28/02; [2002] VSC 352

SUPREME COURT OF VICTORIA

MORTON'S MACHINERY PTY LTD v STUMPGRINDING PTY LTD

Ashley J

21 August 2002

CIVIL PROCEEDINGS – BAILMENT – ENGINE DELIVERED TO REPAIRER OF AGRICULTURAL MACHINERY UNDER WARRANTY – ENGINE COLLECTED BY CARRIER AND DELIVERED TO MANUFACTURER – ENGINE NOT RETURNED – WHETHER REPAIRER A BAILEE FOR REWARD – COMMISSION RECEIVED BY REPAIRER – BENEFIT TO BE GAINED BY REPAIRER IN UNDERTAKING WARRANTY WORK – FINDING BY MAGISTRATE THAT REPAIRER A BAILEE FOR REWARD – WHETHER MAGISTRATE IN ERROR.

Where there was a real benefit gained by a repairer in undertaking warranty work for a customer in that such work was likely to cement the relationship with the customer and in turn bring in remunerative work, it was open to a magistrate to find that when the customer left an engine at the repairer's for work to be done under the warranty the repairer was a bailee for reward.

ASHLEY J:

1. The appellant, Morton's Machinery Pty Ltd, is, *inter alia*, a repairer of agricultural machinery. It was the defendant to a proceeding brought by Stumpgrinding Pty Ltd in the Magistrates' Court. Stumpgrinding (conveniently 'the plaintiff') is the respondent to this appeal.

2. The claim made by the plaintiff alleged that by reason of agreement between it and Morton's (conveniently 'the defendant'), the latter agreed to repair a stumpgrinding machine engine which was the property of the plaintiff and, having repaired the same, to return it. The plaintiff alleged that it had demanded the return of the engine, but that the defendant had failed to abide that demand. It asserted that the defendant had been a bailee for reward. It claimed that by reason of the defendant's failure to return the engine it had suffered loss and damage, which it particularised as the cost of a replacement engine amounting to $4,398. Alternative claims were raised in conversion and detinue. The loss and damage alleged in that connection was identical.

3. By its defence, the defendant denied almost all of the allegations in the plaintiff's complaint. It further asserted that it had merely been requested to pack the engine and make the same available for collection by the manufacturer. It alleged that the machine had been collected by a carrier - that is, presumably, for delivery to the manufacturer.

4. The defendant joined third and fourth parties: the manufacturer, to whom, it seems, the engine was sent, and the carrier.

5. By the time that the proceeding came to trial in the Magistrates' Court on 21 February 2000 a settlement had been arrived at between the third and fourth parties. The learned Magistrate heard evidence from witnesses for the plaintiff and defendant. The third party was represented but adduced no evidence.

6. At the conclusion of the hearing the learned Magistrate resolved in favour of the plaintiff against the defendant, and in favour of the third party against the defendant. He made an order in the plaintiff's favour for $4,397.96, plus interest of $606 and costs of $2,155, and he ordered that the defendant pay the third party's costs of $1,843. These were, for the purposes of s109 of the *Magistrates' Court Act* 1989, final orders.

7. By this appeal the defendant appeals against the orders made in the plaintiff's favour. It does so although, as Mr Black of counsel for the defendant told me today, his client has already paid the amount of the orders made against it and in favour of the plaintiff, and the order for costs made in favour of the third party against which order there is no appeal.

8. A Master determined, in May 2000, that three questions of law had been shown by the defendant to be raised by the appeal. They were as follows:

> "(a) Whether, on the whole of the evidence, it was reasonably open to a Magistrate to reach the conclusion that the Applicant (sic) was a bailee for reward?
>
> (b) Whether, on the whole of the evidence, to (sic) was reasonably open to a Magistrate to reach the conclusion that the Applicant (sic) was in breach of its obligations as bailee?
>
> (c) Whether the proper measure of damages for the non-return of the bailed goods was the price of new replacement goods rather than the actual value of the goods bailed?"

9. Today, Mr Black agreed that the true intent of the first two questions was that there was no evidence upon which it had been open to the Magistrate to reach either of the impugned conclusions.

10. The first question raises the issue upon which, it appears, the dispute between the plaintiff and the defendant centred. Indeed, it may be said to have been the only issue that was agitated, when regard is had to the submissions of counsel which appear as part of the transcript of the proceedings below, being Exhibit PVL.3 to the affidavit of Peter Van Lierop sworn 2 May 2000.

11. The issue can be framed by reference to the reasons of the learned Magistrate which also form part of the transcript to which I referred a moment ago. His Worship found that the principal of the plaintiff, a Mr Romeo, had delivered the engine to the defendant's premises on about 30 November 1999. The engine, a 25-horsepower Koehler engine with muffler and guard, had been taken on a number of earlier occasions to the defendant's premises for warranty work and for servicing. In addition, the plaintiff had in the past had other work and other machines serviced and worked upon by the defendant. There was, according to the Magistrate, "... in that sense a business relationship with Morton's. [The Plaintiff] was a regular customer".

12. His Worship found that Mr Romeo had phoned the defendant about a week before he delivered the engine. He had spoken to a Mr Fry. He had been told to wait a week before bringing the engine in because of a press of business at Morton's. In the course of that week Mr Fry had told Mr Romeo that the engine would have to go to Sydney.

13. His Worship went on to find that Mr Romeo had dropped the engine off –

> "... on or about the 13th of November 1999 for repair knowing that the engine would probably be sent to Sydney for repair ... He left [the] engine with Morton's expecting that it would be repaired but he did not have to trouble himself with who did what to the engine as it was under warranty."

His Worship said this:

> "... I find the defendant was a bailee for reward. The plaintiff delivered the engine to the defendant for repair. The plaintiff was a regular customer of the defendant. If the defendant's only role was to box the engine up and send it to Sydney to be repaired it is still a situation where both parties can expect to derive an advantage. The plaintiff's advantage is obvious. The defendant's advantage is two fold. First the defendant is nurturing and advancing a commercial relationship with the plaintiff. That is, he's keeping a good customer happy. Secondly, the defendant can expected (sic) to be paid for any services rendered by (sic) [the manufacturer]."

14. Mr Black did not dispute the proposition that a bailee may be a bailee for reward notwithstanding that there is an absence of consideration in the contractual sense. He challenged, however, the learned Magistrate's conclusion that there was an advantage to the defendant in nurturing and advancing a commercial relationship with the respondent, and in an expectation that the defendant would be paid for any services rendered by (or to) the manufacturer. He relied upon certain evidence in cross-examination of a defendant's witness, Mr McAleer. I set out more of the evidence than that upon which counsel relied, noting that counsel relied upon the first of the questions and answers.

> Question: "So would you describe him up until these unfortunate events that he was a pretty good customer?"
> Answer: "If a customer is someone you make money out of then no. As a guy coming into the shop

as a pleasant guy and trying to fix this machine then yes he was in the shop. You know."
Question: "But you did charge him when ... you have charged him for the warranty service had you?"
Answer: "No you don't charge for warranty we claim that back for (sic) Koehler or from Engineered Products."
Question: "Oh, I see."
Answer: "But there may have been service for something we'd done we would have charged him for."
Question: "I wonder if you could just have a look at these for a moment please Mr McAleer."
Answer: "Yes well that was a service and repair there for sure. And that was for chainsaw equipment. We are talking about the stump grinder are we?"
Question: "We are talking about him as a customer and the machine and then the engine?"
Answer: "Yes that one there is definitely a service. So yes it was serviced at..."
Question: "OK ... and on the warranty you received did you when you did warranty work on behalf of EPG is it you received pretty modest commission but it is not a decent commission?"
Answer: "Well its (sic) nothing you would make a living out of that's for sure."
Question: "But they did pay you the same as they did pay others?"
Answer: "Yes."
Question: "And the reason you would do that sort of warranty business is that you assume in the hope that you would get new customers from that?"
Answer: "Yes."
Question: "For other stuff?"
Answer: "Yes."

15. It seems to me, with respect, that it did not advantage the defendant much, if at all, that warranty work, past or future, done by the defendant for the plaintiff would not, itself, be remunerative. Mr McAleer's evidence seems to me to well justify a conclusion that there was a real benefit to be gained by the defendant in undertaking warranty work for the plaintiff – on the footing that such work was likely to cement the plaintiff as a customer and, in turn, bring in remunerative work. Indeed, Mr McAleer's evidence showed that the defendant had performed remunerative work for the plaintiff before this incident; and, absent the incident, there was no disclosed reason to imagine that it would not continue.

16. The evidence given by Mr McAleer seems to me also to justify his Worship's probable conclusion – his language was not quite clear – that there was an advantage to the defendant in that it had an expectation of receiving some payment for any services which it rendered under the warranty.

17. Mr Black submitted that the Magistrate ought not to have reached the conclusion that he did because Mr Morton, a principal of the defendant, was not cross-examined to suggest that the defendant would receive any indirect benefit for undertaking what the Magistrate concluded was its role in the particular transaction. He compared the absence of such cross-examination with the fact that Mr McAleer had been relevantly cross-examined, and he submitted that it would have been more appropriate that the cross-examination had been directed to Mr Morton. He further submitted that the third party had been present at the hearing; yet the plaintiff had subpoenaed no witness from the third party who could give evidence of possible advantage to the defendant.

18. It may be said that each of those submissions is not without some force. But the question is whether there was some evidence before the Magistrate as would entitle him to reach the conclusion that he did. To say that the evidence might have been better, or that the evidence that was before his Worship was less than perfect, does not meet the necessary requirement – that is, of an absence of evidence to support the finding.

19. Mr Black also submitted that in the present case the indirect benefit which the learned Magistrate perceived flowing to the defendant was so inconsequential or ephemeral that it should be accounted no benefit at all. Having regard to Mr McAleer's evidence, I could not accept that submission.

20. I go to the second and third questions raised by the notice of appeal. I do so only to say that I should not entertain them.

21. As to the first, there seem to have been no submissions at all made by counsel for either the plaintiff or defendant at trial. What might have been an issue – that is, whether the defendant had discharged the onus of showing no want of reasonable care on its part – never saw the light

of day. The plaintiff's Complaint (which is Exhibit MM.1 to Mr Morton's affidavit sworn 22 March 2000), I add, was also pertinently silent. The Court has repeatedly said that as a general if not inflexible rule it should not permit the agitation of a matter on appeal under s109 of the *Magistrates' Court Act* which, though it might have been raised below, was not. I see no reason to depart from that rule in this instance.

22. The third question falls into the same category. The learned Magistrate awarded the plaintiff a sum which represented the cost of a new engine. It might have been argued (but it was not) that the plaintiff should have been compensated for no more than the value of the engine delivered to the defendant. Such an argument would have given rise to need to consider the conception that in a bailment case the appropriate measure of damages is *restitutio in integrum*, and how that principle should apply in the particular case. But, as I have said, the issue did not arise.

23. It is not very satisfactory for the Court to be left in the position where one or more issues that might have been agitated below were not debated; and where in consequence it considers that they should not be entertained on an appeal. But, as against that, there are the very sound principles that there must be an end to litigation, and that the parties should be held, so far as possible, to the way in which they have conducted a case at first instance.

24. In the event, the appeal must be dismissed. I make no order as to costs.

APPEARANCES: For the appellant Morton's Machinery Pty Ltd: Mr M Black, counsel. Van Lierop & Co, solicitors. No appearance for the respondent.
