

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Fawkes v ZS Motor Group Pty Ltd* [2021] QCAT 150

PARTIES: **JAMES DAVID WILLIAM FAWKES**
(applicant)

v

ZS MOTOR GROUP PTY LTD
(respondent)

APPLICATION NO/S: MVL172-20

MATTER TYPE: Motor vehicle matters

DELIVERED ON: 21 April 2021

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Cranwell

ORDERS: **ZS Motor Group Pty Ltd is required to pay James David William Fawkes the amount of \$233.99 within 28 days of the date of this order.**

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 – whether consumer entitled to damages – whether statutory warranty applied

Australian Consumer Law, s 54, s 259, s 260, s 262, s 263, s 278, s 279
Competition and Consumer Act 2010 (Cth), Schedule 2
Fair Trading Act 1989 (Qld), s 50A
Motor Dealers and Chattel Auctioneers Act 2014 (Qld), s 99, schedule 1 s 3
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 63, s 97, s 102

Medtel Pty Ltd v Courtney (2003) 130 FCR 182

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

- [1] On 7 August 2020, Mr Fawkes ('the applicant') filed an Application – Motor Vehicle Dispute with the Tribunal. The respondent is ZS Motor Group Pty Ltd ('the respondent').
- [2] The applicant was the owner of a 2009 Kia Grand Carnival ('the motor vehicle').
- [3] The applicant purchased the motor vehicle from the respondent on or about 15 February 2016 for \$16,405. The applicant took out a loan to finance the purchase of the motor vehicle.
- [4] The applicant seeks relief under the Australian Consumer Law, which is Schedule 2 to the *Competition and Consumer Act 2010* (Cth). The relief sought by the applicant is a refund plus damages.
- [5] 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.

Procedural issues

- [6] The applicant filed an application for miscellaneous matters on 27 October 2020. He raised a number of issues.
- [7] Firstly, the applicant filed as part of his evidence advice from Philip Nolan, Barrister-at-Law, and Walker Pender Group Pty Ltd, Lawyers. The applicant advised that this material was filed in error. Accordingly, I have not had regard to the legal advice filed by the applicant in deciding his claim.
- [8] Secondly, the applicant sought information from Paul Murray, the salesperson he dealt with at the respondent. The applicant appears to be seeking an answer to the question "did tell James of 14 day cooling off period when he could return vehicle if any issues, therefore called to arrange this without success". As Paul Murray is not a party to the proceedings, I have regarded this as an application for the Tribunal to issue a notice requiring Paul Murray to attend to give evidence pursuant to s 97 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act'). Such an application is required to be accompanied by the prescribed fee. As no fee was paid, the application was not considered by the Tribunal.
- [9] Thirdly, the applicant sought a copy of the contract for the sale of the motor vehicle from Amanda Harward of Accounting Intelligence Pty Ltd. As Accounting Intelligence is not a party to the proceedings, I have regarded this as an application for the Tribunal to issue a notice requiring Accounting Intelligence Pty Ltd to produce a document pursuant to s 63 of the QCAT Act. Again, such an application

is required to be accompanied by the prescribed fee. As no fee was paid, the application was not considered by the Tribunal.

[10] I note in passing that the applicant stated:

I called Amanda and she would not supply me and said ask Stephen Perara at Acacia Ridge Autos. I did email him but no reply given.

[11] It appears that Amanda Harward in any event referred the applicant to Stephen Perara of the respondent, who appears to be a more obvious source for the production of the contract for sale. No directions were sought against the respondent.

Guarantee of acceptable quality

[12] 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’.

[13] 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.

[14] 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.

- [15] 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’.

Evidence

- [16] The applicant provided a written statement to the Tribunal, in which he gave the following evidence:

- (a) On 15 February 2016, the applicant paid a \$500 deposit towards the purchase of the motor vehicle from the respondent. The deposit was subject to finance being approved. The applicant dealt with a salesperson named Paul Murray.
- (b) Later that day, at a KFC store, the applicant met with a finance broker from Credit One Finance Pty Ltd named Jake. The applicant provided a payslip. Jake advised the applicant that he had a 14 day cooling off period if there were any issues with the motor vehicle.
- (c) The applicant’s deposit was returned to him by the respondent.
- (d) On 16 February 2016, the applicant was advised that his application for finance had been approved by Pepper Asset Finance Pty Ltd. He decided to proceed with the purchase of the motor vehicle. He was told by Paul Murray that there was a 14 day cooling off period during which he could return the motor vehicle if there were any issues.
- (e) On 18 February 2016, the motor vehicle was delivered to the applicant’s workplace. It was in a “dirty and messy” condition.
- (f) Later that day, the applicant and his family went out for dinner. They noticed that the sliding door would not close, and the applicant’s wife had to physically hold the door shut.
- (g) The applicant attempted to contact Jake, but his calls were not returned.
- (h) The applicant attempted to contact Paul Murray. The applicant spoke to Stephen Perara, who told him that Paul Murray no longer worked for the respondent.
- (i) On 19 February 2016, the applicant took the motor vehicle to the Kia dealership at Ipswich. The applicant was advised that the motor vehicle was not roadworthy and that it was also unregistered.
- (j) On 26 February 2016, the applicant again attempted to contact Paul Murray. He was again told by Stephen Perara that Paul Murray no longer worked for the respondent. The applicant raised the issue that “the automatic door closer stopped working the day after I purchased” and was told by Stephen Perara that it is “not the car yards [sic] problem”.
- (k) The applicant ultimately attempted to go back to the respondent’s place of business, only to find that the business was no longer there.

- (l) The applicant left the motor vehicle at Kia Ipswich.
 - (m) The applicant was chased for overdue repayments by Pepper Asset Finance Pty Ltd. He told them that “the car is at Kia Ipswich, go and get it, I’m not paying for it”.
 - (n) Pepper Asset Finance Pty Ltd repossessed the motor vehicle on 4 August 2016, and sold it for \$2,500 on 13 September 2016.
 - (o) The applicant’s debt was ultimately assigned to Lion Finance Pty Ltd.
- [17] The applicant provided an invoice from Kia Ipswich dated 21 March 2016. The invoice stated:

Carry out Used car Roadworthy inspection

Performed Road worthy.

Road worthy Failed.

Vehicle requires.

Engine degrease oil leaks visible – possible sump re seal and rear top cam cover.

Right hand sliding door latch/actuator – broken internally cannot close door.

Due to being unable to road test vehicle there may be other items required.

- [18] The applicant also provided a roadworthy certificate dated 21 March 2016, indicating that the motor vehicle was not roadworthy. The certificate noted that “vehicle not road tested due to door not latching”.
- [19] The respondent provided evidence that the registration paperwork for the motor vehicle had been provided to the Department of Transport, who take up to two weeks to process the paperwork. In the meantime, an interim registration label was placed on the windscreen.
- [20] The respondent also provided evidence that its place of business closed in February 2017, one year after the date of purchase, and that the applicant did not attend the business to complain or otherwise send any letters or emails.

Consideration

- [21] I accept the applicant’s evidence that the sliding door on the motor vehicle stopped working on either the day of delivery or the following day. This evidence is supported by report from Kia Ipswich.
- [22] I also accept that the failure of the sliding door rendered the motor vehicle not roadworthy. However, I note that it does not follow that the motor vehicle was not roadworthy when it was delivered to the applicant. Indeed, the material also includes an earlier roadworthy certificate dated 18 December 2015, which was obtained by the respondent.

- [23] Given the failure of the sliding door occurred within a day of the applicant purchasing the motor vehicle, it is open to me to infer that the motor vehicle lacked durability as at the date of supply. I do so infer.
- [24] There is insufficient evidence before me to be able to be satisfied that there was an issue with either the sump or rear top cam cover. The invoice from Kia Ipswich refers to “possible” issues, which is less than definitive.
- [25] I do not accept that the motor vehicle was sold unregistered. I accept the respondent’s evidence regarding the transfer of registration procedure. Indeed, the material also includes a registration certificate in the applicant’s name, with a receipt date of 15 February 2016.
- [26] I do not accept that the applicant was advised by both Paul Murray and Jake that there was a 14 day cooling off period, whereby he could return the motor vehicle if there were any issues. The *Motor Dealers and Chattel Auctioneers Act 2014 (Qld)* does not provide for a 14 day cooling off period, and s 99(2)(c) provides that the cooling off period ends when the purchaser takes physical possession of the vehicle in any event. I consider it implausible that both Paul Murray and Jake, on separate occasions and independently of each other, would have given the applicant the same incorrect advice.
- [27] Based on the evidence before me, I find that a reasonable consumer fully acquainted with the state of the motor vehicle at the time of purchase, particularly having regard to:
- (a) the failure of the sliding door within one day of purchasing the motor vehicle; and
 - (b) the purchase price of \$16,405,
- would not regard the motor vehicle as durable.

Remedies

- [28] 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.

[29] On balance, I am not satisfied that there is a major failure for the purposes of the test contained in s 260. There is no evidence before me to suggest that repairing the sliding door latch would have occasioned any particular difficulties or that repair could not have taken place within a reasonable time.

[30] In the case of a failure which is not a major failure, the remedies available to the applicant are set out in s 259(2) of the Australian Consumer Law as follows:

(2) If the failure to comply with the guarantee can be remedied and is not a major failure:

(a) the consumer may require the supplier to remedy the failure within a reasonable time; or

(b) if such a requirement is made of the supplier but the supplier refuses or fails to comply with the requirement, or fails to comply with the requirement within a reasonable time--the consumer may:

(i) otherwise have the failure remedied and, by action against the supplier, recover all reasonable costs incurred by the consumer in having the failure so remedied; or

(ii) subject to section 262, notify the supplier that the consumer rejects the goods and of the ground or grounds for the rejection.

[31] There is no evidence before me that the applicant incurred costs in having the sliding door latch fixed himself.

[32] I accept the applicant's evidence that he raised the issue of the sliding door latch with the respondent in February 2016, but was told by Stephen Perara that this was not the respondent's problem. Accordingly, I find that the respondent failed to repair the sliding door within a reasonable time.

[33] The applicant was therefore entitled to reject the motor vehicle and obtain a refund, subject to the exceptions set out in s 262 of the Australian Consumer Law.

[34] Section 262(1)(a) does not permit rejection of the goods if the 'rejection period' has ended. The rejection period is defined in s 262(2) as follows:

(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.

- [35] There is no evidence before me that the applicant notified the respondent that he rejected the motor vehicle prior to the commencement of proceedings on 7 August 2020.
- [36] I accept the respondent's evidence that it did not close its place of business until February 2017, and that the applicant did not attend its premises in the year after he purchased the motor vehicle. In any event, the applicant would have been able to undertake an ASIC search to locate the registered office of the respondent, and communicate his rejection in writing.
- [37] I note that the applicant's communication to Pepper Asset Finance Pty Ltd that he did not want the motor vehicle does not amount to a notification to the respondent. There is no evidence that Pepper Asset Finance Pty Ltd was acting as an agent for the respondent.
- [38] The Australian Consumer Law does not envisage a delay of over four years by consumers in rejecting goods, as occurred in this case. The applicant requested that the respondent repair the sliding door latch in February 2016, and the respondent refused to do so. It is at this time, or shortly thereafter, that the applicant should have rejected the motor vehicle in order to obtain a refund.
- [39] In addition, s 262(1)(b) does not permit rejection of the goods if they have been 'lost, destroyed or disposed of by the consumer'. The applicant's decision to cease making payments on the loan resulted in the repossession and sale of the motor vehicle by Pepper Asset Finance Pty Ltd. I regard this as a disposition of the motor vehicle by the applicant, and note that as a consequence he became unable to return the motor vehicle to the respondent as required by s 263(2).
- [40] As the applicant did not reject the motor vehicle during the rejection period, and also disposed of the motor vehicle, there are therefore no remedies currently available to the applicant under s 259(2). Whatever merits the applicant's claims may once have had have been overtaken by his own actions, or lack thereof.

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 applicant has claimed damage in the amount of \$233.99 for use of a rental car between 19 February 2016 and 22 February 2016. I consider that it is reasonably foreseeable that the applicant would be required to rent a car after the sliding door failed.

- [43] The applicant also claims the amount owing to Lion Finance Pty Ltd, which was \$25,904.26 as at 31 July 2020.
- [44] In *Pojzak v Congeo Nominees Pty Ltd* [2013] VCAT 2175 at [80], the Victorian Civil and Administrative Tribunal stated that “any entitlement to claim damages comes with the obligation to mitigate the damages”. The applicant failed to mitigate his damages by rejecting the motor vehicle within the rejection period, which would have entitled him to a refund from the respondent. Instead, the applicant compounded his damages by making a unilateral decision to cease payments on the loan. This had the consequence of him incurring multiple dishonour fees and interest charges, and ultimately resulted in the repossession and sale of the motor vehicle. Further, the applicant did not have the sliding door latch repaired himself, which may have permitted continued use of the motor vehicle.
- [45] In these circumstances, I am unable to quantify any damages suffered by the applicant in relation to the financing of the motor vehicle.
- [46] For completeness, I note that there is insufficient evidence before me to determine whether Pepper Asset Finance Pty Ltd was a linked credit provider for the purposes of s 278 and s 279 of the Australian Consumer Law. Suffice it to say, if Pepper Asset Finance Pty Ltd was a linked credit provider, the applicant did not commence the proceedings jointly against the supplier and linked credit provider (or in its place Lion Finance Pty Ltd) as required by s 279(2).

Statutory warranty

- [47] For completeness, I will also consider the statutory warranty contained in the *Motor Dealers and Chattel Auctioneers Act* 2014 (Qld).
- [48] At the time the applicant purchased the motor vehicle on 15 February 2016, the statutory warranty applied only to motor vehicles less than 10 years old and with an odometer reading of less than 160,000 kms: see schedule 1, s 3.
- [49] The invoice issued to the applicant on 15 February 2016 indicated that the motor vehicle had an odometer reading of 178,639 km.
- [50] Accordingly, the statutory warranty did not apply to the motor vehicle.

Costs

- [51] 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 QCAT Act, which provides that the Tribunal may make a costs order if the interests of justice require it.
- [52] The applicant has been substantially unsuccessful in the proceedings. 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

- [53] The respondent is ordered to pay to the applicant the amount of \$233.99.