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Decision No.	AK 79/92
Reference No.	MVD 105/92
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 AUCKLAND MOTOR VEHICLE DISPUTES TRIBUNAL

Mr H.T.D. Knight - Chairman
Mr R.G. Lewis - Member
Mr A.E. Enting - Member

HEARING at AUCKLAND on the 3rd day of July 1992

APPEARANCES:

For purchaser - [redacted]
For dealer -

DECISION

This dispute arose out of the sale and purchase of a 1987 Alfa Romeo GTV6 motor vehicle. It was a Category B vehicle for the purposes of the Act. It was purchased on the 19 November 1991 at a price of $18,000. The odometer reading at the time of purchase was 49,000km. At the time of the complaint it had travelled a further 8,000km.

The purchaser's evidence was that he had previously owned a Alfa Romeo motor vehicle and he had some knowledge of them. He stated that prior to purchase he took it away and obtained an AA pre-purchase report which he did not actually have available to produce to the Tribunal. He stated that that report said that there were various repairs to be carried out to the vehicle but the most serious matter was that there was a trace of exhaust emission gases in the cooling system. He stated that this would have necessitated the replacement of the cylinder head gasket. He stated that he showed the report to the licensee representative who was not the person who appeared to represent the licensee at the hearing.

Because of his previous ownership of an Alfa Romeo he was well aware of how expensive the head gasket repair could be and he told the licensee representative that he did not want to buy the vehicle with that problem. He was then asked by the licensee "if he replaced the head gasket would you complete the sale?". He stated also that there was a discussion that it might be necessary to machine the head at the time the gasket was replaced.

The purchaser agreed to purchase the vehicle provided the head gasket was replaced and this was written in as a term of the contract on the vehicle offer and agreement form. It actually reads :

> "Dealer to fix head gasket and do warrant of fitness works".

The purchaser's evidence was that the car was driven for the distance of 8,000km and apparently in January 1992 just near Keri Keri the fan belt snapped. He took it to a local garage who informed him that the water pump had seized. He was unable during the holiday period in that area to obtain the necessary parts and/or expertise to repair this type of motor car. He therefore put it on a transporter and sent it back to Auckland and took it to a local Auckland garage that had the expertise in these particular vehicles.

At that time he was not relating the repair the vehicle required back to the date of purchase. He stated he received a telephone call from the repairer to say that they had taken the radiator out and that they were concerned because from what they had been told when they were servicing the car for him that the head gasket had been replaced as a condition of the sale.

From their inspection of the vehicle it was their opinion that the head gasket had definitely not been replaced. The purchaser produced a report dated 16 April 1992 from that repairer who stated that in overseeing the car they found oil in the cooling system caused by a defective head gasket and because they had been told the head gaskets had been replaced within approximately the last three months as part of the

contract with the dealer, they informed the purchaser that the cylinder head "had not been off this motor for some considerable time - if ever". In the report they then stated that the purchaser had as he stated before the Tribunal asked for an independent engineer's inspection. They said that after that was completed they started to remove the cylinder heads and found "the head gaskets to be of the type originally fitted to this car (these are easily identified because of a defective O-Ring in each gasket, most of this type of gasket were replaced by the manufacturer some time ago)".

The report then concluded "in our opinion, the cylinder head gaskets had not previously been replaced or, if they had, they had certainly not been replaced for a very long time and certainly not within the three months prior to us receiving it in our workshop".

The purchaser also produced an AA discretionary check which stated "the inspection revealed no evidence of recent cylinder head removal. The rubber seals still had - dirt caked across the front of the head/block".

The date of that inspection was shown as the 5 February 1992. The detailed report which was actually produced to the Tribunal was dated the 15 April 1992 confirming in more detail that simple report.

On the question of whether or not the head gasket had been removed the licensee appeared to accept that it had not because he stated that prior to the sale being carried out, the vehicle had been sent back to the actual owner because they were selling it on behalf. They understood when they got the vehicle back that the work had been carried out in addition to various other work that was required to be carried out.

Later enquiries apparently revealed that what had happened was that the actual owner instead of carrying out the contractual obligation to replace the cylinder head gasket as agreed, he carried out a test on the vehicle. The vendor told the dealer that the test showed that it was not necessary to replace the head gasket so they did not do so.

The vendor elected to pursue that course of inaction in the face of the AA report. With the hindsight now available from the subsequent history of this vehicle it is clear that that head gasket should have been replaced.

The Tribunal is of the clear view that as at the date of sale this vehicle had in it a defect within the definition of that term provided in s.2 of the Act. Defect in that definition is defined as any mechanical flaw or malfunctioning and having regard to the age of the vehicle, the total distance travelled by it and the price obtained or sought for it by the licensee, has adversely affected or is likely to adversely affect -

(a)..
(b)..
(c) The serviceability of the motor vehicle.

The Tribunal is of the firm opinion that as at the date of sale there was a defect in this vehicle namely the leaking head gaskets and that it was obvious that that condition was going to affect the serviceability of the vehicle and it did.

The Tribunal should point out at this stage that the vendor of the vehicle is indeed fortunate that the vehicle is driven by such a prudent driver because if there had not been the immediate stopping because of the fan belt break, it may well have been that considerable damage could have occurred to the engine.

Section 93 of the Act provides that where there is a sale to a private member of the public by a licensed motor vehicle dealer there should be implied in the contract of sale in the prescribed form a term that if a defect appears in that vehicle in the case of the Category B motor vehicle, before the vehicle has been driven a distance of 3,000km since the date of the sale or (in a case where the vehicle has not been driven within the period of two months commencing with the date of sale) before the expiration of that period. Whether or not the defect existed at the time of sale, the licensee shall repair or make good or cause to be repaired or made good that defect so as to put the vehicle in a reasonable condition having regard to its age and the distance it has been driven.

There was obviously a defect in this vehicle and the licensee had undertaken in writing to repair it at the time of sale. The obligation was the licensee's whether or not the vehicle's being sold on behalf quite apart from the contractual provision that actually provided that the licensee would repair it.

That was not done. The fact that it was not done was apparently not known to the licensee.

The real issue in this case is the question of whether or not a written notice was given to the licensee as required by the Act. Section 102 provides that where the licensee has refused or failed to carry out any obligation imposed on it by s.93 and in this case the licensee failed to carry out that obligation the Tribunal may if it is satisfied that the licensee has failed as aforesaid make an order authorising the purchaser to cause the work that would be necessary to carry out the obligation to be performed and for the purchaser to recover the cost of same up to maximum amount specified in the order. Or where the purchaser already had the necessary work done requiring the licensee to pay the purchaser the reasonable cost incurred by the purchaser in respect of that work being the amount specified in the order.

There then follows the proviso "provided that the Disputes Tribunal shall not make an order under this paragraph unless it is satisfied that, before the purchaser had the necessary work done, it gave written notice of its intention to do so to the licensee and he gave the licensee a reasonable opportunity to

inspect the motor vehicle". It would appear that there are two obligations contained in that proviso : one, to give a written notice and also a reasonable opportunity to inspect the motor vehicle.

In this case there can be no doubt but that the purchaser gave the licensee a reasonable opportunity to inspect because the purchaser's evidence which is accepted was that on the 1 February 1992 that is prior to the 5 February when it was quite clear that AA inspected, he had been rung by the repairer. He had on that date rung both the AA to inspect the vehicle and at the same time he rang the licensee to explain where the vehicle was and to explain exactly what the problem was in that the head gasket had in fact never been replaced in accordance with the terms of the contract, told them where the vehicle was so they could inspect it and they did not take that opportunity to inspect.

There appears to have been a discussion between them whether that time or shortly thereafter but probably on the evidence available to the Tribunal prior to the repairs actually being carried out as to who was to carry out the repairs.

The purchaser had already as far as he was concerned given it to the licensee to do this very repair and they failed to do it.

There was therefore some understandable reluctance on his part to let them repair, in addition he explained it was a company vehicle and he wanted it back on the road and he told them this.

He therefore persisted in having it repaired by the experts.

He wrote a letter dated the 7 February 1992 and in it he stated that he confirmed the recent telephone conversations on Tuesday and Wednesday of that particular week when he told them of the problem of the cylinder head gasket. He then went on to detail the fact that the car had been purchased following the AA report and that they had agreed to fix the head gasket and carry out some other minor repairs and that it was now quite clear that the cylinder head had not been removed from the motor. He stated that the car was required for business use and whilst it was off the road it was not only inconvenient but they were incurring increased operating costs.

He stated that the licensee had told him over the telephone that either the licensee or the previous vendor was going to produce an invoice that the cylinder head gasket had been replaced following the AA inspection.

The purchaser was indignant at that suggestion because obviously from the reports that he had had and the condition of the vehicle it was clear that it had not been replaced.

It was also the evidence of the licensee at the hearing before the Tribunal that in fact it had not been replaced. The letter clearly indicated that the vehicle was going to be repaired as

quickly as possible and that the licensee would be held responsible. On the 13 February 1992 a letter was written to the licensee enclosing a copy of the invoice.

Both those letters were addressed to the [redacted]. The licensee took the point that firstly that the work had been completed before the letter was written.

And secondly, that it was sent to the wrong address because the address on the agreement for sale and purchase was [redacted] Avenue and the letter had been addressed to [redacted] Avenue. The purchaser stated that he "must have got it out of the phone book".

The purchaser had been unable to explain why it had sent it to [redacted] Avenue at the hearing, however an inspection of the telephone book for the Auckland City shows that the licensee's address in fact is shown in the book as "Cnr [redacted] Avenue & [redacted] Street [redacted]".

It is clear that the purchaser looked up the phone book and sent it to that address writing just to [redacted] Avenue.

The licensee stated the letters had not come on his desk until well after the repairs had been completed. However any internal delays should not be attributed to the purchaser.

Be that as it may the opportunity for inspection had been clearly given well prior to any repairs being carried out and the licensee had not been prepared to do that and in fact had quite incorrectly told the purchaser that in fact repairs had been carried out originally at the time of sale and they could produce an invoice to establish that fact.

It would now appear from the evidence before this Tribunal that in fact that statement was not correct.

The licensee in taking the point as to the wrong address does not appear to have a valid argument. The Tribunal is satisfied that on the balance of probabilities that letter would have been delivered to the licensee premises on the next day or at least the day afterwards in the normal cause of the post.

It cannot accept that a business like that situated on the corner of a street would not have received it if it was addressed to one street rather than both streets.

It therefore is not prepared to accept that the licensee did not receive that letter within a reasonable time and having regard to the invoices and the repair dates and other matters it would have received it well prior to the completion of the repairs.

Having regard to the fact that it had already been given a clear oral invitation to inspect which it had declined to do the Tribunal is of the opinion that the purchaser has done everything to comply with the spirit of this Act. The licensee

obviously was not going to inspect the vehicle no matter how much notice he was given.

The Tribunal then turns to the question of the content of the account.

This is a defect. It is not a question of fixing a sum for compensation as in Category D motor vehicles. The Tribunal is obliged to order the reasonable cost of repairs if it is considered that the licensee failed to have the repair carried out which it obviously did in the first instance when it contracted in writing to do so that is the time when the defect had appeared. The fact that the vehicle didn't break down as a result of that defect until much later is in the Tribunal's view irrelevant to the fact that its appearance which was obviously within the warranty time and mileage.

The account has in it two hoses which the Tribunal is unable to ascertain the reason for replacement. Those are the only deductions it considers its can responsibly make from that account.

It may be that there could be a cheaper labour rate elsewhere but the Tribunal doubts that with this particular vehicle the repair could have been carried out as effectively by the licensee or the original vendor.

In these circumstances the Tribunal considers that the appropriate amount to allow in respect of that account is a sum of $1,505.76. This amount has been reached by deducting the hoses, carrying out a correct addition to the account which apparently had not been done in the first place and making appropriate allowances for G.S.T.

There would therefore be an order that the licensee in respect of the breach of s.93 of the Act will pay to the purchaser the sum of $1,505.76.

DATED at AUCKLAND this 22nd day of July 1992

H T D Knight
Chairman

R G Lewis
Member

A E Enting
Member

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