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Application to the Tribunal concerning CASSANDRA MACKENDER & DARRYL MACKENDER - NAPOZ PTY LTD TRADING AS SHADOW TRAILERS AUSTRALIA

Applicant: Cassandra Mackender and Darryl Mackender
Respondent: Napoz Pty Ltd trading as Shadow Trailers Australia

On 15-Jul-2016 the following orders were made:

1. Napoz Pty Ltd trading as Shadow Trailers Australia 16 Barralong Road ERINA NSW 2250 Australia is to pay and the sum of \$39089.00 immediately.

Reasons:

- \$39089.00 Costs of purchase of shadow float trailer, on road costs, engineers report and weighbridge fees

2. The applicant's name C.J Mackender, is amended to Cassandra Mackender.

3. The applicant's name D.R Mackender, is amended to Darryl Mackender.

4. Reasons for decision:

1. On 8 March 2016 , the applicants/consumers filed an application seeking an order that the supplier of goods, being a dual axel aluminium horse trailer, provide a refund of \$37,518.00 and accept at return of those goods.

2. On 6 April 2016, , the Tribunal made procedural directions for the filing and exchange of evidentiary documents prior to the hearing.

3. Only the applicants complied with this direction. The directions contained the warning that failure by a party to provide documents in accordance with the Tribunal directions may result in the party not being able to rely on them at the hearing unless leave is granted for them to do so.

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 Divisional Registrar.

4. The respondent had requested an adjournment and then sought leave to tender further documents and rely upon a video at the hearing. Mr Graves for the respondent initially claimed that he thought he had tendered all documents on the respondent's behalf prior to the first Tribunal appearance on 6 April 2016. There is no material on the Tribunal file, and I have been unable to ascertain any evidence the submission of material to the Tribunal by email. The respondent claimed not to have understood the Tribunal directions. Other evidence to the Tribunal does not support that. In a written submission to the Tribunal the respondent requested a 14 day extension to allow an engineer to inspect the trailer. At the hearing the respondent claimed to have expert evidence in the form of weighbridge certificates. The respondent had not served any material on the applicants, although he claimed to have had possession of most of the material since prior to the first Tribunal appearance. Even considering the delay in the respondent collecting the trailer for inspection the Tribunal was not satisfied that the respondent had explained his reasons for failing to submit material in accordance with directions. The respondent had been aware of the hearing date since 11 May 2016, and an extension to comply with procedural directions had already been granted on 27 April 2016. The respondent has not satisfactorily explained the non-compliance with directions, the applicants are present and ready to proceed. The Tribunal refuses to adjourn the matter further. In the circumstances the parties have a legislative duty to co-operate in facilitating the Tribunal's guiding principle of a just quick and cheap resolution to the real issues in the proceedings, section 36(3) Of the Civil and Administrative Tribunal Act 2013. In relation to the material that the respondent wished to submit, the Tribunal allowed the respondent's expert evidence to be relied upon being weighbridge certificates.

5. The Tribunal has jurisdiction to hear and determine an application by a consumer for determination of a consumer claim. A "consumer claim" means a claim by a consumer for a remedy, including the payment of a specified sum of money that arises from a supply of goods or services, by a supplier in the course of a business, to the consumer.

6. The Tribunal finds that on 15 August 2014 the parties entered into a contract for the sale and supply of a custom of a dual axel aluminium horse trailer. The purchase price was \$35,850.00. On 22 May 2015 the applicant took delivery of the trailer from the respondent's premises.

7. The applicants seek an order that the supplier pay them a specified sum of money, this was originally the sum \$37,518.00 plus costs, later changed to \$59,751.00. No leave was granted by the Tribunal for that amendment

8. The contract to which the claim relates was made in NSW, and the goods were supplied from the respondent's place of business at Erina, NSW.

9. The claim arises from the supply of a new motor vehicle that is used substantially for private purposes within the meaning of the Motor Vehicles Taxation Act 1988 . The amount of the claim is within the monetary jurisdiction of the Tribunal that applies to such claims.

10. The Tribunal has jurisdiction to hear and determine this matter and to make the order sought by the applicant.

11. The applicants gave sworn evidence and tendered the following documents:

- (a) Statement made by the applicants;
- b) Statement of Tracey-Anne Clarke
- (c) Statement of Joshua Booth

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- (d) Statement of Emily Booth
- (e) Report of Sean Kelly, Engineer dated 12 August 2015
- (f) E-HVAIS check report dated 12 April 2016
- (g) Report of Allan Goodacre, Engineer
- (h) Receipts;
- (i) Emails between the applicant and respondent

12. The applicants alleged that the trailer supplied to them was not of acceptable quality or fit for purpose and sought a full refund of the purchase price, on road costs and consequential loss

13. The respondent claimed that it was unable to collect the goods back from the applicants to inspect until after the matter came to the Tribunal. It was presented as roadworthy at the time of purchase, it was able to tow animals and weighbridge certificate were submitted to confirm the axle mass of the trailer. Mr Graves gave evidence on behalf of the respondent. He did not dispute the experts reports of the applicants. He did not dispute that the vehicle had failed to be registered on 12 April 2016. No evidence was provided or available to the respondent at the time of hearing that the trailer was registerable in NSW.

14. Section 28 of the Fair Trading Act 1987 provides that the Australian Consumer Law applies as a law of this jurisdiction.

15. Section 54 of the Australian Consumer Law provides that, if a person supplies goods to a consumer, in trade and commerce, and the supply does not occur by way of sale by auction, there is a statutory guarantee that the goods are of acceptable quality.

16. Acceptable quality means that the goods are fit for all the purposes for which goods of that kind are commonly supplied; acceptable in appearance and finish; free from defects; and safe and durable. Whether goods are of acceptable quality is subject to a reasonableness test, that is, would a reasonable consumer who is fully acquainted with the state and the condition of the goods regard them as acceptable?

17. In deciding if goods are of acceptable quality, the Tribunal takes into account the nature of the goods; the price paid for the goods; any statement or representation made about the goods; and all other relevant circumstances. The guarantee will not cover any defect that was specifically drawn to the consumer's attention or any defect that was caused by the consumer failing to take reasonable steps to look after the goods.

18. The reports provided by Sean Kelly and Allan Goodacre set out that the trailer does not meet NSW RTA requirements as a trailer. This is further demonstrated by the RTA e-HVAIS certificate of 12 April 2016. This sets out that the trailer is not of sound construction and the axles do not comply.

18. The applicant has demonstrated a number of defects. These are that the axle has been placed too far back in the vehicle causing excessive weight flow, the safety chain is defective, rear outline markers have not been fitted, the front Reflex reflectors have not been fitted properly, rear number plate light is not fitted correctly. These defects are such that both experts have set out that the trailer does not comply with NSW Roads and Maritime Services registration requirements. Mr Goodacre has provided evidence that at the time of sale the trailer would also not have complied with Commonwealth Department of Transport and Regional Services (DOTAR) requirements.

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19. The respondent has not presented satisfactory evidence to dispute this. The respondent has disputed the compliance with DOTAR requirements, although there is no evidence before the Tribunal other than the fact that the trailer was originally registered to support this. The respondent has relied upon weighbridge certificates obtained the day before the hearing disputing the Aggregate Trailer Mass (ATM) rating. The Tribunal is not satisfied that they are weighbridge certificates for the trailer in question. Further the respondent has not been able to demonstrate that the trailer is at the time of hearing capable of registration in NSW.

20. The Tribunal is satisfied on the balance of probabilities that the trailer has a number of defects, as described in the applicants' list of defects dated 6 July 2015 and the report of Sean Kelly of 5 August 2015 and Allan Goodacre

21. Having carefully considered all of the evidence and the submissions,, the Tribunal is satisfied on the balance of probabilities that the trailer supplied to the applicants was not of acceptable quality. It was not fit for purpose and was not free from defects. The Tribunal is of the view that a reasonable consumer, fully acquainted with the state and condition of the trailer , would not regard it as being of acceptable quality. The fact that the applicants cannot currently legally tow animals in the trailer, register or insure the trailer is a major defect.

22. It is accepted that the applicants did not receive what they thought that they were paying for

23. The Tribunal is not satisfied that once the extent of the defects were brought to the attention of the respondent that they took reasonable steps to address the matter. In this regard the Tribunal notes that the applicant did not initially allow the respondent to collect the goods, rather requested a local inspection.

24. There is no evidence that the applicants failed to take reasonable steps to look after the trailer or that they caused any of the defects.

25. In accordance with Section 271 of the Australian Consumer Law, if the consumer guarantee as to acceptable quality is not complied with, and the failure to comply is major, the consumer will generally be entitled to their choice of a refund, repair or replacement product.

26. In accordance with Section 259(1)(b) of the Australian Consumer Law, a failure to comply with the consumer guarantee as to acceptable quality is considered major, if the goods would not have been acquired by a reasonable consumer, fully acquainted with the nature and extent of the failure.

27. The consumer is entitled to their choice of a refund, repair or replacement product. The applicant has chosen a refund.

29. The Tribunal allows the following amounts being a refund and consequential loss; original purchase \$35,850.00, on road costs \$1,206.00, engineers report fees \$1,850.00, \$100.00 weighbridge fees, \$83 registration attempt fees. The amounts of transport fees and being unable to sell original horse float are not allowed, no leave was granted to amend the claim as such and these amounts are not substantiated. The costs of legal fees and Tribunal fees are not allowed. Leave was not provided for legal representation and each party is to pay their own costs of the proceedings.

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30. The Tribunal further notes that the respondent has collected the trailer from the applicant and has not returned it. The Tribunal makes no further order in respect of the return of the vehicle.

P Hunter
Tribunal Member
15/07/16

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