Decision No. AK 124 /2002

Reference No. MVD **216/02**

IN THE MATTER of the Motor Vehicle Dealers Act 1975

AND

IN THE MATTER of a dispute

BETWEEN [redacted]

Purchaser

AND [redacted]
T/A [redacted]

Dealer

BEFORE THE MOTOR VEHICLE DISPUTES TRIBUNAL

G D Wiles – Chairman
Mr G Burkett - Advanced Trade Mechanical Member
Mr R B Armstrong – B.E. (Mech.) (Hons.) M.I.P.E.N.Z. SAE International Member

HEARING at AUCKLAND on 16 August 2002

APPEARANCES

[redacted] on his own behalf.
Mr [redacted] for licensee.

DECISION

[1] On 25 April 2002 the purchaser, Mr [redacted], purchased from the dealer a 1995 Nissan Mistral motor vehicle, cc rating of 2700, at an agreed purchase price of $16,995.00. The vehicle was sold with a Category D Warranty within the meaning of the warranty classifications contained in Section 92 of the Motor Vehicle Dealers Act 1975. The odometer reading, as recorded on the Vehicle Offer and Sale Agreement and Window Notice, was 147,653 kilometres.

[2] The purchaser's complaint was that the vehicle as sold to him was neither of merchantable quality nor fit for its purpose, so that the dealer was in breach of its obligations under the statutory warranties implied in the case of Category D vehicles by Section 93(2) of the Act. In particular, the purchaser complained that the engine was substantially worn, such that it used excessive quantities of engine oil and was prone to overheating. The purchaser sought an order for rescission involving return of the

vehicle to the dealer and a refund of his deposit and capital payments made to the hire purchase company.

[3] The purchaser's evidence was that he first noticed that the engine temperature gauge indicated in the hot region when the vehicle was driving uphill on its first long trip to Taupo. It is not clear from the evidence exactly when this trip occurred, but an invoice produced by Mr Richter on behalf of the dealer shows that work was carried out in an effort to address this problem on 19 July 2002. At that time the radiator was flushed out and filled with replacement anti-freeze. It was pressure tested and found to be working satisfactorily. Unfortunately, since that work was completed the purchaser has not tested the vehicle in an effort to determine whether the overheating problem has been resolved.

[4] The purchaser did not produce any independent mechanical report establishing the exact quantity of engine oil used by the vehicle over a set period. He said that he began monitoring the engine oil levels after the vehicle had travelled approximately 2,000 kilometres under his ownership. His assessment was that the engine was using approximately one litre of oil every 1,000 kilometres. The purchaser speculated that this demonstrated excessive engine wear which could lead to a serious mechanical breakdown or at least substantially reduced the service life of the engine.

[5] The dealer offered on more than one occasion to investigate the cause of the engine oil consumption and carry out any necessary repairs. However, the purchaser was concerned that if the oil seals in the top half of the engine were replaced this would create additional pressure on the lower part of the engine, which could in turn fail at some later stage. He preferred that the engine be completely overhauled, but the dealer was not prepared to carry the expense of this.

[6] By arrangement with the purchaser the dealer collected the vehicle and referred it to [redacted] (Auckland) [redacted] at [redacted], on 18 July 2002. The mechanic there carried out a thorough inspection of the engine and found that the inlet valves on cylinders 2, 3 and 4 were leaking and that the valve seals required replacement. He noted that the battery also required replacement and that the engine oil level was at a low reading. The vehicle was checked for engine oil leaks but no abnormal leakage was detected. The dealer replaced the battery at its own cost and offered to rectify the oil usage problem. The purchaser chose not to take up this offer.

[7] Section 93(2) of the Motor Vehicle Dealers Act 1975 provides that in respect of the sale by a licensee of any category D motor vehicle there is implied in the contract of sale a term whereby the licensee warrants:

> *(a) That the motor vehicle has a current warrant of fitness properly issued under the Transport Act 1962 [or current evidence of vehicle inspection issued under the Land Transport Act 1998]; 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.*"

[8] In determining whether the vehicle is of merchantable quality and is fit for the purpose for which vehicles of that type are usually used, an objective test of quality and suitability is to be applied. The question of "*fault*" in a tortious sense is strictly irrelevant to this determination.

[9] The terms implied by s.93(2) apply to every sale of a category D vehicle, notwithstanding any attempt to exclude or alter those terms by separate agreement between the licensee and the purchaser (s.107).

[10] The expressions "*merchantable quality*" and "*fit for the purpose*", although not defined in the Motor Vehicle Dealers Act 1975, are expressions that have been the subject of close judicial examination in the context of s.16 of the Sale of Goods Act 1908 and its United Kingdom equivalent. The Tribunal derives assistance from those decisions at the same time as it embraces the stated purposes of the Motor Vehicle Dealers Act 1975, to be found in the long title, being (inter alia) to "*reform the law relating to contracts for sale of motor vehicles by dealers, in order to promote and protect the interests of consumers*".

[11] The Tribunal has considered in this context the discussions as to the meaning of "*merchantable quality*" to be found in *Henry Kendall & Sons v William Lillico & Sons* [1969] AC 31, particularly at pp 79 and 97, *Hardwick Game Farm v SAPPA* [1969] AC 31, 77, *Camell Laird & Co Ltd v Manganese Brass and Bronze Co Ltd* [1934] AC 402, 430 and [1934] AC 402, 430 and *Taylor v Combined Buyers Ltd* [1924] NZLR 627 at pp 644 - 647. However, as Hardie Boys J. observed, in *Finch Motors Ltd v Quin (No.2)* [1980] 2NZLR 519, 524:

> *The various statements of the meaning of the words which appear in the leading cases must be regarded as directed towards the factual issues in those cases. They are really elaborations for the purpose of the particular*

contract under consideration, of the basic concept that 'merchantable quality' means commercially saleable under the description by which the goods are sold."

[12] Considering the particular terms as to merchantable quality and fitness for purpose implied by s.93(2) of the Motor Vehicle Dealers Act 1975, concerning contracts of sale of category D motor vehicles, the Tribunal regards the following factors as being of particular significance, though not necessarily exhaustive of the factors to be taken into account:

(i) The meaning of the expressions "*merchantable quality*" and "*fitness for the purpose*" are to some degree coloured by and take their meaning from the stated purpose of the Act, being (inter alia) "*to promote and protect the interests of consumers*".

(ii) The description of the vehicle at the time of sale is a relevant consideration. In addition to the particulars as to the date of registration, odometer reading, model and number of previous owners and so on required by s.90 to be included in the window card, the Tribunal will take into account any other particular representations made or descriptions given of the vehicle at the time of sale. The question whether the vehicle does or does not comply with that representation or description will influence the Tribunal in its findings.

(iii) The terms implied by s.93(2) in respect of category D motor vehicles are set forth within the context of the remaining subsections of s.93, which impose obligations on the licensee in respect of defects existing or occurring in relation to category A, B or C second hand motor vehicles. A "*defect*" is defined in s.2 with reference to "*the age of the motor vehicle, the total distance travelled by it, and the price obtained or sought for it*". An overall legislative intent may be gleaned from the Act as a whole and s.93 in particular, that in deciding the question whether a category D vehicle is of merchantable quality and fit for the purpose for which vehicles of that type are usually used, the Tribunal must take into account the age of the vehicle, its mileage at the time of sale and the price at which it was sold. In most cases, these characteristics are present within the "*description*" of the vehicle at the time of sale.

(iv) Section 93(2)(b) itself answers the question, "*for what purpose is the vehicle required to be fit?*" by stating expressly "*for the purpose for which vehicles of that type are usually used*". Motor vehicles of the category D type are usually used for the transportation of persons from place to place. If at the time of sale the vehicle is

incapable of transporting persons from place to place without the need to carry out substantial overhaul or repairs, then the vehicle will clearly not be fit within the meaning of s.93(2)(b). The vehicle must at the time of sale be in such a condition that it is also fit for the transportation of persons for a reasonable period after sale. The Tribunal adopts the observation of Lord Diplock in *Lambert v Lewis* [1981] 2All ER 1185, at p 1191, as follows:

> *"The implied warranty of fitness for a particular purpose relates to the goods at the time of delivery under the contract of sale in the state in which they were delivered. I do not doubt that it is a continuing warranty that the goods will continue to be fit for that purpose for a reasonable time after delivery, so long as they remain in the same apparent state as that in which they were delivered, apart from normal wear and tear."*

(v) In assessing whether the licensee has complied with the implied warranties the point of focus is the date of sale. In *Waterman's Dominion Road Ltd v Taylor* (1998) DCR 13, Judge J P Doogue pointed out that:

> *"The proper approach is to decide whether at the time the vehicle was sold, the defects that it then possessed meant it did not meet the required standard. The only relevance of defects which appear later is that they may amount to evidence which enables the expert assessors on the Tribunal to reason by a process of extrapolation that the existence of the fault at the later time is evidence that it had also existed at the time of purchase."*

[13] Section 102A of the Act provides that in the event that the Tribunal is satisfied that there has been a breach of the terms implied by s.93(2) the Tribunal may make an order:

> *"(a) Requiring the licensee within such period as the Tribunal may specify in the order, to carry out any work, and to do any other thing, as may be necessary to procure the issue in respect of the motor vehicle of a warrant of fitness under the Transport Act 1962;*
>
> *(b) Requiring the licensee to pay to the purchaser, or to anyone claiming through the purchaser, such sum by way of compensation for the breach as the Tribunal thinks fit; or*
>
> *(c) Rescinding the contract, in which case section 101 of this Act, with any necessary modifications, shall apply accordingly."*

[14] Having found a breach or breaches of the implied terms as to merchantable quality or fitness for purpose contained in s.93(2) of the Act, the Tribunal is to adopt a global approach and assess the combined effect of all of the complaints it has found established in determining the question whether rescission should be granted. Although any one of the established complaints viewed in isolation may not of itself and

standing alone have justified cancellation of the contract, the combined effect of the totality of the breaches may be such as to warrant cancellation of the contract (see *Kuipers v Cadenza Car Sales Ltd* [1988] DCR 53.

[15] Returning to the facts of this complaint, the Tribunal is satisfied that this vehicle as sold to the purchaser was of merchantable quality and fit for its purpose, so that the dealer had complied with its obligations under the statutory warranties. The purchaser did not produce any independent mechanical reports covering either of the complaints concerning engine overheating or excessive oil consumption. The report from [redacted] of 18 July 2002 refers to the vehicle's cooling system as being in an average condition for the vehicle's age and mileage. There is no evidence as to whether the work of flushing out the radiator has had any influence on the efficiency of the cooling system.

[16] Although the vehicle does appear to be using some quantity of engine oil in its normal operation, the Tribunal is not satisfied that the level of oil consumption is such that it could properly be described as excessive for the vehicle's age and mileage. As earlier observed, the purchaser did not obtain any independent mechanical report on this aspect of his complaint. The vehicle had already travelled a considerable mileage, approaching 150,000 kilometres at the time of sale. During the period since the date of sale the purchaser has managed to travel more than 6,000 kilometres without any engine breakdown occurring. The purchaser's concerns as to the future service life of the engine may or may not be well-founded. However, the focus of the Tribunal's enquiry is the condition of the engine on the date of sale and in the period shortly thereafter. Nothing in the evidence suggests that the engine then was then so severely worn that it could be regarded as unserviceable.

[17] For the reasons given the Tribunal has no option but to dismiss and does formally dismiss the purchaser's complaint.

DATED at AUCKLAND this 2nd day of September 2002

G D Wiles Chairman	**G Burkett** Member	**R B Armstrong** Member

216.02(jed)