500 and repair costs of \$5,468.80.

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Item 3 B Reply to Appellant's Grounds of Appeal.

5. The Appellant is attempting to re-litigate the factual findings on an internal appeal [s.80(2)(b) *Civil & Administrative Tribunal Act 2013 (NSW)*]. The Appellant cannot, without leave, attempt to re-litigate Tribunal Member C Paull's factual finding that the damage to the car was caused by an impact for which the Appellant was responsible, and not from any inherent mechanical failure or fault.

6. The Appellant has not shown that Tribunal Member C Paull has made any error of law. Tribunal Member C Paull fairly received the Appellant's only legal argument that the terms of the contract were unfair, which argument was set out in documents entitled 'Document 1 'Summary of Complaint'' and 'Document 2 'Complaint to NSW Fair Trading'' (**'Documents 1 and 2'**), which were attached to the original application dated 5 June 2017. Tribunal Member C Paull found that they were not unfair. A subjective feeling that the application of contract terms to a particular factual scenario is unfair does not equate to, or mean that, a Tribunal Member's erred at law in finding that said contract terms were not unfair.

7. The Tribunal does not have jurisdiction under the *Australian Securities and Investments Commission Act 2001 (Cth)* (**'ASIC Act'**). In this regard:
 - (a) The Federal Court case of *ACCC v CLA Trading Pty Ltd* [2016] FCA 377 involved sections 12GBA, 12GND, 12GLA and 12GLB of the ASIC Act, which sit within Division 2 of the ASIC Act.

 - (b) Section 12HD of Division 2 of the ASIC Act vests 'the Court' (capital 'C') with jurisdiction to make declarations and orders under Division 2.

 - (c) Section 12BA of Division 2 defines 'the Court' to mean the Federal Court of Australia. The Tribunal is not the Federal Court of Australia.

 - (d) Thus, even if the Tribunal was minded to exercise powers under Division 2 of the ASIC Act, it could not do so for want of jurisdiction.

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(e) In any event, the case of *CLA Trading* does not apply because the Appellant was at fault in causing the damage. Tribunal Member C Paull made this factual finding. Thus it is not relevant for the Appeal Panel to determine whether or not those terms of the subject contract, which ascribe liability irrespective of fault, are unfair terms. Further, the terms of the contract in *CLA Trading* are not the same as the terms of the contract here and only the Federal Court has jurisdiction to examine the two sets of terms and declare the subject terms before this Appeal Panel unfair or void.

8. The Tribunal does not have jurisdiction under the Australian Consumer Law [Schedule 2 of the *Competition and Consumer Act 2001 (Cth)*] to declare a contractual term to be unfair. In this regard:

(a) The power to declare a contractual term unfair stems from s.250 of the Australian Consumer Law.

(b) Section 250(1) and (2) of the Australian Consumer Law states 'The Court may declare...'

(c) Section 4 of the Australian Consumer Law defines 'court' as follows:

"court", in relation to a matter, means any court having jurisdiction in the matter.

(d) The Tribunal is not listed in the definition of 'court' under s.4 of the Australian Consumer Law. The Tribunal is not a court.

(e) Thus, even if the Tribunal was minded to exercise powers under s.250 of the Australian Consumer Law, it could not do so for want of jurisdiction.

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Item 4: Reply to Leave to Appeal.

9. Leave to appeal as to factual findings should not be granted because the factors listed in Schedule 4, Clause 12(1)(a)-(c) of the *Civil and Administrative Tribunal Act 2013* (NSW) have not been met. Those factors have not been met because:
- a. Tribunal Member C Paull's decision was not unfair or inequitable, nor against the weight of evidence [Clause 12(1)(a)-(b)]. Tribunal Member C Paull relied on 3 or 4 pieces of third party evidence in making the factual finding he did. It was the Appellant's choice, at first instance, not to use an expert report to substantiate his allegation that the car had an inherent mechanical fault in circumstances where his Document 1 on page 1 admits that '*this would have required expert diagnosis*' and on page 4 that the subject is one '*in which none of us are experts*'.
 - b. The Appellant's alleged new evidence, described as alleged '*discrepancies*' in the photographs, previously provided by the Respondent, which he has only now noticed, is not new evidence. The photographs were before and considered by Tribunal Member C Paull. The alleged noticing of alleged new aspects of evidence which have already been presented at first instance is not, by definition, new evidence [see Schedule 4, Clause 12(1)(c)]. Rather, it is the mounting of fresh arguments as to facts which should have been mounted before the fact finder at first instance.
 - c. The Appellant's feelings that Tribunal Member C Paull ignored his arguments at first instance do not mean that this occurred.
 - d. The Appellant's 'Grounds of Appeal' document as attached to his Notice of Appeal do not mount any fresh legal arguments concerning points of law, including as to whether the terms of the contract were unfair, which Tribunal Member C Paull did not already consider in Documents 1 and 2 (as defined). The 'Grounds of Appeal' document is a rehash of Documents 1 and 2.

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- e. The Appellant's citations of public policy have already been taken into consideration by Parliament in its enactment of the ASIC Act and Australian Consumer Law, and decision to vest jurisdiction in said Acts in the Courts.

Item 5: Reply to Extension of Time.

10. The Respondent accepts that the appeal was lodged within time.

Item 6: Hearing.

11. The Respondent has no special needs, nor requires an interpreter.

Item 7: Reply to Appeal Checklist.

12. Per orders of 20 October 2017, the Respondent will submit any evidence and written submissions by way of separate documents.

Orders

1. The Appeal should be dismissed.

2. The Appellant should pay the Respondent's costs.