01/04; [2004] VSC 46

SUPREME COURT OF VICTORIA

EASTERN TRUCK SERVICES v GIBO

Balmford J

13, 25 February 2004 — [2004] ATPR ¶41-982; [2004] ASAL ¶55-121

CIVIL PROCEEDINGS – CLAIM FOR DAMAGES FOR LOSS CAUSED BY SEIZURE OF TRUCK ENGINE – ENGINE REPAIRED BY REPAIRER – VEHICLE OWNER NOT WARNED NOT TO USE VEHICLE - VEHICLE DRIVEN INTERSTATE – ENGINE SUBSEQUENTLY SUFFERING CATASTROPHIC FAILURE – CAUSE OF FAILURE OF ENGINE NOT KNOWN – FINDING BY MAGISTRATE THAT REPAIRER'S SERVICES NOT FIT FOR PURPOSES SOUGHT BY TRUCK OWNER – ORDER MADE AGAINST REPAIRER FOR AMOUNT CLAIMED – WHETHER MAGISTRATE IN ERROR: *GOODS ACT* 1958, S92; *TRADE PRACTICES ACT* 1974, S74(2).

E., a repairer of truck engines performed an engine rebuild on a truck owned by G. When G. took delivery of the truck, G. asked E. whether it would be prudent to use the truck on a trip to far north Queensland. E. responded by saying that he could see no problem with this proposal. Some 8 months later when on a trip to far north Queensland, the truck engine suffered catastrophic failure. G. later sued E. for damages caused by the loss of the engine. At the hearing, the magistrate was unable to find on the evidence what caused the failure of the engine. However, in upholding the claim for damages, the magistrate found that the services provided by E. were not fit for the purposes for which they were sought nor did E. use due care and skill in that E. did not warn G. not to use the vehicle. Upon appeal—

HELD: Appeal dismissed.
Whilst the evidence did not establish to the satisfaction of the magistrate what was the underlying cause of failure of the engine, that evidence did establish that a material and not insignificant cause of that failure was the failure by E. to proceed with the process of diagnosis and to warn G. not to use the vehicle until diagnosis was complete and the fault in the engine identified and rectified. Accordingly, it was open to the magistrate to make an order on the amount sought.

BALMFORD J:

1. This is an appeal on a question of law under section 109 of the *Magistrates' Court Act* 1989 from a final order made on 16 June 2003 by the Magistrates' Court at Ringwood constituted by Mr Martin, Magistrate, whereby the magistrate ordered judgment for the respondent ("Gibo") against the appellant ("Eastern") in the sum of $20,491.12 for damages for loss caused by the seizure of the engine of a truck owned by Gibo and ordered that Eastern pay interest and costs to Gibo.

2. On 29 July 2003 Master Wheeler found the following question of law to be shown by Eastern to be raised on the appeal:

> The learned magistrate having been "unable to find what caused the catastrophic failure of the engine", was it open to him to hold that the loss suffered as a result of the [seizure] of the engine was caused by the failure of [Eastern] to warn [Gibo] not to drive the truck to Queensland?

3. Eastern carries on business in Canterbury Road, Kilsyth as a repairer of truck engines. In January 2000 Eastern performed an engine rebuild on a truck owned by Gibo. Subsequently, drivers of the truck reported various difficulties with the engine, including excessive oil consumption and the production of black smoke, and the truck was returned to Eastern for repair on several occasions. In August 2000, some eight months and 18,682 kilometres after the rebuild, when the truck was returning from a trip to Mackay in Queensland, the engine suffered what the magistrate described as "a catastrophic failure".

4. Gibo brought proceedings in the Magistrates' Court for the cost of repairs and associated costs. The magistrate expressed himself as unable to find, on the evidence, what caused the failure of the engine.

5. However, he accepted the evidence of Mr Pizzey, of Gibo, that Mr Pizzey asked Mr Deans,

of Eastern, apparently in June 2000, whether it would be prudent to use the truck on a trip to far north Queensland, or whether there would be any danger; that Mr Deans responded by saying that he could not see any problem with Gibo taking the truck to Mackay; and that if Mr Deans had expressed a warning Mr Pizzey would absolutely have heeded it.

6. The magistrate continued:

> I do conclude on the evidence before me that the services provided to the plaintiff by the defendant in June 2000 were not fit for the purpose for which they were required. Mr Deans was aware of the business of the plaintiff and [the] purpose for which the vehicle was used. I am satisfied on the evidence of Mr Pizzey that he expressly brought home to Mr Deans the fact that the plaintiff was relying on his skill or judgement . . . in deciding whether to take the vehicle and use it in the normal course of business or to leave it with [Eastern] for further investigation and rectification of the engine problem. . . . I am satisfied the services were not fit for the purposes for which they were sought nor did the defendant use due care and skill in as much as that he conveyed to Mr Pizzey that he could see no problems if the vehicle was driven to Mackay. In those circumstances I find that the defendant has breached section 92 of the *Goods Act* 1958 and the *Trade Practices Act* 1974-1978. Quantum having been agreed the plaintiff is entitled to succeed as to $20,491.12.

7. Section 92 of the *Goods Act* 1958 reads, so far as relevant:

> 92. Fitness of services for purpose
> Where, in a sale of services by a person who sells the services in the course of a business, the buyer expressly or by implication—
> (a) makes known to the seller; or
> (b) in the course of any antecedent negotiations, makes known to a dealer or to a person acting on behalf of the seller—
> the particular purpose for which the services are required or the result that he desires the services to achieve, there is an implied condition that the services are reasonably fit for that purpose or are such as might reasonably be expected to achieve that result, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller, dealer or other person.

Section 74(2) of the *Trade Practices Act* 1974 reads, so far as relevant:

> 74. Warranties in relation to the supply of services ... (2) Where a corporation supplies services ... to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation any particular purpose for which the services are required or the result that he or she desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services ... will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the corporation's skill or judgment.

8. The sole submission of Mr Thompson, for Eastern, was that the magistrate ignored the need for the plaintiff to establish that the loss resulting from the seizure of the engine was caused by the failure to warn. In his submission, it was for Gibo to establish that the engine seized by reason of some defect which warranted a warning not to drive it to Queensland. Unless this could be shown, he submitted, causation was not established. Because the cause of the seizure was not established, it could not be said that it was caused through a chain of events in which the failure to warn played a significant role. It might have been caused by some totally extraneous matter such as the manner of driving, or the temperature in Queensland or some contaminant in the system.

9. Mr Moloney, for Gibo, submitted that that question had not been raised before the magistrate, and accordingly was not available to be raised in this Court.

10. He relied on the following often-quoted passage from the judgment of Gibbs CJ and Wilson, Brennan and Dawson JJ in *Coulton v Holcombe*[1]:

> It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish. ... The powers of an appellate court with

> respect to amendment are ordinarily to be exercised within the general framework of the issues so determined and not otherwise. In a case where, had the issue been raised in the court below, evidence could have been given which by any possibility could have prevented the point from succeeding, this court has firmly maintained the principle that the point cannot be taken afterwards. ...
>
> In our opinion, no distinction is to be drawn in the application of these principles between an intermediate court of appeal and an ultimate court of appeal.

Their Honours went on to cite with approval the summary by the Court of Appeal of New South Wales in the matter before them as to the relevant principles:

> [T]he finality of litigation; the difficulty of inducing an appeal court to consider new facts; the undesirability of encouraging tactical decisions not to present an issue at first instance, keeping it in reserve for appeal; and the need for vigilance to avoid injustice to a party having to meet new facts and new issues of law for the first time at the appeal court.[2]

Mr Moloney also relied on the judgments of the High Court in *Metwally v University of Wollongong*[3] and of the Appeal Division of this Court in *Geelong Building Society (in liq) v Encel*[4], as well as the judgment of Ashley J in *Mond v Lipshut*[5], where, after setting out the proposition in similar terms to those of the High Court in *Coulton v Holcombe*, his Honour continued[6]:

> In the present case counsel urged me to conclude that the evidence was clear in relevant respects; and that its import could not have altered. I cannot agree. Had the point been to the forefront the examination of the respondent and her husband may well have had a different emphasis.

11. There was no transcript of the proceeding below available to put before this Court, and the evidence of that proceeding was contained in two affidavits of counsel who had appeared for Eastern before the magistrate, and affidavits of two solicitors from the firm representing Gibo, who had been present in court during the hearing of the proceeding. The only account of the submissions put by Eastern appears in the affidavit sworn on 4 September 2003 by Ms Marshall of that firm who deposes as follows under the heading "Defendant's Submission":

> The Defendant's counsel submitted that the determination of the case was primarily a question of fact and that conflict about the causes of the engine failure resulted that it was not demonstrated that the Defendant breached a duty and it was not demonstrated that any breach caused the loss suffered by the plaintiff.

12. Mr Thompson, in reply, pointed out that in the cases relied upon by Mr Moloney the point sought to be put on appeal had involved a complete departure from the case put below, one not raised below in any way and perhaps not pleaded. He referred to the passage cited from Ms Marshall's affidavit, and the words "it was not demonstrated that any breach caused the loss suffered by the plaintiff". He submitted that that was precisely the point he was making, and he had simply taken it further than it was taken by counsel who had represented his client below.

13. Given the manner of expression, in the authorities which I have cited and elsewhere, of the principle that a point cannot be raised for the first time on an appeal, it seems to me that the operation of that principle must depend on the appellant who seeks to raise a point not raised below bearing the onus of satisfying the appeal court that no "evidence could have been given which by any possibility could have prevented the point from succeeding" to use the words of the High Court in *Coulton v Holcombe*. However, the operation of that principle assumes a knowledge of the evidence which was actually before the court below.

14. In *Geelong Building Society*[7], in the course of consideration of the authorities, Tadgell J emphasised that the ultimate question is whether it is in the interests of justice to permit the appellant to rely upon the point. While the affidavits before the Court are extensive, they do not pretend to correspond to anything like a complete transcript of the hearing before the magistrate, which occupied six days. In that situation, it is not possible to determine what was actually said and not said in evidence or in argument. The only account of the submissions for Eastern is brief in the extreme. In those circumstances, I consider that to refuse to allow Eastern to rely upon the point would not be in the interests of justice.

15. Mr Moloney submitted further that in order to succeed, Eastern must satisfy the Court

that a finding contrary to the decision of the magistrate was "the only possible decision that the evidence on any reasonable view can support", to use the words of Herring CJ in *Young v Paddle Bros Pty Ltd*[8]. He cited the following passage from the judgment of Phillips JA in *S v Crimes Compensation Tribunal* [1998] 1 VR 83 at 89:

> Once the task of construction is over, the question whether the claimant's particular circumstances fall within the relevant statutory description is essentially a question of fact.
>
> Where an appeal may be brought to the court only on a question of law, the question just identified is peculiarly the province of the tribunal below, not the court. ...
>
> ... Thus if the question whether the claimant's circumstances fall within the statutory description is one on which minds can legitimately differ, involving a value judgment on the evidence (or other material), it is a matter for the tribunal. In that category one can put most questions of a causal link ...
>
> Nevertheless if, in determining whether the particular circumstances of the claimant are such as to fall within the relevant statutory description, the fact-finding tribunal arrives at a conclusion which was simply not open to it, that is an error of law; and the question whether it arrived at a conclusion which was not open to it is a question of law.

16. In *Taylor v Armour & Co Pty Ltd*[9] the Full Court (Gavan Duffy, Sholl and Adam JJ) said:

> We have come to the conclusion that we should adopt the view that the Supreme Court on an appeal from petty sessions by way of order to review should, with regard to any question of fact, act according to long established practice, and treat the matter in the same way as an appeal from a jury. ... Accordingly, it is not for this Court to make up its own mind upon the evidence, though giving weight if necessary to the fact that the tribunal below has seen the witnesses. This Court has merely to see whether there was evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did come. ... It may well be that [this practice] was initially due to the difficulty of establishing with real certainty the precise details of the evidence given before magistrates.

As I have said, that difficulty is present in this case.

17. When the matter is considered on the basis of those passages, it cannot be said that the decision of the magistrate was a decision which was "simply not open" to him, in the words of Phillips JA. There was evidence upon which he might, as a reasonable man, have come to the conclusion to which he did come. That being so, Eastern's appeal must fail.

18. In case I am wrong in this, I now turn to consider the final submission of Mr Moloney. He relied on evidence by expert witnesses called by both parties that Eastern should have continued with diagnosis of the symptoms of failure exhibited by the engine, rather than releasing the truck for continued use, and that Gibo should have been warned that continuing to use the vehicle rather than pursuing the diagnosis of the problem could result in catastrophic failure of the engine.

19. The evidence did not establish to the satisfaction of the magistrate what was the underlying cause of failure of the engine. However, Mr Moloney submitted, that evidence did establish that a material and not insignificant cause of that failure was the failure by Eastern to proceed with the process of diagnosis and to warn Gibo not to use the vehicle until diagnosis was complete and the fault in the engine identified and rectified.

20. He relied on the judgment of Lord Reid in *Bonnington Castings Ltd v Wardlaw*[10], where his Lordship said:

> I cannot agree that the question is: which was the most probable source of the respondent's disease, the dust from the pneumatic hammers or the dust from the swing grinders? It appears to me that the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease. What is a material contribution must be a question of degree. A contribution which comes within the exception *de minimis non curat lex* is not material, but I think that any contribution which does not fall within that exception must be material. I do not see how there can be something too large to come within the *de minimis* principle but yet too small to be material.

And later[11]:

> In my opinion, it is proved not only that the swing grinders may well have contributed but that they did in fact contribute a quota of silica dust which was not negligible to the pursuer's lungs and therefore did help to produce the disease. That is sufficient to establish liability against the appellants.

21. He also relied on *Chappel v Hart*[12] where Gaudron J said:

> As Dixon J pointed out in *Betts v Whittingslowe* [1945] HCA 31; (1945) 71 CLR 637 at 649, albeit in relation to a statutory duty, "breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the accident did occur owing to the act or omission amounting to the breach".

22. Having considered the matter, I accept the submission of Mr Moloney set out in [19] above.

23. For the reasons given, the appeal is dismissed. Counsel may wish to make submissions as to costs.

---

[1] [1986] HCA 33; (1986) 162 CLR 1 at 7; 65 ALR 656; (1986) 60 ALJR 470.
[2] at 8.
[3] [1985] HCA 28; (1985) 60 ALR 68; (1985) 59 ALJR 481.
[4] [1996] VicRp 44; [1996] 1 VR 594; [1996] ANZ Conv R 180.
[5] [1999] VSC 103; [1999] 2 VR 342.
[6] at [37].
[7] at 606.
[8] [1956] VicLawRp 6; [1956] VLR 38 at 41; [1956] ALR 301.
[9] [1962] VicRp 48; [1962] VR 346 at 351-2; (1961) 19 LGRA 232.
[10] [1956] UKHL 1; [1956] AC 613 at 621; [1956] 1 All ER 615; [1956] 2 WLR 707.
[11] at 623.
[12] [1998] HCA 55; [1998] 195 CLR 232 at 238-9; 156 ALR 517; 72 ALJR 1344.

APPEARANCES: For the appellant Eastern Truck Services: Mr M Thompson, counsel. Herbert Geer and Rundle, solicitors. For the respondent Gibo JL Nominees: Mr P Moloney, counsel. Aughtersons, solicitors.
