23/12; [2012] VSC 264

SUPREME COURT OF VICTORIA

ZOGIANNIS v STEVENS

Davies J

7, 19 June 2012

CIVIL PROCEEDINGS – MOTOR VEHICLE PROPERTY DAMAGE – DEFENDANT ADMITTED LIABILITY – QUESTION OF QUANTUM – APPLICATION OF PRINCIPLES FOR MEASURING DAMAGES – FINDING BY MAGISTRATE THAT PLAINTIFF HAD NOT SUSTAINED THE LOSS CLAIMED – IN THAT RESPECT CLAIM DISMISSED – ORDER MADE ON THE CLAIM FOR LOSS ASSESSOR'S FEE – WHETHER MAGISTRATE IN ERROR.

Z.'s motor vehicle was damaged when it collided with a vehicle being driven by S. Z. issued proceedings claiming the loss plus the loss assessor's fee. At the hearing of the claim, S. admitted liability for the collision but denied the loss and damage claimed and alleged that the claimed net loss was excessive. In his claim, Z. stated that he sold his car as a wreck; however, evidence emerged that Z. still owned the vehicle and that the damage to it had been repaired. The Magistrate found that Z. was still the owner of the motor vehicle at the date of the hearing of the claim but concluded that Z. had not proved the loss he had asserted in the pleadings. Accordingly, he made an order on the claim for the amount of the loss assessor's fee ($330) and refused both parties their costs of the proceedings. Upon appeal—

HELD: Appeal allowed. Magistrate's orders set aside. Remitted to the Magistrate for determination in accordance with the law.

1. It is trite law that when goods are damaged by the negligence of a tortfeasor, the owner of the goods suffers an immediate and direct loss in consequence of the damage sustained and a cause of action accrues to the owner to recover that loss. The basic pecuniary loss recoverable by an owner in that circumstance is the diminution in the value of the damaged goods, on the principle that the owner is entitled to be put back, so far as money can do it, into the same position as if the damage had not occurred.

2. In the case of negligent damage to a car, the authorities establish that if the car is wrecked completely as the result of the collision, the loss that the owner is entitled to recover from the tortfeasor will normally be measured by the cost of replacing the car with another car of comparable type and condition, with an allowance in favour of the tortfeasor for the value of the car in its damaged condition. If the car is repairable, the measure of loss will usually be the costs of repair but if the costs of repair exceed, or would exceed, the market value of the car, a question arises as to whether it is reasonable for the owner to incur the expenditure in repairing the car or whether the reasonable option is to replace the car. Ordinarily, the owner can recover the cost of repairs or the value of the car, whichever is the less. In each case, the onus is on the owner to satisfy the Court on the evidence as to which of the measures of damages is reasonable in the circumstances and as to the amount of damages to which the owner is entitled by the application of that method.

3. The Magistrate applied the wrong legal principles in concluding that the onus of proof on quantum was not discharged by reason of the finding that the plaintiff still remained the owner of the car. That fact, whilst relevant, was insufficient of itself to engage the legal principles governing the assessment of the damages that the plaintiff was entitled to recover. What the plaintiff had to prove was the extent of the damage to his car caused by the defendant's negligence (as this was in issue) and satisfy the Magistrate that the appropriate measure of damages was the market value of his car immediately before the accident, less its post-accident value, on the basis that this measure of damages was less than the cost of repairs. The question for the Magistrate was whether he should be satisfied on the evidence on the balance of probabilities that the loss should be quantified on that basis and not by reference to the cost of repairs. The Magistrate did not address that question at all and the failure to address that question vitiated the decision.

DAVIES J:

Introduction

1. The appellant ("Mr Zogiannis") has instituted an appeal under s 109 of the Magistrates' Court Act 1989 (Vic) ("the Magistrates' Court Act") against the orders of a Magistrate made on 18 November 2011 in a proceeding in which Mr Zogiannis sued the respondent ("Mr Stevens") for

loss and damage arising from a motor car collision that Mr Zogiannis alleged was caused by the negligence of Mr Stevens. The amount claimed was $25,958 for the "net loss" of the value of his car which was assessed by a loss assessor in the amount of $25,628, together with $330 for the loss assessor's fee.[1] Mr Stevens admitted liability for the collision but denied the loss and damage claimed and further alleged that the claimed net loss was excessive.[2] Following a contested hearing on quantum, the Magistrate held that he was not satisfied on the balance of probabilities that Mr Zogiannis had sustained the loss claimed in his Complaint, except for the $330 loss assessor's fee.[3] The Magistrate ordered Mr Stevens to pay Mr Zogiannis $330 and refused both parties their costs of the proceedings. Mr Zogiannis contends in this appeal that the Magistrate's conclusion that he had not proved his total loss claim was affected by legal error. Mr Stevens has filed a cross appeal, contending that the Magistrate erred in law in allowing Mr Zogiannis his claim for the assessor's fee and in failing to award costs of the proceeding to Mr Stevens.

The nature of the appeal

2. An appeal from an order of the Magistrates' Court may only be brought on a question of law,[4] so both appeals are competent only if they raise questions of law for the Court's determination. At the commencement of the hearing I expressed concern to counsel for both parties that the questions put forward as questions of law in their respective Notices of Appeal did not, in fact, raise questions of law for the Court's consideration but rather constituted factual challenges to the Magistrate's decision. Moreover, both parties conducted the appeals in a manner directed at persuading the Court to take a different view of the evidence. However, this is not an appeal by way of rehearing and this Court does not have jurisdiction to intervene with the decision below because it may take a different view of the facts.[5] It is not sufficient in an appeal under s 109 of the Magistrates' Court Act simply to demonstrate that it is open for this Court to come to a different conclusion on the evidence or even that the Magistrate made a wrong finding of fact.[6] This Court's jurisdiction to hear an appeal from the Magistrates Court conferred by s109 of the *Magistrates' Court Act* is only enlivened if there is a question of law.

3. As the authorities make clear, the requirement for a question of law is not merely a qualifying condition to the appeal. The subject matter of an appeal under s109 of the *Magistrates' Court Act* is the question of law[7] and the ambit of the appeal is confined to that question.[8] Thus there is a need and importance for the question of law said to enliven and to form the basis of this Court's jurisdiction to hear the appeal to be identified exactly to ensure that the statutory appellate jurisdiction of this Court is lawfully engaged, defined and circumscribed.[9]

4. The requirement prescribed in Rule 58.08 of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) that the Notice of Appeal set out the grounds supporting the question of law serves to ensure that there is a question of law raised and that the question of law raised is the entire subject matter of the appeal. Where the grounds do no more than indicate that the subject matter of the proposed appeal invites reconsideration of the merits of the decision, the jurisdiction of the Court is not enlivened, even though the question of law identified may be expressed in judicial review terms. If the question of law properly analysed is not a question of law, the form of its expression does not turn it into a question of law.[10] Questions of fact or questions of mixed fact and law are not turned into pure questions of law merely by embracing language that the Magistrate "erred in law" or by using formulaic language for grounds of judicial review.[11]

The question of law

5. Although both counsel took the opportunity to amend their Notices of Appeal during the course of the hearing, the amendments suffer the same lack of precision in identifying any questions of law said to be raised by their appeals. The generality of expression and lack of grounds precisely articulating how the questions put forward has not identified in a meaningful way the questions of law said to enliven the appeal and cross appeals. Notwithstanding the form of the questions in the original and amended Notices of Appeal filed on behalf of Mr Zogiannis, a question of law that can be understood from the submissions is whether the Magistrate applied the wrong legal principles to the assessment of the loss and damage claimed by Mr Zogiannis and thereby fell into legal error in determining that Mr Zogiannis had not proved his loss and damage. Counsel for Mr Stevens indicated to the Court that he was not prejudiced by the appeal proceeding on a question of law framed in that way[12], though his primary position remained that the arguments advanced on behalf of Mr Zogiannis in substance were a complaint about the Magistrate's decision on the facts, not about the application of wrong principles of law to the facts.

Legal principles

6. It is trite law that when goods are damaged by the negligence of a tortfeasor, the owner of the goods suffers an immediate and direct loss in consequence of the damage sustained and a cause of action accrues to the owner to recover that loss. The basic pecuniary loss recoverable by an owner in that circumstance is the diminution in the value of the damaged goods, on the principle that the owner is entitled to be put back, so far as money can do it, into the same position as if the damage had not occurred.[13]

7. In the case of negligent damage to a car, the authorities establish that if the car is wrecked completely as the result of the collision, the loss that the owner is entitled to recover from the tortfeasor will normally be measured by the cost of replacing the car with another car of comparable type and condition, with an allowance in favour of the tortfeasor for the value of the car in its damaged condition.[14] If the car is repairable, the measure of loss will usually be the costs of repair[15] but if the costs of repair exceed, or would exceed, the market value of the car, a question arises as to whether it is reasonable for the owner to incur the expenditure in repairing the car or whether the reasonable option is to replace the car.[16] Ordinarily, the owner can recover the cost of repairs or the value of the car, whichever is the less. In each case, the onus is on the owner to satisfy the Court on the evidence as to which of the measures of damages is reasonable in the circumstances and as to the amount of damages to which the owner is entitled by the application of that method.[17]

The claim for loss and damage

8. As liability for the collision was not in issue, Mr Zogiannis is entitled to recover the direct loss that he sustained as the result of the negligent damage to his car. Mr Zogiannis put his claim on the basis that he is entitled to recover damages measured by the pre-accident value of his car less its salvage value (the net loss) in the amount assessed by a loss assessor.[18] The loss assessor's assessment was attached to the Complaint as required by r40.14(1)(b) of the *Magistrates' Court (General Civil Procedure) Rules* 2010 (Vic) and by force of that Rule, that assessment was evidence of the loss claimed by Mr Zogiannis.

9. In his Defence, Mr Stevens disputed that Mr Zogiannis had suffered the loss claimed, and further pleaded that the amount claimed for the net loss of the vehicle was excessive.[19]

10. The only witnesses called at the hearing were Mr Zogiannis, who gave evidence that he sold the car as a wreck for $8000 (which was the salvage value assessed by the loss assessor) and the loss assessor. The loss assessor gave evidence that he inspected the damage to the car, which was to the front end of the car, and assessed the car as a write-off because the costs of repair were going to exceed the market value of the car. Both witnesses were cross-examined and in the course of the cross-examination of Mr Zogiannis, evidence emerged that Mr Zogiannis still owned the car and that the damage to the car which the loss assessor had inspected had been repaired.

The reasons for decision

11. The Magistrate rejected Mr Zogiannis' evidence that he had sold the car as a wreck and found, as a fact, that Mr Zogiannis was still the owner of the car. On the basis of that finding, the Magistrate concluded that Mr Zogiannis had not proved "the loss he has asserted in his pleadings".[20] The Magistrate then went on to hear counsel on the question of the loss assessor's fee. Counsel for Mr Stevens disputed the fee on the ground that it was a disbursement. His Honour concluded that it was a particular of loss and allowed the claim.[21]

12. The Magistrate did not explain in express terms why it followed from the finding of the fact that Mr Zogiannis was still the owner of the car that he had not proved his claim. It is sufficiently clear though, on a fair reading of the reasons for judgment, that His Honour was of the view that Mr Zogiannis had to show that he had lost the total use of his car, as the damages he was seeking was a claim for the net loss value of his car and that His Honour was of the view that he had not proved total loss because he still had the car and it had been repaired.

Decision

13. The Magistrate applied the wrong legal principles in concluding that the onus of proof on quantum was not discharged by reason of the finding that Mr Zogiannis still remained the owner

of the car. That fact, whilst relevant, was insufficient itself to engage the legal principles governing the assessment of the damages that Mr Zogiannis is entitled to recover. Mr Zogiannis did not have to prove that he no longer had the car nor did he have to prove that the car was completely wrecked in order to recover damages quantified by reference to the market value of the car. What Mr Zogiannis had to prove was the extent of the damage to his car caused by Mr Stevens' negligence (as this was in issue) and satisfy the Magistrate that the appropriate measure of damages was the market value of his car immediately before the accident, less its post-accident value, on the basis that this measure of damages was less than the cost of repairs. The question for the Magistrate was whether he should be satisfied on the evidence on the balance of probabilities that the loss should be quantified on that basis and not by reference to the cost of repairs. The Magistrate did not address that question at all and the failure to address that question vitiates the decision.

14. Counsel for Mr Zogiannis went further and submitted that the only conclusion reasonably open to the Magistrate on the evidence before the Court was that Mr Zogiannis had suffered loss and that the measure of his loss was the uncontroverted pre-accident value of the car less its post-accident value. However, by deciding the case on the basis that he did, the Magistrate did not make the relevant findings of fact that would oblige him to find in favour of Mr Zogiannis and it is not open to this Court to "second guess" the factual findings in the light of the evidence before the Magistrate.[22] The case must be remitted to the Magistrate for determination in accordance with the law.

Cross Appeal

15. The cross appeal on behalf of Mr Stevens identified two alleged errors. The first alleged error is that the Magistrate erred in allowing the loss assessor's fee of $330 when there was no evidence from Mr Zogiannis that he had paid or incurred that fee and no evidence that the loss assessor had charged or rendered an invoice for that fee. There is no merit whatsoever in this alleged error. Apart from the fact that the invoice was put into evidence before the Magistrate and not controverted, the submission was not put below to the Magistrate. The argument before the Magistrate proceeded on behalf of Mr Stevens on the basis that the only issue concerning recoverability of the loss assessor's fee was the proper characterisation of that fee, whether as a head of damage (as contended for Mr Zogiannis) or a disbursement (as contended for Mr Stevens). It is not open now to assert that the evidence was deficient when the point was not taken below. [23]

16. The second alleged error is that the Magistrate erred in the exercise of his discretion regarding costs by not taking into account certain "matters or facts". This is a factual challenge to the merits of the exercise of discretion by the Magistrate on the award of costs and no identifiable error of law in the way in which that discretion has been exercised has been shown.

17. Accordingly I propose to make the following orders:

1. The appeal is allowed.
2. The orders of the Magistrates' Court are set aside.
3. The case is remitted to the Magistrate for determination in accordance with the law.
4. The cross appeal is dismissed.
5. The respondent is to pay the appellant's costs of the appeal.

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[1] Exhibit SN-1 to the affidavit of Steven Nikolaidou sworn 23 December 2011 (Complaint, Magistrates' Court Proceeding B11745153) at [3].

[2] Exhibit SN-2 to the affidavit of Steven Nikolaidou sworn 23 December 2011 (Defence, Magistrates' Court Proceeding B11745153) at [2]-[3].

[3] Exhibit SN-3 to the affidavit of Steven Nikolaidou sworn 23 December 2011 (Transcript of Proceedings, Magistrates' Court Proceeding B11745153, 18 November 2011), 57 (lines 40-47), 64 (lines 23-34), 68 (lines 22-24).

[4] Section 109(1) *Magistrates' Court Act* 1989 (Vic).

[5] *Cf Branir Pty Ltd v Owston Nominees (No 2)* [2001] FCA 1833; (2001) 117 FCR 424; *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 at [65]–[94]; (2003) 197 ALR 201; (2003) 77 ALJR 989; (2003) 38 MVR 1; (2003) 24 Leg Rep 2.

[6] *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, 150–151 (Kirby P) and 156-157 (Glass JA with whom Samuels JA agreed); *State of Victoria v Subramanian* [2008] VSC 9; (2008) 19 VR 335 at [32]; *Ericsson v Popovski* [2000] VSCA 52; (2000) 1 VR 260, 265; *Waterford v Commonwealth* [1987] HCA 25; (1987) 163 CLR 54, 77; (1987) 71 ALR 673; (1987) 61 ALJR 350; 12 ALD 741 (Brennan J); *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, 356; (1990) 94 ALR 11; (1990) 64 ALJR 462; 21 ALD 1

per Mason CJ (with whom Brennan J agreed, Deane J agreed generally and Toohey and Gaudron JJ agreed on this point); ; *Birdseye v Australian Securities and Investment Commission* [2003] FCAFC 232; (2003) 38 AAR 55; 76 ALD 321; *Comcare v Etheridge* [2006] FCAFC 27; (2006) 149 FCR 522 at [15]-[16]; 227 ALR 75; (2006) 90 ALD 31; 42 AAR 335 (Branson J); *Weeks v Commissioner of Taxation* [2012] FCA 342; *Servos v Repatriation Commission* [1995] FCA 1137; (1995) 56 FCR 377, 385; (1995) 129 ALR 509; 37 ALD 489 per Spender J; *Sent v Commissioner of Taxation* [2012] FCA 382, and *Brandon v Commissioner of Taxation* [2011] FCA 264.

[7] *Wong v Carter* [2000] VSCA 53 at [43]; *Ericsson (Australia) Pty Ltd v Popovski* [2000] VSCA 52; (2000) 1 VR 260, 265.

[8] *TNT v Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation* [1988] FCA 119; (1988) 82 ALR 175, 183; (1988) 19 ATR 1067 (Gummow J); *Commissioner of Taxation v Brixius* (1987) 16 FCR 359; (1987) 7 AAR 316; 19 ATR 506.

[9] *Hoe v Manningham City Council* [2011] VSC 37, at [4] (Pagone J).

[10] *Commissioner of State Revenue v STIC Australia Pty Ltd* [2010] VSC 608, at [9], [10] (Davies J); *Birdseye v Australian Securities and Investment Commission* [2003] FCAFC 232; (2003) 38 AAR 55; 76 ALD 321.

[11] *Comcare v Etheridge* [2006] FCAFC 27; (2006) 149 FCR 522; 227 ALR 75; (2006) 90 ALD 31; 42 AAR 335; *Birdseye v Australian Securities and Investment Commission* [2003] FCAFC 232; (2003) 38 AAR 55; 76 ALD 321; *Commissioner of Taxation v STIC (Australia) Pty Ltd* [2010] VSC 608.

[12] Transcript of Proceedings (7 June 2012), 73.

[13] *Dimond v Lovell* [2002] 1 AC 384, 406 (Lord Hobhouse of Woodborough).

[14] *Dimond v Lovell* [2002] 1 AC 384*, Powercor Australia Ltd v Thomas* [2012] VSCA 87, *Neville Kingsbury-Carr v Glenn William Kiliman* [2007] ACTSC 36; (2007) 47 MVR 522.

[15] *Jansen v Dewhurst* [1969] VicRp 53; [1969] VR 421; *Murphy v Brown* (1985) 1 NSWLR 131; (1985) 2 MVR 29; [1985] Aust Torts Reports 80-701.

[16] *Jansen v Dewhurst* [1969] VicRp 53; [1969] VR 421.

[17] *Jansen v Dewhurst* [1969] VicRp 53; [1969] VR 421, 426.

[18] Exhibit SN-1 to the affidavit of Steven Nikolaidou sworn 23 December 2011 (Complaint, Magistrates' Court Proceeding B11745153) at [3].

[19] Exhibit SN-2 to the affidavit of Steven Nikolaidou sworn 23 December 2011 (Defence, Magistrates' Court Proceeding B11745153) at [3].

[20] Exhibit SN-3 to the affidavit of Steven Nikolaidou sworn 23 December 2011 (Transcript of Proceedings, Magistrates' Court Proceeding B11745153, 18 November 2011), 57 (lines 1-5 and 42).

[21] Ibid 64 (lines 23-34).

[22] *Price Street Professional Care Pty Ltd v Commissioner of Taxation* [2007] FCAFC 154; (2007) 243 ALR 728 at [29]; (2007) 97 ALD 593; (2007) 67 ATR 544 (Kenny, Edmonds and Greenwood JJ).

[23] *Chen v Chan* [2008] VSCA 280 at [42]–[48] per Maxwell P, Redlich JA and Forrest AJA; *Gould v Mount Oxide Mines Ltd (in liq)* [1916] HCA 81; (1916) 22 CLR 490. See also *Dare v Pulham* [1982] HCA 70; (1982) 148 CLR 658 at 664; 44 ALR 117; 57 ALJR 80 (Murphy, Wilson, Brennan, Deane and Dawson JJ); *Banque Commerciale SA, En liquidation v Akhil Holdings Ltd* [1990] HCA 11; (1990) 169 CLR 279; (1990) 92 ALR 53; 64 ALJR 244; *Whisprun Pty Ltd v Dixon* [2003] HCA 48; (2003) 200 ALR 447; (2003) 77 ALJR 1598 [52] (Gleeson CJ, McHugh and Gummow JJ); [2003] Aust Torts Reports 81-710; *Mann v Medical Practitioners Board of Victoria* [2004] VSCA 148 at [24]; (2004) 21 VAR 429 (per Nettle J).

APPEARANCES: For the appellant Zogiannis: TJ McLean, counsel. John Curtain & Associates, solicitors. For the respondent Stevens: M Purvis, counsel. Hall & Wilcox, solicitors.
