13/07; [2007] VSC 28

SUPREME COURT OF VICTORIA

INSURANCE MANUFACTURERS of AUSTRALIA PTY LTD v VANDERMEER

Kaye J

14, 21 February 2007

CIVIL PROCEEDINGS – INSURANCE CLAIM – HOUSE OCCUPIED BY TENANTS – LANDLORD REMOVED HOUSEHOLD GOODS OF TENANTS AND LEFT THEM OUTSIDE THE PROPERTY ON THE ROADSIDE – LANDLORD DIRECTED BY POLICE OFFICER TO PLACE ALL PROPERTY IN SHED ON LANDLORD'S PROPERTY – PROPERTY REMOVED TO SHED – LATER CLAIMED BY TENANT THAT SOME OF THE PROPERTY HAD BEEN DAMAGED – CLAIM BY TENANT ON INSURANCE COMPANY – CLAIM DENIED – TENANT REQUIRED TO SHOW THAT DAMAGE TO PROPERTY HAD BEEN CAUSED BY MALICIOUS ACT OF LANDLORD – CLAIM UPHELD BY MAGISTRATE – REASONS GIVEN BY MAGISTRATE – WHETHER REASONS ADEQUATE – WHETHER MAGISTRATE IN ERROR IN UPHOLDING CLAIM.

V. was given access to live in G.s house. G. later required V. to vacate the premises which V. refused to do. G. with the help of others attended at the property and removed V.s household goods, some to a shed on the property and the rest to the roadside outside the property. When a police officer attended at a later time, he ordered G. to put all of the property in the shed. G. complied with this direction. When V. made a claim on her insurance policy, a loss assessor attended the property and recorded that some of the property was damaged. V. claimed that the damage occurred as a result of the malicious acts of G. and his assistants. The claim was denied and V. took action to recover the amount claimed. The magistrate upheld the claim and gave reasons for his decision. Upon appeal—

HELD: Appeal allowed. Order on the claim set aside. Matter remitted for retrial before another magistrate.

1. The requirement that a judge or magistrate, in an appropriate case, give reasons for judgment is a well established and longstanding principle of law. The reasons given for that requirement are generally twofold. First, in cases in which an appeal lies, the provision of the reasons for judgment identifies for the appellate court the reasoning and basis upon which the decision under appeal was made. Secondly, a failure by a judge or magistrate to provide such reasons can engender a real sense of grievance by the losing party, who is left ignorant as to why the decision, adverse to its interest, has been made. Allied to that reason is the public interest in maintaining public acceptance of judicial decisions and the integrity of the judicial process.

***Sun Alliance Insurance v Massoud* [1989] VicRp 2; [1989] VR 8, applied.**

2. For the purposes of the policy, the phrase "damage caused by malicious act" should be accorded the meaning stated by Thomas J in *Jeffery v Associated National Insurance Co Limited* [1984] 2 Qd R 238 where it was held that the word "malicious" in a similar phrase in a marine policy of insurance denoted loss resulting from "the intentional doing of a wrongful act without just cause." The magistrate made no finding that G. and his helpers had intentionally caused damage to the goods but stated that "all care" was not taken during the removal of the goods. Further, the magistrate did not reveal in his reasons how the actions of G. and his helpers equated to the intentional malicious causing of damage to the goods.

3. The magistrate's statement of reasons failed adequately to disclose how he came to his ultimate conclusion, namely, that the damage which he found had been occasioned to the goods was the result of a malicious act or malicious acts. The failure of the magistrate to state his reasons deprived the Court, as the appellate court, of the opportunity to examine how the magistrate reached his ultimate conclusion, and whether he did so correctly. In those circumstances, the failure of the magistrate to provide adequate reasons constituted an error of law for the purposes of s109 of the *Magistrates' Court Act*.

KAYE J:

1. At the times relevant to this appeal the respondent, Denise Vandermeer, held a policy of insurance with the appellant, Insurance Manufacturers of Australia Pty Ltd. That policy covered the respondent against loss and damage to contents of her household caused (*inter alia*) "by malicious acts". On 15 June 2004 the respondent made a claim on the appellant in which she

alleged that household contents owned by her were damaged on 14 June 2004 at premises at 2249 Murray Valley Highway, Cobram. The appellant rejected that claim. The respondent commenced proceedings against the appellant in the Magistrates' Court at Shepparton in August 2005. The hearing of the proceeding took place on 20 and 21 March 2006. The magistrate pronounced judgment in favour of the respondent on 1 May 2006, and ordered the appellant to pay the respondent $38,484.95. The appellant appeals against that judgment and order pursuant to s109 of the *Magistrates' Court Act* 1989.

2. The premises at 2249 Murray Valley Highway are and were owned by Theodore Groot. In May 2004 Mr Groot attempted to sell the property. While the property was on the market he entered into negotiations with the respondent and her husband. In the course of those negotiations Groot permitted Mr and Mrs Vandermeer to enter into possession of the property. Shortly thereafter negotiations broke down, but Mr and Mrs Vandermeer remained on the property. In early June 2004 Mr Groot attended at the property with two constables of police, one of whom was Senior Constable Eyre. The police acted as mediators and secured an agreement by Mr and Mrs Vandermeer that they would vacate the premises by 7 June 2004.

3. Notwithstanding that agreement Mr and Mrs Vandermeer remained at the premises. On 13 June 2004 Mr Groot attended at the premises together with his partner, Ms Kyra Kaywood, and six other relatives or friends. They took a trailer with them. When they arrived they found that the premises were untidy, and that there were a large number of items, including furniture, belonging to Mr and Mrs Vandermeer still at the premises. Mr Groot, together with his colleagues, then proceeded to remove the respondent's goods from the house, using the trailer to do so. By that means the goods were transported along the driveway, and were left on the side of the Murray Valley Highway. Mr Groot, in his evidence, stated that he did not leave the electrical goods of the respondent by the roadway, but stored them in a shed on the property. At the hearing before the magistrate, there was differing evidence as to the state of the weather at the time of the removal of the respondent's goods from the house. Mr Groot maintained that at that time there was light rain falling.

4. In the meantime, a neighbour, Mr John Fraser attended at the scene at about 2.30pm, and observed Mr Groot placing the respondent's belongings on the side of the road. At that time it was raining. He went back to his own house and telephoned the police. As a result Constable Eyre attended at the premises at 3.00pm. He directed Groot to remove all the items of property from the roadside, and to store them in the shed. Groot complied with that request, and as a result the respondent's items of property were all stored in the shed within 20 to 30 minutes.

5. The respondent claimed that as a result of the actions of Groot and his colleagues, a number of her items of property were either broken or damaged by the act of removing them from the house, or were damaged by their exposure to the rain and the elements. She made the claim on the policy on the basis that the damage to her property had been caused by the malicious act of those persons.

6. The proceedings before the magistrate took place on 20 and 21 March 2006. At the conclusion of the evidence, the appellant and the respondent each filed detailed written submissions. The learned magistrate published written reasons for his decision on 1 May 2006. The material part of those reasons is as follows:

> "The plaintiff must prove that the items were damaged due to a malicious act. I am satisfied that the items had been placed in the open under cover of heavy rain for approximately four and a half hours. These items included furniture, some clearly broken and items placed in cardboard boxes such as clothing, linen and household items. I am satisfied that the property was damaged as a result of the malicious act by Mr Groot and his helpers on this day. In my opinion it is clear he wanted them removed from his property at any cost and bought (sic) in approximately seven people to assist in the removal of the property. I do not accept that all care was taken during the removal of the goods. It was raining heavily and the removalists were merely intent on moving the plaintiff's belongings (from) Mr Groot's property. To place such fragile items onto the roadway in the manner they did, they would have been aware the property would be damaged."

7. The amended notice of appeal contains five grounds of appeal, namely:

1. The magistrate failed to consider and apply the correct test of what constitutes a "malicious act" within the policy.

2. On the evidence it was not open to the magistrate to find that the respondent's goods had been damaged as a result of a malicious act.

3. The magistrate erred in law in finding that the goods had been left out in the rain for four and a half hours.

4. The magistrate erred in determining the quantum of damages to be awarded to the respondent.

5. The magistrate failed to provide adequate reasons for his decision.

8. In his submissions on behalf of the appellant, Mr H. Austin correctly recognised that, logically, ground 5 should be argued first. As a prelude to his submissions on that ground, Mr Austin made two points. First, he pointed out that the case made by the respondent before the magistrate was that the damage, which was claimed from the insurer, was caused by the act of Groot and his cohorts in removing her goods from the house, and placing them by the roadway. The respondent did not claim that any of the damage was caused by the subsequent movement of the goods from the side of the roadway to the shed, or their storage in the shed, at the behest of Senior Constable Eyre. Secondly, it was common ground before the magistrate, and indeed before me that, for the purposes of the policy, the phrase "damage caused by malicious act" should be accorded the meaning stated by Thomas J in *Jeffery v Associated National Insurance Co Limited*. [1] In that case his Honour held that the word "malicious" in a similar phrase in a marine policy of insurance denoted loss resulting from "the intentional doing of a wrongful act without just cause."

9. In support of ground 5 Mr Austin submitted:

(1) The magistrate found that the respondent's goods were damaged, not just by their exposure to rain when left on the roadside, but also by the act of their removal from the house and carriage to and placement at the roadside. The only direct evidence that, before the goods were subsequently moved from the roadside, any were broken, was an observation by Mr Fraser that a table was seen to be broken. Senior Constable Eyre did not observe any such damage to the furniture. On the other hand both Mr Groot and Ms Kaywood stated in evidence that the goods had been handled with care, and that no damage was occasioned by their removal from the house and placement by the side of the road. Their evidence to that effect was not challenged in cross-examination and it was uncontradicted. The learned magistrate failed to identify why he did not accept that evidence, how it was that the damage was caused, and what kind of damage had been caused to the goods, as a result of their removal from the house and carriage to the roadside. Mr Groot also gave evidence, which was not contradicted or challenged in cross-examination, that the electrical goods were removed straight from the house to the shed, and not placed by the roadside. However the magistrate found that some of the electrical goods were damaged and awarded damages in respect of them. Again the magistrate did not give any reasons for rejecting the uncontradicted and unchallenged evidence of Groot, nor did he identify how those goods were damaged, or the extent of that damage.

(2) Further, Mr Austin submitted that the magistrate failed to give any or any adequate reasons for his findings that the damage which he found had been caused to the goods was the result of a malicious act by Groot and his helpers. Mr Austin submitted that the magistrate failed to pay any heed to the agreed test of "malicious" stated in *Jeffery*'s case. In particular the magistrate failed to identify how he came to the conclusion that the damage was caused by an intentional act of Groot and his helpers. Further, the magistrate failed to consider whether the acts of Groot and his helpers were unlawful for the purposes of the test enunciated in *Jeffery*'s case. In particular, the magistrate failed to deal with the issue of the right of an owner of a property to remove goods which have been wrongly stored on that property without his permission.

10. In response Mr Cahill, who appeared for the respondent, submitted:

(1) It was clear that the magistrate did not accept the evidence of Groot and Kaywood that care had been taken in removal of the goods, and found that the goods had been damaged in transit between the house and the roadway. Although the magistrate did not state why he had rejected the evidence, nonetheless his reasons make it clear that he did not accept nor rely on that evidence in support of his conclusions. Mr Cahill submitted that the evidence of Mr Groot and Ms Kaywood was not entirely uncontradicted on that aspect of the case. First, Senior Constable Eyre, on arrival, observed a suitcase with wet clothes. Furthermore, the loss assessor, Mr Dolman, stated that when he inspected the shed some days later, it was a mess. Mr Dolman himself found that there were 15 damaged items in

> the shed. It was not put in cross-examination to the plaintiff that she had been responsible for the damage to any of those items, either before their removal from the house, or after their storage in the shed. Thus it is implicit that the magistrate preferred that evidence to the evidence of Groot and Kaywood as to the occurrence of damage to the goods resulting from their removal from the house and placement by the side of the road.
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> (2) Mr Cahill further submitted that the magistrate found that the cause of the damage was malicious in that it resulted from the reckless indifference of Groot and his helpers to the fate of the goods. There was evidence that it was raining heavily. Further there was evidence of some pre-existing hostile intent, at least by Ms Kaywood to the respondent. Mr Cahill further pointed out that, by stating that he "did not accept" that all care was taken in the disposition of the goods, the magistrate indicated that he had considered the evidence of Groot and Kaywood to the contrary, and rejected that evidence.
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> (3) Mr Cahill submitted that the magistrate's reasons must be understood in the light of the detailed and thorough written submissions of the parties. In publishing his written reasons, the magistrate assumed that the parties were well acquainted with the competing positions put by the parties in relation to the issues which he had to determine.

11. The requirement that a judge or magistrate, in an appropriate case, give reasons for judgment is a well established and longstanding principle of law.[2] The reasons given for that requirement are generally twofold. First, in cases in which an appeal lies, the provision of the reasons for judgment identifies for the appellate court the reasoning and basis upon which the decision under appeal was made. Thus in *Pettitt v Dunkley*,[3] Moffitt JA stated:

> "The reason why the judicial obligation to give reasons in an appropriate case exists, is, that where an appeal is provided, the trial at first instance does not exhaust the rights which parties have. Just as an express statutory requirement to find facts and give a decision on the particular question of law which arises is directed to ensuring that the right of appeal in case of error of law is effective, so any general judicial duty to give reasons is similarly directed. ... [T]he duty of the judge or court is not limited to hearing the case and entering a verdict. Not only has he a judicial duty to determine and enforce the rights of parties at a trial judicially conducted at first instance, but he also has a judicial duty which, within some limits, is directed to preserving and facilitating any rights of appeal from his decision which a party may have."

12. The second reason for the requirement to provide reasons is that a failure by a judge to provide such reasons can engender a real sense of grievance by the losing party, who is left ignorant as to why the decision, adverse to its interest, has been made. Allied to that reason is the public interest in maintaining public acceptance of judicial decisions and the integrity of the judicial process.[4]

13. Those two reasons led Gray J, who delivered the leading judgment of the Full Court of Victoria in *Sun Alliance Insurance v Massoud*, to identify the two fundamental criteria, which his Honour considered were critical to the provision of adequate reasons by a judicial officer. His Honour stated:[5]

> "In my opinion, the decided cases show that the law has developed in a way which obliges a court from which an appeal lies to state adequate reasons for its decision.
>
> The adequacy of the reasons will depend upon the circumstances of the case. But the reasons will, in my opinion, be inadequate if ... –
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> (a) The appeal court is unable to ascertain the reasoning upon which the decision is based; or
>
> (b) justice is not seen to have been done.
>
> The two above stated criteria of inadequacy will frequent overlap. If the primary Judge does not sufficiently disclose his or her reasoning, the appeal court is denied the opportunity to detect error and the losing party is denied knowledge of why his or her case was rejected."

14. In *Beale v Government Insurance Office of NSW*,[6] Meagher JA, in considering an appeal from a decision of a district court judge, stated that there are three fundamental elements of an adequate statement of reasons, namely: the judge should refer to relevant evidence; the judge should set out any material findings of fact and conclusions or ultimate findings of fact reached; and the judge should provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts so found.

15. Under s109 of the *Magistrates' Court Act*, the right of appeal of a party to a civil proceeding before a magistrate to the Supreme Court is confined to an appeal on a question of law. In those circumstances the requirement for the provision of reasons as to findings of fact by a magistrate is less rigorous than in a case in which an appeal lies on questions of fact. Thus in *Perkins v County Court of Victoria*,[7] Buchanan JA stated:

> "The degree of detailed reasoning required of a tribunal depends upon the nature of the determination, the complexity of the issues and whether the issues are ones of fact or law or of mixed fact and law, and the function to be served by the giving of reasons. As to the last matter, reasons which are required to enable a right of appeal on questions of fact to be exercised might not be required if an appeal is limited to questions of law."

16. In *Perkins*, Buchanan JA adopted the statement of principle by McHugh JA in *Soulemezis v Dudley (Holdings) Pty Ltd*.[8] In that case the applicant appealed against the finding by the Compensation Court of New South Wales that she was fit to work after a particular date. The right of appeal was only available in respect of a question of law. McHugh JA stated:

> "Whilst it is true that his Honour did not expressly give any reasons for the finding, his reasons for judgment show quite clearly in my opinion that he held that the applicant was fit for work because the CAT scan did not reveal any abnormality. ... What is decisive is that his Honour's judgment reveals the ground for, although not the detailed reasoning in support of, his finding of fact. But that is enough in the case when no appeal lies against the finding of fact. Accordingly there was no failure to give reasons sufficient to constitute an error of law."

17. In this case it is at least implicit from the reasons of the magistrate that he found, first, that the goods of the respondent had been damaged both through the act of their removal and storage by the side of the road, and, also, by being exposed to rain and the elements while they were at the roadside. Secondly, the magistrate found that that damage to the respondent's goods was the result of a malicious act or malicious acts by Groot and his colleagues. Both of those issues were live issues at the hearing before the magistrate. In order to determine the adequacy of the magistrate's reasons for finding in favour of the respondent on both issues, it is necessary first to identify the evidence that was led by each party in relation to them.

18. The respondent herself was not present while the goods were carried to the side of the road and stored there. In the afternoon of 13 June she received a telephone call from Mr Fraser, as a result of which she returned to the property. When she arrived the goods had already been moved inside the shed. On the next day she observed their condition in the shed. She stated that they were a mess. There were wet soggy boxes strewn about the shed, there were smashed tables and chairs, and some items were missing. She gave detailed evidence as to what items were missing, and what items were either broken or spoiled by exposure to the rain and mud. Although the respondent was cross-examined at some length, she was not cross-examined as to the condition of the goods before their removal from the house, except that it was put to her that the goods were in a dirty condition when they were in the house. The respondent rejected that proposition.

19. Mr Fraser was also called to give evidence on behalf of the respondent. He said that when he arrived it was raining. When asked to describe the condition of the respondent's goods he said there was a broken table, and the furniture was all wet in the rain. He said that there was "a fair bit of stuff in broken boxes" which were just tied up with pieces of twine.

20. Mr Groot gave evidence concerning the removal of the goods from the property. He said that when he arrived at the house, it was dirty. He said that he then proceeded to remove the respondent's belongings to the side of the road by using his trailer which was attached to his motor vehicle. He said that he moved four loads of items to the side of the road, and that each load took about ten minutes. When he had completed removing the goods to the roadside the police arrived and directed him to put them in the shed. He complied with that direction. It took him about half an hour to move all of the respondent's items to the shed. He said that he handled the respondent's goods with care, and he denied occasioning any damage to them. He said that when he commenced to remove the goods from the house it had started to drizzle. In cross-examination he denied that there was a heavy drizzle, and he denied that the ground around the house and the sheds and by the road was muddy. He denied that any of the items were damaged. He also said that he did not place any of the respondent's electrical items by the roadside, but

put them directly in the shed. He was not cross-examined as to the method by which the goods were transported from the house to the road, and it was not put to him that the act of removing them from the side of the roadway had occasioned the damage claimed by the respondent.

21. Ms Kaywood gave evidence on behalf of the appellant. She stated that she stayed in the kitchen and was packing items into boxes. She said she did so carefully. She said that those who were involved in moving the boxes from the house did so carefully so that they would not be damaged. She denied that any items were damaged by her stacking the goods in boxes. The only cross-examination on that issue was as to the state of the weather at the time that the goods were removed. Ms Kaywood denied that it was raining, and said that it did start to drizzle for about five minutes.

22. The appellant also called Senior Constable Eyre to give evidence. Senior Constable Eyre stated that it was raining heavily on the day in question. When he arrived at the premises after being called by Mr Fraser, Mr Groot and his family were stacking furniture beside the roadway. He said there were some things that were stacked on top of each other, and it was not simply thrown into a pile. When he told Groot that the goods had to be moved to the shed, Groot and his colleagues complied, and had moved the goods within 20 to 30 minutes. He said that in that process Groot and his family handled the goods in a manner which was "fairly businesslike". He said that they were placing the goods in the shed, not throwing them in. The goods were treated in a manner which would not have caused damage to them. He said that while he was there he did not observe any damage being caused to the respondent's goods. That evidence was not challenged in cross-examination.

23. Finally, the appellant called Mr Phillip Dolman, an insurance loss adjuster. Mr Dolman stated that he attended at the property on 17 June. He took photos of the items in the shed. As a result of his inspection he prepared a report to the insurer which was tendered in evidence. That report identified a number of items of which he recorded "damage sighted", by which he meant that he had actually observed the damage claimed by the respondent. Mr Dolman gave evidence as to his assessment of the claim made by the respondent.

24. It is in that context that the magistrate was required to decide whether the property of the respondent was damaged, and, if so, whether it was damaged as a result of a malicious act or acts of some other persons, in this case, of Groot and his colleagues. As I have stated, it is implicit in his Honour's reasons that he found that some of the respondent's goods were damaged in the sense that they were broken. He referred to some items of furniture being "clearly broken". Of the damages that were awarded to the respondent, apparently some $25,168.95 was compensation for breakages and the like to property of the respondent, as distinct from rain damage. It was certainly open to the magistrate to find that the property of the respondent was damaged in the process of it being removed from the house and placed by the roadside. The magistrate would have been entitled to accept the evidence of the respondent that the property was undamaged before its removal from the house, and the evidence of the respondent and Dolman as to the damage which had been observed to the respondent's goods when they were in the shed. If the magistrate accepted those two sets of evidence, it was open to him to infer that the respondent's goods had been damaged as a result of their removal from the house and being placed by the roadside.

25. On the other hand that finding by the magistrate involved rejecting the evidence of Mr Groot and Ms Kaywood. Neither of those witnesses were cross-examined as to whether damage was caused to the respondent's property as a result of its carriage from the house to the roadside and its placement on the roadside. The magistrate has not exposed in his reasons just why he rejected the evidence of Groot and Kaywood on that aspect of the case.

26. In a case where an appeal lies on findings of fact, the failure of a judge to identify why the evidence of one witness is preferred to another may, in an appropriate case, constitute an error of law.[9] This being an appeal from a decision of a magistrate on an error of law, such an omission would not, in my view, alone constitute an error of law. However, having found that damage was caused to the respondent's goods by their removal from the house and being placed by the roadside, the magistrate then proceeded to hold that those goods were damaged "as a result of a malicious act by Mr Groot and his helpers on that day". It is here that the written reasons of the magistrate, in my view, are deficient. The magistrate stated:

> "In my opinion it is clear he wanted them removed from his property at any cost and brought in approximately seven people to assist in the removal of the property. I do not accept that all care was taken during the removal of the goods. It was raining heavily and the removalists were merely intent on moving the plaintiff's belongings from Mr Groot's property. To place such fragile items onto the roadway in the manner they did, they would have been aware that property would be damaged."

27. As I have already stated, at the hearing before the magistrate, and before me, the parties accepted and adopted the test of "malicious act" postulated by Thomas J in *Jeffery*, namely, the intentional doing of a wrongful act without just cause. In other words the parties adopted and put to the magistrate that the correct test of "malicious act", for the purposes of the policy, was an act intentionally causing the damage complained of. The magistrate did not make any express finding that Groot and his helpers had intentionally caused the damage to the goods. The magistrate stated that he did not accept that "all care" was taken during the removal of the goods, and that in placing fragile items onto the roadway in the manner they did "they would have been aware that property would be damaged." (Emphasis added). However, the magistrate did not make any finding as to what act or acts caused the damage to the property and how such acts could be characterised as malicious. More importantly, the magistrate did not in his reasoning reveal how it was that he considered that the lack of "all care" by Groot and his helpers, and the fact that they "would" have been aware that the property would be damaged, equated to the intentional malicious causing of damage to the goods.

28. It is possible that, in finding malicious damage in relation to the articles that were actually broken or otherwise damaged, the magistrate had in mind the concept of reckless indifference. In his written submissions, counsel for the respondent had submitted that Groot and his friends had no concern for the respondent's goods in putting them on the roadway; that there was an intention to leave the goods there without regard for their safety or their care "or at the very least reckless indifferences as to the care of the contents"; and that there was the real likelihood of theft or damage of the contents but for the timely intervention of Senior Constable Eyre. However, the magistrate does not make it clear from his reasons that he was in fact adopting any such concept.

29. There were no detailed submissions before me, or indeed before the magistrate, as to whether, for the purposes of the test postulated in *Jeffery*, reckless indifference was sufficient to constitute malice. Certainly the concept of reckless indifference has its place in the criminal law. In an appropriate case it is equated with the malice required to prove the charge of murder, namely, the intention to kill or cause really serious injury.[10] Similarly, the charge of malicious wounding under the previous provisions of the *Crimes Act* was held to be made out where the accused had acted with reckless indifference to whether or not his actions caused injury to the victim.[11] In the absence of argument before me it is neither desirable nor necessary for me to determine this point. However assuming that a malicious act for the purposes of the policy is an act which the culprit knows will probably, or even possibly, result in damage to goods, and nonetheless acts with reckless disregard for the safety of the goods, there is still a significant gap in the reasons of the magistrate in equating his findings, such as they are expressed, with malice for the purposes of the policy. At its highest, the magistrate found that he did not accept that "all care" was taken during the removal of the goods, and that when the goods were placed on the roadway Groot and his helpers "would have been" aware that the property would be damaged. His Honour made no specific finding that Groot and his helpers actually had such an awareness. Further he made no finding as to how such recklessness caused damage to the goods. For example, if the goods were already damaged, then their placement by the roadside, and being exposed to theft and the like, would be irrelevant.

30. In a sense, such findings as may be extracted from the decision of the magistrate do not, on their face, amount to a finding which is equivalent to recklessness in the sense which I have described above. Thus, arguably, ground 2 of the grounds of appeal has been made out. However so to conclude would, in my view, be unfair to the respondent. The real difficulty lies in the failure of the magistrate to reveal in his reasons for decision how it is that he concluded that the damage to the goods was caused by a malicious act or malicious acts of Groot and his helpers.

31. The magistrate also found that some of the goods of the respondent were damaged by rain. It appears that his Honour's award of damages to the respondent included an award of some $13,316 for rain damaged goods. The evidence of Senior Constable Eyre, and of Mr Fraser, supports the conclusion that at the time they attended, it was raining heavily. Groot and Ms Kaywood gave

evidence to the contrary. It is implicit that the magistrate rejected that evidence. He did so without any explanation. Likewise he appears to have rejected the uncontradicted evidence of Groot that he placed all the electrical goods in the shed and not by the road. Again the magistrate's failure to reveal why he rejected the evidence of Groot and Kaywood would not, alone, constitute an error of law. However it is allied to another issue which is of greater moment. The magistrate in his reasons for decision stated that he was satisfied that the items " ... had been placed in the open under cover of heavy rain for approximately four and a half hours." There was no evidence which supported that finding. At most the evidence supported a finding that the items were exposed for one and a half hours. Indeed, it appears that Groot had only just concluded, or was concluding, placing them in the open, when Senior Constable Eyre intervened, and directed him to place them in the shed. Mr Cahill, who appeared for the respondent, properly conceded that the magistrate's finding was an error. That finding is the subject of ground 3.

32. Mr Cahill contended that the error was of no consequence, because there was other evidence that the items were damaged by rain, and the length of their exposure to the rain was of no consequence. However, the error of fact by the magistrate may be relevant to the finding by him that the exposure of the goods to rain constituted a malicious act by Groot and his helpers. The magistrate did not make it clear whether his finding, as to the period of time for which the items were exposed, was relevant or important to his decision that the rain damage to the respondent's goods was the result of a malicious act by Groot and his helpers. If that finding of fact was relevant to the magistrate's ultimate conclusion, then it may vitiate that conclusion. In particular if the magistrate's finding that the goods had been exposed for four and a half hours was critical to his ultimate decision that the rain damage to the goods was caused by a malicious act, then the magistrate would have made an error of law.[12] It is at this point that the inadequacy of the magistrate's reasons again becomes evident. His Honour has failed to reveal just why it was that he concluded that the placement of the goods in the rain constituted, not just a careless act by Groot and his helpers, but a malicious act, for the purposes of the policy. Again, the findings by the magistrate that he did not accept that all care was taken, and that Groot and his helpers were merely intent on moving the plaintiff's belonging from Groot's property, do not, alone, equate to a finding of reckless indifference, let alone a finding of intentional damage.

33. There is a further difficulty with the magistrate's reasons for finding that the respondent's goods were damaged as a result of a malicious act or malicious acts. The test articulated by Thomas J in *Jeffery* of "malicious act" involves the concept of intentional damage without lawful excuse. In his written submissions to the magistrate, the appellant argued that Groot was entitled to re-enter the premises on the day on which the respondent had agreed to vacate them and failed to do so. Thus it was submitted that Groot's dealing with the respondent's goods could not be considered "unlawful" for the purposes of a finding that the damage was caused by a malicious act. The magistrate in his reasons did not address the question whether Groot, in the circumstances, was acting lawfully or otherwise in removing the goods from the house and placing them by the roadside. That question does raise complex and unresolved issues of law. In *Haniotis v Dimitriou*,[13] Brooking J considered, but did not find it necessary to determine, whether a landlord, exercising a lawful right of re-entry, was required to exercise any and if so what degree of care in removing the tenant's goods from the demised premises. Nonetheless the magistrate did not in his reasons give any consideration to the question whether the acts of Groot and his helpers were wrongful acts "without just cause" for the purposes of the definition of "malicious act" adopted by Thomas J in *Jeffery*'s case.

34. It is with some reluctance and hesitation that I would come to a conclusion that a magistrate, having heard and considered a case such as this, has failed to provide adequate reasons for his decision. It is well recognised and understood that the requirement for the provision of reasons by a magistrate is less rigorous than that imposed on judges who are higher in the court hierarchy. Furthermore, the magistrate in this case had the benefit of detailed and careful submissions. I suspect that his Honour resorted to an economic expression of his conclusions, rather than a detailed statement of his reasons, by assuming that the parties to whom his decision was addressed would understand how he had resolved the competing issues which had been agitated in the submissions. However, and be that as it may, the analysis upon which I have embarked above reveals, in my view, that the magistrate's statement of reasons fails adequately to disclose how his Honour came to his ultimate conclusion, namely, that the damage which his Honour found had been occasioned to the appellant's goods was the result of a malicious act or malicious acts.

The failure of the magistrate to state his reasons deprives this Court, as the appellate court, of the opportunity to examine how the magistrate reached his ultimate conclusion, and whether he did so correctly. In those circumstances I consider that his Honour's failure to provide adequate reasons does constitute an error of law for the purposes of s109 of the *Magistrates' Court Act*.[14]

35. It was common ground between the parties that if I were to conclude that the magistrate had made an error of law requiring me to set aside the decision of the magistrate, then I should remit the matter to the Magistrates' Court for hearing by a different magistrate. As I have reached the conclusion that the magistrate erred in law in failing to provide adequate reasons for his decision, it follows that the appropriate conclusion is that the magistrate's decision of 1 May 2006 should be set aside, and that the matter should be remitted to the Magistrates' Court for hearing before another magistrate.

36. In light of the conclusions which I have reached, it is not necessary for me to determine the other four grounds of appeal in the appellant's amended notice of appeal. However in deference to the careful and thorough submissions which were addressed to me by both sides, I shall deal with them briefly. Mr Austin correctly conceded that ground 2 was somewhat ambitious. This is because the magistrate did not make sufficient findings of fact to enable a conclusion to be reached as to whether or not, on the evidence, it was open to find a malicious act on behalf of Groot and his helpers. On such findings as can be elicited from the magistrate's reasons, I have already expressed the view that the ultimate conclusion that the respondent's goods were damaged by a malicious act was not open. However as I have already stated, to so conclude would be unfair to the respondent, since the magistrate has not addressed the findings which are necessary to determine whether or not the respondent's goods were damaged as a result of a malicious act or malicious acts.

37. I have already observed that Mr Cahill has correctly conceded that the magistrate's finding that the property had been left in the rain for four and a half hours was erroneous. Thus the error identified in ground 3 is made out as a matter of fact. However, it is not possible to determine whether that error is an error of law, because it is not possible to discern whether that finding by the magistrate was critical to his conclusion that Groot and his helpers had committed a malicious act which caused damage to the goods.

38. The fourth ground of appeal was that the magistrate erred in determining the quantum of damages to be awarded to the respondent. This ground of appeal was based on the proposition that the magistrate had only found that the act of leaving the property in the rain constituted a malicious act. If that proposition is correct, then the magistrate could not have awarded more than $13,316 damages to the respondent. However, although the magistrate did not expressly so state, it is, in my view, implicit in his Honour's reasons that he found not only that the respondent's property had been damaged by its exposure to the elements, but also that there had been damage to that property in the process of removing it from the house and placing it by the side of the road. Accordingly the fourth ground of appeal would not succeed.

39. Thus, I have concluded that ground 5 of the amended notice of appeal is made out by the appellant. The learned magistrate erred in law in failing to provide adequate reasons for his decision. Accordingly, and subject to discussion with counsel, I propose the following orders:

1. The appeal be allowed.
2. The order of the magistrate at Shepparton made 1 May 2006 be set aside.
3. The matter be remitted to the Magistrates' Court of Victoria for retrial, before a magistrate other than the magistrate who heard the matter below.

40. I shall hear counsel on the question of costs.

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[1] [1984] 2 Qd R 238 at 249.
[2] *De Iacovo v Lacanale* [1957] VicRp 78; [1957] VR 553 at 557-9 (Monahan J); *Sun Alliance Insurance Limited v Massoud* [1989] VicRp 2; [1989] VR 8 at 18-19 (Gray J); *Pettitt v Dunkley* 38 FLR 199; [1971] 1 NSWLR 376; 5 Fam LR 137; *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd (No 2)* [2002] VSCA 189; (2002) 6 VR 1 at [99] to [106]; *Intertransport International Private Ltd v Donaldson* [2005] VSCA 303 at [18]-[19] (Chernov JA).
[3] Above at 388.

[4] *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 440 at 442 (Meagher JA); *Sun Alliance Insurance v Massoud* (above at 18).
[5] Above at 18.
[6] Above at 443.
[7] [2000] VSCA 171; (2000) 2 VR 246 at 273; (2000) 115 A Crim R 528.
[8] (1987) 10 NSWLR 247 at 282.
[9] *Hadid v Redpath* [2001] NSWCA 416 (2001) 35 MVR 152 at 164 [53] (Heydon JA).
[10] *Pemble v R* [1971] HCA 20; (1971) 124 CLR 107 at 120 (Barwick CJ); [1971] ALR 762; (1971) 45 ALJR 333.
[11] *R v Lovett* [1975] VicRp 49; [1975] VR 488 at 494; *R v Bacash* [1981] VicRp 86; [1981] VR 923 at 924; and compare also *R v Whitehead* [1960] VicRp 3; [1960] VR 12 at 13.
[12] *S v Crimes Compensation Tribunal* [1998] 1 VR 83 at 90 (Phillips JA).
[13] [1983] VicRp 46; [1983] 1 VR 498.
[14] *Pettitt v Dunkley* (above) at 381-2.

APPEARANCES: For the appellant DPP: Mr CW Beale, counsel. Solicitor for Public Prosecutions. For the respondent Bleakley: Mr W Walsh-Buckley, counsel. Stephen Andrianakis & Associates, solicitors.
