Decision No **AK 147/2000**

Reference No MVD 229/00

IN THE MATTER of the Motor Vehicle Dealers Act 1975

AND

IN THE MATTER of a dispute

BETWEEN

Purchasers

AND

Dealer

BEFORE THE MOTOR VEHICLE DISPUTES TRIBUNAL

Mr HTD Knight, Chairman
Mr R G Lewis F.A.I.N.Z. R.E.A. M.S.A.E. (A'sia) Member
Mr R B Armstrong B.E. (Mech) (Hons) M.I.P.E.N.Z. M.S.A.E. (A'sia), Member

HEARING at AUCKLAND on 27 September and 25 October 2000

APPEARANCES
Mrs for the purchasers
S for dealer

DECISION

Attached to this decision is a Memorandum as to the procedure followed by the Tribunal and particulars of the qualifications and experience of its lay members.

This dispute arose out of the sale and purchase of a 1987 Mazda Capella motor car registered number RO 1381, a 2000 cc vehicle one which had been imported second-hand

from overseas. It was a category D vehicle within the meaning of the classifications contained in section 92 of the Motor Vehicle Dealers Act 1975. The contract was on the basis that the vehicle was being sold for $5,000, $2,000 of which was being given for the 1987 Holden Berlina Sedan, and the balance of $3,000 financed through a well known finance company.

The background to the matter appears to be that Mrs had been involved in a business type situation with a salesperson who worked for the licensee and in that capacity had done certain favours for this person. Apparently the purchasers had approached this salesperson asking about a car, presumably a reasonably cheap car. As the salesperson did not have a car of the type sought on the licensee's yard the purchasers were taken to a panel shop where they were told that they were viewing a repossessed car which was in the course of being repaired.

It is appropriate to note at this stage that the Tribunal is satisfied that the salesperson involved in this transaction was also employed as a repossession agent for the same finance company. In fact the evidence disclosed that at times repossessed cars from the finance company were held on the yard overnight before being transferred over to the finance company.

The purchasers' evidence was that the "paperwork" as she called it, for the car, was signed on Saturday 13 May 2000.

The "paperwork" actually consisted of two documents. One was an instrument by way of security dated 13 May 2000 for a loan of $3,000 plus a consumer credit indemnity of $300 and "other" of $200 a total of $3,500. The other document was the consumer credit indemnity which costs $300 in the instrument by way of security document, also dated 13 May 2000, covering both of the purchasers.

In the original complaint the purchasers listed numerous problems with the performance of that first motor vehicle and the fact that there was neither jack nor spare wheel. Also,

shortly after picking up the vehicle one the tyres blew out and they claimed in respect of that although there was no cost to them in respect of that matter which could have been awarded against the licensee. In respect of the other complaints, because of what happened with the finance company which replaced the vehicle, there were no ongoing complaints relating to the new vehicle.

Therefore the short point in respect of this dispute was whether or not the dealership as such sold the vehicle to the purchasers. The dealership claims that this was a private sale by one of its registered salespersons on his own behalf to a personal friend.

It should be noted that the definition of "sell" or "sale" is defined in section 2 of the Act which reads as follows.

> *"Sell", in relation to any motor vehicle, means sell, or offer to sell, or expose for sale that motor vehicle or any interest in that motor vehicle; [and includes dispose, or offer to dispose, or expose for disposal that motor vehicle or any interest in that motor vehicle pursuant to a hire purchase agreement] and "sale" has a corresponding meaning:*

Mrs evidence was that she contacted the salesperson with whom she had previously had dealings not related to the buying and selling of cars. At that time she had a bad credit rating and he offered to help her out by obtaining finance in respect of the car he could obtain for her. Apparently the purchasers telephoned the dealership and the salesperson took them to a panelbeater's premises where the vehicle was being repaired.

The transaction was discussed in such detail that it was noted there was no spare tyre, jack or wheel brace and according to the purchasers the salesperson agreed to obtain those items. The purchasers were told that the car had been repossessed by the finance company and the actual transaction was discussed with the salesperson either on the dealer's yard or at the panelbeater's shop. The salesperson told them that the price of the car would be $5,000, the deposit $2,000 being the amount of the value placed on their trade-in. The balance of $3,000 would be arranged by the finance company which had repossessed the car and was the owner. It would have been clear to the purchasers that the vehicle was being sold on behalf of the finance company.

The purchasers attended the dealership's yard during normal business hours where they understood they were to sign the paperwork involved in the transaction. Mrs said she was surprised at how little paperwork there was.

In summary:

1. The purchasers phoned the salesperson, an acquaintance, asking for a low priced car.
2. The salesperson said he could help and Mrs attended the dealership's premises.
3. The salesperson then drove Mrs to the panel shop where the car was being repaired.
4. The salesperson and Mrs returned to the dealer's yard.
5. The next day the purchasers signed the finance papers at the dealership's office.
6. The vehicle was prepared for delivery and the dealership's salesperson delivered it to Mr workplace and uplifted the trade (which had been transferred by Mrs to into the name of the dealership).

The purchasers' evidence was that about 13 days after purchase they began to experience problems with the vehicle,. Mrs had to spend a considerable amount of time on the phone both to the dealership and to the finance company as the vehicle still had the following faults.

1. Back wheel bearing still not repaired, the complaint being noise;
2. Front wheel bearings and suspension (passenger side) not attended to;
3. Still no jack;
4. Battery not holding charge – (a fault with the alternator?)
5. Driver's seat not adjusting - it was welded solid to the floor;
6. Oil leaks "repaired" by merely gluing rocker cover.

The purchasers kept on at the finance company endeavouring to get the matters attended to. Finally the finance company replaced their security of the car by sending Mrs to the finance company's outlet for disposal of its cars where she saw a car with a $3,500 price on it which the finance company supplied to her in replacement of the car which she

then had. The only effect of that was that the security over her original purchase was transferred to that car.

Mrs queried with the finance company what had happened to her $2,000, given in the form of the trade-in. The finance company replied, forwarding a letter addressed to the purchasers. It was undated but had written on it "posted 22.8.2000"

> *On May 13 2000 you arranged to purchase a 1990 Mazda Capella which you financed through Unfortunatly (sic) the car was not satisfactory and . assisted you into a replacement vehicle under the same terms and conditions as the original contract. When you signed the contract the loan approved was $3000. This was the net amount advanced after deduction of your deposit which was the Holden Berlina which was traded in. Although on paper you were allowed $2000 the vehicle was on sold for $450 which was the commission paid to the sales person for handling the transaction. The deposit was shown as $2000 to allow your application to proceed because of your adverse credit and it would give you the opportunity to re-establish your credit rating.*
>
> *The 1991 Toyota Corolla which we replaced the Mazda with, was purchased from who sell their surplus vehicles to the public at wholesale or book value prices. To date we havnt (sic) received the signed acknowledgment forms for the change. If these are not received by September 1 2000 we will arrange for your Toyota to be uplifted and put into storage untill (sic) the documents are signed.*
>
> *If you require further information please do not hesitate to contact the undersigned.*
> *(sgd)*

That letter confirms the concept of the sale which was done orally by the salesperson at $5,000 with a $2,000 deposit which was obviously an inflated amount, this time with the consent of the finance company and from which they paid the commission of $450 to the licensee's salesperson.

The fact that the price was "hydrauliced" (a term which is used in the trade) is not a problem with which the Tribunal can deal. It must accept the actual amount allowed in the transaction.

This also confirms the fact that the vehicle was not of merchantable quality nor fit for its purpose as it was accepted that the vehicle was unsatisfactory and had to be replaced.

The finance company wrote a letter on 6 September 2000 to the purchasers which read as follows:

> *Further to your letter dated 30 August 2000 we refer you to our undated letter sent to you on 22 August 2000. In your letter you refer to the first payment being in dispute as you had the Capella at that time. You had the use of the car for all but 7 days prior to the car being exchanged. sold the Capella on behalf of Finance as a repossessed vehicle. As we have discussed previously, the Capella was exchanged for the Toyota Corolla when it was realised that the capella (sic) was not up to scratch. There was never any agreement from for the first payment to be cancelled. in fact when spoke to the writer on July 31 informing us about Mr going onto monthly salary, she agreed to pay $695 being three monthly payments on August 22 after the salary was in the bank. If you are struggling to catch up we have no problem with receiving minimum weekly payments of $50 on top of the monthly payments. However, we are not prepared to allow the arrears to continue without a firm arrangement to bring the account up to date. We are not prepared to receive less than $50 per week on top of the monthly payments.*

On 17 May 2000 the finance company wrote to the purchasers stating:

> *We wish to advise you that the hire purchase agreement with has been assigned to Ltd.*
>
> *For your records we enclose copies of the hire purchase agreement and the consumer credit indemnity. Please feel free... .*

It is clearly incorrect for the finance company to be talking of a hire purchase agreement with but it does suggest that the transaction has been carried out on their behalf by . It is to be noted that when the purchasers completed the MR13A notice for disposal of a vehicle, it was completed on the basis that the new owner was ; which would confirm their understanding that they were dealing with at the time the transaction took place with the salesman on the premises.

The Tribunal accepts the manager's evidence that the dealership received no profit from this transaction nor was it entered into their register as part of their stock.

However the dealership was taking a certain risk in allowing its salesperson to also operate as a repossession agent for the finance company and to allow the finance company to store vehicles at its premises, even though these vehicle were not displayed.

The manager pointed out that there was no salary paid to the salesman but he was a registered salesman receiving commissions from transactions carried out on behalf of the dealership.

It is clear from the evidence that the salesperson was only licensed to sell cars on behalf of the dealership and was clearly selling a vehicle as a registered salesperson for the dealership. It would appear to the Tribunal that the dealer's salesperson, operating out of their yard and from their telephone number, sold the car and the transaction therefore falls within the definition of "sale" by the dealership. The fact that it may have sold at full profit or without profit or on behalf, is not a matter that would affect the dealership's obligations under the Act.

The purchasers rang the dealership to ask for a vehicle to be obtained for them. They knew the salesperson personally and he agreed to help. The transaction then occurred with that sales person who was an agent of the dealership. His job does not, as far as the public is concerned, affect his status as a salesperson for the dealership. The public would have been unaware of the "moonlighting" transaction, and after all he was dealing with them in the normal course of a mercantile agent's business at the premises of the mercantile agent.

The fact that the salesperson was also "moonlighting" as an agent for the finance company dealing off the yard does not appear (to the Tribunal) to affect the relationship of the dealership with members of the public. So far as the purchasers are concerned, the dealer sold the vehicle in the ordinary course of business.

The purchasers sought $2,000 and associated costs. The associated costs are not allowed. The Tribunal considers it has no option but to allow the $2,000 claim as a refund of deposit.

This decision would appear to be unfair to the dealership as it took no profit. However that is a matter the dealership should now discuss with the finance company which knowingly allowed the transaction to take place through the auspices of.

The Tribunal therefore orders that the contract of sale oral entered into by the dealerhip's salesperson in respect of the Mazda motorcar registered number RO 1381 be rescinded. The vehicle has already been returned and as the finance company which originally financed the transaction has taken another car as security, there is no need to deal with a consequential order relating to the finance company. Nor is there any need to make consequential orders as the Tribunal normally would in relation to depreciation by virtue of mileage travelled, because the purchasers had very little satisfactory use of the vehicle. The evidence also disclosed that any loan car supplied was usually without a warrant of fitness and unreliable.

There will however be a consequential order that the licensee refund to the purchasers the $2,000 deposit, the agreed value of the trade-in.

DATED at AUCKLAND this 10th day of November 2000

HTD Knight Chairman	R G Lewis Member	R B Armstrong Member

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