

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Moss & Anor v Reece Rosvall trading as Preferred Autos*  
[2020] QCAT 384

PARTIES: **PAMELA MOSS**  
(first applicant)

**JOANNE BROWN**  
(second applicant)

v

**REECE ROSVALL TRADING AS PREFERRED  
AUTOS**  
(respondent)

APPLICATION NO/S: MVL043-20

MATTER TYPE: Motor vehicle matter

DELIVERED ON: 6 October 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Cranwell

ORDERS:

- 1. Pamela Moss and Joanne Brown are required to return the motor vehicle the subject of these proceedings to Reece Rosvall trading as Preferred Autos within 7 days of the date of these orders.**
- 2. Reece Rosvall trading as Preferred Autos is required to pay to Pamela Moss and Joanne Brown (jointly) the amount of \$57,556 within 28 days of the date of these orders.**

CATCHWORDS: TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – GUARANTEES, CONDITIONS AND WARRANTIES IN CONSUMER TRANSACTIONS – GUARANTEES, CONDITIONS AND WARRANTIES – whether motor vehicle of acceptable quality – whether failure to comply with consumer guarantee a major failure – whether goods rejected during the rejection period – whether consumer entitled to refund

*Australian Consumer Law, s 3, s 54, s 260, s 262, s 263  
Competition and Consumer Act 2010 (Cth), Schedule 2  
Fair Trading Act 1989 (Qld), s 50A, s 50C  
Motor Dealers and Chattel Auctioneers Act 2014 (Qld),*

s 12

*Campbell v Caravan & RV Central Pty Ltd t/as Avan New South Wales & FCA Australia Pty Ltd* [2016]

NSWCATCD 90

*Cary Boyd v Agrison Pty Ltd* [2014] VMC 23

*Haisman v Drive (Aust) Pty Ltd* [2020] QCAT 44

*Medtel Pty Ltd v Courtney* (2003) 130 FCR 182

*Morphy v Beaufort Townsville Pty Ltd* [2018] VCAT 1520

*Vautin v BY Winddown, Inc (formerly Bertram Yachts) (No 4)* [2018] FCA 426

**REPRESENTATION:**

Applicant: Self-represented

Respondent: Self-represented

APPEARANCES: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

**REASONS FOR DECISION**

**Preliminary matters**

- [1] On 14 February 2020, Pamela Moss (the first applicant) and Joanne Brown (the second applicant) filed an application – motor vehicle dispute with the Tribunal. The respondent is Reece Rosvall trading as Preferred Autos (the respondent).
- [2] The applicants entered into a contract with the respondent on 7 July 2019 to purchase a Ford Transit campervan (the motor vehicle). The purchase price was \$55,596.50.
- [3] ‘Motor vehicle’ is defined in s 12(1) of the *Motor Dealers and Chattel Auctioneers Act 2014* (Qld) to mean:
  - (a) a vehicle that moves on wheels and is propelled by a motor that forms part of the vehicle, whether or not the vehicle is capable of being operated or used in a normal way; or
  - (b) a caravan.
- [4] The applicants’ campervan falls within this definition.
- [5] The application indicates that the applicants are seeking relief under the Australian Consumer Law, which is schedule 2 to the *Competition and Consumer Act 2010* (Cth). The relief sought by the applicants is a refund plus damages.
- [6] Section 50A of the *Fair Trading Act 1989* (Qld) vests the Tribunal with jurisdiction in relation to motor vehicles in respect of certain actions under the Australian Consumer Law.
- [7] In addition to their claims under the Australian Consumer Law, I note that the applicants have raised a number of contractual claims against the respondent. The Tribunal does not have jurisdiction to deal with contractual claims over \$25,000.

## Australian Consumer Law provisions

### *Guarantee of acceptable quality*

- [8] Section 54(1) of the Australian Consumer Law provides that, where a person supplies goods in trade or commerce, the goods are guaranteed to be of ‘acceptable quality’.
- [9] The time at which goods are to be of acceptable quality is the time at which the goods are supplied to the consumer: *Medtel Pty Ltd v Courtney* (2003) 130 FCR 182 at [64] and [70]. However, information available after the time of supply may be taken into account in deciding whether the goods were of acceptable quality at the time of supply.
- [10] Sections 54(2) and (3) of the Australian Consumer Law define acceptable quality as follows:
- (2) Goods are of ***acceptable quality*** if they are as:
- (a) fit for all the purposes for which goods of that kind are commonly supplied; and
  - (b) acceptable in appearance and finish; and
  - (c) free from defects; and
  - (d) safe; and
  - (e) durable;
- as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable having regard to the matters in subsection (3).
- (3) The matters for the purposes of subsection (2) are:
- (a) the nature of the goods; and
  - (b) the price of the goods (if relevant); and
  - (c) any statements made about the goods on any packaging or label on the goods; and
  - (d) any representation made about the goods by the supplier or manufacturer of the goods; and
  - (e) any other relevant circumstances relating to the supply of the goods.
- [11] The *Macquarie Dictionary* defines the word ‘defect’ to mean ‘a fault’ or ‘imperfection’.
- [12] The *Macquarie Dictionary* defines ‘durable’ as ‘having the quality of lasting or enduring of or relating to goods which will be good for some time, as opposed to those intended to be used or consumed immediately’.
- [13] In *Morphy v Beaufort Townsville Pty Ltd* [2018] VCAT 1520 at [72], the Victorian Civil and Administrative Tribunal stated:
- [T]he context of the section clearly requires that the question of durability be determined by having regard to how long a ‘reasonable consumer’ would

expect the goods to last, taking into account the price paid, the nature of the goods and the representations made about the goods.

- [14] In *Campbell v Caravan & RV Central Pty Ltd t/as Avan New South Wales & FCA Australia Pty Ltd* [2016] NSWCATCD 90 at [57], the New South Wales Civil and Administrative Tribunal stated:

A reasonable consumer would also be entitled to expect that such a high cost item would be durable, being capable of safe and effective use over a number of years (or at least many thousands of kilometres).

- [15] However, the guarantee of acceptable quality does not apply in circumstances where s 54(7) of the Australian Consumer Law applies:

(7) Goods do not fail to be of acceptable quality if:

- (a) the consumer acquiring the goods examines them before the consumer agrees to the supply of the goods; and
- (b) the examination ought reasonably to have revealed that the goods were not of acceptable quality.

### **Evidence**

- [16] As noted above, the applicants have made a number of contractual claims against the respondent which are beyond the Tribunal's jurisdiction. My consideration of the evidence will be confined to the evidence that relates to the applicants' claims under the Australian Consumer Law.

- [17] The first applicant gave evidence that she viewed the motor vehicle on 1 July 2019. At her request, the vehicle was inspected by Steve Kamphuis of Ultra Tune Mermaid Beach. Mr Kamphuis found a number of faults, but stated that he could not inspect the transmission without enormous time and effort.

- [18] The first applicant stated that she collected the motor vehicle from the respondent on 8 July 2019. She set out on a trip to Tin Can Bay on 13 July 2019. Approximately 148 km into the trip, the motor vehicle made a strange sound and a yellow warning light came on. She returned the motor vehicle to Mr Kamphuis for further inspection.

- [19] The applicants provided a letter from Mr Kamphuis dated 4 September 2019. He stated:

I have looked into a problem with Ford Transit van Registration number [omitted].

The customer has concerns with Auto transmission. The warning light for the transmission illuminates and a loud squeal type noise occurs.

The diagnosis is an intermittent failure with hydraulic pump and actuators on the transmission. These parts are no longer available and haven't been for the past 6 years.

There is no option for repairing vehicle available.

- [20] The applicants subsequently requested a refund. The respondent refused, but arranged for the motor vehicle to be assessed by Coastline 2 Hinterland Car Care.

The applicants provided a copy of an invoice dated 30 September 2019, which stated:

**Automatic Transmission**

Diagnose

Found Short in Wiring

Repair as Required

Road Test

- [21] The respondent provided a letter from Chris McCurdy of Coastline 2 Hinterland Car Care dated 16 April 2020. He stated:

I, Chris McCurdy of Coastline 2 Hinterland am an Automatic Transmission Specialist. I have 25 years of experience with Automatic Transmissions and have owned 3 shops over this time.

I received a Ford Transit in the shop from Preferred Autos, they asked for me to diagnose this as a complaint of “Intermittent Problem”. I drove the vehicle for approx. 45 minutes to try and find a fault. The Transit eventually threw a check engine light, upon scanning, the fault code was stating a TCM Communication Fault. We then decided to have Max from Advanced Diagnostics in to find faults. As per his attached receipt he stated:

Diagnostic test of engine management system, Check fault codes and data stream, Check and report. No Crank, Trace to no power supply to starter relay. Link relay as per wiring diagram and retest.

We then followed by driving the car for approx. 1 hour, the Transit drove perfectly for this entire time ...

In regards to the pre-purchase inspection, there is possibility that many fault codes were found as this can be caused by a broken wire or a crook earth.

1. Parts can be supplied and are readily available for this Transmission.
2. We have worked on numerous Transmissions of a Fort Transit and have the required tools and scanning equipment to do so.
3. Hydraulic Pump Fault – If a pump has failed you are going to end up with no line pressure so therefore the car would have no forward or reverse.

- [22] The first applicant stated that when she returned the motor vehicle to the respondent on 10 October 2019, the same sound that she had originally complained about re-occurred.

- [23] The applicants provided a further letter from Mr Kamphuis dated 24 March 2020. He stated:

When [the first applicant] was travelling up to the Sunshine Coast, the transit van made a very noisy loud sound and a warning light had come on the dash (asm light). The vehicle was pulled over and turned off. [The first applicant] left the vehicle parked for approx 1 hour then restarted the vehicle and found to be ok for approx. another ½ hour until the same thing happened. [The first applicant] turned around and returned home stopping a number of times to rest the vehicle.

The vehicle arrived at the workshop and presented no warning light on dash.

The van was scanned for fault codes and found to have transmission codes relating to intermittent hydraulic pump and actuator issues.

After seeking advice in regards to this problem, I found a Ford transit van specialist who gave me the following advice:

1. There are no parts available (hydraulic pump or actuators)
2. Even if I found parts no one has the scan tool equipment to be able to bleed and code parts to vehicle due to the age of vehicle.
3. There is also a high probability that there would be further issues with the auto transmission because pump failure can cause internal problem/failure.

Unfortunately I have no options available to rectify problem with vehicle and the problem will only get worse.

[The first applicant] advised me that the dealer had found someone to rectify vehicle. I am not sure what repairs were carried out, but the vehicle displayed the same symptoms as previously mentioned before she arrived home.

- [24] The applicants provided a further statement of Mr Kamphuis dated 27 May 2020, which states:

[The first applicant's] concern is a transmission fault. A loud audible sound coming from the transmission.

Coastline have examined the Transit van with the help of an outside source and come up with a power supply issue relating to the starter motor.

I am not sure how this relates to the customers [sic] concern when the initial code stated by them was for TCM communication fault.

My initial scan of the vehicle showed a code for transmission codes relating to intermittent hydraulic pump and actuator issues.

Why this didn't show in any diagnosis of the vehicle by Coastline I'm not sure.

[The first applicant] has had the same issue on driving the vehicle home which doesn't surprise me because the concern hasn't been rectified and I'm still of the opinion that no one can fix issue with any certainty.

- [25] The applicants also provided a statement of Marilyn Loraine Bromley, the previous owner of the motor vehicle. She stated:

On or about 5 June 2019, Mr Stevens inspected the vehicle, I showed him how to drive it as it does have special requirements.

...

On or about 7 July 2019, Mr Stevens and another staff member of Preferred Autos telephoned me and said they could not start the engine or had a problem with transmission.

I knew it was only that they did not drive it in the way advised, so I drove from Burleigh to Arundel to go through it with them and took Paul for a drive to ensure he knew all about it.

- [26] The evidence that I have been presented with can be summarised as follows:

- (a) Mr Kamphuis stated that there is an intermittent failure relating to the transmission, and that the parts are no longer available.
- (b) Mr McCurdy stated that the parts are readily available, and that he has fixed the problem.
- (c) The first applicant stated the sound re-occurred after Mr McCurdy “fixed” the problem.
- (d) The former owner stated that the motor vehicle had to be driven in a particular way to avoid transmission problems.

[27] Much of this evidence is contradictory and not easily reconciled. I am mindful that the very nature of intermittent failure can be difficult to diagnose. In particular, the first applicant’s evidence is that the failure first presented some 148 km into a trip.

[28] On the balance of probabilities, I consider it more likely than not that the intermittent failure did not present itself during the inspection by Mr McCurdy. A different fault did present itself, which he rectified. This conclusion is supported by the first applicant’s evidence that the initial sound re-occurred after the motor vehicle was returned by Mr McCurdy.

[29] Ms Bromley’s evidence is consistent with the existence of an intermittent failure at the time the applicants purchased the motor vehicle, but that she had developed an idiosyncratic driving style which minimised the occurrence of the failure.

[30] These findings lead me to accept Mr Kamphuis’ evidence relating to the existence of the intermittent failure relating to the transmission.

[31] Mr Kamphuis and Mr McCurdy gave diametrically opposed evidence as to the availability of parts. Given that I have accepted Mr Kamphuis’ evidence as to the existence of the intermittent fault, and given that I have considered it likely that the intermittent fault did not present itself during Mr McCurdy’s inspection, I consider Mr Kamphuis’ evidence as to the availability of parts is likely to be more reliable. I accept his evidence.

[32] Having regard to the existence of the intermittent failure relating to the transmission as found above, I find that a reasonable consumer fully acquainted with the state of the motor vehicle at the time of purchase would not regard the motor vehicle as free from defects and durable.

[33] I accept that the applicants requested a refund shortly after Mr Kamphuis examined the motor vehicle on 4 September 2019.

[34] For completeness, I note that Mr Kamphuis inspected the motor vehicle prior to the purchase by the applicants. He stated that he could not inspect the transmission without enormous time and effort. I accept that it was not reasonable to expect his pre-purchase inspection to reveal the existence of an intermittent failure relating to the transmission.

### **Remedies**

[35] The remedy available to the consumer against the supplier depends in the first instance on whether the failure is a ‘major failure’. That term is defined in s 260 of the Australian Consumer Law to relevantly mean:

- (a) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; or
- (b) the goods depart in one or more significant respects:
  - (i) if they were supplied by description—from that description; or
  - (ii) if they were supplied by reference to a sample or demonstration model—from that sample or demonstration model; or
- (c) the goods are substantially unfit for a purpose for which goods of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or
- (d) the goods are unfit for a disclosed purpose that was made known to:
  - (i) the supplier of the goods; or
  - (ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the goods were conducted or made;
 and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or
- (e) the goods are not of acceptable quality because they are unsafe.

[36] The test of whether there is a major failure for the purposes of s 260 and the test for whether goods are of acceptable quality for the purposes of s 54 both adopt a ‘reasonable consumer’ benchmark. For the reasons already given, I find the intermittent failure relating to the transmission is such that a reasonable consumer, fully acquainted with the nature and extent of the failure, would not have acquired the motor vehicle. Central to my reasoning in this regard is the finding that parts are not available to repair the failure.

[37] In order to obtain a refund, the consumer is required to reject within the ‘rejection period’. That term is defined in s 262(2) of the Australian Consumer Law to mean:

(2) The *rejection period* for goods is the period from the time of the supply of the goods to the consumer within which it would be reasonable to expect the relevant failure to comply with a guarantee referred to in section 259(1)(b) to become apparent having regard to:

- (a) the type of goods; and
- (b) the use to which a consumer is likely to put them; and
- (c) the length of time for which it is reasonable for them to be used; and
- (d) the amount of use to which it is reasonable for them to be put before such a failure becomes apparent.

[38] In *Nesbit v Porter* [2000] 2 NZLR 465 at [39], the New Zealand Court of Appeal held that the rejection period was one that:

...suffices to enable the consumer to become fully acquainted with the nature of the defect, which, where the cause of breakage or malfunction is not apparent, the consumer can be expected to do by taking the goods to someone, usually or preferably the supplier, for inspection. In this context, therefore, a defect is not ‘apparent’ until its cause has been identified and the buyer knows what has to be done to fix it, and what that will cost; in other words, until the buyer is in a position to determine whether the defect is substantial.

[39] I have found that the applicants sought a refund shortly after the motor vehicle was inspected by Mr Kamphuis on 4 September 2019. This is the point at which the intermittent fault relating to the transmission was first diagnosed. In these circumstances, I am satisfied that the applicants rejected the motor vehicle within the rejection period.

[40] In *Haisman v Drive (Aust) Pty Ltd* [2020] QCAT 44 at [24], I found that the Tribunal has jurisdiction to make an order requiring the supplier to pay to the consumer a stated amount of money, namely the amount of the refund payable under s 263(4)(a). In this case, the applicants have notified the respondent that the goods have been rejected in accordance with s 263(1) of the Australian Consumer Law. I will give effect to the requirement in s 263(2) that the goods be returned by so ordering. Upon the return of the motor vehicle, the applicants will be entitled to a refund pursuant to s 263(4).

### **Damages**

[41] The Tribunal is vested with jurisdiction in respect of actions under s 259(4) of the Australian Consumer Law, which provides:

The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee, if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

[42] The applicants claim damages of \$28 for transfer fee, \$1,618.50 for stamp duty and safety inspection, gas certificate and towing to mechanic of \$340. The total of these claims are \$1,986.50, and were necessary to register the vehicle in their names. I am satisfied that these damages were reasonably foreseeable and are recoverable by the applicants.

### **Costs**

[43] Section 50C of the *Fair Trading Act* 1989 (Qld) provides that the Tribunal may make a costs order against the respondent in the amount of the prescribed filing fee paid by the applicant. This power is subject to s 102(1) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), which provides that the Tribunal may make a costs order if the interests of justice require it.

[44] While the applicants have been successful, they have conflated their claims with a number of contractual claims in respect of which the Tribunal does not have jurisdiction. It is trite to state that conflation of claims in this manner invariably presents an obstacle to the early resolution of matters. In these circumstances, I do not consider that it is in the interests of justice to order the respondent to pay the filing fee of \$345.80.

### **Orders**

[45] The orders of the Tribunal are:

1. The applicants are required to return the motor vehicle the subject of these proceedings to the respondent within 7 days of the date of these orders.
2. The respondent is required to pay to the applicants (jointly) the amount of \$57,556 within 28 days of the date of these orders.