

BETWEEN

ADU

APPLICANT

AND

ZWG Ltd

RESPONDENT

Date of Order:

7 June 2013

Referee:

Referee Tunncliffe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ADU owes \$26.50 to ZWG Ltd. The sum is to be deducted from the Bond of \$2000. ZWG Ltd is to pay the remainder of the Bond, being \$1972.50 to ADU on or before 17 June 2013.

Facts

[1] ADU and UB hired a Mercedes campervan from ZWG Ltd. The period of hire was to be from 10 March 2013 to 24 March 2013. ADU and UB collected the van on the afternoon of 9 March and took it home overnight. UB drove the van home and also drove it from [A] to [B] the next morning. ADU drove the van from [B] to [C]. At [C], ADU and UB had to stop for road works. When they attempted to move on, ADU could not get the van into gear. After directing the following traffic past, UB took over the wheel and after a short period of time was able to get the van into gear. The next stop was at a railway crossing and UB could not get the van into gear. Again after a short period of time, the van went into gear and they were able to carry on to [D].

[2] At [D], ADU and UB rang ZWG Ltd and were told to carry on slowly to [E] and take the vehicle to the Mercedes repairer. The repairer discovered the clutch was burnt out. ADU and UB were advised to take the van to a camping ground about five kilometres away for the night. ADU and UB found that the van was now much worse and would only travel at about 15 km/hr.

[3] The van could not be repaired the next day due to unavailability of the part required. After phone discussions with AR, ADU and UB left the van at the camping ground for AR to collect together with \$50 for fuel because they had not been able to fill the van up.

[4] ZWG Ltd has since had the van repaired at a cost of \$2501.95. ZWG Ltd retained the deposit of \$2000 paid by ADU and UB on account of these repairs.

[5] ADU has lodged a claim against ZWG Ltd seeking a refund of the \$2000 bond, plus \$140 for petrol costs for her daughter to travel to [E] to collect herself and UB, and \$44 for

the camping ground fee they would not otherwise have paid as they had been intending to freedom camp.

[6] ZWG Ltd has lodged a claim seeking to retain the Bond of \$2000.

Issues

[7] The issues for determination are as follows:

- (i) Whether the clutch was damaged recklessly or wilfully by ADU or UB, or as a result of mishandling or failure to take reasonable care in handling the van;
- (ii) Whether ADU is entitled to compensation for petrol and camping ground costs, and
- (iii) Whether either party owes money to the other.

Decision

Did ADU or UB recklessly or wilfully damage the clutch, or damage it by false handling or failure to take reasonable care?

[7] The law of contract applies. Parties to a contract are bound by the agreed terms or any implied terms.

[8] The relevant term of the contract to consider in relation to the owners obligations is clause 14 of the Agreement to Hire which places responsibility on the owner for all ordinary and extra-ordinary costs of running the vehicle during the term of the hire except to the extent that by the terms of the agreement those costs are payable by the hirer. The note attached to Clause 14 states that in the unlikely event of a mechanical problem, repair costs will be borne by the owner.

[9] The relevant terms of the contract to consider in relation to the hirer's responsibilities in the Agreement to Hire are Clause 9 and 10(f). In Clause 9, the hirer is required to take all

reasonable care in handling the vehicle. The cost of insuring the vehicle during the period of hire is included in the hire charge. Clause 10 is the insurance clause. There are exclusions in the insurance clause. Sub-clause (f) states that the insurance indemnity does not apply to damage, injury or loss arising when the vehicle is wilfully or recklessly damaged by the hirer or any driver named in the Agreement.

[10] There are also Conditions of Campervan Hire set out on ZWG Ltd's website. A copy of these conditions was given to ADU prior to the hire and it is agreed that these conditions also form part of the hire. The relevant section is headed "Mechanical Failure" wherein it states that damage to the clutch due to false handling of the campervan is to be paid by the customer.

[11] It seems to me that repairing a failed clutch would fall to ZWG Ltd as an ordinary or extraordinary cost of running the vehicle and because the repair is required as a result of a mechanical breakdown, unless it can be proved "on the balance of probabilities" (i.e. with more certainty than doubt/more likely than not) that ADU or UB failed to take reasonable care in handling the vehicle, drove or behaved wilfully or recklessly, or falsely handled the vehicle causing the clutch to burn out.

[12] The clutch plates had been replaced 96,909 km prior to the hire to ADU or UB. Mr Wenzel says immediately before the hire to ADU and UB he had driven the van from the [F] airport to [G] which involves hills and he noted nothing wrong with the clutch. Also AR and NV refer to the comments in the invoice where the repairer says this was one of the worst clutches he had seen as all the fibers had been burnt off. This didn't look like a part failure as it had been slipped and burnt and turned the clutch components blue with the heat. The repairer stated if the clutch was in this condition from when the vehicle was picked up and driven from [F] it would not have made it up the steep hills leaving [F]. ZWG Ltd suggests that unfamiliarity of driving a manual vehicle or a campervan may be a factor.

[13] On the other hand, UB's evidence is that he had been a truck driver for 10 years, albeit now 30 years ago, and that ADU and UB have owned manual vehicles over the years and only their last two vehicles have been automatics. ADU has driven manual cars on a

daily basis for the last 13 years in the course of her employment. UB said he noticed nothing untoward when driving or travelling in the campervan before the problem at [C]. UB was able to drive up the [local mountain ranges]. He says he drove slowly in low gear and noticed nothing untoward and he did not have to stop and start on an uphill section. ADU drove the van for approximately one hour on the flat between [B] and [C]. Neither noticed any untoward smell at any time.

[14] I have considered all of the evidence by both parties. Weighing up the evidence of AR, that he observed no fault with the clutch when he drove the vehicle prior to the hire to ADU and UB and that therefore ADU and UB must have done something to cause the damage, along with the statement in the repairer's invoice, against the evidence of ADU and UB, who gave evidence consistent evidence about their careful use of the van and the absence of any obvious problem until [C], I find there is insufficient evidence to satisfy me that is more likely than not that either ADU or UB has failed to take reasonable care handling the van or driven or behaved recklessly or wilfully, or falsely handled the vehicle leading to clutch failure. Therefore, I find that ADU (and/or UB) is not liable to pay for any part of the cost of repairing the clutch.

Is ADU entitled to the cost of petrol and camping ground fee?

[15] In Clause 14 of the Agreement to Hire, it is stated that in the event of a breakdown the owners do not accept any responsibility for hotel or motel charges and their liability is limited to the refund of hire charges for total loss of vehicle use. In the website conditions headed "Supply", ZWG Ltd reserves the right to supply a substitute campervan, but if a substitute is not available, ZWG Ltd's liability is limited to a full refund of monies received by ZWG Ltd.

[16] A replacement van was not available.

[17] I find that ADU is not entitled under the terms of the contract for the cost of petrol for her daughter to travel to [E] to collect ADU and UB, or for the overnight camping ground fee.

[18] ZWG Ltd has refunded the hire fee, except for the one day the van was used for.

Conclusion

[19] ZWG Ltd is not entitled to retain the bond of \$2000 and it should be returned to ADU. However, at the hearing it was agreed that an additional amount of \$26.50 was owed by ADU to fuel up the van at the end of the period of hire. ZWG Ltd may deduct that from the bond but are to refund \$1972.50