Decision No. AK 027 / 2002

Reference No. **MVD 314/01**

IN THE MATTER of the Motor Vehicle Dealers Act 1975

AND

IN THE MATTER of a dispute

BETWEEN **Miss [redacted]**

Purchaser

AND **[redacted].**
T/A [redacted]

Dealer

BEFORE THE MOTOR VEHICLE DISPUTES TRIBUNAL

Mr H T D 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 17 January 2002

APPEARANCES

Purchaser on own behalf
Mrs [redacted] and Mr [redacted] on behalf of licensee

DECISION

[1] 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.

[2] This dispute arose out of a sale and purchase of a 1989 Subaru Legacy RS motor car, Reg. No: [redacted] It was a 2000 cc vehicle one which had been imported second hand from overseas. It was a category D vehicle for the purposes of the classifications of the Act. It was sold for $7,995.00 on 3 September 2001 at an odometer reading of 108,551 km. The purchaser laid a complaint dated 13 November 2001 with the Motor Vehicle Dealers' Institute and gave the odometer reading at that time as 110,531 km.

In respect of a category D motor vehicle, s.93(2) states that there is implied in every contract of sale a term that the licensee warrants:

> '*(a) That 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.'*

It is to be noted that the vehicle is not only to be of merchantable quality, it is also to be fit for the purpose.

The question of "*fault*" in a tortious sense is irrelevant to the inquiry which is to be directed at the quality and suitability of the vehicle in an objective manner.

Section 107 of the Act provides that the parties are unable to contract out of the provisions of the Act except for the very limited provisions of s.94 - confined to category C vehicles after an independent evaluation and a statutory declaration has been completed.

Section 102A of the Act provides that where the Tribunal is satisfied that the licensee is in breach of either of those terms, s.93(2) it 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; or*
> *(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.'*

When considering rescission, the Tribunal is to take a global approach and assess the combined effect of all the faults it has found established, even although any one of the established complaints viewed in isolation may not itself and standing alone have justified rescission (see *Kuipers v Cadenza Car Sales Ltd* 1988 DCR 53).

The test of merchantable quality is set out in such cases as *Grant v Australian Knitting Mills Ltd* 1936 AC 85 and *Taylor v Combined Buyers* 1924 43 NZLR 627 and particularly

mond J at pp 644-647 bearing in mind that within the terms of the Motor Vehicle Dealers Act, the warranty is not only one of merchantable quality but also that the vehicle is fit for its purpose.

However, on the question of merchantable quality, the position seems to be clear. The Tribunal accepts the decision in *George Willis & Company Limited v David's Pty Ltd* (1957) 98 CLR 77. That case decided (inter alia) that the description of the goods at the time of sale was a matter of relevance when considering the question as to whether or not the goods were of merchantable quality at the time of sale.

The Tribunal has considered and adopted as a correct statement the schedule as set out by the Christchurch Motor Vehicle Disputes Tribunal and reported in 3 NZAR at page 91 and in particular the statement at pages 93 and 94 which reads as follows:

> *'In some cases the Tribunal had had to consider there has been some sort of description accompanying the sale and that has been a special circumstance in construing merchantable quality and fitness for purpose in the light of the particular description or representation found to be a factor. In other cases there is no special circumstance arising out of a particular description or representation found to be a factor. In other cases there is no special circumstance arising out of a particular description at the time of sale. In such cases the Tribunal has to direct itself to find, whether on the evidence, as a question of fact, the vehicle concerned was of merchantable quality and fit for the purpose for which vehicles of that type are usually used.*
>
> *In considering the question of whether or not a defect exists in relation to an A, B or C Category vehicle, the definition of defect in s 2 directs that regard shall be had to the age of the motor vehicle, the total distance travelled by it and the price obtained or sought for it by the licensee. The obligation imposed on the licensee under s 93 of the Act in respect of such defects requires a licensee to repair or make good the defect so as to put the vehicle in a reasonable condition having regard to its age and the distance that it has been driven.'*
>
> It seems to this Tribunal that the Act as a whole directs attention to the age and mileage of a vehicle and such general intention should be taken into account in looking at merchantable quality and fitness for purpose. In the case of motor vehicles their usual purpose is for the transportation of persons from place to place and it seems to us that in the case of a motor vehicle which is old and/or has travelled a substantial mileage it cannot be said that it is not of merchantable quality or unfit for the purpose for which vehicles of that type are usually used just because any or all of its components are

substantially worn or worn to that degree which is consistent with such age and mileage.

> *However, it also seems to us that where the Tribunal is satisfied at the time of sale the vehicle cannot be used or requires a substantial overhaul or repair before it can be used for a reasonable period thereafter for the purpose of the transportation of people from place to place, then notwithstanding the age and mileage of the vehicle it cannot be said that the vehicle is of merchantable quality and fit for the purpose for which vehicles of that type are usually used. What is a reasonable time and what is a reasonable mileage to travel after purchase must be a question of fact in each particular case as must be the degree of overhaul or repair found to be necessary. On these issues the description accompanying the sale (if any) the age and mileage of the vehicle and the price sought for it are matters to be taken into account.*
>
> *As we see it, the Act as a whole imposes on licensees selling second-hand motor vehicles an obligation in respect of all such vehicles to a greater or lesser degree that they may be capable of being used as vehicles for at least some time after sale without substantial overhaul or repair unless for Category D vehicles, the event which prevents use was not something existing or present at the time of sale.*

There has been in the past some division of judicial authority as to whether or not a Disputes Tribunal was entitled to make an award under s.102A of the Act even although the purchaser had not given a written notice in accordance with s.102(1)(b).

Cameron v Lawrence Motors Limited 1990 DCR 289 is a case which considered all the relevant authorities on the issue of written notice and Judge Ryan, pp 293 onwards says that when making an award under s.102A of the Act, the Tribunal was entitled to make an award without the requirement for the written notice as provided in s.101(2)(b) which is the section applying to the obligations of licensees in respect of categories A, B and C vehicles.

The Tribunal adopts the observation of Lord Diplock in *Lambert v Lewis* [1981] 2 A11 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.*'

this Tribunal's opinion such a repair need not be substantial if it is indeed essential to carry out a repair before the vehicle can be fit for its purpose for a reasonable time after purchase.

[3] Returning to the actual facts of this case the purchaser made the following points in her evidence. Firstly, that the vehicle was advertised in an Auto Trader Magazine for the period 30 August to 5 September 2001, that advertisement describing the vehicle as *"89 Subaru Legacy RS 4 DR 2000 EFI Turbo, 4WD, 106,000 kms, manual, black, A/C, ..."* The vehicle was clearly advertised in the advertisement which she saw as one having air-conditioning The purchaser stated that she noticed from that advertisement that the vehicle had all the various features which she wanted in a vehicle.

[4] As she was travelling to Auckland in any event on 3 September, she went and inspected the car. The purchaser stated that whilst the sales person went away to get the key of the vehicle she studied the window card which once again had on it under "extras" several items which were obviously being made selling features of the vehicle which included the words *"air-conditioning".* The purchaser took the vehicle for test drive and informed the Tribunal that the performance was fine. During the completion of the transaction the purchaser was offered a warranty by the sales person but she declined to take it. She stated that, at no time during the negotiations and the demonstration of the car, was she informed that the air-conditioning of the car did not work.

[5] The purchaser's evidence was that she did not have any cause to use the air-conditioning because the temperature at that time of the year did not warrant having the air-conditioning on to cool the vehicle.

[6] The purchaser stated that on or about 13 or 14 October she attempted to use the air conditioning but no refrigerated air emanated from it. The purchaser said she attempted over the next few days to see if the air-conditioning would work but it didn't so on the 17 October she phoned the Managing Director of the company and explained the problem to him.

[7] The purchaser stated that the company's Managing Director asked her if she had purchased a warranty with the vehicle. When the Director heard that she had not done so he then told her that the problem was not covered.

[8] The purchaser's evidence was that she told the Director that she had only just tried to use the air-conditioning a few days before that telephone call for the first time and immediately it was noticed that it wasn't working. The purchaser also made the point to the Director at that time that the air-conditioning was an advertised feature on the vehicle's window card and it should have been working.

[9] The purchaser said that the Director then told her that he would talk to [redacted] who was the sales person with whom she'd been dealing. The purchaser said that the sales person rang her later in the day and told her that in order to get the problem diagnosed she had to get the air-conditioning unit re-gassed, because that is what the problem would be. The purchaser told that sales person that she had already been in touch with an air-conditioning expert who had told her that there might be other reasons why there was no refrigerant in the system such as leaks. The purchaser therefore informed the sales person that she did not consider she should be responsible for the cost of repairing the defect. She explained to the Tribunal that she did not wish to re-gas it as the system was probably faulty which would mean that she would only incur a further unnecessary expense.

[10] The purchaser told the Tribunal that she asked the sales person for a written guarantee that the dealership would pay for the car repairs.

[11] The sales person explained that he would have to talk to his "boss" and come back to her.

[12] The purchaser explained that one week later, on the 24 October, as she had not heard back from the dealership, she had written them a letter which was sent and later shown to the Tribunal at the hearing. The purchaser did receive a response to that letter reads as follows:

Dear [redacted]

Thank you for your letter dated 24 October 2001.

We are very sorry that you felt that we had "dismissed" your complaint, as this is not so. The owner of the business has been overseas and returned home yesterday. We wished to discuss your letter fully with him to reach a fair and reasonable response.

You are quite right in stating that the vehicle was advertised with air conditioning. However the vehicle is a 1989 model with 108,551 kms and you declined the safe guard of a mechanical warranty. We would recommend that for peace-of-mind you purchase a warranty.

We believe it is fair in meeting you half-way in the reasonable cost of repairing the air conditioning system. We would like the opportunity to discuss the cost of this repair. We hope this meets with your approval and look forward to hearing from you soon.

Yours sincerely

[redacted]
Manager"

[13] There was further correspondence between the parties concluding with a letter from the licensee dated 8 November 2001 which reads as follows:

"Dear Ms [redacted]

Thank you for your fax of 3 November 2001.

We are disappointed that you are not willing to accept our offer of meeting you half way in the cost of repairing the air conditioning system. We dispute your claim that the issue has nothing to do with a warranty, or the age or condition of the vehicle. Our sales consultant recommended that due to the age, conditioning and nature of the vehicle that a warranty be purchased.

At the time of sale the vehicle was of merchantable quality and your complaint did not reach us until seven weeks after purchase.

We believe we are being fair and reasonable in meeting you half way in the repair of the faulty unit.

We have taken legal advice and it would seem that our only course of action is to seek mediation through an independent body.

Regards, [redacted]"

[14] The purchaser also produced to the Tribunal a report dated 24 October 2001, from [redacted] which reads as follows:

"To [redacted]

I have inspected you're A/C system for correct operation, have found no refrigerant left in system, locate top hose from compressor to condenser is loose and leaking. This needs to be replaced before further pressure testing with Nitrogen takes place.

I remain
[redacted]"

[15] That report clearly justifies the purchaser's decision not to re-gas the unit because it would have just been a waste of time and money.

[16] The purchaser also produced a further report from [redacted] which read as follows:

"To check out air conditioning on Subaru, [redacted]
Diagnose no gas. Pressurise and leak test, locate leaks on TX valve (under dash) discharge hose and receiver-drier seals (needs replacing). Advise."

[17] Report also had attached to it an actual drawing of the area of the faults showing that the faults were on the high pressure side of the system, and included the following:

(1) leaking discharge hose
(2) the receiver dry seals needed replacing
(3) that the TX valve was leaking

A copy of that diagram is attached to this decision marked with a letter "A".

[18] The purchaser also produced from those same people an estimate to repair the air conditioning which read as follows:

Kylie Wright

Subaru air conditioning
To fit new TX valve to evaporator
Fit new receiver drier
Make up new discharge hose and fit gas up and test system"

[19] The purchaser also produced evidence to show that the cost of actually putting in a proper working air conditioning unit would have amounted to somewhere between $1,800.00 to $2,200.00 and therefore the person at the Subaru Dealership in Tauranga was of the opinion the difference in value would be approximately $2,000.00 between a vehicle which had air conditioning working and one which didn't.

[20] However, the Tribunal would treat the purchaser's claim as being one for the repair of that air conditioning unit. In fact the purchaser confirmed at the hearing that that was the basis of her claim. In any event the Tribunal would take the lower amount.

[21] In addition to those matters the purchaser sought costs as follows:

		$
(1)	Day's wages	137.60
(2)	Mileage from Tauranga to Auckland and back	268.00
(3)	Report from [redacted]	30.00
(4)	Parking	13.00
	T O T A L	**448.60**

[22] The Tribunal records that the purchaser did ask for the matter to be dealt with under the Consumer's Guarantee's Act but the Tribunal only has a consentual jurisdiction and the licensee did not consent in writing as required by the Act.

[23] The licensee in reply made the following points:

(1) The issue before the Tribunal was whether or not the air conditioning was working at the time of sale. The licensee believed that it was and the submission to the Tribunal was that in fact it was so working.
(2) The dealership would have liked the opportunity to have inspected the vehicle to ascertain if in fact the air conditioning was faulty, and in fact the

> Managing Director had phoned the purchaser and offered to do just that. In fact the licensee asked a question through the Chair of the purchaser. The purchaser explained that the only 'phone call between herself and the Managing Director was the one already referred to in the evidence namely that of the 17th of October. She said it was one made by her to the licensee and in it he had declined liability for the air conditioning repair but he had because the purchaser never taken out a warranty as offered to her. The purchaser stated that he did offer to go 50/50 in that telephone conversation as clearly has been done in the correspondence. The purchaser was quite adamant that the Managing Director had never asked her to bring the car to Auckland to have the fault diagnosed.

[24] That evidence of the purchaser is accepted and it is noted that the call was not a call from the licensee to the purchaser but from the purchaser to the licensee.

[25] The only sworn evidence the Tribunal has before it on the issue is the evidence of the purchaser which is accepted. The purchaser was a good witness. The suggestion made that the licensee had called the purchaser and offered to have the fault diagnosed in Auckland was nothing more than hearsay evidence before the Tribunal. The Tribunal notes that there was no mention in the correspondence which went back and forth between the parties of such an offer which it would have expected to have appeared in the correspondence if in fact it had been made orally. The Tribunal finds that there was no such offer made to the purchaser.

[26] There was another witness produced for the licensee to explain that the warranties were sold so that a fault could be diagnosed as to whether or not a defect was pre existing fault.

[27] However, that approach in the business has absolutely nothing to do with the evidence before the Tribunal nor the licensee's obligations under the Act.

[28] In fact the Tribunal does not consider it appropriate that the purchaser should have to pay for a warranty just so that any faults which later occur might be diagnosed.

[. ..] In all the circumstances, the Tribunal, on the balance of probabilities accepting as it does entirely the purchasers evidence, considering the actual technical evidence which was produced to it, and an expertise of its members to that evidence, accepts that the vehicle as at the date of sale was not presented with an operating air conditioning unit. The unit was faulty for the reasons already given by the air conditioning experts, and it is contained in this decision. In those circumstances, having regard to the descriptions the vehicle in the advertisement in the window card, it was not of merchantable quality nor fit for its purpose with the faulty air conditioning in it. The purchaser claimed the sum of $447.75 for the repair plus the cost of her report at $30.00 which takes the total to $477.75.

[30] The Tribunal was unable because of the restrictions placed on by the Act to make an order for any other costs which would have totalled another $418.60 which does seem unfortunate from the purchaser's point of view because of what was a very small amount of money she had paid to travel all the way to Auckland, and lose a day's pay plus pay for her parking.

[31] Under the Consumer's Guarantee's Act, the position may well be different.

[32] There will be a formal order that the licensee pay to the purchaser by way of compensation for breach of the term applied in s93(2) of the Motor Vehicle Dealer's Act the sum of $477.75.

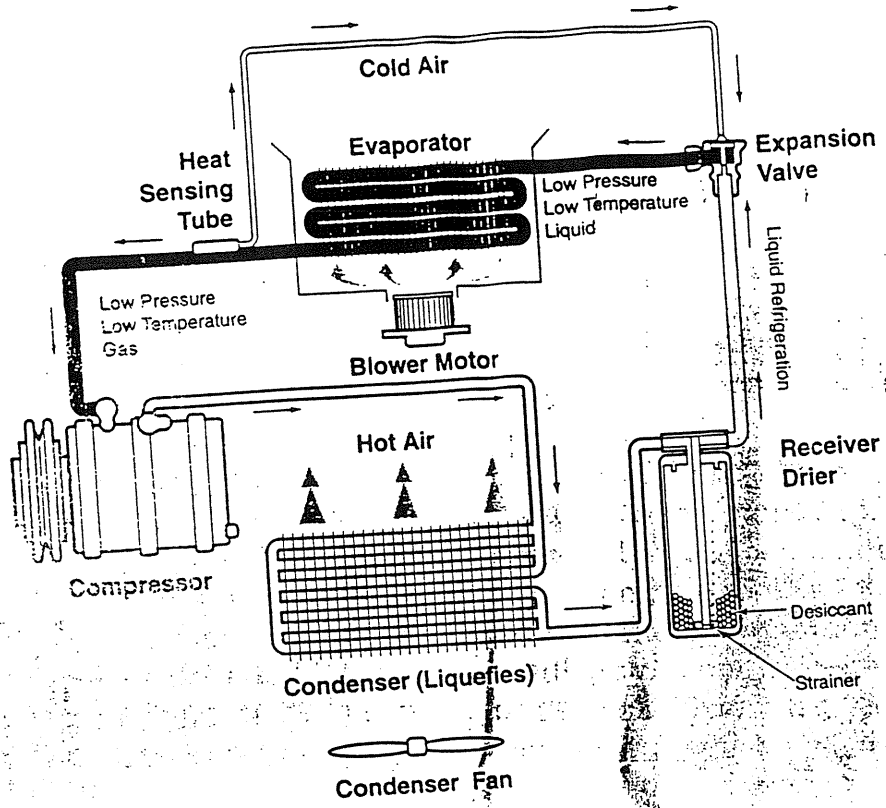
DATED at AUCKLAND this 11th day of March 2002

H T D Knight
Chairman

R G Lewis
Member

R B Armstrong
Member

Low Pressure Side



High Pressure Side