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Decision No. AK 016/2002

Reference No. MVD 285/01

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 MOTOR VEHICLE DISPUTES TRIBUNAL

G D Wiles – Chairman
Mr G Burkett - Advanced Trade Mechanical Member
Mr B Felton, F.I.M.I. (UK), M.S.A.E. (A'sia) M.I.A.M.E. – Member

HEARING at AUCKLAND on 24 January 2001

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APPEARANCES

Purchaser on own behalf
[redacted] and
[redacted] for dealer

DECISION

[1] This complaint relates to the purchase by Mr [redacted], on 8 March 2001, of a 1993 Nissan Homy van, cc rating of 3,700, for a purchase price of $6,050.00. The purchaser successfully bid for the vehicle at the [redacted]' Auctions Premises at [redacted]. It was not until some days later that he discovered for the first time that the vehicle had been owned by the dealer and sold by the dealer through [redacted]' [redacted]. This was clear from the registration papers which arrived in the post. However, there was no indication at the auction itself that the dealer was in any way involved in the sale.

[2] The purchaser's complaint relates to the condition of the vehicle's automatic transmission unit. The Tribunal accepts the purchaser's evidence that he had difficulty driving the vehicle as early as the trip home from the auction premises on the date of sale. He said that the transmission slipped and did not change properly between the second and third gears. He spoke to a friend who confirmed that there was a problem

with the automatic transmission unit and suggested that it would need to be dismantled and any repair would be expensive. The purchaser returned to [redacted] to complain about the vehicle but he was told that he had purchased it *"as is where is"* and [redacted] was not legally liable.

[3] The purchaser referred the vehicle to a mechanic at [redacted] at [redacted]. On the evidence given by the purchaser as to the delay incurred in the transmission repairs it seems likely the vehicle was delivered for repair in or about the first week of April 2001. The purchaser produced an invoice from [redacted] dated 24 April 2001, which date coincides with the completion of the repairs. The invoice includes a list of the various parts that were supplied and describes the work of completely overhauling the transmission and replacing the valve body assembly. The invoice refers to a charge of $2,075.55. The purchaser said that he was able to persuade the mechanic to accept in full payment the sum of $1800.00, that being the sum that he had available at the time. The invoice refers to an odometer reading of 152,344 kilometres, which shows a distance travelled since the date of sale of 884 kilometres. The description of the work carried out is as follows:

> *"Remove transmission & completely strip down, rebuild, fitting parts as listed, have converter overhauled (lock up), fit a new set of electrical solenoids. Strip and inspect valve body & found damaged. So bought a second hand one & strip, clean, & fit new solenoid set, reassemble transmission, refit automatic flush transmission cooler, add oil to transfer case, road test, check codes, add TPS switch."*

[4] The reference to damage having been found in the valve body indicates that the transmission has reached an advanced stage of wear, probably for lack of regular maintenance. It is consistent with the purchaser's description of the difficulty that he had in operating the transmission as early as the trip home from the auction premises. The dealer's Service Manager, Mr [redacted], acknowledged that wear or damage to the valve body could explain the problems that the purchaser was experiencing. However, the Tribunal does not accept the further suggestion that Mr [redacted] made that the valve body damage could have been caused in the relatively short period after the date of sale and the distance, 800 kilometres, that the vehicle had travelled up to the point of the transmission overhaul.

[5] Shortly following the completion of these repairs the purchaser returned to [redacted] in an effort to achieve reimbursement of the repair cost. He was

again told that [redacted] had no responsibility in the matter and he was referred to the dealer. By this time the purchaser was aware from the Certificate of Registration that the vehicle had been sold through [redacted] by the dealer. He said that he made more than one attempt to discuss the matter with a responsible officer of the dealership before he managed to speak to Mr [redacted], the Customer Relations Manager employed by the dealer. Mr [redacted] said that he did not speak to the purchaser until after receiving notice of the complaint in the form of a copy of the letter from the Secretary of the Auckland Branch of the Motor Dealers' Institute addressed to the purchaser and dated 11 October 2001. Mr [redacted] took the view that because the vehicle had been sold through [redacted] Auctions, the dealer had no responsibility in the matter and any complaint about vehicle defects would need to be addressed to [redacted]. He made a note for the purchaser to go off and see Mr [redacted] at [redacted]. In short, the purchaser was referred backwards and forwards between [redacted] and the dealer and in the end he was confused as to who was the responsible party. Because no window notice or any other sales documentation had been prepared at the time of sale, contrary to the dealer's obligations under the Motor Dealers Vehicle Act 1975, the purchaser's confusion is understandable.

[6] The purchaser initially lodged his complaint against [redacted]. The complaint directed against the dealer was not lodged until 11 October 2001, being seven months after the date of sale. The Tribunal notes that on the face of it the complaint has been lodged beyond the statutory time limit as prescribed by Section 98 of the Motor Dealers Vehicle Act 1975. By Section 98(3) the Tribunal is directed that it shall not exercise its jurisdiction in respect of any dispute involving an allegation that a licensee has refused or failed to carry out any obligation imposed on it by Section 93 of the Act unless a complaint in respect of the matter was made to the Institute within six months after the date of sale, in the case of a Category D motor vehicle. However, the Tribunal does have a discretion under Section 98(4) to enquire into and deal with a dispute in all respects as if the complaint had been properly made within the prescribed period, provided that it is satisfied that the purchaser was justified in not making the complaint within the statutory period and that, having regard to the dealer's interests, it is just and reasonable that this dispute should be considered.

[7] In this case the purchaser's delay in lodging the complaint against the dealer is reasonably explained by the confusion caused by the dealer in failing to prepare proper documentation recording the sale and identifying the responsible vendor and providing the other particulars required to be included in the sale documentation under the Motor

Vehicle Dealers Act 1975. The purchaser has acted promptly after becoming aware of the problem affecting the automatic transmission in raising the complaint and then having the necessary repairs completed. There is no suggestion on the part of the dealer that the delay of one month beyond the statutory period has caused the dealer any particular prejudice. In the circumstances the Tribunal is prepared to exercise its discretion in favour of enquiring into and dealing with the dispute in all respects as if the complaint had been properly made within the prescribed period.

[8] The age and mileage of the vehicle at the time of sale dictates that it is to be regarded as having been sold with a Category D warranty, within the meaning of the warranty classifications contained in Section 92 of the Motor Vehicle Dealers Act 1975. This 1993 vehicle had an odometer reading of 151,460 kilometres at that time.

[9] 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."*

[10] 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.

[11] 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).

[12] 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*".

[13] 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."*

[14] 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.*"

[15] 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."

[16] 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."

[17] Mr [redacted] contended on behalf of the dealer that the purchaser was bound by the provisions of the printed document headed "Conditions of Auction," as published by [redacted]. This includes various clauses designed to limit or exclude the liability of Turners' Auctions and/or the vendor. Clause 2 reads as follows:

> *"The purchaser must be satisfied as to the actual condition of its vehicle/goods prior to commencement of bidding. By the act of bidding the purchaser shall be deemed to have inspected the vehicle/goods purchased and to have accepted the same in their then condition in all respects."*

[18] The Tribunal has consistently adopted the view in similar cases involving auction sales that where the substance of the matter is that the vehicle has been sold through an auctioneer by a licenced motor vehicle dealer, the provisions of the Motor Vehicle Dealers Act 1975 nevertheless apply and cannot be excluded or circumvented by any separate contractual provisions. This vehicle did not belong to [redacted] but it did belong to the dealer and the dealer has, albeit through the agency of the auctioneer, offered to sell or exposed for sale this motor vehicle, in a manner consistent with the meaning of the word "sell" in Section 2 of the Motor Vehicle Dealers Act 1975. By Section 107 of the Act the provisions of Part VII "*shall have effect notwithstanding any provisions to the contrary in any contract of sale or other agreement."* Part VII includes the statutory warranties and the requirements for the preparation of Vehicle Offer and Sale Agreements and Window Notices incorporating the prescribed particulars. Accordingly, any clauses in the auctioneer's provisions do not avail the dealer.

[19] The Tribunal is satisfied that this vehicle as sold to the purchaser was not of merchantable quality and was unfit for its purpose owing to the faulty condition of its automatic transmission unit. The problem was identified almost immediately. The purchaser said he had not been in a position to carry out a test drive of the vehicle

because he did not arrive at the auction until shortly prior to the start of the auction and by then the auctioneer was not allowing further test drives to be conducted. However, the purchaser said that he understood that in the event of a mechanical defect being discovered in the vehicle the auctioneer's usual practice was to place a notice on the vehicle listing the defect or defects involved. In the case of this vehicle no notice was apparent and the purchaser assumed that no particular defect had been identified.

[20] For the dealer, Mr [redacted] referred to a service invoice dated 16 February 2001, prepared on the dealer's stationery and recording the results of a warrant of fitness inspection and a pre-sale inspection. The vehicle passed a warrant of fitness test and it is noted that the vehicle was road tested to check for any *"bearing noises, clunks, rattles, clutch & trans performance."* No faults were noted. Mr [redacted] said that if it had been found that the transmission fluid was low or contaminated it would have been either topped up or replaced as necessary. He did not personally recall this vehicle. However, he acknowledged that the road test that would have been conducted would have been of a relatively limited nature over a period of approximately two or three kilometres at speeds of approximately 50 to 60 kilometres per hour. The purchaser's evidence was that he did not realise that there was any problem affecting the transmission until he arrived at the motorway on the way back to his home address in Mt Roskill.

[21] The Tribunal is satisfied that the repair cost of $1800.00 is reasonable having regard to the nature and extent of the work completed. It is appropriate that the purchaser should be reimbursed that expense. For the reasons given the formal order of the Tribunal is that pursuant to Section 102A of the Motor Vehicle Dealers Act 1975 the dealer shall pay to the purchaser the sum of $1800.00.

DATED at AUCKLAND this 25th day of February 2002

G D Wiles
Chairman

G Burkett
Member

B J Felton
Member