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SUPREME COURT OF VICTORIA

MAMMONE v RACV INSURANCE PTY LTD

Gillard J

3 March, 30 April 1976 — [1976] VicRp 63; [1976] VR 617; Noted 50 ALJ 649

INSURANCE – MOTOR CAR INSURANCE – INTERPRETATION OF TERMS OF INSURANCE POLICY – "SPECIALLY MODIFIED" – MEANING OF – WHETHER ATTACHING SIX-INCH RIMS AND RADIAL TYRES SPECIALLY MODIFIED THE VEHICLE – CLAIM REJECTED BY INSURANCE COMPANY – INSURANCE COMPANY REQUIRED BY MAGISTRATE TO GRANT CLAIM – WHETHER MAGISTRATE IN ERROR.

The defendant sought to be indemnified by the third party (the RACV) against an order for damages made against him arising from a motor car collision. The insurance proposal relating to the comprehensive policy for the motor car contained a declaration by the defendant that:

> "I warrant and declare as a condition of the proposed insurance except as stated below in 'special information' —
> the motor vehicle — (a) has not been and will not be specially modified from the maker's original specification and I agree that this proposal whether signed by me or caused to be signed by me shall be the basis of the contract between me and the RACV Insurance Pty Ltd".

During the currency of the policy six inch rims and radial tyres were fitted to the defendant's vehicle. The third party wrote to the defendant claiming because of the fitting of the rims and tyres, together with extractors, the vehicle was not the risk described in the proposal therefore the company was not liable.

The Magistrate found that under the policy of insurance the third party was bound to indemnify the defendant. The principal questions, the concern of the review were:–
(i) What was the proper interpretation to be assigned to the declaration of the defendant in the proposal for insurance? and
(ii) Whether on the facts there had been a material alteration in the relevant sense of the risk covered.
Upon Order Nisi to review—

HELD: Order absolute. Remitted to the magistrate for determination according to law.
1. The magistrate misdirected himself as to the proper construction of the declaration. ***Huddleston v RACV Insurance Pty Ltd*** **[1975] VicRp 67; [1975] VR 683, distinguished.**

2. The words "specially modified" required something more than a mere alteration to the vehicle. It must be borne in mind that the words used in the warranty were "specially modified." To modify a motor vehicle means the alteration is of such a character that the vehicle suffers no radical transformation. It follows that a vehicle could conceivably be altered without such alteration constituting a special modification. Literally, an alteration could be a modification, but not necessarily a special modification. The introduction of the word "special" must be given some meaning. It follows, therefore, that for a vehicle to be specially modified it must be accepted that some importance be given to the word "special" and the requisite alteration should possess special character which distinguishes it from a mere modification. In other words, the introduction of the word "specially" required that the relevant modification must be (a) "of such a kind as to exceed or excel in some way that which is usual or common"; or (b) "exceptional in character, quality or degree"; (see meaning of the word "special" in *Shorter Oxford Dictionary*.)

3. The word "special" introduces the concept of something unusual, abnormal or exceptional, the very antithesis to something general or usual or to be expected.

4. At least a necessary ingredient in order to make a modification a special one was that it should be deliberate, designed or planned. But are those characteristics all that are necessary to make a modification a special one? It must be remembered for what purpose the statements in the proposal were to be made. From the answers given to the questions asked, the underwriters should be enabled to assess the nature of the risk and thereby to assess the appropriate premium payable to cover such risk.

5. In this context in the proposal, and having regard to its purpose, the parties must have

intended that in order for an alteration to the vehicle to constitute a special modification of the vehicle, the alteration must be of such a special character so as to alter, in a material way, the risk being covered. It was in this sense the parties must have intended to use the word "special".

6. It was therefore necessary to refer this matter back to the Magistrate for him to determine whether on the evidence the modification was a special one in the sense expressed above. That is to say, did the alteration to the rims materially increase the risk covered? It was uncertain whether the Magistrate had already found facts to answer this question. Accordingly, the proper course to adopt was to refer the matter back to the Magistrate to make an unequivocal finding of fact on the issue, having regard to the test laid down.

GILLARD J: This is the return of an order nisi to review a decision given in the Magistrates' Court at Moonee Ponds on 1 August 1975, when an order was made in third party proceedings against RACV Insurance Pty Ltd which for convenience will be referred to as "the third party", in favour of Vivenzo Mammone, who will be referred to as "the defendant", in the sum of $400 with $366.90 costs.

It appeared that the defendant, on 19 December 1974 was involved in a motor car collision at Glenroy when he was driving a motor car which was owned by him and which he alleged was covered at that time by a comprehensive policy of motor car insurance issued by the third party to him. An order for damages was made at the Magistrates' Court at Moonee Ponds in favour of the other driver involved in the collision against the defendant, who thereupon in third party proceedings sought an indemnity from the third party in respect of such order.

The learned Magistrate found that under the policy of insurance the third party was bound to indemnify the defendant, and made the order set out above. An order nisi was granted to the third party to review this decision on some ten grounds, which it is unnecessary to repeat, since the principal questions that emerged from the submissions of counsel in respect of these grounds for my determination were, namely:—

> (a) what was the proper interpretation to be assigned to a declaration of the defendant in the proposal for the motor car insurance; and
>
> (b) whether on the facts there had been a material alteration in the relevant sense of the risk covered.

The answers to these questions would determine whether the order nisi should be made absolute or should be discharged.

It appeared from the evidence that on 29 September 1972, the defendant's father on his behalf signed a proposal form for a motor car insurance cover by the third party. The proposal contained the following printed declaration in the third party's form, required to be signed by a proponent for insurance, viz:—

> "I warrant and declare as a condition of the proposed insurance except as stated below in 'special information'—
> (1)... (2) the motor vehicle—
> (a) has not been and will not be specially modified from the maker's original specification...
>
> "And I agree that this proposal whether signed by me or caused to be signed for me shall be the basis of the contract between me and the RACV Insurance Pty Ltd."

The proposal was accepted by the third party, and a policy of insurance was issued to the defendant to expire at a period long after 19 December 1974. In September 1974, the motor vehicle was taken by the defendant to Stuckey Tyre Service to fit new tyres. The manager of that company was called to give evidence before the Magistrate, and a lengthy account of that evidence is set out in the affidavits filed before me. It is unnecessary to recount it in full. It may be accepted that if the evidence were taken as being accurate, it might be inferred that the fitting of the six inch rims and the radial tyres by such company on the defendant's vehicle would have improved the performance and safety of the vehicle. It might also be added that since any such alteration would have been beneficial to the nature of the risk covered, in many ways the alteration would reasonably be regarded as not unexpected to be made. Nevertheless, having received a claim from the defendant in relation to the collision at Glenroy, on 22 January 1975, the third party wrote

to the defendant the following letter, omitting formal parts:—

> "We refer to the recent accident involving your vehicle, registered number JKV-365.
>
> "The inspection by our Assessors discloses that this vehicle is fitted with 6 inch steel wide wheels together with extractors, although the proposal form signed by you on 29 September, 1972 contained a declaration that the motor vehicle has not been and will not be specially modified from the maker's original specifications.
>
> "In the circumstances, your vehicle is not the risk described in the proposal, and the Company is therefore not liable under the terms of your policy. We regret that the cost of repairs to your vehicle, and any third party property liability which may arise, must now be matters for your own attention.
>
> "The enclosed cheque represents return in full of the last premium paid to this Office."

It was therefore argued at the proceedings before the Magistrate that because of the alteration to the vehicle the third party was not liable under the terms of its policy. The Magistrate rejected this argument, basing himself on the decision of the Full Court in *Huddleston v RACV Insurance Pty Ltd* [1975] VicRp 67; [1975] VR 683. Although his attention was drawn to the difference between the verbiage of the proposal in that case and the verbiage of the proposal in these proceedings, the Magistrate was of opinion that the reasoning in *Huddleston's Case* applied to this particular case.

Unfortunately I cannot agree with that view of *Huddleston's Case*. The declaration there was very similar to that in these proceedings. It, however, contained the words, "that to the best of my knowledge and belief" which were inserted immediately after the expression, "as a condition of the proposed insurance." The Full Court held:

> "*Ex facie*, the words must be taken to refer to the then state or condition of the proponent's mind in relation to the matters declared by him, of the past, the present and the future."

This was the foundation of its judgment in that case. In these proceedings there is nothing in the form of a declaration which could limit it to be "as no more than a present intention not to modify the vehicle in the future", as was decided by the learned Magistrate. Since that interpretation of the declaration was the basis of the judgment, it must follow that the learned Magistrate has misdirected himself as to the proper construction of the declaration.

A further attack was made on his judgment in that the Magistrate had failed to consider the nature of the alteration to the risk by the placing on of six inch wheels on the vehicle. In this regard the Magistrate said:

> "The second argument put forward was that by fitting wider wheels and so modifying the vehicle the nature of the risk was substantially changed as to relieve the insurer of his liability under the policy. I am unable to agree. While the fitting of the wider wheels constituted a modification, the essential nature of the risk was not changed."

The error alleged by the third party was that in finding the essential nature of the risk had not changed, the Magistrate had failed to adopt the proper test, namely, had the risk been materially changed?

I am rather inclined to the view that the proper interpretation of the whole of what the Magistrate said showed that he substantially adopted the correct test. However, it can be seen that in the way he expressed it there is some vagueness and uncertainty in what he intended. When one reads the whole of his finding it could reasonably be urged that he meant that the risk had not been materially altered. However, I find some difficulty in being certain as to whether that was the test he applied. For reasons which will become apparent I do not believe that it is necessary for me to give a concluded view of this matter at this stage, since I accept the submission on behalf of the third party that this case should be sent back to the Magistrate to make a specific finding in relation to this issue.

Mr Adams appeared on behalf of the defendant before me to show cause, and urged, as he was entitled to do, that in any event, on the Magistrate's finding of facts, the defendant was entitled to succeed. In particular, he urged that the words "specially modified" as used in the declaration

was a vague and uncertain expression, and it should be construed *contra proferentem*. It will be remembered that the meaning of this expression was left open by the Full Court in *Huddleston's Case*: see (VR) p688.

Mr Adams repeated an argument he made before the Magistrate that the declaration was only intended to be a declaration by the proponent of his then present intention. For reasons I have given I cannot accept this interpretation. The elimination of the words "to the best of my knowledge and belief" removed any reference to a present state of mind, and left the warranty in the form of an explicit promise, that the motor vehicle would not be specially modified, and such warranty would stand as the basis or as a condition of the insurance cover.

Mr Adams then argued that the words "specially modified" require something more than a mere alteration to the vehicle. I am of opinion that that submission is correct. It must be borne in mind that the words used in the warranty are "specially modified." To modify a motor vehicle means the alteration is of such a character that the vehicle suffers no radical transformation.

It follows that a vehicle could conceivably be altered without such alteration constituting a special modification. Literally, an alteration could be a modification, but not necessarily a special modification. The introduction of the word "special" must be given some meaning. It follows, therefore, that for a vehicle to be specially modified it must be accepted that some importance be given to the word "special" and the requisite alteration should possess special character which distinguishes it from a mere modification. In other words, the introduction of the word "specially" requires that the relevant modification must be (a) "of such a kind as to exceed or excel in some way that which is usual or common"; or (b) "exceptional in character, quality or degree"; (see meaning of the word "special" in *Shorter Oxford Dictionary*.)

Many examples are to be found in precedent to illustrate, in various contexts, how the lexical meaning of the word "special" has been used. This word introduces the concept of something unusual, abnormal or exceptional, the very antithesis to something general or usual or to be expected: see *Stroms v John and Peter Hutchison* [1905] AC 515, at pp525-6; *R v Bradford Licensing Justices; Ex parte Illingworth* [1938] 4 All ER 48, at p50; [1939] 3 All ER 106; *Aktiebolaget Manus v RJ Fullwood and Bland Ltd* [1949] Ch 208, at p211; [1949] 1 All ER 205, at p207; *Lines v Hersom* [1951] 2 KB 682, at p688; [1951] 2 All ER 650, at p653; *Aichroth v Cottee* [1954] 1 WLR 1124; [1954] 2 All ER 856, at p857; *Harris v Rugby Portland Cement Co Ltd* [1955] 1 WLR 684; [1955] 2 All ER 500, at p501.

It is a dangerous approach to interpret a contract by assigning to expressions used therein a meaning judicially given to the same or similar expressions in other contexts. Any authority or *dicta* can only have a very limited value: (see *Huddleston's Case* at p685.) Nonetheless, when one looks at the dictionary meanings of the two words used here, it would appear that there is some support and authority for Mr Adams' submission that the expression "specially modified" requires a construction quite different in character than if only the word "modified" had been used.

As it was stated in argument, it seems that at least a necessary ingredient in order to make a modification a special one was that it should be deliberate, designed or planned. But are those characteristics all that are necessary to make a modification a special one? It must be remembered for what purpose the statements in the proposal were to be made. From the answers given to the questions asked, the underwriters should be enabled to assess the nature of the risk and thereby to assess the appropriate premium payable to cover such risk.

The proposal form contained an appropriate section wherein specific information might be given of any exceptions to the printed form of declaration. Presumably, the declaration and any exceptions stated thereto would be the kind of information upon which the insurer would determine whether it would accept the proposal or whether it would load the premium: (cf. *Huddleston's Case* at p685 and *Woolfall and Rimmer Ltd v Moyle* [1942] 1 KB 66; [1941] 3 All ER 304.

It is a notorious fact that at rare intervals manufacturers and distributors of motor vehicles do find weaknesses in design of a particular model. On such occasions, advertisements appear in our daily newspapers calling in the vehicles for modification by the manufacturers or distributors, as the case may be. Because it is purposive, any modifications so made might, in one sense, be

regarded as special: it is intended, it is planned and deliberately carried out in order to improve the performance of a motor car, generally from a safety angle. But is a promise that a motor car is not to be specially modified to be interpreted so that that alteration could invalidate the cover? If a manufacturer or distributor discovered that one of its models had some inherent weakness in design likely to constitute a hazard to the safety of the vehicle, any alteration to lessen or remove any weakness would be of great benefit to anyone interested in the motor car and, accordingly, such alteration should and would be expected to be made to the vehicle. If there were some weakness found in the vehicle by its manufacturer/distributor, and alteration from the original specification could not reasonably be considered as being unusual, abnormal or unexpected. If then the modification was made, surely the parties could never have intended that the warranty that the vehicle would not be specially modified would apply to any such expected alteration. Equally, the parties could never have intended, if such modification was effected, the insurer would be entitled to deny liability under the policy in respect of an indemnity for loss or damage suffered in an incident, the cause of which had no connexion with such beneficial change to the motor vehicle.

In this context in the proposal, and having regard to its purpose, the parties must have intended that in order for an alteration to the vehicle to constitute a special modification of the vehicle, the alteration must be of such a special character so as to alter, in a material way, the risk being covered. It is in this sense the parties must have intended to use the word "special".

Having regard to the foregoing discussion, the introduction of the word "specially" in the context of this form of proposal does lead to some uncertainty as to the meaning of the expression and as to what the parties precisely intended should be comprehended by the expression "specially modified". Mr Adams was quite correct in his submission that because of this uncertainty introduced by the word "specially" the expression should be construed beneficially to the insured and against the interests of the insurer, whose printed form it was. It may be readily accepted as quite reasonable that an insurer should require of its insured a promise that he would not alter the vehicle so as materially to increase the risk being covered. If the insured did increase the risk, it would be quite reasonable for the insurer to be relieved of liability under the policy. It is my view then it would be for this purpose and this purpose only, that the declaration would be sought by the third party. The warranty obtained from the defendant was to ensure that the risk would not be materially altered to the detriment of the insurer. It could never have been intended that the declaration and warranty was to prevent an alteration to the vehicle which would improve its performance from a safety angle and so lessen the risk covered by the underwriter. This would be quite a reasonable interpretation to place upon the expression.

Of course, whether a modification did or did not improve the performance of the motor vehicle from a safety angle would be a question of fact. On the evidence given in the Magistrates' Court, particularly by the witness Stuckey on the one hand, and by the witnesses Gove and Johnstone on the other, there was a distinct difference of opinion in the expert testimony on this question of fact. I am not certain whether the learned Magistrate has made any actual finding on this issue. In para. 29 of the affidavit of Thomas Adrian Fowler in support of the application for an order nisi, it is stated that the Magistrate made a finding of fact that the defendant's motor car had been specially modified from the makers's original specification. No reasons appeared in the affidavit for this finding. In the confused record of the proceedings, exhibit "A" to the affidavit of Geoffrey William Ewing, it would appear the Magistrate found as a fact that the motor car had been modified, but did not specifically find that it was specially modified. This appears to be supported by what the Magistrate has said in his reasons for judgment, to which I have already referred.

It therefore becomes necessary, in my view, to refer this matter back to the Magistrate for him to determine whether on the evidence the modification was a special one in the sense that I have interpreted the expression herein. That is to say, did the alteration to the rims materially increase the risk covered? I am somewhat uncertain whether the Magistrate has already found facts to answer this question. As I have already stated, I was inclined to the view that a possible interpretation of all the Magistrate said on the subject did amount to a finding in the defendant's favour; but I cannot be sufficiently certain on this matter, and it seems that the proper course to adopt is to refer the matter back to the Magistrate to make an unequivocal finding of fact on the issue, having regard to the test that I have laid down.

It follows, therefore, that the order nisi will be made absolute, and costs must follow the event. The order in favour of the defendant against the third party in the third party proceedings will be set aside and the third party proceedings referred back to the Magistrate to determine whether or not the modification to the vehicle found by him materially altered the risk covered by the policy of insurance. This is a case where a certificate should be granted to the defendant under the *Appeal Costs Fund Act*. Order absolute.

Solicitors for the defendant: Penttila and Co.
Solicitors for the third party: Middletons.
