35/00; [2000] VSC 510

SUPREME COURT OF VICTORIA

MORRIS v RACV INSURANCE LTD

Hedigan J

6 November 2000

CIVIL PROCEEDINGS – INSURANCE – MOTOR CAR POLICY OF INSURANCE – CAR OWNER REQUIRED TO DISCLOSE MODIFICATIONS TO VEHICLE – SUSPENSION OF VEHICLE ALTERED TO ENABLE TRAILER TO BE TOWED – INSURER NOT NOTIFIED – VEHICLE STOLEN – INDEMNITY REFUSED – CLAIM BY INSURER THAT ALTERATION TO SUSPENSION WAS A MODIFICATION WHICH HAD TO BE DISCLOSED – IF MODIFICATION DISCLOSED INSURANCE WOULD HAVE BEEN DECLINED – CLAIM BY INSURED DISMISSED – WHETHER MAGISTRATE IN ERROR.

M. took out a motor car insurance policy with RACV. When the vehicle was stolen, RACV declined to indemnify M. on the ground that M. had failed to disclose the full nature and extent of modifications which had been made to the vehicle. It was said that if RACV knew of the modifications it would not have entered into the policy. On the hearing in the Magistrates' Court of the claim by M. for the amount due, M. admitted that he had raised the suspension of the vehicle by installing heavier new suspension in order to enable the vehicle to tow a trailer and boat. RACV claimed that the level of risk for insurance was assessed by use of a points system developed in accordance with certain guidelines. In M.'s case, the alteration to the suspension would have carried a ten-point penalty which would have put M. over the permitted number of points to be allowed whereby the insurance policy would not have been effected. The magistrate found that the alteration of the suspension was a 'modification' within the meaning of the policy and dismissed M's claim. Upon appeal—

HELD: Appeal dismissed.
The question for the magistrate was whether the alteration to the suspension was a modification which M. was required to disclose under the terms of the policy. M. admitted that "bigger springs and shockers" were fitted to the vehicle in order to carry a one-tonne trailer and further, that such a modification ought to have been notified to RACV. In those circumstances, it was open to the magistrate to conclude that the alteration to the suspension was a modification which should have been disclosed to the insurer, that M. failed to disclose the modification to RACV and that M. was in breach of the duties imposed on him by the provisions of the policy and the *Insurance Contracts Act*.

HEDIGAN J:

1. This is an appeal pursuant to s109 of the *Magistrates' Court Act* 1989 from a decision of the Magistrates' Court at Melbourne on 31 January this year, that the claim made by the plaintiff appellant, Mr Craig Morris against the respondent defendant RACV Insurance Ltd, be dismissed. The grounds of appeal are set out in the order of Master Wheeler of 1 March this year. Such questions of law are devised in the absence of the respondent, and frequently do not accurately reflect the critical issues. Oddly enough in this case, the grounds of appeal approved by the Master, the appellant devising the relevant questions, has probably to some extent disadvantaged the appellant rather than the respondent. I say that because, as will emerge as I develop these reasons, the first of the questions, and I quote, "Having regard to the whole of the evidence, could a reasonably properly instructed Magistrate have dismissed the appellant's claim", does not deal specifically with the way in which the case has been argued before me.

2. It may be, as Mr Searle who appeared for the appellant argued, that that question is so wide that there could be reasonably drawn within its boundaries the case that was really argued, namely, that it was not open to the Magistrate to make the critical finding of mixed fact and law as to "modification" that he did make.

3. This appeal has been beset with unfortunate features. It appears that at the Magistrates' Court the recording of the proceeding was incomplete. Certainly the whole of the evidence was not recorded, nor it would appear, were counsel's final addresses and the Magistrates' reasons as pronounced by him.

4. Perhaps it should be said, as the transcript would reveal, that on the application of the

appellant, when this matter came on before me in June, that concern about the matter was expressed. The affidavits that had been sworn on the appeal, whilst they were in agreement with many features of what had occurred in the lower court, were not in agreement about a number of important matters. Thus this led to an application being made to me by Mr Searle on the previous occasion that the appeal be adjourned to enable the court to call on the Magistrate for a report pursuant to powers given in Order 58(14) of the Rules, in an effort to resolve if possible, the problem of conflicting accounts as what it was that the Magistrate had identified as his reasons for dismissing the claim.

5. Not without some doubt at that time, I acceded to that request. In the event, the Magistrate reported that because he believed the proceedings were being recorded, he did not retain any notes that he may have taken by hand at the time to any significant effect, and otherwise he had no recollection of the matter. Thus no light was thrown on the matter by this course being adopted. Nevertheless the reference was pursued in the interests of justice.

6. The case was concerned with a claim by the plaintiff for some $15,725 said to be due to be paid to him pursuant to a motor car insurance policy with RACV Insurance Ltd, the defendant-respondent, which covered motor car theft. The plaintiff claimed that his car had been stolen. This was not admitted by the defendant in its defence, but it was ultimately found by the Magistrate, that the vehicle, a Holden Calais, had been stolen. The defence by its written defence had primarily relied on the fact the plaintiff had failed to disclose to the insurer the full nature and extent of modifications which had been made to the vehicle in circumstances in which it was asserted that the defendant would not have offered a policy, and entered into it, had the true modifications been disclosed to it. This, it was contended, was in breach of the duties imposed on the plaintiff by the relevant provisions of the *Insurance Contracts Act* and the policy.

7. I should state that the policy has never been produced as an exhibit to the affidavits in this case. It would appear that nothing turns on that as no argument was addressed to the Magistrate, and for that matter to me, that the policy's conditions permitted modifications other than those described in the evidence given to the Magistrates' Court. As I understand it, essentially that involved the allowance of some modifications and some permitted so-called "points allowed" modifications, but not so as to exceed 20 points. This appears to be derived from the evidence of Ms Reddenbach who was called on behalf of the defendant.

8. The plaintiff was, I might say in the vernacular, a motor car buff who enjoyed, apparently to some profit, buying, modifying and selling vehicles of the more spectacular kind, exhibition-type vehicles. In this case the plaintiff gave evidence of a general kind that he always notified RACV or the insurers of any modifications. He did not, it would appear in any clear way, specifically address, in evidence in chief, the modifications that were addressed as being important in the hearing.

9. The critical part of the proceeding and the appeal as well, appears to have been concerned with two aspects, and how the Magistrate dealt with them. I should state that in relation to the missing recording of parts of the evidence, that those parts that were recorded have been transcribed. The transcription does not include any of the evidence in chief given by the plaintiff appellant Mr Morris. It commences during a period of cross-examination by counsel for the then defendant, Mr McDermott, who has also appeared for the defendant respondent on this appeal. Most of the evidence, indeed it appears all of it, that was called on behalf of the defendant, has been reproduced. Unhappily, as I have indicated, further missing or unrecorded tape has not been able to be transcribed, which included addresses and reasons.

10. The appellant's affidavit of 29 February 2000 purports to set out the evidence. I should say that even without the answering affidavit, in many respects even taken standing alone, it appears to be incomplete and dubious as a reliable account of evidence. The view which I form is that the decision of the Magistrate would be almost inexplicable if all that had occurred were the matters set out in Mr Morris's first affidavit. That affidavit placed its main emphasis, it appears to me, upon the issue of a tow bar that was on the vehicle and whether its presence had been notified to the insurer. Whether that was a modification or an accessory appears to be in some doubt, but the first affidavit of Mr Morris alleged that the evidence he gave was that all modifications were notified to the insurer. There appears to be some doubt about that upon looking at the whole of

the evidence. I note also that it was apparently claimed in the evidence, that at some point of time, representatives of RACV Insurance had actually seen it, that is, the vehicle with the tow bar on it. I do not think that matter was ever resolved in the evidence. Moreover, the RACV documentation did not disclose any knowledge of the existence of the tow bar.

11. The plaintiff's affidavit claimed that he was not asked whether he had told RACV about the tow bar modification, if I use that phrase. It appears that the plaintiff, through a friend, had advertised the vehicle including some modifications in a car magazine. It was through this that the defendant had discovered the modifications. It appears to have been admitted that they were incorrectly described. The plaintiff's affidavit set out the evidence of the defence witnesses which included the evidence of one Ms Reddenbach, who gave evidence of the points system developed and adopted by the defendant company in accordance with guidelines, by which the level of risk for insurance was assessed. According to Mr Morris's affidavit, there was tendered through that witness underwriting guidelines. Ms Reddenbach detailed modifications to the car's wheels, body kit and steering wheel. At least in Mr Morris's first affidavit, the lowering of the suspension and other matters in relation to its extractors, a modified computer chip and the exhaust were ignored. It was accepted that there had been disclosed three modifications; the wheels, the body kit and the steering wheel. Ms Reddenbach's evidence was there was no record of Morris having reported the inclusion of a tow bar facility on the car. Undisclosed, according to her, that took it into an "unsuitable" category.

12. The first affidavit also dealt with the evidence Mr Craig Ericson who was a customer relations consultant who gave some relevant evidence.

13. The summary in that first Morris affidavit of the Magistrate's reasons for decision does not appear to be complete. As a consequence, the affidavit of Mr Diony, a law clerk in the employ of the solicitors acting for the defendant (who took some notes which were reproduced as an exhibit) dealt with, in a much fuller way, the evidence given at the Magistrates' Court. Some of the earlier parts of Mr Morris's affidavit, which were obviously derived from documentation, were not in dispute. Such matters, as the early part of the affidavit concerning the tow bars and the failure to address suspension modification raised doubts about Morris' affidavit. Diony's affidavit dealt with the opening of Counsel for RACV, his reference to the relevant sections of the *Insurance Contracts Act* and the fact that the defendant would adduce evidence that, if the plaintiff, the insured, had disclosed all modifications that had taken place, then that would have been an unacceptable risk and no insurance would have been offered.

14. Counsel for the defendant, according to Mr Diony's affidavit, stated that the issues were "What were the underwriting guidelines, what were the modifications and had the plaintiff disclosed them?"

15. On the basis of that affidavit (which I will not go through in detail) the defendant claimed the real issue was the lowering of the suspension, which alteration carried in effect, a "ten point penalty" so that, whether or not the tow bar modification had been notified and/or known, it was open to the Magistrate to find the vehicle was over-modified without consent and that the insurer was thereby entitled to deny liability. I should say that a supplementary affidavit of the appellant dealt with the refusal of the Magistrate to permit the plaintiff to have the case reopened to recall Mr Morris to readdress the tow bar issue, the Magistrate having declined to do so. The second affidavit of Mr Morris dealt with those matters and also an affidavit of Mr Lethlean, his counsel in the lower court.

16. There were some unsatisfactory aspects about the second affidavit of Mr Morris as to form, since it was making claims as to what was "clear" and what was "confirmed." The matters that were raised in detail in the affidavit of Mr Diony concerned the modifications of the suspension (matters dealt with in the lower court according to the second Morris affidavit) namely that the suspension had been modified (not as the advertisement suggested) by being lowered, but by being raised. That was apparently on the basis of it was being returned from its "sagging position" by elevation to its normal position by the expedient of putting in new suspension. I should say however, that the Magistrate did not have to accept that evidence and even if he did, the question was whether it was open to him to view it as a non-notified modification, whether it was an improvement or not. The affidavit of Mr Diony set out his recollection of the evidence based on his memory and

notes. Having regard to the gaps in transcription occasioned by the non-operation throughout the whole of the hearing of the recording device, I regard the affidavit of Mr Diony as being more convincing, both in a narrative form and in substance. It makes sense, if one may use that phrase, of the Magistrate's conclusion. As I have indicated, that affidavit set out parts of Ms Reddenbach's evidence and dealt with and denied parts of the plaintiff's affidavit, asserting that the plaintiff had not given any evidence that he told the insurer he put a tow bar on the vehicle, and that he had merely asserted that he had a tow bar and that the insurer should have known that because he had marine insurance.

17. It would appear that it was open to the Magistrate to take account of the failure of the plaintiff to notify the insurer of all of the modifications in the advertisement, although it is likely that the Magistrate rejected, so it seems to me, the advertisement as being an accurate description of the modification. The respondent's affidavit states that the Magistrate found the plaintiff had not informed the insurer that he had a tow bar fitted to his vehicle. This is confirmed by the part-transcript. Indeed, as I said in the course of matters this morning, referring to passages during the course of the evidence nearing its conclusion, the Magistrate specifically found that the plaintiff Mr Morris had not told the insurer about the tow bar.

18. The Diony affidavit stated that the Magistrate found the plaintiff had breached his duty of disclosure because of his failure to tell the insurer that he had modified the suspension. Looking at the affidavits on either side, it appears likely that when the plaintiff was being questioned as to the "lowering" of suspension, (the phrase used in the advertisement) it emerged that he was claiming that it had not been lowered but had been raised. I will be referring to some passages in more detail shortly, but it does appear that the plaintiff said that he agreed that he had not told the insurer that he had raised the suspension because he believed that was not necessary. According to Diony, that was the evidence upon which the Magistrate found against the plaintiff, because, according to this affidavit, when the Magistrate gave his reasons, he referred to the admission made by the plaintiff that he had raised the suspension. That reference was made as an explanation for his reason as to why he had not told the insurer. The Magistrate rejected that as the reason for not telling the respondent. According to Diony, the Magistrate's articulated reason was that Morris did not tell the insurer about the modified suspension because he believed that it would seriously affect his insurance. Diony claims that the Magistrate further held that if the insurer had been told about the modified suspension, it would not have offered any insurance to the plaintiff. That would certainly have been open to the Magistrate, as Ms Reddenbach had given evidence to that effect. This then became a case about deliberate withholding of a relevant matter.

19. Before me, the debate in the affidavits as to whether or not the decision turned around the question of the tow bar, or the question of the modification, largely disappeared. Mr Searle, who argued a difficult case well for his client, sensibly focussed on the modification issue. That is not a specific question, but I propose to treat it as falling within the general question that was formulated as to whether the matter was open to the Magistrate to decide in the way that he did. I should say that the failure for it to be identified as the specific question gives some indication that the question of the modification and suspension has played a far greater role here for the appellant, than the way in which it was dealt with before the Magistrate, where the appellant concentrated on the tow-bar. Notwithstanding that, it appears to me that the Magistrate was well aware of that and focussed his attention primarily upon the question of the modification. When one goes back to that part of the transcript that relevantly survives, that seems to be what he did.

20. The evidence appears to have been that an unnotified modification of a tow bar would have carried with it a so-called "two point penalty" or aggregation. There had been permitted modifications to the vehicle. But if the alteration to the suspension was unnotified, and that is not in doubt, then if it were a "modification" of the vehicle, it carried a ten-point penalty which would have put the insured over the permitted number of points to be allowed. If it was not a modification, then clearly the insurance would have had to have been correctly effected, the other terms presumably having been complied with.

21. This enables me to dispose of the second of the grounds, concerned with the refusal of the Magistrate to allow the case to be reopened. Since the application for reopening was only on the basis of dealing with the question of the tow bar, the argument was that the plaintiff had

not had an appropriate opportunity, as having not been cross-examined on it, to make clear his case that he had notified the insurer about the provision of the tow bar. At the end of the day, if the case here (as I think it did before the Magistrate) really turned around the question of the modification of the suspension (if it were a modification) that argument has no significance. If the modification were a modification and an unnotified one, then clearly the insurance was entitled to be refused because there had been a non-disclosure of a relevant matter. If it were for the reasons advanced by Mr Searle in argument before me, not a modification, then it matters not really as to whether or not the evidence was allowed because it was accepted by the insurer that, on the points counting, the insurance would have been effected. Thus the point here became, as I think it always was, a question of whether there was a modification of the suspension.

22. No independent expert was called. An argument was advanced before me by Mr McDermott that the plaintiff himself was virtually an expert in these matters. Mr Searle's argument was that once it emerged that the suspension was elevated and not lowered, it could never have been said that a rectification of that kind was a modification that had to be notified to the insurer. What in effect he said was that the vehicle had "old suspension", that it was "sagging" and that the change to it elevated it, to put the suspension back, as it were, in the original position. This on any account, he argued, was an improvement. But, he claimed, it did not answer to the description of a modification, because what one had in effect was better suspension than in the original form. No insurer could have reasonably required or would have required, to have been told that it was going to be done, or once it was done.

23. The insurer's case was that alterations of that kind could reasonably answer the description of a "modification". The focus of the insurer was on the necessity for it to be informed so that it might make up its own mind as to whether what had occurred or was about to occur fell within the insurer's guidelines as to a modification, so that it might make a decision for itself about insuring, once notification had been given.

24. The first matter that might be addressed is that the form of the question is as to whether the decision that was made by the Magistrate was open to the Magistrate. Although there was some force in Mr Searle's arguments, (which were well presented) I would find it difficult to reach the conclusion that a Magistrate could not regard that as a "modification" within the meaning of the insurance as it was explained to him. I could not conclude that it was not open to the Magistrate to reach that conclusion.

25. The matter became clearer upon attention being given to what transpired before the Magistrate. Mr Searle founded his case on the basis that, as it appeared before the Magistrate (derived from the affidavits) it would not have been open to him to find it was a modification, simply if at all, if there was but an elevation, so to speak, to improve the vehicle. Upon Mr McDermott's taking me to some relevant parts of the transcript, it appears the matter went further than that, and to some extent explains why Mr Diony's affidavit was in the form that it was.

26. I refer to pp17 and 18 of the transcript, when plaintiff was under cross-examination by Mr McDermott as to the modifications. Commencing at line 4 when Mr McDermott was cross-examining, "Now whether you actually lowered (we'll come to the advertisement shortly) you are telling the court honestly that you in fact raised your suspension and you said you didn't think that was a modification?" "I'm telling you that it is a modification that would have given you another ten points and outside the limits of what you are able to modify the vehicle." That was, I think, Mr McDermott's manner of telling him, the witness, that evidence was going to be called concerning that effect arising, as the insurer was going to contend.

27. The Magistrate intervened and said, "Just stopping you there, if that's the case when you've raised, you've told us about the springs, you did it because it was a one tonne boat and you're a boaty?" Answer, "When I said before the standard height of the car was given in 89, it had sagged and gone down a bit. Now, if you raised it a quarter of an inch ..." Magistrate, "That's not what you said before, you said the concept was to raise these springs specifically to carry this sort of weight, and the question I got the standard sort of springs it would have had would have been too soft to carry a one tonne trailer." Answer: "That's right. Now, it wasn't to do anything with sagging with age, it was to do with," (the witness said) "the weight. The weight of the boat and the nature of the springs as set on the car to tow such a heavy object." "Therefore," (the Magistrate)

"you modified it to take it away from the normal so it would be better for a one tonne boat?" "Yes, bigger springs in it and bigger shockers," was the answer.

28. Magistrate, "Well, it's just now been put that carries 10 points, so that modification is a factor that would have concerned the insurance, do you follow what they're saying?" Answer, "I do, yeah." "Well, that's one modification you didn't tell them about?" "Yes." "You agree that you didn't tell them about that modification?" "No, about ..." "Because you didn't see it was significant?" "No." "But if they did, they were entitled to know, would you agree with that?" "Yes."

29. Reliance was placed upon that as not only indicating that the alteration had not simply been to correct sagging, but the putting in of heavier new suspension in order to enable the vehicle to be used to tow the boat, either safely or without damage, that this was known to the plaintiff who agreed it was, in his own mind, a modification that ought to have been notified.

30. This was a matter which, in the context of Mr Diony's affidavit, explains how the Magistrate ultimately gave his reasons. It is a critical piece of evidence, all the more perhaps because it was really elicited by the Magistrate taking over, as it were, the questioning of the witness on that aspect.

31. I am satisfied, on observing that that issue had become important to the Magistrate and, I believe, to the parties, that the main issue was the modification issue. The Magistrate, based upon that evidence, in addition to the matters to which I have already referred, found that it was open to him to find (and he did so) that that modification that ought to have been notified, a modification accepted by the plaintiff himself that had not been notified and that it ought to have been notified.

32. I conclude, therefore, that it was open to the Magistrate to reach the conclusion that he did. I conclude also that the second ground must fail for the reasons I have already indicated. Once the Magistrate concluded, and as I find, was entitled to conclude on the whole of the evidence, that it was a modification, the issue of permitting a re-opening to deal with the tow bar was entirely irrelevant. There is no discernible error in that aspect.

33. There was also some submission made on behalf of the plaintiff that the whole matter should be set aside and returned to the Magistrates' Court for re-hearing, in effect, because of the doubts or difficulties occasioned by uncertain affidavits, fragmented transcription of evidence, the plaintiff's evidence-in-chief having to be derived wholly through the affidavits and not by resort to the transcript, and other matters. Mr Searle did not specifically refer to all those but it is reasonable enough, I think, to treat the submission as drawing in all of what I describe as some of the unhappy aspects of the litigation.

34. I reject that submission. The lower court transcription is an aid to, not a pre-condition of, a just hearing. It may be doubted, I think, although I make no final decision about it, that this court has the power specifically to simply set aside an order on such a basis. It would certainly rarely do so and, almost never do so once there was evidence on oath from both sides as to what had transpired before the Magistrate. Ordinarily, of course, when the court is faced with the perhaps not wholly uncommon situation of a conflict in the affidavits, it prefers the affidavit that tends to uphold the court's decision, although that is not inevitable.

35. In this case, as I have indicated, because of the way in which the affidavits set out the matters, (including close attention to detail in the respondent's affidavits) I much prefer the respondent's version, which was more exact and lent a rational aspect to the process of the decision which occurred. Finally, in any event, those parts of the transcript that have survived have thrown an appropriate light upon the decision of the Magistrate which I think in the event was correct.

36. Accordingly, the questions are answered, (a), yes, and (b), no. The appeal is therefore dismissed.

APPEARANCES: For the appellant Morris: Mr J Searle, counsel. Barretts, solicitors. For the respondent: Mr G McDermott, counsel. Mills Oakley, solicitors.