

BETWEEN

**HD
APPLICANT**

AND

**RWW Ltd
RESPONDENT**

Date of Order:

15 February 2017

Referee:

Referee: J Tunncliffe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that RWW Ltd is to pay the sum of \$310.00 to Mr HD on or before Wednesday 1 March 2017.

Facts

[1] On Saturday 1 October 2016 at around 11:45 pm, Mr HD's car was towed by RWW Ltd (RWW) from a visitors' car parking space at 4 X Street, Y Suburb. Signs specify a time limit of four hours for these spaces, and indicate that it is a towaway area 24 hours 7 days.

[2] Mr HD now claims a refund of his towing fee, on the basis that he had not been parked for more than four hours. The issue to be determined is whether he was parked in excess of the time limit.

Was Mr HD's car parked in excess of the time limit?

[3] The relevant law is the tort of trespass to goods. RWW is not disputing that it towed the car away, so a prima facie case of trespass to goods is established. The burden is therefore on RWW to establish an affirmative defence, specifically a defence known as "distress damage feasant".

[4] The first element that must be proved for the defence of distress damage feasant is that the car was parked unlawfully. Mr WR, an employee of RWW, gave evidence that he had chalked across the tread of the tyres of all the cars earlier in the evening, and that the chalk mark was still on the tread of Mr HD's tyre when Mr WR returned to check the cars just over four hours later. Mr RC, director of RWW, gave evidence that he saw the chalk on the tread at the tow yard when Mr HD collected his car.

[5] However, Mr HD gave evidence that his car had not been on the premises for the duration of the four hours. He said he had been attending a party at the premises, but left the party around 8 pm to attend an awards dinner for his football team at DHH restaurant. He said he returned to the premises and re-parked his car around 11:30 pm, so had only been parked for a short time before the car was towed.

[6] Mr HD produced a statement from Mr DC, whose party Mr HD attended in Y Suburb, asserting that Mr DC saw Mr HD leave and return in his car. I am unable to place any weight on this statement since when I telephoned Mr DC at today's hearing, he had little recollection of the evening and admitted that he did not actually see the car leave or return; he only knew that Mr HD had left for a while.

[7] Mr HD also produced a bank statement showing a payment from his account to DHH at 10:09 pm that night, and a printout from Facebook to verify that the awards dinner was held at DHH from 8:00 pm till 11:00 pm.

[8] Mr DC pointed out that this does not prove that Mr HD's car was driven to the awards dinner, since Mr HD could have got a ride from someone else. While this is possible, I find insufficient evidence to conclude that Mr HD is lying when he claims to have taken his car. The only evidence produced by RWW is Mr RC and Mr WR's word regarding the chalk mark. Against this is Mr HD's word that he did not see any chalk mark on the tread of his tyre, and was only pointed to a chalk mark on the side wall of the tyre, which would not have rubbed off while driving.

[9] RWW could have proven its case by producing CCTV footage. Mr RC admitted that there probably would have been relevant CCTV footage, but that he did not ask the owner to provide it, and it is now too late since the footage is only kept for about a month. Mr HD was able to show that he texted his friend the day after his car was towed to ask his friend to get the CCTV footage from the building owner. He gave evidence that he contacted the owner himself a short time later, but the owner refused to provide him with the footage.

[10] On the evidence before me, I conclude that it is more likely than not that Mr HD left the premises in his car as he claims, and RWW has failed to prove otherwise. Since RWW has not discharged the burden of proving that the car was parked unlawfully, the defence of distress damage feasant does not apply, and I find that RWW committed a trespass by removing the car. Therefore RWW must refund to Mr HD the \$310.00 he paid to have the car released.