NCAT
NSW Civil & Administrative Tribunal

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Case number **2023/00372771**
Previous case number MV 23/44832

ELLEN GALLO
[redacted]

3 July 2024

Case title	**ELLEN GALLO v HOUMA HOLDINGS PTY LTD** **Application under Motor Dealers & Repairers Act 2013**

Please find enclosed a copy of the written statement of reasons for the decision of the Tribunal made on 20 June 2024.

Registrar
[redacted]

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Civil and Administrative Tribunal
New South Wales

Case Name:	**Gallo v Houma Holdings Pty Ltd**
Medium Neutral Citation:	[2024] NSWCATCD
Hearing Date(s):	28 March 2024 and 20 June 2024
Date of Orders:	03 July 2024
Date of Decision:	03 July 2024
Jurisdiction:	Consumer and Commercial Division
Before:	Senior Member K Ross
Decision:	(1) On or before 16 July 2024 Ellen Gallo is to deliver the vehicle to the Respondent. (2) On or before 16 July 2024 Houma Holdings Pty Ltd is to pay Ellen Gallo the sum of $48,975.00.
Catchwords:	CONSUMER LAW: Australian Consumer Law – guarantee of acceptable quality – failure to rectify in reasonable time – rejection period
Legislation Cited:	The Australian Consumer Law Fair Trading Act 1989
Cases Cited:	Nil
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Ellen Gallo Houma Holdings Pty Ltd
Representation:	Nicholas Putley (Applicant) Bernard de Riviere (Respondent):

File Number(s): 2023/00372771 (Previously MV 23/44832)

Publication Restriction: Unrestricted

REASONS FOR DECISION

The application

1 The applicant purchased a new Kia Sportage motor vehicle ("the vehicle") from the respondent in November 2018 for a price of $48,975.00. She complains that the vehicle has had a history of electrical issues. On 29 June 2023, the applicant provided the respondent with a rejection notice and sought a refund of the purchase price.

2 The respondent did not accept the rejection notice, and the applicant lodged these proceedings. When the matter came before the Tribunal, the parties agreed that the respondent would, on or before 31 December 2023, replace the wiring harness, and test the starter motor for faults. The respondent replaced the harness, but the replacement harness was faulty. With the vehicle still not properly repaired, on 8 January 2024 the applicant lodged a renewal application. She seeks to return the vehicle, and to have a refund of the purchase price.

3 The respondent opposes the orders sought.

4 I am satisfied that the applicant is a consumer. The respondent supplies new motor vehicles in the course of carrying out its business. The claim is a consumer claim, and the Tribunal has jurisdiction under the Fair Trading Act 1989 to hear and determine the claim.

The evidence

5 Many of the facts in this matter are not disputed. I make the following findings:

(1) The applicant purchased a new Kia Sportage motor vehicle ("the vehicle") from the respondent in November 2018 for a price of $48,975.00.

(2) On 29 July 2020 the applicant took the vehicle to the respondent because the audio unit and parking sensors had failed. The respondent advised the applicant that a new audio unit was required.

(3) On 12 August 2020 the applicant took the vehicle to the respondent. The respondent replaced the parking sensors. The audio unit was not replaced because the respondent said that it had found and replaced a blown fuse.

(4) On 6 January 2021 the applicant sent an email to the respondent, reporting that the parking sensors were again faulty. The car was booked in for diagnosis on 15 January 2021. On 29 January 2021 the vehicle was returned to the respondent. It remained with the respondent until 25 February 2021. The parking sensors and the wiring harness for the parking sensors were replaced.

(5) The audio unit continued intermittently to malfunction.

(6) On 18 November 2021 the vehicle was presented to the respondent, and the audio unit was reset.

(7) On 7 December 2021 the applicant again reported the audio issues. The vehicle was taken in for diagnosis on 23 December 2021. The applicant was advised that Kia would be engaged.

(8) The applicant followed up the issue with the respondent during January, February and April 2022. The applicant was advised that the unit had been ordered.

(9) The applicant followed up the issue during September and October 2022, and was advised on 6 October 2022 that the replacement unit would be about 4 weeks.

(10) The vehicle was presented for a service on 8 November 2022. The audio unit was still not available.

(11) On 6 December 2022 the audio unit was replaced. It failed again on that same day. The failure was reported on 7 December 2022, and on 14 December 2022 the applicant was advised that another unit had been ordered.

(12) Around the end of February 2023, the applicant contacted the respondent for an update and was told that the audio unit had not been ordered. The respondent indicated that it needed to see the vehicle again, and in early March 2023 the vehicle was returned for further diagnosis. The respondent determined that the external amplifier was faulty. On 25 May 2023 the amplifier was replaced.

(13) The audio unit failed again on collection of the vehicle.

(14) On 21 June 2023 the vehicle was taken to the respondent for further testing. The respondent determined that the issue was caused by a faulty wiring harness, and an estimate of 6 to 12 weeks was provided for repair.

(15) On 29 June 2023 the applicant provided a rejection notice to the respondent. She sought a refund of the purchase price.

(16) On 27 September 2023 the respondent advised the applicant that Kia would not accept the rejection notice and wished to repair the vehicle.

(17) On 4 October 2023, the applicant commenced these proceedings.

(18) On 23 October 2023, when the matter came before the Tribunal, the parties agreed that the respondent would, on or before 31 December 2023, replace the wiring harness, and test the starter motor for faults.

(19) On 4 December 2023 the applicant took the vehicle to the respondent for repair. The respondent replaced the wiring harness, but the replacement harness was faulty, causing an issue with the airbags. The

respondent provided the applicant with a loan vehicle and advised the applicant that a new wiring harness had been ordered.

(20) With the vehicle still not repaired, on 8 January 2024 the applicant lodged a renewal application.

(21) On 15 February 2024 the respondent advised the applicant that the new wiring harness had been fitted to the vehicle, and was ready for collection.

(22) On 28 March 2024 the matter was listed for hearing in the Tribunal. The applicant gave evidence that the vehicle had been damaged whilst in the possession of the respondent. The respondent accepted that there were scratches on the vehicle and a cut in the back seat. The applicant also reported that there were now issues with the lane assist and steering assist functions not operating correctly, the rear window dehumidifier not working, and one window not properly operating.

(23) The respondent requested that it be given an opportunity to have the vehicle independently inspected by a KIA appointed inspector. The Tribunal adjourned the proceedings part heard and made directions for the applicant to file and serve any expert report by 12 April 2024, and for the respondent to file and serve any expert report by 26 April 2024. Evidence in reply was to be filed and served by 3 May 2024.

(24) The applicant filed and served a report of Joshua Morris dated 8 April 2024. He adopted the Tribunal's code of conduct. He states that:

> "Further inspection of the BCM (Body Control Module) output to the demist relay circuit is required."

(25) On 23 April 2024 the respondent sent an email to the applicant, seeking to have the vehicle inspected by an expert on 30 April 2024. The applicant stated that she was willing to provide access to the vehicle for inspection up until 26 April 2024, being the date by which the

respondent's report was to be filed and served, but unless NCAT extended the time for filing and serving the report, would not provide access to the vehicle after that date.

(26) The respondent did not seek an extension of time from the Tribunal and did not file and serve any expert report. At the commencement of the hearing on 20 June 2024, the Tribunal declined to extend time on the basis that the respondent had had ample opportunity to provide the evidence on which it intended to rely. The Tribunal determined that any further extension of time was not consistent with the Tribunal's guiding principle.

The law

6 The Australian Consumer Law provides a guarantee that goods supplied to a consumer will be of acceptable quality:

> 54 Guarantee as to acceptable quality
>
> (1) If:
>
> (a) a person supplies, in trade or commerce, goods to a consumer; and
>
> (b) the supply does not occur by way of sale by auction;
>
> there is a guarantee that the goods are of acceptable quality.
>
> (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.

7 If the goods do not comply with the consumer guarantee, a consumer can take action against the supplier. Section 259 of the ACL provides that:

259 Action against suppliers of goods

(1) A consumer may take action under this section if:

(a) a person (the supplier) supplies, in trade or commerce, goods to the consumer; and

(b) a guarantee that applies to the supply under Subdivision A of Division 1 of Part 3 - 2 (other than sections 58 and 59(1)) is not complied with.

(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.

(3) If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:

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

(b) by action against the supplier, recover compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods.

(4) 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.

(5) Subsection (4) does not apply if the failure to comply with the guarantee occurred only because of a cause independent of human control that occurred after the goods left the control of the supplier.

(6) To avoid doubt, subsection (4) applies in addition to subsections (2) and (3).

(7) The consumer may take action under this section whether or not the goods are in their original packaging.

8 Relevantly, there is a major failure to comply with a guarantee if:

260 When a failure to comply with a guarantee is a major failure

(1) A failure to comply with a guarantee referred to in section 259(1)(b) that applies to a supply of goods is a major failure if:

(a) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; 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

…...

(e) the goods are not of acceptable quality because they are unsafe.

9 Section 262 provides:

262 When consumers are not entitled to reject goods

(1) A consumer is not entitled, under section 259, to notify a supplier of goods that the consumer rejects the goods if:

(a) the rejection period for the goods has ended; or

(b) the goods have been lost, destroyed or disposed of by the consumer; or

(c) the goods were damaged after being delivered 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) 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.

Consideration

10 The issues to be determined are:

(1) Is the vehicle of acceptable quality, as defined in s 54 (2), having regard to the matters set out in s 54 (3) of the ACL?

(2) If the vehicle is not of acceptable quality, is the failure to comply with the guarantee a major failure, either because

(a) a reasonable consumer fully acquainted with the nature and extent of the failure would not have purchased the vehicle, or

(b) because the vehicle is substantially unfit for a purpose for which the vehicle is commonly supplied and it cannot, easily and within a reasonable time, be remedied to make it fit for such a purpose?

(3) If the failure is not a major failure, can the failure to comply with the guarantee be remedied? If so, has the supplier failed to comply with the consumer's request for remedy within a reasonable time?

(4) Has the rejection period ended?

Is the vehicle of acceptable quality, as defined in s 54 (2), having regard to the matters set out in s 54 (3) of the ACL?

11 Goods are of acceptable quality if they are as fit for all the purposes for which goods of that kind are commonly supplied; and acceptable in appearance and finish; and free from defects; and safe; and 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 nature of the goods; and the price of the goods and any statements made about the goods on any packaging or label on the goods; and any representation made about the goods by the supplier or manufacturer of the goods; and any other relevant circumstances relating to the supply of the goods.

12 No evidence has been given in respect of any statements or representations made about the goods. I take into account that the vehicle was sold for a cost of almost $50,000. Cars are complex pieces of equipment. A reasonable consumer would expect that over time, some issues might arise in respect of the vehicle, requiring servicing and repair. This includes issues with what might be regarded as accessories such as the audio unit.

13 I have found that the vehicle has had the following issues and repairs:

- July 2020 – issues with audio unit and parking sensors – audio unit not fixed
- August 2020 – replacement of parking sensors
- February 2021 – second replacement of parking sensors and wiring harness for parking sensors
- November 2021 – audio unit reset
- December 2022 – audio unit replaced – immediately failed again
- May 2023 – amplifier replaced -audio unit immediately failed again

- June 2023 – identification of need to replace wiring harness

- December 2023 - Starter motor issues reported – wiring harness replaced and immediately failed –fault relating to airbags- vehicle with supplier until wiring harness again replaced in February 2024

- March 2024 – issues with lane assist and steering assist functions not operating correctly, the rear window dehumidifier not working, and one window not properly operating.

- April 2024 – applicant's expert reports ongoing issues with wiring harness.

14 It cannot be said that the vehicle has been free from defects in the electrical system of the vehicle. This has included ongoing issues with the audio unit from July 2020, which appear only to have been resolved by the replacement of the wiring harness in March 2024. There were issues with parking sensors, requiring two replacements. When it was identified that the wiring harness required replacement, it also failed again and had to be replaced twice, with the evidence indicating that it is still not functioning properly.

15 I am satisfied that the vehicle is not of acceptable quality as defined in s 54. It is not fit for all the purposes for which vehicles are supplied, it is not free from defects, and a reasonable consumer would not regard these issues as acceptable.

16 This is not simply a case of a vehicle with a defective audio system. The vehicle has required replacement of the main wiring harness twice (and it is still not operating correctly) affecting various electrical components including the audio system, the parking sensors, the airbags, and the lane assist and steering assist functions.

If the vehicle is not of acceptable quality, is the failure to comply with the guarantee a major failure?

17 As explained above, a failure to comply with a consumer guarantee will be a major failure if either a reasonable consumer fully acquainted with the nature and extent of the failure would not have purchased the vehicle, or because the vehicle is substantially unfit for a purpose for which the vehicle is commonly supplied and it cannot, easily and within a reasonable time, be remedied to make it fit for such a purpose.

18 I am not satisfied that a reasonable consumer would have purchased the vehicle, knowing that it would be plagued with issues which have not been remedied in a reasonable time frame. If however I am wrong about that, the evidence would suggest that the issues have not been able to be remedied, easily and within a reasonable time, to make the vehicle fit for all the purposes for which vehicles of this kind are supplied.

19 Whilst there is no expert evidence before the Tribunal, the facts show that replacements have had to be made on multiple occasions. This may be because of the underlying wiring harness issues. However, after almost four years, there are still ongoing issues with the electrical system in the vehicle.

If the failure is not a major failure, can the failure to comply with the guarantee be remedied? If so, has the supplier failed to comply with the consumer's request for remedy within a reasonable time?

20 If I am wrong about the failure being a major failure, the evidence would suggest that the issues have still not been properly remedied. Whilst the supplier has attempted to repair the issues, there are still outstanding issues, and the vehicle is still not free from defects. The supplier has failed to remedy the defects within a reasonable time.

Has the rejection period ended?

21 The rejection period 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 to become apparent having regard to the type of goods; and the use to which a consumer is likely to put them; and the length of time for which it is reasonable for them to be used; and the amount of use to which it is reasonable for them to be put before such a failure becomes apparent.

22 A motor vehicle is expected to have a life of many years. True it is that repairs and maintenance must be expected. The issues with this vehicle began when the vehicle was less than two years old. The supplier has been attempting to address the issues ever since. The car is now almost 6 years old and has travelled approximately 130,000 km.

23 I take into account that the fact that the issues could not be resolved in a reasonable time has only become fully apparent during the last year. It is the failure during that period in particular which satisfies me that the rejection period has not ended.

What orders should the Tribunal make?

24 The applicant has served a rejection notice. She is entitled to return the vehicle and have the purchase price refunded. I will so order.

Orders

(1) On or before 16 July 2024 Ellen Gallo is to deliver the vehicle to the respondent.

(2) On or before 16 July 2024 Houma Holdings Pty Ltd is to pay Ellen Gallo the sum of $48,975.00.

Senior Member K Ross

03 July 2024.

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I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar

