

BEFORE THE MOTOR VEHICLE DISPUTES TRIBUNAL

[2017] NZMVDT Hastings 38

Reference No. MVD 015/2017

IN THE MATTER of the Motor Vehicle Sales Act 2003

AND

IN THE MATTER of a dispute

BETWEEN **NICHOLAS JOHN GOUDER**
Purchaser

AND **BAYSWATER VEHICLES LIMITED**

Trader

MEMBERS OF TRIBUNAL

B R Carter, Barrister - Adjudicator

R C Dixon, Assessor

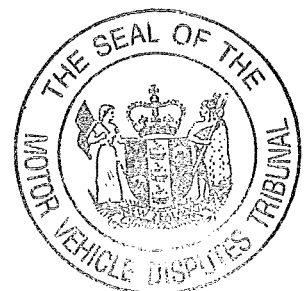
HEARING at Hastings on 22 March 2017

DATE OF DECISION 12 April 2017

APPEARANCES

Mr N Gouder, the purchaser

Mr M Chan, for the trader



ORDERS

The Tribunal makes the following orders:

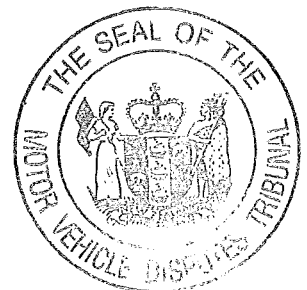
- A. The purchaser's application to reject the vehicle is upheld.
- B. The purchaser shall, within five working days of this decision, return the vehicle to the trader.
- C. The trader shall, within 10 working days of the date of this decision, pay \$28,907.60 to the purchaser.

DECISION

[1] The vehicle did not comply with the guarantee as to acceptable quality in s 6 of the Consumer Guarantees Act 1993 ("the Act"). Five months after purchase the vehicle's air intake piping and throttle body were replaced. Eleven months after purchase the vehicle broke down and the vehicle's fuel injectors, injector feed pipes and return line were replaced. Four days after this repair was completed the vehicle broke down again and the vehicle's fuel rail was replaced. Finally, ten days after the fuel rail repair the vehicle's touch screen failed. See paragraphs [16] to [27].

[2] The purchaser was entitled to reject the vehicle under s 18(3)(a) of the Act because there has been an accumulation of defects sufficient to justify rejection. A reasonable consumer would not have purchased this vehicle for the price paid by the purchaser if it had known that the vehicle would develop this accumulation of defects within 13 months and less than 8,000kms travelled. See paragraphs [28] to [34].

[3] The purchaser has exercised his right to reject the vehicle within a reasonable time. The purchaser has rejected the vehicle shortly after the accumulation of defects became apparent. See paragraphs [35] to [40].



[4] The purchaser is also entitled to a remedy under s 18(2)(b)(i) of the Act, as set out in the orders above. See paragraphs [41] to [43].

REASONS

Introduction

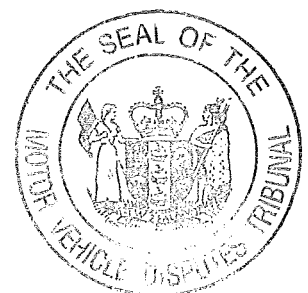
[5] On 28 December 2015, Nicholas Gouder (“the purchaser”) bought a 2012 Holden Captiva LX 7 seater, registration number GJE422 (“the vehicle”) for \$27,000 from Bayswater Vehicles Limited (“the trader”). The vehicle had travelled 74,000 kms at the time of sale.

[6] The vehicle has been used as the purchaser’s family car. The purchaser has experienced a series of problems with the vehicle. The difficulties experienced by the purchaser include faults with the vehicle’s throttle body, fuel injectors, a fuel rail and touch screen.

[7] In December 2016, the purchaser rejected the vehicle. The purchaser has applied to have the Tribunal uphold its rejection and order that the trader refund the full purchase price.

[8] The following issues arise:

- (a) Did the vehicle comply with the guarantee of acceptable quality in s 6 of the Act?
- (b) Was the vehicle’s failure of a substantial character, entitling the purchaser to reject the vehicle?
- (c) Did the purchaser exercise the right to reject the vehicle within a reasonable time?
- (d) What other remedy is also available to the purchaser?



Background

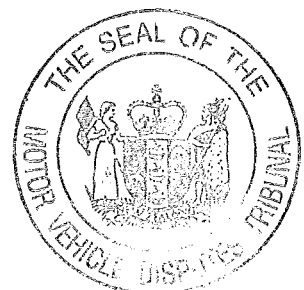
[9] In May 2016, five months after purchase, the vehicle's warning light came on and the vehicle began to stall when its engine was at low revolutions. The purchaser returned the vehicle to the trader who assessed the vehicle and returned it to the purchaser without performing any repairs. In late May or early June 2016, the purchaser noticed that the vehicle was again stalling. The vehicle's odometer reading at this time was 77,549 kms.

[10] The purchaser returned the vehicle to the trader who arranged for Karamu Holden to replace the vehicle's air intake piping at throttle body. The trader charged the purchaser a total of \$1,907.60 for this work. The purchaser disputed the bill, and asked the trader whether the repair was covered by the Act. The purchaser says the trader advised that the repair cost was not covered by the Act as the fault had occurred outside of the three month period covered by the Act. The purchaser paid the bill.

[11] In November 2016 the vehicle broke down. The purchaser contacted the trader to advise it of the breakdown and then transported the vehicle to Karamu Holden. After five weeks of assessment, Karamu Holden concluded that the break down was caused by a fault with the vehicle's fuel injectors. Karamu Holden replaced the faulty fuel injectors, injector feed pipes and return line. The vehicle's odometer reading at this time was 81,641 kms. On this occasion the trader agreed to pay for the repairs. The trader paid a total of \$5,063.65 for these repairs.

[12] The vehicle was returned to the purchaser on 23 December 2016. On 27 December 2016 the vehicle broke down again. The purchaser contacted the trader and rejected the vehicle. The trader refused to accept this rejection.

[13] The vehicle was then transported to Karamu Holden who again assessed the vehicle. In January 2017 Karamu Holden replaced a fuel rail. The trader has again



paid for the cost of that repair. The vehicle's odometer reading at this time was 81,819 kms.

[14] The vehicle was then returned to the purchaser, who says that 10 days later the vehicle's touch screen failed. The purchaser has obtained an estimate for the replacement of the touch screen from Karamu Holden, who estimate a replacement cost of \$2,041.60.

[15] The purchaser has now applied to the Tribunal to uphold his rejection of the vehicle. He says he has no faith in the vehicle.

Did the vehicle comply with the guarantee of acceptable quality in s 6 of the Act?

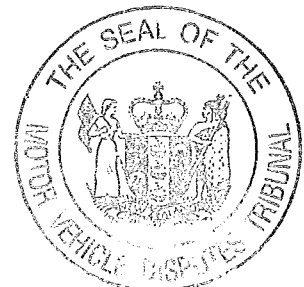
Relevant law

[16] Section 6 of the Act imposes on a supplier and the manufacturer of consumer goods "a guarantee that the goods are of acceptable quality." Section 2 of the Act defines "goods" as including vehicles.

[17] The expression "acceptable quality" is defined in s 7 as follows:

7 Meaning of acceptable quality

- (1) For the purposes of section 6, goods are of **acceptable quality** if they are as—
- (a) fit for all the purposes for which goods of the type in question are commonly supplied; and
 - (b) acceptable in appearance and finish; and
 - (c) free from minor 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, would regard as acceptable, having regard to—
- (f) the nature of the goods;
 - (g) the price (where relevant);
 - (h) any statements made about the goods on any packaging or label on the goods:

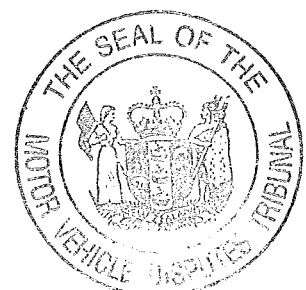


- (ha) the nature of the supplier and the context in which the supplier supplies the goods:
 - (i) any representation made about the goods by the supplier or the manufacturer:
 - (j) all other relevant circumstances of the supply of the goods.
- (2) Where any defects in goods have been specifically drawn to the consumer's attention before he or she agreed to the supply, then notwithstanding that a reasonable consumer may not have regarded the goods as acceptable with those defects, the goods will not fail to comply with the guarantee as to acceptable quality by reason only of those defects.
 - (3) Where goods are displayed for sale or hire, the defects that are to be treated as having been specifically drawn to the consumer's attention for the purposes of subsection (2) are those disclosed on a written notice displayed with the goods.
 - (4) Goods will not fail to comply with the guarantee of acceptable quality if—
 - (a) the goods have been used in a manner, or to an extent which is inconsistent with the manner or extent of use that a reasonable consumer would expect to obtain from the goods; and
 - (b) the goods would have complied with the guarantee of acceptable quality if they had not been used in that manner or to that extent.
 - (5) A reference in subsections (2) and (3) to a defect means any failure of the goods to comply with the guarantee of acceptable quality.

[18] In considering whether or not goods meet the guarantee of acceptable quality, the Tribunal must consider the quality elements as set out in s 7(1)(a)-(e) of the Act as modified by the factors set out in s 7(1)(f)-(j) from the perspective of a "reasonable consumer". The test is an objective one; it is not a view of those factors from the purchaser's subjective perspective.

[19] In *Stephens v Chevron Motor Court Limited*,¹ the District Court held that the correct approach to the Act was first to consider whether the vehicle was of acceptable quality. If the vehicle was not of acceptable quality, the next point to consider was whether the purchaser required the trader to remedy any faults within a reasonable time in accordance with s 19 of the Act. If the failure to comply with the guarantee of acceptable quality is of a "substantial character" within the meaning of s 21, or if the faults cannot be remedied, the Tribunal is directed to ask whether the purchaser exercised its right to reject the vehicle within a reasonable time.

¹ *Stephens v Chevron Motor Court Limited* [1996] DCR1



The vehicle was not free from minor defects or durable

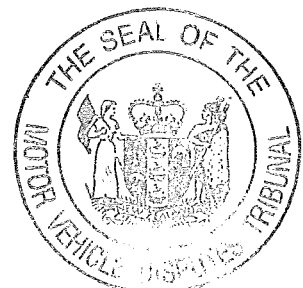
[20] The vehicle did not comply with the guarantee of acceptable quality in s 6 of the Act because it was not free of defects at the time of sale and has not been durable.

[21] In May 2016 the vehicle began to stall when the vehicle's engine was at low revolutions. The vehicle's air intake piping and throttle body were replaced at a cost of \$1,907.60 to the purchaser. This fault occurred five months after purchase, and the purchaser had travelled approximately 3,400 kms in the vehicle. I am satisfied that a reasonable consumer would not expect a vehicle of this price, age and mileage to develop a fault within five months of purchase that caused it to stall intermittently. The Tribunal's assessor advises that this is not the type of fault that would ordinarily be expected to occur in a vehicle of this age and mileage.

[22] In November 2016, the vehicle broke down. The vehicle's fuel injectors, injector feed pipes and return line were replaced. On 27 December 2016, four days after the previous repair was completed the vehicle broke down again. The vehicle's fuel rail was replaced.

[23] The Tribunal's assessor considers that these two faults ("the fuel system fault") are likely to have been related, and that the earlier replacement of the fuel injectors, injector feed pipes and return line did not remedy the fault. I am satisfied that a reasonable consumer would not expect a vehicle of this price, age and mileage to develop a fault with its fuel system that caused it to break down twice within 12 months of purchase. The Tribunal's assessor advises that this is not the type of fault that would ordinarily be expected to occur in a vehicle of this age and mileage.

[24] Ten days after the fuel rail repair the vehicle's touch screen failed. The purchaser has obtained an estimate of \$2,041.60 to replace the touch screen.



[25] This fault arose 13 months after sale. I am satisfied that a reasonable consumer would not expect a vehicle of this price, age and mileage to develop a fault which caused its touch screen to fail within 13 months of purchase. The vehicle cost \$27,000. It was four years old and had an odometer reading on 74,000kms at the date of purchase. The purchaser has since driven approximately 8,000 kms in the vehicle, which is by no means an excessive distance to have driven a family vehicle in a 13 month period. In these circumstances, I consider a reasonable consumer would expect the vehicle to have been more durable than it was.

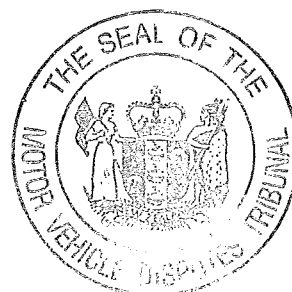
[26] During the hearing, the trader advised that it had a policy that it will not normally provide a remedy under the Act where a defect arises more than six months after the vehicle is sold.

[27] There is nothing in the Act that says that its protections will normally only apply for any particular period, let alone a six month period. The protections provided by the Act last for as long as is reasonable taking account of factors such as the vehicle's age, mileage and price, and the use to which the vehicle has been put by the purchaser. In many situations, the Act's protections are likely to apply well beyond six months after sale. I consider this case to be one of those situations.

Was the vehicle's failure of a substantial character, entitling the purchaser to reject the vehicle?

Relevant law

[28] Section 21 of the Act defines the circumstances in which a failure to comply with the guarantee as to acceptable quality will be regarded as being a failure of a substantial character for the purposes of s 18(3) of the Act. Section 21 of the Act provides as follows:



21 Failure of substantial character

For the purposes of section 18(3), a failure to comply with a guarantee is of a substantial character in any case where—

- (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 1 or more significant respects from the description by which they were supplied or, where they were supplied by reference to a sample or demonstration model, from the sample or demonstration model; or
- (c) the goods are substantially unfit for a purpose for which goods of the type in question are commonly supplied or, where section 8(1) applies, the goods are unfit for a particular purpose made known to the supplier or represented by the supplier to be a purpose for which the goods would be fit, and the goods cannot easily and within a reasonable time be remedied to make them fit for such purpose; or
- (d) the goods are not of acceptable quality within the meaning of section 7 because they are unsafe.

There was a failure of substantial character

[29] The purchaser seeks to reject the vehicle because there has been an accumulation of defects that have caused him to lose faith with the vehicle.

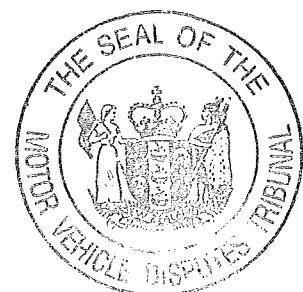
[30] In *Cooper v Ashley & Johnson Motors Limited*,² the District Court stated that a purchaser may reject a vehicle where there had been an accumulation of minor defects. The Court noted that a point will eventually be reached where the purchaser could “say convincingly that he or she had “no confidence in the reliability of the vehicle”.³

[31] I am satisfied that the purchaser is entitled to reject the vehicle for two reasons.

[32] First, there has been an accumulation of faults sufficient to justify rejection. A reasonable consumer would not have purchased this vehicle for the price paid by the

² *Cooper v Ashley & Johnson Motors Limited* [1996] 7 TCLR 407

³ *Ibid*, at 417



purchaser if it had known that the vehicle would, within 13 months and less than 8,000kms travelled:

- (a) Develop a fault with its throttle body that caused the vehicle to stall intermittently;
- (b) Develop a fault with its fuel system that caused the vehicle to break down twice; and
- (c) Develop a fault that caused its touch screen to fail.

[33] The purchaser says he has lost faith with the vehicle. I consider this loss of faith to be justified. The purchaser is entitled to reject the vehicle.

[34] Second, I consider the fuel system fault to have been a failure of substantial character justifying rejection in its own right. I am satisfied that a reasonable consumer would not have purchased the vehicle had it known that the fuel system fault would develop. The fault caused the vehicle to break down twice and has cost more than \$5,600 to repair.

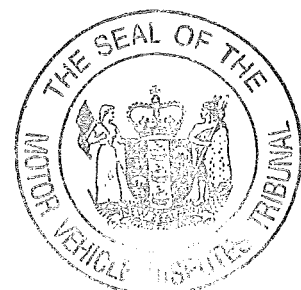
Did the purchaser exercise the right to reject the vehicle within a reasonable time?

Relevant Law

[35] Section 20 of the Act provides that the right of rejection will be lost if it is not exercised within a reasonable time of the supply of the goods, in which it would be reasonable to expect the defect to become apparent.

20 Loss of right to reject goods

- (1) The right to reject goods conferred by this Act shall not apply if—
 - (a) the right is not exercised within a reasonable time within the meaning of subsection (2); or



- (b) the goods have been disposed of by the consumer, or have been lost or destroyed while in the possession of a person other than the supplier or an agent of the supplier; or
 - (c) the goods were damaged after delivery to the consumer for reasons not related to their state or condition at the time of supply; or
 - (d) the goods have been attached to or incorporated in any real or personal property and they cannot be detached or isolated without damaging them.
- (2) In subsection (1)(a), the term **reasonable time** means a period from the time of supply of the goods in which it would be reasonable to expect the defect to become apparent having regard to—
- (a) the type of goods:
 - (b) the use to which a consumer is likely to put them:
 - (c) the length of time for which it is reasonable for them to be used:
 - (d) the amount of use to which it is reasonable for them to be put before the defect becomes apparent.
- (3) This section applies notwithstanding section 37 of the Sale of Goods Act 1908.

[36] The Court of Appeal in *Nesbit v Porter*⁴ in considering s 20 and what was a “reasonable time” under the Act, in respect of an 11 year old Nissan Navarra sold for \$10,990 and rejected because of rust nine months after purchase said

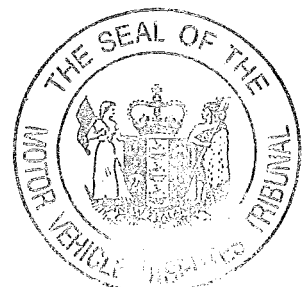
[36] In many, if not most, cases the period will be longer for new goods, which a buyer is entitled to expect to be defect-free when first used, than it will be for second-hand goods of the same type. As a general rule, the older the goods, the shorter is likely to be the reasonable time. The period may also be longer if the goods are likely to be used infrequently or only at a particular time of year. For example, one would not expect any defect in skis purchased during summer to become apparent until the next winter.

[37] Another factor which will influence the period to be allowed for exercise of the right of rejection is whether regular inspections of the goods for defects are customary or, as in the case of motor vehicles, required by law. But for defects which cannot be expected to be revealed by such inspections the reasonable time may be longer.

...

[39] A reasonable time under s 20 must accordingly be one which 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 and preferably the supplier, for inspection. In this context, therefore, a defect is not ‘apparent’ until its cause has

⁴ *Nesbit v Porter* (2000) 9 TCLR 395 at [36], [37] and [39]



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.

The purchaser exercised the right to reject within a reasonable time

[37] The purchaser rejected the vehicle on 27 December 2016 immediately after becoming aware that the vehicle had broken down again due to the fuel system fault. The trader did not accept the rejection and returned the vehicle to the purchaser in January 2017. The purchaser did not retract its rejection at this stage, but took the vehicle back because it was the family vehicle and he had no other alternative vehicle. The purchaser rejected the vehicle again on 30 January 2017, shortly after the touch screen failed.

[38] I consider the purchaser has exercised his right to reject the vehicle within a reasonable time. The purchaser has not lost the right to reject the vehicle by delaying his rejection in any unreasonable way.

[39] The accumulation of defects are a failure of a substantial character entitling him to reject the vehicle. The purchaser has rejected the vehicle shortly after the accumulation of defects became apparent.

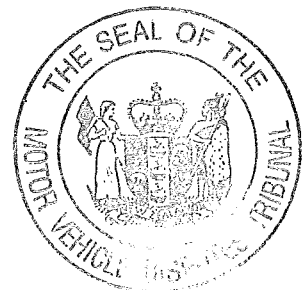
[40] Further, the fuel system fault is, on its own, a failure of a substantial character, sufficient to justify rejection of the vehicle. The purchaser rejected the vehicle immediately after becoming aware that the vehicle had broken down again due to the fuel system fault.

What other remedy is available to the purchaser?

Relevant law

[41] Section 18 of the Act provides as follows:

- 18 Options against suppliers where goods do not comply with guarantees**



- (1) Where a consumer has a right of redress against the supplier in accordance with this Part in respect of the failure of any goods to comply with a guarantee, the consumer may exercise the following remedies.
- (2) Where the failure can be remedied, the consumer may—
 - (a) require the supplier to remedy the failure within a reasonable time in accordance with section 19;
 - (b) where a supplier who has been required to remedy a failure refuses or neglects to do so, or does not succeed in doing so within a reasonable time,—
 - (i) have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred in having the failure remedied; or
 - (ii) subject to section 20, reject the goods in accordance with section 22.
- (3) Where the failure cannot be remedied or is of a substantial character within the meaning of section 21, the consumer may—
 - (a) subject to section 20, reject the goods in accordance with section 22; or
 - (b) obtain from the supplier damages in compensation for any reduction in value of the goods below the price paid or payable by the consumer for the goods.
- (4) In addition to the remedies set out in subsection (2) and subsection (3), the consumer may obtain from the supplier damages for any loss or damage to the consumer resulting from the failure (other than loss or damage through reduction in value of the goods) which was reasonably foreseeable as liable to result from the failure.

The purchaser is entitled to a remedy under s 18 of the Act.

[42] The purchaser is entitled to reject the vehicle under s 18(3)(a) of the Act. The purchaser is also entitled to recover the cost of the repairs to the vehicle in May 2016 under s 18(2)(b)(i) of the Act. The vehicle's air intake piping and throttle body were replaced at a cost of \$1,907.60.

[43] Accordingly, the trader should within 10 working days of the date of this decision, pay \$28,907.60 to the purchaser.

DATED at AUCKLAND this 12th day of April 2017



B.R. Carter
Adjudicator

