THE FAIR TRADING COMMISSION
BEFORE THE BOARD OF COMMISSIONERS

IN THE MATTER OF THE CONSUMER PROTECTION ACT, 2010;

TARICK BEY
V.
HENRIE FRAISE FILS & COMPANY (SEYCHELLES)

Case No: CPA.16.301

Complainant – Tarick Bey
Respondent – Henrie Fraise Fils& Company (Seychelles)

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

For the Complaint: Mrs. Sylvie Faure –Senior Legal Officer (FTC)

For the Respondent –Mr. Pesi Pardiwalla, Attorney-At-Law

RULING

[1]On 26th of November, 2016 the Fair Trading Commission (the Commission) registered a complaint from one Mr. Tarick Bey (the complainant) of House S14-22, Perseverance 1 against Henrie Fraise Fils and Company (Seychelles) Limited (the respondent), a registered company (See CE7) and the authorised dealer of Renault in Seychelles, of Providence Industrial Estate, P.O Box 755, Victoria, Mahe. The complaint comprised of three issues the complainant encountered with his vehicle, a Renault Kwid Rxt (MEEBBA005G4351482 – Outback Bronze) which he purchased from the respondent on the 9th of August, 2016, that is –

1. the car lost power when going uphill when the air-conditioning system was on;
2. problems with the brakes which made funny noises and took time to stop completely; and
3. learning via the internet that Renault was recalling this batch of cars over a faulty hose clip in the fuel system.

[2]The complainant further stated in his complaint that he had taken the vehicle back to the dealer on several occasions but he was told there was nothing wrong and they refused to test said vehicle.The complainant therefore wanted a replacement of the car or a refund of the price he paid. The Commission found merit in the complaint and proceeded to investigate the matter.

[3]As part of the investigation process the vehicle was tested by the Seychelles Land Transport Agency by Mr. Jason Rusteau who is the Manager of the Vehicle Testing Station. They provided a report dated 15th February, 2017 which put the first issue relating to the loss of power when the air-conditioning system was on to rest, stating that this was normal for a car with a small capacity engine. This matter was not pursued any further. That same report also stated that the engine of the complainant's car was tested to that of a new car and there was no difference, thus ruling out the second issue of a strange noise. With regards to the third complaint with the brakes the report stated that the brakes worked fine although there was a brake warning light which stayed on when you accelerated the car but went off when the accelerator pedal is released (See CE19). It is on this third complaint that the investigation continued. To that effect the respondent agreed to and in fact changed the accelerator pedal but the problem reoccurred. The vehicle was tested for a second time by Mr. Rusteau of the Vehicle Testing Station and their second report dated 14th March, 2017 stated that a faulty accelerator pedal was diagnosed and subsequently replaced by the respondent and the fault was gone. The report also makes mention of the vehicle being part of a batch of vehicle that has been recalled by Renault in relation to possible faulty clip which fastens part of the fuel pipe. Mr. Rusteau noted that the fuel pipe had been zip tied to another fuel pipe running close to it and according to him that fix solved the issue of the faulty clip (See CE20). The respondent later stated that this fix posed no danger and it was not a safety issue.

[4]A diagnostic test conducted by the respondent picked up a fault with the accelerator pedal once more. The respondent offered to replace the accelerator pedal again but the complainant refused and insisted on a replacement or refund. The Commission therefore filed a case for the contravention of Section 42(1)(c) of the Consumer Protection Act, 2010 which states that: -

> *"**42.**(1)(c) Subject to this Part, where a consumer acquires any goods, otherwise than by way of sale by auction, which are not of good quality, in good working condition or defective the consumer may, within 6 months after deliver 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, -

(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 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 the parties; or

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

[5]The complainant, represented by Mrs. Sylvie Faure, Senior Legal Officer of the Fair Trading Commission, produced four witnesses in support of his case. To begin with, the complainant testified that he is requesting for a replacement or refund because the vehicle has not performed to the standard he was expecting a new vehicle to. That he has lost confidence in the respondent given that he has brought the vehicle to them on several occasions even before he filed his complaint at the Commission and all the opportunities they were given have failed to successfully repair the vehicle. During cross-examination it was put to Mr. Bey whether he would accept the car if the respondent imported a new accelerator pedal and changed it which would take care of the brake warning light and the complainant again refused and insisted on a replacement or refund.

[6]Secondly, Ms. Nadia Pillay, Senior Analyst of Consumer Goods Department of the Fair Trading Commission, testified that she was the investigating officer in this matter. That she acquired the relevant documents to assist with the matter but despite all correspondences and effort with the parties they failed to come to an agreement. The respondent insisted to provide another repair and the complainant refused. In cross-examination counsel for the respondent inquired from the witness why she decided to proceed with the case given the two reports from the Vehicle Testing Station stated that all issues with the car had been taken care of and the respondent was ready and willing to replace the accelerator pedal to which the witness stated that the respondent had repaired the vehicle on multiple occasions yet the issue with the brake warning light continued to reoccur and this to her constituted a breach of Section 42(6) of the Consumer Protection Act, 2010.

[7]Next, Mr. Jason Rusteau, Manager of the Vehicle Testing Station testified as to his involvements in the case and the reports he produced. Mr. Rusteau explained that after being requested by the Commission he conducted a general test on the vehicle to identify the issues being complained about and he subsequently produced his first

report dated 15th February, 2017 which described the engine noise as having no difference with that of a new car, that the cut in power when climbing hills with the air-conditioning system on was normal for such a small engine and that the brakes worked fine although the brake warning light stayed on when the vehicle was accelerated and he could not confirm whether that light could cause the brakes to malfunction but the possibility was there. Furthermore, Mr. Rusteau testified that he produced a second report dated 14th March, 2017 which provided that a diagnostic test was done on the vehicle and it identified a fault with the accelerator which was changed. A second diagnostic test revealed that the fault was gone. The report also addressed the issue of the recalls in relation to the clip fastening the fuel pipe. Mr. Rusteau stated that Renault recalled those batch of vehicle to replace the clip with a stronger one but on this vehicle, he observed that the fuel pipe in question had been tied to another fuel pipe running alongside it therefore should the clip break the fuel will more or less stay where it is. In cross-examination the witness maintained that he stood by the contents of his report.

[8]Lastly, Mr. Neddy Padayachy, Principal Analyst in the Consumer Goods Department testified that he was involved in the investigation of the case together with Ms. Pillay. His testimony corroborated that of Ms. Pillay as to the investigation process and the outcome of the investigation and their recommendation to forward the case for hearing before the Board of Commissioners. With that the complainant closed its case and opted to file written submissions.

[9]The respondent did not call any witnesses in its defence instead proceeded to file written submissions based on the evidence the Commission had submitted during the hearing.

[10]Mrs. Faure submitted that the vehicle, the Renault Kwid Rxt (MEEBBA005G4351482 – Outback Bronze) purchased by Mr. Bey qualified as defective pursuant to Section 39(1)(b) of the Consumer Protection Act, 2010 which defines 'defect' in relation to any goods or services as *"any characteristic of the goods or components thereof that renders the goods or components less useful, practicable or safe than persons would generally be reasonable entitled to expect in the circumstances."* That it is undisputed evidence that the complainant brought the vehicle to the respondent for 'brake issues' even before filing his complaint with the Fair Trading Commission and again on several occasions when the case being investigated whereby the respondent attempted reparation on two more occasions with regards to the warning brake light signalling the need to change the accelerator pedal but without success. Mrs. Faure submitted that since the pedal was changed more than once and still the problem re-occurred this triggered the provisions of Section 42 (6) which provides that *"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 has not been remedied, or a further 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." That no evidence has been produced to show that the complainant used the vehicle in a manner contrary to the manufacturer's instructions hence the above section should apply. Mrs. Faure quoted the case of FTC vs. Sun Motors Limited (CPA.16.003 whereby the Board stated that "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 warranty and as far as practicable, any issues that arise with the vehicle, that is covered under the warranty should be dealt with under the terms of the warranty", and that the issue of refund or replacement should be the last option reserved for instances in which the vehicle is beyond repair or that the number of attempts at repairing is so unreasonable that it required a refund. That perhaps the very specificity of the vehicle dealership business means that consumers should be afforded protection when the implied warranties of Section 42(1) are not met. Mrs. Faure is of the view that the Board's reasoning in the Sun Motors case cited above is understood as it is reluctant to open the industry to consumers availing of their right to return goods failing to meet the Section 42(1)(c) warranty but nevertheless the right is there and the answer to the problem is to amend the Consumer Protection Act, 2010 to provide for a hierarchy of remedies. Mrs. Faure concluded by submitting that a complex product is defective even where its defectiveness is attributable only to a fault in one of its components and in Section 42(6) there is a clear distinction between goods and components and it provides that in the event a defect not having been cured by corrective measures the supplier shall replace the goods or refund the price paid for the goods given that the evidence adduced has shown clearly that the vehicle is defective as per the definition provided for by the Consumer Protection Act, 2010, hence the Board should find that the respondent has breached the requirements of Section 42(1)(c) of the same Act and orders redress for the complainant in terms of Section 42(6) of the Act.

[11]Mr. Pardiwalla, counsel for the respondent, submitted that the respondent has dealt with the issues complained of by the complainant, that is, the funny noise and the issue of loss of power when going uphill when the air-conditioning system is on and this is corroborated by the report of Mr. Jason Rusteau from the Vehicle Testing Station (See CE19) and Mr. Rusteau further places the matter to rest in his report dated 14th March, 2017 (CE20). That the matter of the brake warning light staying on was addressed after a problem was with the accelerator pedal sensor was diagnosed but unfortunately the pedal was replaced from a batch of new cars which were later discovered to have the same sensor problem. Mr. Pardiwalla further submitted that a new reprogrammed accelerator pedal is now in place but the

complainant will not take his car, which is still at the garage of the respondent, and the Commission is not interested in seeing if the replacement has been done but instead following a wrongly interpreted provision of the law to put blame on the respondent. Mr. Pardiwalla is of the view that the correct interpretation of the law is settled in the ruling of FTC vs. Sun Motors (CPA.16.003) particularly at paragraphs [13], [14] and [15] and until this is reversed this is authority. Mr. Pardiwalla moved that the complaint should be dismissed and the complainant ordered to take back his car.

[12]The Board has deliberated lengthily on the matter. This complaint was lodged in November, 2016 and attempts of the respondent to repair the issues being complained of on the vehicle has been unsuccessful. It is unfortunate that it has now been over a year and a half since the complainant has loss the use of his vehicle. This is testament to the complexity and difficulty complaints relating to motor vehicles bear on the Commission as a whole and the parties involved. The defect in this case was diagnosed to be that of a faulty accelerator pedal. It was brought into evidence that this pedal was replaced twice from a batch of the same Renault vehicle but the respondent willingly or ignorantly carried out the replacement with the same defective accelerator pedal from that batch hence this did not ameliorate the complainant's issue. According to the respondent the correct component was received from Renault and subsequently replaced meaning that the issue with accelerator pedal has been remedied and therefore the complainant should take back his vehicle. The complainant has not accepted this position.

[13]Based on all the above the Board of Commissioners hereby finds the respondent to be in breach of Section 42(1)(c) of the Consumer Protection Act, 2010 in that the complainant did not receive a vehicle that was free of defect. **Consequently, the Board orders the respondent, within fourteen (14) working days from the receipt of this ruling, to run a diagnostic test on the vehicle in question in the presence of the complainant, officers of the Fair Trading Commission and a representative of the Vehicle Testing Station to verify that the problem with the accelerator pedal has been resolved and no warning light is observed. If the problem is found to be still occurring during the test, the Board hereby orders that the respondent refunds to the complainant the sum of SR.226,000 being the price paid for the vehicle, not later than fourteen working days after running said test.**

[14]In the event that the problem with the accelerator pedal is resolved the Board hereby directs that the respondent, within fourteen working days of receipt of this ruling;

1. Submits the vehicle to a road worthiness test to be conducted by the Vehicle Testing Station to ensure that the vehicle is road worthy. Any faults identified during the road worthiness test shall be rectified at the cost of the respondent.
2. Thereafter the vehicle shall be returned to the complainant in the presence of officers of the Fair Trading Commission.
3. The Board further orders that the warranty on the vehicle resumes coverage anew meaning three years or 100,000km whichever comes first effective from the date the vehicle is handed over to the complainant.
4. Further, should the complainant encounter the same problem with the brake warning light relating to the accelerator pedal within three months of the date of return of the vehicle to him, the respondent shall refund to the complaint the sum of SR.226,000 pursuant to Section 42(6) of the Consumer Protection Act, 2010 within fourteen working days of the fault's reoccurrence.

[15]In all orders given above a report shall be filed to the Board of Commissioners stating the order complied with and outcome obtained.

[16]The parties are free to appeal against this ruling (*see Section 77 of the Consumer Protection Act, 2010 and Section 44 of the Fair Trading Commission Act, 2009).*

We rule accordingly.

Pronounced by us on this 30th day of August, 2018.

Mr. Victor Pool
Presiding Chairperson

Mr. Philippe Chong-Seng
Commissioner

Mrs. Jenna Thelermont
Commissioner

Mr. Michael Nalletamby
Commissioner