

Decision No. AK 048/2002

Reference No. MVD 013/02

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 B Felton, F.I.M.I. (UK), M.S.A.E. (A'sia) M.I.A.M.E. – Member

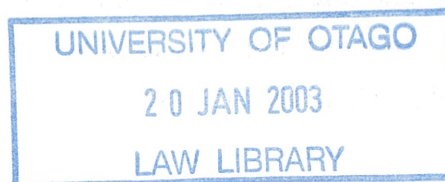
HEARING at AUCKLAND on 15 March 2002

APPEARANCES

Purchaser on own behalf.

[REDACTED] in support of purchaser.

Mr [REDACTED] for dealer.



DECISION

[1] On 22 September 2001 the purchaser, [REDACTED] purchased from the dealer a 1993 Land Rover Discovery vehicle, cc rating of 3,500, for an agreed purchase price of \$23,988.00. 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 on the vehicle at that time was 56,980 miles.

[2] The purchaser's complaint was that the vehicle had been misrepresented to him both as to its true mileage and as to the number of previous owners. He sought orders for rescission of the Vehicle Offer and Sale Agreement and for return of the vehicle to the dealer in exchange for the purchase price.

[3] In the period of two months or so following the date of sale the purchaser noticed a number of relatively minor defects with the vehicle, which he referred to the dealer. Appropriate repairs were completed at the dealer's cost. More significantly from the purchaser's point of view, the vehicle's engine stalled and stopped at the traffic lights on two occasions, one in early November and again on 27 November 2001. After the first occasion on which the engine stopped the vehicle was referred to the dealer for repairs. Some tuning work was carried out but the dealer was unable to determine the actual cause of the engine stoppage. Following the stalling incident on 27 November 2001 the vehicle was again returned to the dealer. The problem was identified with the result that the temperature sensor was replaced. No further stalling or engine stoppage incidents have occurred. On each occasion the vehicle was being driven by Mrs [REDACTED], she being the principal driver of the vehicle.

[4] The Window Notice attached to the vehicle at the time of sale refers to the vehicle as having an odometer reading of "56,980". There is no indication as to whether that is a reading of the distance travelled by the vehicle in kilometres or in miles. Against the sub-heading 'No. of owners' are the words "Ex overseas 1993". The Vehicle Offer and Sale Agreement prepared by the dealer's salesperson, [REDACTED], records the odometer reading as 56,980 "Km". The alternative reference to miles has been crossed out. There is no reference on this document to the number of previous owners of the vehicle.

[5] The purchaser said that he made a direct enquiry of Mr [REDACTED] about the vehicle's mileage, which seemed to him to be somewhat low given the age of the vehicle. He said that Mr [REDACTED] response was, "We don't buy cars with high mileage. We only buy good quality cars," or words to that effect.

[6] The purchaser had simply assumed that the odometer reading of 56,980 meant that the vehicle had travelled 56,980 kilometres. He is not familiar with the conversion rate between kilometres and miles and it did not occur to him that this odometer reading may be a reference to the distance in miles. He said that it was not until approximately one week after the date of sale, when he located the original Certificate of Registration in the vehicle's glove box, that he saw that the vehicle's odometer read in miles rather than kilometres and realised that the actual odometer reading recorded on the Window Notice must have been a reference to the distance travelled by the vehicle in miles. The following day the purchaser attended a local car fair and obtained a vehicle information report from the Motor Web agency represented at the car fair.

This confirmed the information on the Certificate of Registration that the vehicle had been first registered in New Zealand in June 1996. The report also recorded that there had been two previous private owners of the vehicle since that time. Shortly afterwards the updated Certificate of Registration was received by the purchaser in the post. This detailed the ownership history of the vehicle since it had been imported from the United Kingdom in 1996 and recorded its odometer reading at the last Warrant of Fitness inspection at 57033 miles.

[7] The purchaser's complaint was that it had not been made clear to him at the time of sale that the odometer reading as noted on the Window Notice was a reading in miles rather than kilometres. He made the obvious point that if the vehicle's actual mileage had been converted to a reading in kilometres then it would have been clear to him that the vehicle had travelled approximately 91,000 kilometres. His point concerning the number of owners was that he was not told by the salesperson that the vehicle had had two previous private owners since the vehicle was first registered in New Zealand. He said that he had gained the impression that the vehicle had been imported by the dealership directly from the United Kingdom. However, he acknowledged that the Window Notice correctly noted that the vehicle had first been registered in New Zealand in June of 1996.

[8] For the dealer, Mr ██████ acknowledged that a mistake had been made in entering the odometer reading on the Vehicle Offer and Sale Agreement against a reference to kilometres rather than miles. He said that the normal practice of the dealership was to record in express terms the odometer reading on the Window Notice against a reference to either kilometres or miles as appropriate. He said that when this transaction was carried out in September last year, the yard at Panmure had only just been established and its computer had not been installed and made ready for use. Window Notices are now printed from the computer with a reference to the odometer reading in kilometres or miles as appropriate.

[9] It was not until approximately 3 months after the date of purchase, on 20 December 2001, that the purchaser lodged the present complaint with the Motor Vehicle Dealers Institute Inc. Mr ██████ evidence was, and the purchaser acknowledged, that this was the first occasion on which he raised any complaint concerning the vehicle's odometer reading or the number of the vehicle's previous owners.

[10] On 16 January 2002 the purchaser had the vehicle inspected by the New Zealand Automobile Association's Technical Inspection Centre at Penrose. He produced a copy of the Inspector's report, which describes the vehicle's general condition as satisfactory, but identifies three items under the heading 'Essential Repairs'. The Inspector notes a coolant leak at the water pump, some engine oil leaks, and the dirty condition of the brake fluid. Following completion of this report and notwithstanding the earlier filing of the complaint with the Motor Vehicle Dealers Institute, the purchaser referred the report and the vehicle back to the dealer for the carrying out of the repairs that had been identified by the AA Inspector. Some work was completed but it seems that the problems listed in the report were not properly addressed or resolved. The AA Report was of course prepared approximately 4 months after the date of sale, by which time when the vehicle had travelled a further 3,290 miles.

[11] The purchaser's complaint in this case involves an allegation that the vehicle as sold is substantially different from the vehicle as represented in the notice attached to it at the time of sale in purported compliance with s.90 of the Act.

[12] Section 101 (as inserted by s.10 of the Motor Vehicle Dealers Amendment Act 1994) provides that where there is an allegation that a second hand motor vehicle (not being a commercial vehicle) as sold by the licensee to the purchaser -

- “(a) Is substantially different from the vehicle as represented in the notice attached to it in purported compliance with Section 90 of this Act; or*
- (b) Did not have a notice attached to it as required by Section 90 of this Act and is substantially different from the vehicle as represented to the purchaser by the licensee -*
- the Tribunal may, if it is satisfied that the vehicle is substantially different as aforesaid,-*
- (c) Order that the contract of sale be rescinded in accordance with the Section; or*
- (d) Where having regard to all the circumstances of the case, it considers that an order for rescission would be unwarranted or unjust order the licensee to pay to the purchaser, or to any other person claiming through the purchaser such sum (not exceeding \$12,000.00) as the Tribunal thinks just by way of compensation in respect of the difference in value between the vehicle as represented and the vehicle as sold by the licensee -*

and, in either such case, the Tribunal may make such further or consequential order as it thinks fit."

[13] The section then gives the Tribunal jurisdiction to make an order for rescission notwithstanding that the parties cannot be restored to the position that they were in immediately before the contract was made.

[14] In *Manchester Fiat v Bradford & Others*, unreported, H.C., Christchurch A.No.274/84, 17 October 1985, the High Court examined the scheme of Part VII of the Motor Vehicle Dealers Act 1975, with particular reference being made to s.101 of the Act. In that case the dealer had submitted that the Tribunal was wrong to grant the remedy of rescission because the evidence showed that the purchaser had continued to drive the vehicle for a significant period after discovering that the engine was smaller than that represented at the time of sale. By reference to the general law, it was submitted that this amounted to an election by the purchaser to affirm the contract, notwithstanding the fact that the vehicle was substantially different from the vehicle as represented at the time of sale, with the result that the remedy of rescission was no longer available to the purchaser. Cook J rejected this argument. His Honour found that affirmatory conduct was merely a factor to be taken into account in deciding whether rescission was *"unwarranted or unjust"*. Referring to the unique nature of the Tribunal's jurisdiction under the Motor Vehicle Dealers Act, His Honour said;

"...should there be any apparent conflict in any particular case between the Act, and the general law, the only inference I can draw from its provisions is that the Act is intended, so far as the sale of motor vehicles is concerned, in the circumstances mentioned and within the limits imposed in the Act, to provide not only a procedure for deciding disputes between dealers and their customers but also remedies quite distinct from those which might be available to a dissatisfied purchaser if he had to take action in the normal way."

"As I see it, the Tribunal is to consider the dispute in a practical way on its merits and, if the complaint is substantiated before it, to make an order under (a) or (b) of Section 101 (1) [now section 101 (1) (c) or (d)] as it thinks proper without having to concern itself as to what the position between the parties might be under the general law."

Special provision has been made in respect of complaints that the vehicle has travelled a greater distance than that recorded on the Window Notice. Section 101(4A) refers directly to representations made by the dealer as to the distance travelled by a vehicle, and provides;

"For the avoidance of doubt, it is hereby declared that the Tribunal may make an order under sub-section (1) of this Section in any case where it is proved that the distance travelled by a second hand motor vehicle substantially exceeded the odometer reading as represented to the purchaser by the licensee, notwithstanding that a notice was attached to the vehicle pursuant to Section 90 (1) of this Act that stated the reading on the odometer at the time the vehicle was displayed for sale, unless the notice or a separate notice contained the statement referred to in section 90(3) (c) (a) of this Act."

[15] The notice required to be displayed on the vehicle, in the event that the licensee is uncertain as to the true mileage of the vehicle, must contain the wording referred to in s.90(3)(c)(a), in order to be effective. Section 90(3)(c)(a) provides;

"In any case where there are reasonable grounds to believe that the odometer reading of the motor vehicle may not be correct, the words 'Warning. Odometer reading may be incorrect'."

[16] Having made any finding that the vehicle is substantially different from the vehicle as represented, the Tribunal may order rescission. In the event that the Tribunal considers that an order for rescission would be unwarranted or unjust, it may order compensation *"in respect of the difference in value between the vehicle as represented and the vehicle as sold by the licensee"*. In either case, the Tribunal may make such further or consequential order as it thinks fit.

[17] Compensation is to be measured by reference, not to the price, but to the actual value of the vehicle. The price paid represents an agreement between an individual vendor and an individual purchaser, and for any number of reasons may exceed or fall short of the vehicles true worth. (See *Neil Wolfgram Motors Limited v Coker* (1985) 3 DCR 8).

[18] Returning to the facts of this complaint, the Tribunal can understand that the purchaser was initially confused as to the true distance travelled by the vehicle

because of the reference to the Vehicle Offer and Sale Agreement to a odometer reading of 56,980 kilometres. However, the information recorded on the Window Notice is of crucial importance in the context of the purchaser's complaint. Although the odometer reading does not refer to kilometres or miles the Tribunal finds that the dealer has literally complied with its obligations under Section 90 of the Motor Dealers Act 1975 by noting "*the reading on the odometer at the time the vehicle was displayed for sale.*" Nothing was said in the course of the negotiations leading to the sale about kilometres or miles and the Tribunal is satisfied that there was no oral misrepresentation of the position. In any event, it cannot be said that the odometer reading noted on the Window Notice was inaccurate because it was a literal noting of the digits displayed on the odometer at the relevant time. There was no suggestion that the odometer had been tampered with or that the distance travelled by the vehicle calculated in miles, was greater than that referred to on the odometer instrument.

[19] The Tribunal is also satisfied that there is no misrepresentation on the face of the Window Notice as to the number of previous owners. Mr ██████ acknowledged that it was the responsibility of his dealership to note the number of previous private owners of the vehicle, at least since it was first registered in New Zealand. Instead of "Ex-overseas 1993", the number '2' should have been included against the reference to the number of previous owners. Accordingly, there has been a failure to follow the requirements of Section 90 of the Act. The Tribunal's view, however, is that there has been no positive misrepresentation of the number of previous private owners.

[20] It is quite clear on the evidence that the purchaser's wife, the principal driver of the vehicle, decided within a matter of a few weeks after the purchase that the vehicle was not suitable for her. She had had some frightening experiences involving the cutting-out of the engine at traffic lights in busy traffic conditions. In December 2001 the purchaser approached Mr ██████ and asked him to find a replacement vehicle, preferably a sedan car rather than a 4 wheel drive vehicle. Some effort was made to try and locate a suitable replacement vehicle but without success. It is this desire to replace the vehicle that, in the Tribunal's view, has been the true motivation behind the lodging of the complaint in the first place. The purchaser raised no issue concerning the vehicle's mileage or the number of previous owners until the complaint was lodged some three months after the date of sale. There is no evidence that the purchasers were substantially misled or that they placed any particular reliance on the representations as to the odometer or the number of previous owners.

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

DATED at AUCKLAND this 16th day of April 2002



G D Wiles
Chairman



G Burkett
Member



B J Felton
Member