

**THE HIGH COURT ON CIRCUIT  
SOUTH EASTERN CIRCUIT, COUNTY OF CARLOW**

Record Number: 2007 No. 288 CA

BETWEEN

LESTER ROTHWELL

PLAINTIFF/RESPONDENT

AND

ARROWDALE LIMITED TRADING AS SHEEHY MOTORS

DEFENDANT/APPELLANT

**Judgment of Mr Justice Michael Peart delivered on the 29th day of November 2007**

1. On the 7th January 2003 the plaintiff attended at the defendant's premises as he was interested in purchasing a car. It is accepted by the defendant that at the outset the plaintiff specified clearly that he wanted to buy a car which would have a fuel consumption of at least fifty miles per gallon. With that in mind the defendant recommended that he buy a Volkswagen Passat 1.9 tdi Comfort Line - a diesel model - at a cost of €32,500, and he was assured that this model would meet the fuel consumption specification desired by the plaintiff. The plaintiff purchased that car.
2. The plaintiff has given evidence that within a matter of a couple of weeks he noticed that he was having to fill the fuel tank more often than he expected and he set about checking his fuel consumption by keeping records of how many miles he drove before filling up again and he concluded by this means that he was getting only about 34 miles per gallon (mpg). He contacted the defendants who told him that this was probably a feature of the running-in period and that he should wait and see what the position was after he had driven the car for three thousand miles.
3. By the end of that running-in period the plaintiff was still dissatisfied with his fuel consumption and went back to the defendant at the end of April 2003. The defendants carried out their own fuel consumption test, and gave the plaintiff a replacement car while those tests were being carried out. Nigel Downes, the service manager of the defendant at that time gave evidence before me and said that when he tested the car he was astonished to find that the result of the test he performed was 27.68 miles to the gallon. He kept the car for a week and further testing resulted in a consumption of between 32 and 34 mpg. In May 2003 further testing by Mr Downes produced a consumption of 31.2 mpg. At that stage it was thought that there may be a problem with the turbo mechanism in the car, and this was checked and repaired and the car was returned to the plaintiff.
4. The plaintiff continued to be in contact with the defendant about the continuing low fuel consumption during the summer of June and July 2003. According to the plaintiff while immediately after the turbo was attended to he got a reading of 56 mpg, this improvement was short-lived, and in June a test produced a result of only 41.1 mpg. At all times the defendant gave the plaintiff a replacement car while they were checking out his car. Mr Downes stated in evidence that in tests carried out by him in July he obtained readings of 52.1 mpg and 58.4 mpg.
5. By July the plaintiff states that he told the defendants that he wanted them to take the car back and refund him the cost.
6. However, it appears that the defendant and the plaintiff agreed that an independent test would be carried out by the AA, and the defendant arranged for this to be done at their expense. The test carried out on the 24th July 2003 by Tony O'Connor, who is an auto engineer with the AA. That test, much to the surprise of Mr Downes, produced a result of 34.69 mpg. In his evidence, Mr O'Connor stated that when this result was produced he was of the view that there must have been some intermittent fault with the car given the fluctuations appearing in the figures at different dates.
7. By this time the plaintiff was becoming exasperated and communication between him and the defendants became somewhat fraught. The plaintiff stated that he was becoming very agitated about this problem and began to feel that he was being 'fobbed off' when he continued to try and make progress with the difficulties. At any rate he was assured that the problem would be solved shortly.
8. In September 2003 the defendant arranged for a test to be carried out by Motor Distributors Limited, the importers of the car. Mr Frank Glover, a Consulting Automotive Engineer, carried out that test. By this time the car had done about 13600 miles. Without setting out in detail the contents of his report and his evidence, this test produced a result equating to 56.08 mpg, which he considered more than acceptable.
9. Matters drifted on throughout 2004 and into 2005 during which period the plaintiff stated in evidence that he continued to see consumption at between 37 and 38 mpg.
10. In March 2005 Mr O'Connor carried out a further test on the car in conjunction with Mr Glover. That test used a slightly different methodology in view of the variations in the previous test results. The result of this test was just over 50 mpg and this was regarded as being in accordance with the manufacturer's specification. Other diagnostic tests carried out on the car revealed no fault with the car. Mr Glover stated in his evidence that the plaintiff expressed surprise with this result since he was still of the view that he was getting lower mileage per gallon than this, based on the amount of fuel he was purchasing. Mr Glover accepted that the plaintiff was getting lower mileage according to his own tests and records, but stated that all he could say was that on the two occasions on which he carried out tests he achieved acceptable levels of fuel consumption, and he was satisfied that the car was in good working order. He considered that if there were regular fluctuations in fuel consumption this would indicate that there was some other fault with the vehicle, but he was satisfied that there were none.
11. The plaintiff has stated that he in fact sold the car himself privately in March 2006 for €14,500. The car had by that time done about 56,000 miles. He stated that he had had some difficulty selling it, but the Court has no evidence as to who he sold it to or what efforts he had made to sell it. He believes that he should have been able to sell it for about €22,000 based on what he saw similar cars of that being sold for. The defendants say that this expectation was unrealistic and that the sale value should have been about €18,000.
12. The plaintiff has sold the car since these proceedings commenced in December 2003. In his Civil Bill he sought an order rescinding the contract and directing the defendant to repay him the cost of the vehicle. In addition he sought damages for negligent misstatement and/or breach of contract. Since the car has been sold, the claim for rescission is no longer applicable. I should say that even though the plaintiff gave evidence that he had told the defendant in 2003 that he wanted his money back, I am not satisfied that this amounted to a rescission at that time. There certainly was not a complete failure of consideration given the nature of the

fault complained of in relation to the levels of fuel consumption. In any event the plaintiff continued to have the use of the car until he sold it in March 2006.

### **Conclusions**

13. At the outset it is important that I accept completely the plaintiff's evidence as to his experience as to fuel consumption. He has given his evidence honestly and in a convincing way. His records have been compiled carefully and deliberately and I have no doubt that he is correct that throughout the time he had this car he never, other than for a short period after the turbo was repaired, got a fuel consumption which matched the manufacturer's specification and the assurance given to him at the time of purchase that this vehicle would meet the specification required by him in order to purchase this model. It is a fact also that on the first occasion on which Mr O'Connor of the AA carried out a test he also achieved a less than acceptable result.

14. Nevertheless, I have to accept also the results of the other tests carried out both by the defendants themselves and by Mr Glover for the suppliers. There is no reason to question the methodologies used for all these tests, and there is no doubt raised as to the truth of the results. Those tests are of course tests on particular days, and can only be interpreted as showing what occurred on those days alone.

15. I am also satisfied from the evidence given that there was no underlying fault with the vehicle which would have meant that the car was using more fuel than it ought to, save of course for the fault which was found to exist with the turbo and which was attended to by the defendant.

16. I am also satisfied that the defendant at all times gave the plaintiff a replacement car to use during times when they kept the car for testing purposes. In addition, it is clear that the defendant dealt with the plaintiff's complaints courteously, and that is in spite of the statement by the plaintiff in his evidence that in the summer of 2003 relations became somewhat fraught between the parties due to his agitation and exasperation at the continued low levels of consumption he was experiencing and the fact that nothing seemed to be resolving the difficulty. It is natural that such difficulties might occur, but certainly there is no question of there being any evidence that the defendant behaved in any way which should in any element of aggravated damages. There is no question about that. Indeed the plaintiff has not suggested otherwise.

17. It is also important to say that no suggestion has been made that it is the manner in which the plaintiff may have been driving the car which may have resulted in his achieving low fuel consumption.

18. On balance I am satisfied that for whatever reason, which has not been established in this case, this car did not perform according to the fuel consumption specified both by the manufacturers and the sales representative of the defendant when the plaintiff purchased the car, in spite of the test results achieved by Mr Glover and by the defendant when acceptable results were achieved.

19. The issue to be decided is what damages the plaintiff should be entitled to recover. He has sold the car now, and he had the use of the car since January 2003 until March 2006 and he travelled 56,000 miles in it over that period. In my view the level of damages cannot equate to the cost of the car less what he sold it for, or less that what he ought according to the defendant to have been able to sell it for, namely about €18,000. That would be unfair to the defendant, since there was not a complete failure of consideration.

20. In my view the plaintiff's loss is the difference in cost of fuel between what he would have spent had the car done 50 mpg to the gallon, and what he actually spent while clocking up 56,000 miles. The only evidence which the Court has heard as to this difference has been given by Mr Glover who has done a calculation of this figure. The plaintiff did not adduce any evidence in that regard, so the Court has no reason not to accept that calculation.

21. Mr Glover did his calculation in September 2003 when the car had done 13562 miles. He calculated how many gallons of fuel were used on the basis of a consumption of 36mpg, and another calculation based on 50 mpg. He then converted gallons to litres, and based on a diesel price of 82 cents per litre, arrived at a figure representing how much more the plaintiff had spent on diesel than he ought to have spent. Using the same methodology, I have arrived at the following calculation on the basis of 56000 miles travelled. Travelling that distance at 36 mpg the plaintiff bought 1556 gallons of diesel. Had he achieved 50 mpg per gallon he would have bought 1120 gallons of diesel. That is a difference of 436 gallons of diesel. Converting those gallons to litres produces a total of 1982 litres of diesel. Taking the price of 82 cents of diesel, the plaintiff's additional fuel cost over 56,000 miles comes to €1625. That is his actual loss over the period of ownership. I have no evidence of current diesel cost per litre, but even if in the last couple of years there was some upward move in this cost it will not alter the loss figure very significantly.

22. In addition to that actual loss, I am of the view that some element of general damages is justified given the trouble that the plaintiff endured in having the problem addressed. It was undoubtedly a source of considerable aggravation for him since he purchased the car and he was caused a good deal of inconvenience in having to frequently get back to the defendant about it and leave the car back for testing and so forth. The plaintiff has not attempted to overstate this factor. However I believe that a figure of €5000 is a reasonable sum to which the plaintiff should be entitled to recover under this heading.

23. I will therefore affirm the order of the Circuit Court save for a variation in the amount of the decree to the sum of €6625.