37/72

SUPREME COURT OF VICTORIA

LIGHTNING PANELS PTY LTD v BEN ARI

Crockett J

26 October 1972

CIVIL PROCEEDINGS – MOTOR VEHICLE COLLISION – VEHICLE DAMAGED – CLAIM BY CAR OWNER LODGED WITH BROKER TO MAKE CLAIM ON HIS INSURANCE COMPANY – INSURER ENGAGED LOSS ADJUSTER TO INSPECT THE DAMAGE AND ARRANGE SELECTION OF A REPAIRER – QUOTATION AGREED UPON – REPAIR WORK CARRIED OUT – ACCOUNT SENT TO INSURER – ACCOUNT NOT PAID – INSURER BECAME INSOLVENT – AFTER REPAIRS EFFECTED OWNER TOOK POSSESSION OF HIS REPAIRED MOTOR CAR AND SIGNED A CLEARANCE CERTIFICATE – ACCOUNT RENDERED TO CAR OWNER – ACCOUNT NOT PAID – SUMMONS ISSUED – MAGISTRATE FOUND IN FAVOUR OF THE REPAIRER – WHETHER MAGISTRATE IN ERROR.

HELD: Order nisi absolute. Magistrate's order set aside. Complaint dismissed.
1. The insurer was the party primarily responsible for the payment of the repairs and that that was the arrangement that was made in the first instance with the repairer. In those circumstances, it was not possible to look at some document which was signed by the owner at the request of the repairer after the initial contract has been made for the purpose of determining what were the terms of that initial contract.

2. There was no material upon which it was reasonably open for the Magistrate to have concluded constituted evidence of a contract of a kind which would expose the owner to responsibility for the payment of the cost of repairs. Accordingly the Stipendiary Magistrate was in error in concluding to the contrary.

CROCKETT J: Mr Ben Ari was the owner of a Jaguar motor car. He entered into a policy of comprehensive insurance in relation to that motor car. The insurer was a company called Mid-Pacific and International Insurance Company. Unfortunately, Mr Ben Ari's car was struck from behind, causing damage to the vehicle. The damage was such that the policy of insurance which he had entitled him to recover the cost of the repairs from the insurer. Accordingly, he contacted his broker with the request that he make the appropriate claim on the insurance company. This was done. The result was that the insurer engaged a loss adjuster to inspect the damage and to arrange the selection of a repairer who could attend to the carrying out of the necessary repair work. The adjuster was a Mr Sutherland. Pursuant to that engagement, Mr Sutherland arranged to see the car at the premises of Lightning Panels Pty Ltd. That company carries out body repair work to motor vehicles.

The repairer had indicated its readiness to carry out the repair work in question, and prepared a quotation setting out the details of the work to be done and the price at which it was prepared to do it. Mr Borto was the person concerned on behalf of that company, to negotiate the contract for carrying out the repairs. Mr Borto went through the quotation with Mr Sutherland. The result was that Mr Sutherland made certain alterations to the quotation leading to a reduction in the original price quoted which it seems the repairer was prepared to accept. Upon this being done, Mr Sutherland reported to the insurer that be had put the work in hand and that it was to be done at a price which he agreed with the repairer.

All that had transpired to this date was a common business practice which one could believe is normally performed in relation to similar circumstances which no doubt occur with great frequency. The repair work was ultimately carried out. When that was done the repairer sent an account for the total amount of the agreed price of $437.45 to the insurer. The account is dated the 4 August 1970. It has not been paid. Shortly thereafter, the repairer learned that the insurance company had become insolvent, or rather learned for the first time that it had some time before become insolvent.

At or about the time that the account was sent to the insurance company, Mr Ben Ari took delivery of his car. Before doing so, he signed a document described as a clearance certificate. It bears date the 6 August 1970. By it he absolved both the repairer and his insurer from further liability in connection with his claim in respect of damage to the vehicle. Apparently upon learning of the presumed inability of the insurer to pay the account in question, the repairer then rendered an account to Mr Ben Ari. That account was dated 13 August 1970 and it is for the same sum. However, appended to it are these words: "We are sorry we have to send you the account for repair because your insurance company has gone into liquidation." Not surprisingly, Mr Ben Ari refused to pay that amount.

As a result of that refusal the repairer brought proceedings in the Magistrates' Court at Melbourne for the recovery of the sum in question from Mr Ben Ari. Those proceedings are by way of default summons in that court's special jurisdiction. The matter was duly heard, Mr Borto giving evidence on behalf of the complainant and Mr Ben Ari and Mr Sutherland were called to give evidence in defence of the claim. The stipendiary magistrate hearing the matter concluded that the repairer should succeed and accordingly made an order in its favour.

The defendant Mr Ben Ari is aggrieved by that decision with the result that he obtained an Order Nisi to review it. The grounds upon which the Order Nisi was granted are variously stated but in essence, amount to a complaint that there was no evidence before the magistrate upon which he could have found in favour of the repairer. It has fallen to me to determine on the return of the Order Nisi whether that complaint is with or is without foundation.

The repairer has before me, contended that the evidence which was placed before the magistrate would have enabled the repairer to succeed in one or more of three different ways. It was said first that the manner in which the performance of the repair work was arranged was such as to justify in law the conclusion that the insurer was, through its own servants, acting as an agent for the owner. It would appear from the reasons attributed to the magistrate for reaching the conclusion that he did that some such argument may have appealed to him. It is clear, however, in my view that such a contention is unsustainable.

Mr Fagan appearing for the repairer to show cause suggested that the intervention of the broker operated in a way to attract to the subsequent actions of the loss adjuster a nexus of agency between that adjuster and the owner, notwithstanding that the adjuster was, in turn, clearly the agent of the insurer. In my view there is no basis for the acceptance of such a contention. The adjuster was, without doubt the agent of the insurer. He said so in terms when testifying and the report which he submitted to the insurer and which was in evidence puts the matter beyond doubt. Furthermore, I an unable to accept as valid the proposition that because the owner chose to make his claim through the intervention of his own broker, that would alter the true situation: that is that the arrangement for the carrying out of the repairs made by Mr Sutherland was an act performed by him solely as an agent for the insurance company.

It was then said that the evidence enabled the conclusion to be drawn that it was not the insurer who contracted for the performance of the repairs but it was the owner himself who made that contract. Or, at all events, if the insurer did enter such a contract, then it was collateral with one also made by the owner so that each was subject to a joint obligation to meet the cost of the repairs.

As an alternative to that submission it was urged that the evidence permitted a finding that there was a second and independent contract made by the owner with the repairer to the effect that the owner undertook, in the circumstances that the insurer did not pay the cost of the repairs, that the owner would.

It is now, I think, quite clear that, in the circumstances to which I have referred, the negotiation of an agreement by an insurer for the carrying out by a repairer of repairs on an insured's vehicle is a transaction in which the insurer does not act as the agent for the insured.

This much was established in two decisions of the Court of Appeal – *Godfrey Davis Ltd v Culling* [1962] 2 Lloyds Rep 349 and *Cooter & Green Ltd v Tyrrell* [1962] 2 Lloyds Rep 377. I interpolate that it was not agency on this basis which counsel for the repairer was contending for,

although it appears from the reasons of the stipendiary magistrate that it may have been some such agency which led him to believe that he was entitled to make the order that he did.

Therefore in the ordinary course in the type of circumstances that are commonplace and which 1 have outlined, one ordinarily will find a contract made between the repairer and the insurer and in those circumstances, of course, it is the obligation of the insurer to meet the cost of the repairs. However, when that is done it is still open for a separate and independent contract also to be made by the owner with the repairer. That this may be done, and indeed commonly is done, is indicated by a decision of the Court of Appeal in *Charnock v Liverpool Corporation* [1968] 3 All ER 473; [1968] 1 WLR 1498. In that case the owner was required to pay a comparatively small part of the total cost of the repairs by way of an excess. He also had to pay some trifling towing charges. His insurer arranged for the repairer to carry out the repairs. The owner yielded up the car to the repairer in its damaged condition so that the repairs might be carried out. The time taken to perform the work was found to be greater than that which was reasonable in the circumstances. The delay in repair led to the owner's suffering damage. He sued the repairer to recover that damage. It was held he was entitled to recover. It was said in such circumstances there was a contract between the repairer and the owner in which it was to be implied that the car would be delivered to the owner after allowing a reasonable time for the repair work.

Presumably the consideration for such a contract to the handing over of the car to the repairer to permit him to take advantage of the profitability presumably inherent in the other contract made by him with the insurer. Possibly also a consideration might be found in the arrangement for that part of the cost of the repairs represented by the excess being payable directly by the owner to the repairer.

The cases to which I have referred have shown that what the contract is, the nature of its terms and between what parties it has been made, depends upon the circumstances of each individual case. It is clear from those authorities that it was open in the circumstances for the repairer were it so minded, to contract with the owner, were he prepared to do so, on terms either that the owner would be solely or jointly responsible for the payment of the cost of the repairs on the one hand, or that he would be responsible for the payment of the repairs on the other hand in the event that the insurer, being primarily responsible, failed to meet its obligation.

The question then is whether the material placed before the magistrate and reproduced before me on affidavit does permit a finding of the existence of a contract in one or other of those two ways which constitute the second and third limbs of the argument upon which Mr Fagan relies.

A considerable degree of assistance in undertaking the analysis of the evidence and the implications which are to be derived from it is, I think, to be found in a very recent ease which again was dealt with by the Court of Appeal in England. The decision is *Brown & Davis Ltd v Galbraith* (1972) 3 All ER 31; [1972] 1 WLR 997. The facts of that case bear a remarkable similarity to those with which I have to deal. The principal point of distinction I think is this: That at the time that the repairer undertook to effect repairs he was quite unaware of the financial instability of the insurer.

In the present case, the evidence which I think I must assume was open to be and in fact was accepted by the magistrate, suggests that the repairer, when dealing with Mr Sutherland, had some doubts about the financial strength of Mid-Pacific and International Insurance Company.

The Court of Appeal in *Galbraith's case* gave its decision principally through the medium of the judgment of Cairns LJ. That judgment shows that the Court was concerned to examine the evidence in that case to determine whether a finding of a contract whereupon the owner was rendering himself primarily responsible for the payment of the repairs was able to be made. The court insisted that in determining that matter it was open for it to look at the circumstances in which the negotiations had taken place and to pay regard to the subsequent events which had occurred. By doing this it was possible to gain assistance in determining what was the intention of the parties. A summary of the matters found significant in that connection is undertaken by Cairns LJ at p38, and because of the applicability it has, I think, to the present case, quotation of it is justified notwithstanding its length. His Lordship there said:

"But is it possible to imply here a contract on the part of the defendant in any event to pay? The circumstances which to my mind point to the conclusion that ought to be reached on that question are these. First of all, is it clear that at the interview between the defendant and Mr Davis on 4 July Mr Davis was informed that the defendant had comprehensive insurance; secondly, that on the document described as an estimate, which is really the evidence of the contract between the repairers and the insurance company, there is this important note; NB., the Insured's confirmation should be obtained concerning these items namely, the excess and the towage charge but not the main cost of repair; thirdly, that the invoice which was rendered to the defendant was an invoice only in respect of the excess and the towage charge, the invoice for the bulk of the repairs being sent to the insurers; next, that on the satisfaction note there are these words (this is a note, of course, which the car owner is invited to sign) 'Payment of the repairer's account shall constitute a complete discharge of insurer's liability in respect of damage to my vehicle'; next, that the defendant was never informed of the price of the repairs which had been agreed between the assessor, on behalf of the insurance company, and the repairers; and was never given any opportunity of saying whether he would agree to that price or not. Lastly, there are certain answers given by Mr Davis in cross-examination, which I think can be properly considered in this case. He said;

> 'As far as we were concerned, we were dealing with the insurance assessor. The insurance company were going to meet the claim and the defendant to meet the excess and balance of towing"'.

The second and third points in terms do not have a precise parallel with the present case. On the other hand, the evidence shows clearly that Mr Borto was aware that an excess that he said was $70, was payable by the owner in partial payment of the total cost of the repairs.

As to the sixth point, it is true that Mr Borto made no such concession in precise terms as was made by the representative of the repairer in the case from which I have just quoted. Nevertheless, the similarity of the actions, undertaken by the repairer in this case with those that were undertaken in *Galbraith's case*, to my mind, leave no other conclusion open but that the contract which was made for the performance of the repairs was one in which the insurer was to be primarily responsible for the payment of those repairs. Mr Ben Ari played no part in the determination of the cost of the repairs. He was not invited to participate in an examination of the detailed quotation. The fact is that he received no account for the repairs until after the insurer had itself been invoiced with the cost and it was learned by Mr Borto that it was unable to pay that cost.

The documents which are in existence contain the name of the insurance company in all instances. They include not merely the initial account but also the quotation and the clearance certificate, the terms of which I have already referred to. Mr Fagan has urged that the fact that the repairer was aware of the possibility of financial instability on the part of this particular insurer at the time that the contract for the repairs was made is enough to explain the various matters to which I have referred as having occurred consistently with the repairer contracting with the owner as the person primarily responsible for the payment of the cost of the repairs.

Mr Fagan urged that the sending of the account to the insurance company could be explained as something that was done by the repairer consistently with its belief that its only contract was with the owner its action being explicable by reason of its knowledge that that owner nevertheless did have a comprehensive policy of insurance with that particular insurer. I appreciate the submission that is put but in my view it has no weight or at all events, no sufficient weight, to justify my taking any view other than that the evidence irresistibly points to the only conclusion able to be reached, namely that the repairer did contract with the insurer for the insurer to be primarily responsible for the payment of the cost of the repairs.

That now leaves the third and final argument advanced by Mr Fagan to be dealt with. That argument, as I have said is this notwithstanding the existence of such a contract, a finding as to which I have already determined is compelled by the evidence, it was open to the owner to make an independent contract with the repairer to the effect that in he event that the insurer did not pay the cost of repairs then he, the owner, would.

As I have already indicated it is clear on the authorities that such a contract was open to be made if the parties wished to do so. The question is whether the evidence permits the finding to the effect that such a contract was made. The evidence on which it is said that the magistrate was free to find such a contract as having been proved is to be found in a statement in the evidence

of Mr Borto when he swore that he said to the owner, "The insurance company is very 'dicey' and my company will only accept authorisation to repair from owners." After such statement had been made to the owner he then yielded up his damaged car to the repairer for repairs to be performed upon it. It is argued that by doing so the owner accepted the offer to repair in circumstances that there should be implied into the contract so created a promise that the owner would pay for the repairs if the event (then considered possible) should come to pass that the insurer was unable to pay. The conclusion that a contract to that effect was open to be found on such evidence by the magistrate has, if I might say so, been fully, plausibly and persuasively argued by Mr Fagan but despite what he has said I have not been persuaded that that material does justify the finding for which he contends.

In the first place, where a repairer, as I have already concluded the evidence irresistibly shows is the fact, contracted with an insurer for the insurer to pay for the repairs to be performed, it seems to me that the evidence, either by express agreement or by implication must be discernible in the clearest possible manner to establish an alternative obligation on the part of the owner to pay, in the event that the insurer does not, the cost of those repairs.

To my mind the passage pointed to as supporting the contract with its terms as contended for is too equivocal to permit the implication being introduced that Mr Fagan contends was open to be drawn.

If I might, to support the conclusion which have I have expressed, I make one further quotation from the judgment of Cairns LJ from the same page as that from which I have already cited. I refer to these words of His Lordship:

> "In order to imply a promise by the defendant to pay for these repairs, it is necessary to say not merely that it would be a businesslike arrangement to make but that any other arrangement would be so unbusinesslike that sensible people could not be supposed to have entered into it. It appears to me that it is very doubtful whether it could be said that it would be a businesslike arrangement to make, and I certainly am not prepared to say that it was so obvious a term that it ought to be implied in order to give business efficacy to the transaction."

The reasons which have been discussed with me by Mr Fagan, make it plain enough, I think, that the contract which he suggests was open to be found here was a businesslike arrangement to make but it is entirely another matter for it to be said that any other arrangement would be so unbusinesslike that sensible people could not be supposed to have entered into it.

To begin with, I think there is considerable doubt as to whether the reference to "authorisation to repair" is of sufficient width to involve the necessary implication that it is an authorisation to repair on the basis that in giving such authorisation there is a necessary exposure to responsibility for payment on the part of the owner. Certainly if that is what the repairer was intending, one would have expected him to have said so in the plainest of words. Language which it would be easy enough to employ would require him merely to say that "I think your insurance company might not be able to pay and I will therefore only do the work on the basis that you are prepared to pay me if it does not." If that is what the repairer intended to have been the only basis on which he would undertake the repairs, one would have expected him to have said so.

Mr Fagan also pointed to a signed document. It is perhaps difficult to understand what it really is. It is headed "Workshop Copy". It has a reference to the quotation in question and the names of both the owner and the insurer are inserted in it. It was signed by Mr Ben Ari and the date at which it was signed is whether one has regard to the date it bears or other evidence concerning the matter, plainly a date long after that upon which the original contract was made. It does contain a number of printed terms headed "Repair and storage Agreement" and there is a reference to transactions being in cash unless other arrangements have been made. Mr Fagan has contended that the original contract that was made with the owner is to be found in the words that I have already referred to as uttered by Mr Borto, and that that was in effect an agreement to do work upon terms which were to be reduced to writing and that the document to which I have just referred is the repository of that bargain, Although signed, after the initial contract was made, it is nevertheless possible to look at it because it was by implication a term that the parties were to reduce that initial agreement to writing.

I think that there is a great deal of doubt about whether that argument is a valid one, but in any event it is totally inconsistent I think with the proposition that the insurer was the party primarily responsible for the payment of the repairs and that that was the arrangement that was made in the first instance with the repairer. In those circumstances, I think it is not possible to look at some document which is signed by the owner at the request of the repairer after the initial contract has been made for the purpose of determining what were the terms of that initial contract. Furthermore, if the contract was one of a type for which in the alternative Mr Fagan was contending it was open to be found by the magistrate it would be quite inconsistent with the owner's being concerned about the amount of the excess which he was responsible for meeting in conformity with the terms of his insurance policy.

Altogether, therefore, I am persuaded that there is no material upon which it was reasonably open for the Court below to have concluded constituted evidence of a contract of a kind which would expose the owner to responsibility for the payment of the cost of repairs. Accordingly the Stipendiary Magistrate was in error in concluding to the contrary.

The Order Nisi therefore will be made absolute. The order of the magistrate will be set aside. In lieu thereof there will be an order dismissing the complaint with costs, and the applicant will have the costs of this application subject to the statutory limit. (Discussion ensued as to costs.)
HIS HONOUR: I think I need make no further pronouncement but that which I have made.
MR FAGAN: Your Honour, I would apply for a certificate under s13 of the *Appeal Costs Fund Act*:
HIS HONOUR: I will grant that certificate, Mr Fagan.
