Decision No.WN 41/89

Reference No.MVD 174/89

IN THE MATTER of the Motor Vehicle Dealers Act 1975

AND

IN THE MATTER of a dispute

BETWEEN [redacted]

Purchaser

AND [redacted]

Dealer

BEFORE THE WELLINGTON MOTOR VEHICLE DISPUTES TRIBUNAL

R D Burnard - Chairman
D J Boyle

HEARING at WELLINGTON on the 9th day of October 1989

APPEARANCES

Purchaser in person
[redacted] for dealer

DECISION

[redacted] purchased a 1975 Ford Cortina Stationwagon from [redacted] of New Plymouth on 11 May 1989 for a price of $5,995.00. The transaction came within the category D classification under the provisions of the Motor Vehicle Dealers Act 1975.

[redacted] told us that at the time he purchased the vehicle he noticed a noise which he described as being in the middle of the engine. He enquired from the salesman [redacted] as to this noise and was told it was gudgeon noise but there was nothing to worry about. The engine lost power and started smoking and knocking and used excessive oil and about three weeks after the purchase he approached the dealer and complained. [redacted] said that he was told to return in a weeks time when a nationwide warranty which was obtained by the purchaser at the time of the sale would come into effect. [redacted] understood that it was the dealer's intention to claim on that warranty and the dealer offered to obtain a replacement engine.

[redacted] whilst initially agreeing to this course later reconsidered his position and chose not to have the replacement

engine fitted as he was concerned that such engine would not have the 12 month nationwide warranty which he had purchased. His girlfriend's father intervened at this stage and it was discovered that the nationwide warranty did not apply to the vehicle in any event because it had been modified by having a V6 engine fitted.

[redacted] told us that he had not used the vehicle in recent months which has been parked up at home. He said that the vehicle while still able to be driven would not start easily and there was substantial damage to the engine. He asked that he be paid back his deposit of $2,100.00 and also sought additional damages in the form of the cost to him of other forms of transport and other consequential losses.

The dealer, [redacted] gave evidence. He said that the whole dispute had arisen because of the intervention of [redacted] who is the father of [redacted] girlfriend. [redacted] said he understood that the purchaser had agreed to the replacement engine being fitted and had that been done the car would have been back in running order within a few days and there would have been no problem. He said that he did not realise that the nationwide warranty would not apply to a vehicle which had a replacement engine. He said that he recalled the vehicle having a noise when it was sold but his mechanic had said it was just tappet noise. He had arranged a replacement engine with a three month warranty at a cost of $500.00 and offered to fit it at no cost to the purchaser.

It is important to the parties that the Tribunal records that it is set up under the Motor Vehicle Dealers Act 1975 and only has the jurisdiction which is given to it by Part VII of that Act. In particular the Tribunal has no power to enforce the nationwide warranty which was purchased at the time of this transaction and our consideration of this dispute has necessarily been confined to enquiring whether the dealer has complied with the implied term in the contract of sale created by s.93(2) of the Act which reads as follows:

> *(2) Where, after the commencement of this section, any licensee sells a category D motor vehicle to any person who does not be reason of the sale become the trade owner of the vehicle there shall be implied in the contract of sale a term ... that the licensee warrants -*
>
> *(a) The the motor vehicle has a current warrant of fitness properly issued under the Transport Act 1962; and*
>
> *(b) That the motor vehicle is of merchantable quality and is fit for the purpose for which vehicles of that type are usually used.*

No complaint was made that the vehicle did not have a current warrant of fitness at the time of the sale and we have confined our consideration of the implied term to the second aspect,

namely whether the vehicle was of merchantable quality and fit for the purpose to which vehicles of that type are usually used. This is a somewhat marginal case. The purchaser at the time the complaint was made some six weeks after the sale had travelled approximately 3000 km in the vehicle although it is probable that rather less than half of this distance was travelled at the time he first complained three weeks after the sale. On balance however we have reached the view that the vehicle did not comply with the implied term and was not of merchantable quality and fit for the purpose for which vehicles of its type are usually used when it was sold to [redacted]. At the time of the sale both parties agreed there was a noise from the engine [redacted] describing it as tappet noise whereas [redacted] believed it came from the middle of the engine. The noise got steadily worse and the engine started smoking and we believe it is a proper inference for us to make that the condition of the vehicle was such at the time of the sale that within a short period major engine repairs were going to be necessary and we consider we are justified in concluding that the vehicle was not of merchantable quality when it was sold. Indeed this appears to have been recognised by the dealer when the complaint was made by his offer to fit the replacement engine.

By s.102A of the Act where as in this case we are satisfied that there was breach of the term implied by s.93(2) the Tribunal may either award compensation or rescind the contract. We are not prepared to grant recission of this contract as the purchaser requests. He informed us that he has defaulted in all the hire purchase payments due under the hire purchase agreement entered into at the time of the sale with the exception of the first payment and as there is every possibility the vehicle will be repossessed, we consider it would be unjust to the dealer for a recission order to be made with the consequences which flow from such an order under the terms of s.101 of the Act.

We accordingly propose awarding compensation to the purchaser. When the purchaser first approached the dealer an offer was made to replace the engine and it was apparent that a replacement engine with a three month warranty was available for a price of $500.00. No evidence was given as to the precise cost of installing the engine and indeed the purchaser was planning to have a friend carry out this work. In our experience this work if carried out by a mechanic in the ordinary course of his business would have cost approximately $250.00 and we therefore propose awarding compensation in the total sum of $750.00.

We are not prepared to include in the figure awarded for compensation any consequential losses as these would not have been incurred if the purchaser had as we believe he should have, minimised his loss by having the engine replaced when the dealer offered to take this course.

We should add that although we have no jurisdiction to award the purchaser the sum involved it does appear to us that the amount he has paid for the nationwide warranty of $220.00 has been completed wasted and should be returned to him because of the inapplicability of the warranty due to the term which states that the warranty is not to apply to a vehicle which has been modified.

Our formal order is to require the dealer to pay the sum of $750.00 to the purchaser by way of compensation for breach of the term implied by s.93(2) of the Act.

We should also record that both parties consented to the Tribunal sitting in the absence of the consumers representative.

DATED at WELLINGTON this 12th day of December 1989

R D Burnard

D J Boyle

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