THE FAIR TRADING COMMISSION

BEFORE THE BOARD OF COMMISSIONERS

IN THE MATTER OF THE CONSUMER PROTECTION ACT, 2010;

FAIR TRADING COMMISSION
(On behalf of Mr. Richard Burka)
VS.
SUN MOTORS LIMITED
(Rep herein by Mr. Cedric D'Offay)

Case No: CPA.16.003

Complainant – Mr. Richard Burka
Respondent – Sun Motors Limited

QUORUM:
Mr. Victor Pool – Presiding Chairperson
Mr. Philippe Chong-Seng – Commissioner
Mrs. Jenna Thelermont – Commissioner
Mr. Michael Nalletamby – Commissioner

For the Complaint: Ms. Karine Dick –Legal Officer (FTC)

For the Respondent – Mr. PesiPardiwalla (Attorney-At-Law)

RULING

[1]This matter arose from a complaint lodged with the Fair Trading Commission by Mr. Richard Burka of Takamaka, Mahe on the 12th January, 2016 against Sun Motors Limited situated at Providence Industrial Estate, Mahe. The complaint was to the effect that Mr. Richard Burka, a taxi driver, bought a Nissan Qashqai, registration number S9717, from Sun Motors Limited for the sum of SCR455,000 under a warranty of 2years or 50,000km, whichever comes first. The warranty covers all parts, except for wearable parts, and labour

[2]Mr. Burka in his complaint to the Commission stated that he encountered the several problems with the vehicle as follows –

- On November 1st 2015 whilst driving a warning light came on and the indicator on his dashboard gave a warning saying Chassis Control Fault. When this happened, the mileage was at 20,000km.
- On the 21st December, 2015 the same warning indicator as above was displayed again and this time the millage was about 37,000km.
- On January 6th 2016 warning indicator for the brakes (including hand brake) was displayed on the dashboard.

[3]For the first incident the respondent undertook an upgrade of the software that interfaced the Chassis Control System. After the second incident with the Chassis Control the respondent reprogrammed the same software again claiming that it had not been done properly the first time. After the third incident on 6thJanuary,2016the complainant took the vehicle to the respondent premises and explained that he was not happy with the vehicle and that he would like to return the vehicle and either be refunded his money or be given a new vehicle. Mr. Ah-Cheen who was there at the time explained that he cannot make that decision by himself and that the vehicle is under warranty and he will have to consult with the other directors.

[4]According to Mr. Burka he returned to the respondent on the 14th January, 2016 to collect his cheque book from the vehicle. There he saw his vehicle placed on display in the respondent's showroom with his number plate on it. He met Mr. Ah-Cheen who informed him that the problem had to do with a brake calliper and that the company is willing to order one and replace under the warranty. Mr. Burka told Mr. Ah-Cheen that he does not want the vehicle back and he maintained that he wants either a refund or a replacement. Mr. Burka left and he was later informed by a letter from the respondent's legal representative to come remove the vehicle from the premises default of which he will be liable to pay a SR500 fee per day for the storage of the vehicle. The complainant removed his vehicle and brought it to his residence where according to him it has remained.

[5]The Commission investigated the matter but was unable to reach an agreeable settlement between the parties the Fair Trading Commission filed a case before the Board of Commissioners for the contravention of Section 42(1)(c) read with Section 39(1)(b) of the Consumer Protection Act, 2010. The parties appeared before the Board on several occasions for the hearing of the case. Ms. Karine Dick, Legal Officer of the Fair Trading Commission called three witnesses in support of her case. Firstly, Mr. Burka reiterate the problems he encountered with the vehicle and maintained that he wishes for a replacement or refund. It was put to him in cross-examination by Mr. Pardiwalla, counsel for the respondent, that this was unreasonable as it is the respondent's claim that the vehicle is repairable and whether he would be willing to allow the respondent to run a full diagnostic test on the vehicle

to which Mr. Burka categorially refused. Secondly, Mr. Jason Rousteau, a Manager from the Vehicle Testing Station testified that the said vehicle passed all the mechanical test conducted by the Vehicle Testing Station and the vehicle was deemed road worthy. He personally test-drove the vehicle on two occasions, firstly for a period of one day and secondly for a period of five days and found that none of the issues raised by the complainant occurred and the vehicle performed as a new vehicle should. Mr. Rousteau added that although he did not test the electronic component of the vehicle he is of the opinion that if the Chassis Control light comes on this indicates a problem with either the steering, brakes or suspension components of the vehicle and said vehicle is not safe to be used until the issue be checked. Thereafter in cross-examination Mr. Rousteau confirmed that the Chassis Control System is present in modern vehicles which can be switched off at any time. Lastly, Mr. Erol Sophola, Senior Analyst of the Fair Trading Commission, detailed to the Board the investigation process undertaken by the Commission and produced his investigation report with the Commission's findings which was to the effect that it could not be ascertained independently whether the Chassis Control System was working properly or not henceforth whether the vehicle is safe or unsafe to be used. When cross-examined by counsel for respondent as to why then the case was forwarded to the Board of Commissioners Mr. Sophola stated that it was so that the Board could bring finality to the case.

[6]The respondent counsel called two witnesses. Mr. Gerard Mayadas, a Director of Sun Motors Limited, testified that the company was still prepared to rectify whatever fault is found after another check has been done that is covered under warranty. The second witness for the respondent, Mr. Mike Howarth stated that he is the Workshop Manager for PMC Auto since 2001 and that he is involved in diagnostics and repairs on vehicles. Mr. Howarth stated that the Chassis Control System is a technology which enhances driver comfort and confidence and that issues with said system does not mean that the vehicle is unsafe to use for you can switch off this mechanism and the vehicle will function fully mechanically.

[7]Both parties concluded their cases by filing written submissions. Ms. Dick submitted that the Board should find in favour of the complainant and order that the respondent provides a replacement or refunds to the complainant the sum paid for the Nissan Qashqai pursuant to Section 42(1)(c) of the Consumer Protection Act, 2010 given that from evidence produced the complainant has shown that the said vehicle was defective as per the provision of Section 39(1)(b) of the Consumer Protection Act, 2010.

[8]In his submissions Mr. Pardiwalla raised a point of contention that Mr. Burka for all intent and purposes was not a consumer for the purposes of the Consumer

Protection Act, 2010. Mr. Pardiwalla also contended that it was a grave error on the part of the Commission not to have taken the vehicle in question into their custody for the duration of the investigation until the completion of the matter before the Board. Lastly, he argued that the Fair Trading Commission did not feel they had a meritorious case to put before the Board but nevertheless they proceeded with the case at the insistence of Mr. Burka and he supported this argument by quoting Mr. Sophola's investigation report which stated that *"...through its investigation the Commission found that there is no definite proof that the Nissan Qashqai is unsafe but on the other hand there is no definite proof that the Nissan Qashqai is a safe."* That in the circumstances of the case Mr. Burka was unreasonable in refusing the repair the respondent was offering and therefore the case should be dismissed.

[9]The Board of Commissioners has deliberated on the matter and would like to address issues raised by counsel for the respondent. Firstly, the Board does not share Mr. Pardiwalla's argument that Mr. Burka should not be considered as a consumer under the Consumer Protection Act, 2010. Based on the evidence produced and a reading of Section 2(1) which defines a consumer in relation to goods as *"a person who acquire goods otherwise than for the purpose of resale but does not include a person who acquires goods for the purpose of using them in the production or manufacture of any other goods or articles for sale.",* the Board takes notice that Mr. Burka bought the vehicle at the full rate of applicable duty and not at the reduced rate applicable a taxi operator and thereafter only did he apply for his taxi license. It can also be argued that a strict interpretation of Section 2(1) the word service does not appear next resale or production and manufacture of any other goods for sale.

[10]In contrast, counsel's contention that FTC's failure to take possession of the vehicle leaves us in a position whereby we cannot guarantee any further tampering with the vehicle finds support with this Board. We feel that in this case, the failure to take into custody of the vehicle was an omission on the part of the Commission and in future the Commission shall ensure that it makes provisions to take possession of the subject matter of an investigation as may be necessary based on the circumstances of the case so as to preserve the evidence. Be that as it may, the Board takes notice that in the matter at hand, the gathering of all the evidence upon which the case rests postdates the day the complainant retook possession of the vehicle from the respondent. Therefore, this Board **will not have entertained** any issues arising subsequently.

[11]Lastly Mr. Pardiwalla's contention that there was no case to answer which he supported with Mr. Sophola's finding that *"...through its investigation the Commission found that there is no definite proof that the Nissan Qashqai is unsafe but on the other hand there is no definite proof that the Nissan Qashqai is a safe."* The

Board is of the view that whether or not the vehicle is safe or unsafe the fact remains that Mr. Burka purchased the vehicle with so many options. A reading of Section 39(1)(b) shows that this section is qualified by at least one of three elements namely less useful, less practicable and less safe. Therefore, it may well be that the fault with the Chassis Control System and the brake calliper does not render the vehicle unsafe but the Board also has to decide whether or not it has rendered the vehicle less useful and or less practicable.

[12]The Board shall address the applicability of the Consumer Protection Act, 2010 with regards to this case. Section 39(1)(b) provides that *"'defect" in relation to any goods or a service, means any characteristic of the goods or components thereof that renders the goods or component less useful, practicable or safe than persons would generally be reasonably entitled to expect in the circumstances."* The Commission has admitted that they were unable to certify that the vehicle was safe or unsafe. With the lack of such evidence the Board cannot pronounce itself on the issue. Hence the Commission has failed to satisfy this element of Section 39(1)(b) of the Act. On the other hand, when it comes to the other two elements of the Section the Board is of the opinion that the Commission has provided sufficient evidence to show that the fault with Chassis Control System and the rear brake calliper has rendered the vehicle less useful as well as less practicable in that Mr. Burka has been unable to make use of all the options he hoped to enjoy when he purchased the vehicle. Consequently, the Board of Commissioners hereby finds that the vehicle is defective as per the provisions of Section 39(1)(b) of the Consumer Protection Act, 2010.

[13]The Board shall now address the matter of a remedy. In that regard Section 42(1)(c) of the Act states as follows:

> *"42.(1) Subject to this Part, where a consumer acquires any goods, otherwise than by way of sale by auction, -*
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> *(c) which are not of good quality, in good working order or defective; the consumer may, within 6 months after delivery of the goods, return the goods to the supplier, without penalty and at the supplier's risk and expense, and the supplier shall refund to the consumer any costs associated with the use, installation or delivery of the goods, and at the direction of the consumer, -*
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> *(i) unless the goods are not reasonably fit for the purpose referred to in paragraph (a) or (b), repair the goods within 60 days of the return of the goods to the supplier;*

(ii) replace the goods within 7 days of the return of the goods to the supplier or such longer period as agreed by parties; or

(iii) refund to the consumer the price paid for the goods, within 24 hours of the return of the goods."

[14]Moreover, Section 42(6) further states that;

*"**42(6)** If a supplier repairs any goods or any component of any such goods pursuant to subsection (1)(i), and within 3 months of that repair, the failure, defect or unsafe feature is discovered, the supplier shall –*

(a) replace the goods; or

(b) *refund to the consumer the price paid by the consumer for the goods."*

[15]The Board has cautiously deliberated on a suitable remedy. The Board is mindful that the law gives the deciding direction to the consumer on the remedy it wants but due to the circumstances of the case in regards to the specificity of the vehicle dealership business the Board is of the view that a ruling in favour of a replacement or refund of the vehicle is unwarranted. The vehicle was bought under a warranty, therefore, as far as practicable any issues that arise with the vehicle, that is covered for by warranty should, be dealt with under the terms of the warranty. We feel that the issue of refund or replacement should be the last option reserved for instances in which the subject matter in question is beyond repair or that the number of attempts at repairing is so unreasonable such that it requires a refund or replacement. In this case the Board feels only two attempts at repairing the said vehicle was not unreasonable given the circumstances of the case. The Board is of the view that the problems with the vehicle may be remedied under the terms of the warranty. There is considerable evidence that show that Mr. Burka was not ready to accept any repairs to the vehicle and that is why the case has reached this Board. In fact, Mr. Burka's refusal for a repair and his insistence for a refund or replacement by itself is a breach of the contractual terms of the sale. He bought the vehicle knowing there was a warranty and that the terms of the warranty provided for repairs on non-wearable parts so if the vehicle is repairable then the vehicle should be repaired as per the terms of the warranty. We have on record evidence of the willingness of Sun Motors Limited's offer to take the vehicle back, run a complete test on the vehicle and repair and replace the defective brake callipers. In the matter before the Board, if we are to argue as was done by the complainant and apply the provision of Section 42 as they are, a person may buy a vehicle and if he experiences a problem with the vehicle and he refuses a repair, the dealership has to refund the price paid or replace the vehicle. The Commission may well ask a consumer to go for a repair first but the consumer may argue that as per the provision of Section 42 it is the discretion of the

consumer to choose between which of the remedies he may choose from provided under section 42.(1) (i), (ii) or (iii). It is evident the unfair consequences such an interpretation may bring to any vehicle dealership. But fortunately, this provision only gives the consumer a 'direction' and not complete 'discretion'. The Board is mandated to decide on this matter and provide for the appropriate remedy given the circumstances of the case and taking into account all the relevant factors necessary to bring a just and reasonable settlement of the matter.

[16]Based on the above observations the Board hereby rules as follows:-

- **That Mr. Burka upon informing the Respondent 2 days in advance through the Commission, within 2 weeks from the date of this ruling to take the vehicle back to the respondent garage and;**
  (a) The respondent to replace the defective brake calliper in question;
  (b) Run the appropriate diagnostic test to certify that the Chassis Control System and the brakes are in good working order and thereafter
  (c) The respondent is to hand over the vehicle back to the complainant in the presence of officers Commission and provide proof of compliance with (a) and (b) above.
  (d) The statutory provision of Section 42(6) of the Consumer Protection Act, 2010 shall apply on the repairs made as ordered in (a) and (b) above.

[17]In terms of warranty, we further order the following –

As the warranty has already lapsed in relation to the 2 years while in the custody of Mr. Burka we shall extend the warranty on mileage only for a further 10,000km in addition to the 50,000km when it is reached.

We rule accordingly.

Pronounced by us on this 19th day of December, 2017.

Mr. Victor Pool
Presiding Chairperson

Mr. Philippe Chong-Seng
Commissioner

Mrs. Jenna Thelermont
Commissioner

Mr. Michael Nalletamby
Commissioner