32/06; [2006] VSCA 186

SUPREME COURT OF VICTORIA — COURT OF APPEAL

KUEK v DEVFLAN PTY LTD and ANOR

Warren CJ, Eames JA and Bell AJA

31 August 2006

CIVIL PROCEEDINGS – WORK AND LABOUR DONE TO MOTOR VEHICLE – WARRANTY GIVEN IN RELATION TO WORK DONE AND MATERIALS SUPPLIED – WITHIN WARRANTY PERIOD ENGINE BROKE DOWN – ENGINE SAID TO BE DAMAGED DUE TO FRAYED TIMING BELT – PROCEEDINGS BROUGHT BY VEHICLE OWNER CLAIMING DAMAGES AGAINST MECHANIC AND A COMPANY ASSOCIATED WITH THE MECHANIC – NATURE OF CONTRACTUAL RELATIONSHIP – WHETHER WITH MECHANIC OR COMPANY OR BOTH – FINDING BY MAGISTRATE THAT CONTRACT NOT MADE WITH COMPANY – CLAIM AGAINST COMPANY DISMISSED – WHETHER MAGISTRATE IN ERROR – WARRANTY AS TO FITNESS AND SERVICE – FINDING BY MAGISTRATE THAT TIMING BELT DID NOT CAUSE THE ENGINE DAMAGE – CLAIM AGAINST MECHANIC DISMISSED – WHETHER MAGISTRATE IN ERROR – APPEAL AGAINST MAGISTRATE'S FINDING DISMISSED BY SUPREME COURT – APPELLANT ORDERED BY SUPREME COURT TO PAY INDEMNITY COSTS – WHETHER JUDGE IN ERROR.

K. contacted N. and asked him to carry out repairs to K's motor vehicle. N. attended K.'s house and carried out the repairs and gave a written warranty of 12 months or 20,000kms. When the vehicle broke down during the warranty period, K. issued proceedings against N. and also DP/L which carried on the business of mechanic and autoelectrical trading as Lubi's Mobile. After hearing evidence, the magistrate found that there was no contractual relationship beween K. and DP/L and dismissed the claim. In relation to the main factual issue, the magistrate found that the frayed timing belt did not cause the engine damage and then dismissed the claim against N. An appeal to the Supreme Court of Victoria was dismissed (cf MC 10/2005] and the judge granted indemnity costs against K. Upon appeal—

HELD: Appeal in relation to the main factual issue dismissed. Appeal in relation to the order for indemnity costs upheld.

1. The magistrate was in error in deciding that there was no contractual relationship between DP/L and K. The undisputed facts showed that N. was acting on behalf of the company and as a result, if K. was entitled to relief in respect of N.s allegedly defective work he was entitled to relief against the company.

2. The appeal must be dismissed because of the magistrate's unchallenged finding as to the lack of any causation between the frayed timing belt and the damage to the engine. This unchallenged finding constituted an insuperable obstacle to K.s case. The claim that he brought was a claim for damages relating to the damage caused to the engine of his vehicle by virtue of the failure of the timing belt. That damage was primarily quantified as the cost of a replacement engine, which came complete with a new timing belt. The claim was not for the cost of replacing the defective belt. The damages claim was put in negligence or breach of contract due to poor workmanship, and/or breach of warranty. The magistrate, in deciding those claims, had to decide whether the damage to the engine was due to the belt. When he decided that point against K. this meant that the negligence and breach of contract claim, and the warranty claim, as put, had to fail. That finding was a complete answer to the claim against Devflan Pty Ltd, so the case against that company would have failed even if K. had been found to have contracted with it.

3. In relation to the order with respect to indemnity costs, there was no basis known or apparent for the making of the order other than an order for party-party costs. Accordingly, the appeal so far as it relates to the matter of costs is allowed.

***Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority* [2005] VSCA 298; (2005) 13 VR 435, followed.**

WARREN CJ:

1. I invite Bell AJA to state his reasons first.

BELL AJA:

2. Gabriel Kuek was the owner of a 1994 2.2 litre Toyota Camry. When the vehicle broke down

he contacted Luby's Mobile Mechanics in order to obtain assistance repairing the vehicle. A Mr Ljubomir Nikolovski came in response to that call and repaired the vehicle. On 24 March 2003 he replaced the timing belt and performed some other minor work. Luby's Mobile Mechanics was the trading name of Devflan Pty Ltd. As the invoice for Mr Nikolovski's work disclosed, Mr Nikolovski was an employee and a director of that company. The invoice carried a warranty expressed in these terms: "Warranty 12 months, 20,000."

3. On 13 May 2003, Mr Kuek's vehicle broke down again. A mechanical examination revealed that the timing belt was frayed and that the engine itself had been damaged. In particular, it had bent valves.

4. Mr Kuek issued proceedings in the Magistrates' Court of Victoria against Devflan Pty Ltd and Mr Nikolovski. The basis of the claim sufficiently appears from paragraphs 6 to 9 of the complaint dated 4 September 2003, from which I quote:

> "6. On 13 May 2003 the engine of the plaintiff's motor vehicle broke down. The breakdown was due to negligence and/or unsatisfactory work that the defendants performed on the engine. Particulars of negligence and/or unsatisfactory work: (a) The defendants failed to properly check the engine. (b) The defendants failed to properly identify all the problems in the engine. (c) The defendants failed to properly assess what problems in the engine required replacement, repair and/or servicing. (d) The defendants failed to replace those parts in the engine that required replacing. (e) The defendants failed to properly undertake necessary repairs and/or service to the engine.
>
> 7. Further and in the alternative, the defendants failed to fulfil their contractual obligation to rectify the problems in the engine.
>
> 8. Further and in the alternative, the work that the defendants provided and/or supplied were not fit for the purpose for which they were intended.
>
> 9. As a result of the defendants' negligence and/or breach of contract, the plaintiff suffered financial loss. Particulars of loss: (a) Tow truck fee (to be advised). (b) Auto-electrician's diagnostic fee: $77. (c) Mechanic's assessment fee: $53.90. (d) Cost of repairs to engine of motor vehicle: $1,925. (e) Loss of remunerative time by reason of lack of motor vehicle: $1,800. Total: $3,855.90."

5. The claim was heard by a magistrate, who, on 22 October 2004, dismissed it with costs. The magistrate had competing evidence before him about the possible causes of the damage to the engine. This was the main factual issue in the case. His Honour decided to accept the evidence of the respondents that the timing belt, even if it had operated defectively, could not have caused the engine damage. This finding was not challenged on appeal.

6. Mr Kuek presented his case to the magistrate upon the additional basis that the warranty in respect of the timing belt was, in effect, an unconditional guarantee, but the additional basis was put as another way of obtaining damages for replacing the damaged engine. There was no distinct claim for the replacement of the frayed belt. The magistrate rejected this alternative claim, as it was not shown that the belt caused the engine damage.

7. Mr Kuek appealed from his Honour's decision to the Supreme Court. The questions in the appeal are set out in the order of Master Wheeler dated 17 October 2004. The only two pressed were these:

> "(a) Was it open to the learned magistrate to hold that there was no relevant contractual relationship between the first respondent and the appellant?
>
> (b) Did the learned magistrate consider the extent of the warranty (Exhibit GK.4 to the affidavit of Gabriel Kuek sworn 22 November 2004), particularly as to whether such warranty covered (i) initial inspection and advice; and (ii) consequential damages as a result of the work performed?

8. On 18 May 2005, Balmford J dismissed the appeal. Her Honour found that the error of law specified in paragraph (a) was not established because it was open on the facts for the magistrate to have found as he did, and her Honour found that the error of law in paragraph (b) was not established because the magistrate did consider the extent of the warranty. Her Honour dismissed the appeal and granted indemnity costs against Mr Kuek. Mr Kuek now appeals to this Court.

9. Before turning to why, in my view, this appeal must be dismissed, I wish to say that, with respect, I could not agree that the magistrate was correct in law to decide that there was no contractual relationship between Devflan Pty Ltd and Mr Kuek. The undisputed facts show that Mr Nikolovski was acting on behalf of the company. In consequence, if Mr Kuek was entitled to relief in respect of Mr Nikolovski's allegedly defective work, he was entitled to that relief against the company.

10. The appeal must be dismissed because of the magistrate's unchallenged finding as to the lack of any causation between the frayed timing belt and the damage to the engine. This unchallenged finding constitutes an insuperable obstacle to Mr Kuek's case. The claim that he brought was a claim for damages relating to the damage caused to the engine of his vehicle by virtue of the failure of the timing belt. That damage was primarily quantified as the cost of a replacement engine, which came complete with a new timing belt. The claim was not for the cost of replacing the defective belt. The damages claim was put in negligence or breach of contract due to poor workmanship, and/or breach of warranty. The magistrate, in deciding those claims, had to decide whether the damage to the engine was due to the belt. When he decided that point against Mr Kuek, this meant that the negligence and breach of contract claim, and the warranty claim, as put, had to fail. No ground of appeal invited Balmford J or this Court to disturb that positive finding. The finding is a complete answer to the claim against Devflan Pty Ltd, so the case against that company would have failed even if Mr Kuek had been found to have contracted with it.

11. It was submitted on behalf of Mr Kuek that the appeal should be allowed to proceed on a basis not put before the magistrate or Balmford J, namely, that the warranty claim encompassed a lesser claim for the cost of replacing the frayed belt. This submission must be rejected. The factual issue of what damages, if any, flowed from having to replace the belt was not determined by the magistrate because it was not an issue in the trial. It appears to be entirely speculative whether Mr Kuek suffered any specific damages as a result of the alleged breach of the warranty, as the whole engine, including the belt, was replaced. Mr Kuek is not here seeking to put on appeal an argument that different legal consequences flow from undisputed facts fairly contested at trial. He is seeking to put on appeal a wholly different case as to damages, which is inherently a question of fact. It is inappropriate to allow this case to be put on this alternative basis at this late stage. [1]

12. For these reasons, in relation to the grounds raised by questions (a) and (b) specified in the notice of appeal, I would dismiss the appeal.

13. In relation to the issue of the order for indemnity costs made by Balmford J, I have had the advantage of hearing the reasons for decision to be given by the Chief Justice, and, for those reasons, I would uphold the ground of appeal in relation to this issue.

WARREN CJ:

14. I agree with the reasons of Bell AJA upon the substantive issues raised in the notice of appeal. That leaves the matter of the order made by the judge below with respect to costs.

15. This Court was informed that there were written submissions on the costs issue before her Honour, but they were not before us and they therefore do not fall for consideration. After hearing oral argument, her Honour held:

> "Effectively, the Calderbank letters and the nature of the proceeding itself I think in the circumstances justify award of the indemnity costs."

No other reasons were given by her Honour.

16. In *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority*[2], the Court of Appeal set out the test to be applied in assessing the reasonableness of rejecting a Calderbank letter. In the present matter, two letters of offer were served by the respondents on the appellant. The first of those letters offered to bear costs provided the appeal at first instance was discontinued. Before us, Mr Nash for the appellant relied upon *Jacomb v. Australian Municipal Administrative Clerical and Services Union*[3], to support the submission that an offer to withdraw does not constitute a Calderbank offer.

17. It is neither necessary nor appropriate in this appeal to construe the nature of the letters served. There is a more fundamental point. *Hazeldene's Chicken Farm* sets out plainly the requirements before indemnity costs can be ordered. The principles upon which that case was based have long been established.[4]

18. On the face of her Honour's short reasons as to costs, I am unable to ascertain whether consideration was given to the nature of the letters served. Further, I am unable to ascertain the reasoning that underlay the decision to order indemnity costs. In those circumstances, I consider there was no basis known or apparent to make an order for indemnity costs or to make an order other than the usual order for party-party costs. Accordingly, in so far as the discretion is re-opened before this Court, I do not consider any basis has been made out to make an order with respect to the appeal below other than an order for party-party costs. There was no evidence of which I could be satisfied on the basis of the test in *Hazeledene's Chicken Farm* that an order for indemnity costs would be warranted.

19. In those circumstances, I would allow the appeal so far as it relates to the matter of costs. I would otherwise dismiss the appeal.

EAMES JA:

20. For the reasons given by Bell AJA, I agree that the appeal with respect to grounds of appeal 1 to 4 inclusive should be dismissed. As to the grounds of appeal concerning the order made below as to indemnity costs, being grounds 5 to 8, I agree with the learned Chief Justice, for the reasons she stated, that the appeal should be allowed. No good reason having been shown for departing from the usual order that party-party costs be awarded, I therefore agree that an order allowing party-party costs should be substituted in lieu of the order made by the learned judge below as to indemnity costs, with respect to the appeal before her Honour.

WARREN CJ:

21. The Court will contemplate making orders that the orders of Balmford J in paragraph 2 be substituted by an order "the appellant pay the respondent's costs of the appeal and the appeal otherwise be dismissed". That then raises the matter of the costs of the present appeal.
(Discussion ensued.)

22. The remaining matter to be considered is the question of the costs of this appeal. The Court is satisfied that, as the respondent has succeeded on the substantive argument, it is appropriate that costs follow the event in the ordinary course and that the respondents are entitled to costs on the usual party-party basis.

23. The Court's attention was directed to a Calderbank offer by way of letter dated 16 June 2005 but in fact sent on 10 February 2006. That is not a relevant matter. The relevant matter is the substantive issue which has been determined by the Court.

24. The appellant has succeeded with respect to the indemnity costs issue. However, that was only a very small component of the appeal. The additional remark to be interpolated is that, arguably, the appellant was fortunate to be here on the basis of the substantive issue and therefore able to ventilate the indemnity costs issue on which he has succeeded. In those circumstances, the Court will make the usual order for costs to the successful party on a party-party basis.

25. The orders of the Court are as follows:

1. Paragraph 2 of the order of Balmford J of 18 May 2005 is set aside and in lieu thereof it is ordered that the appellant pay the respondents' costs of the appeal.
2. The appeal is otherwise dismissed.
3. The appellant pay the respondents' costs of this appeal.

---

[1] See *Suttor v Gundowna Pty Ltd* [1950] HCA 35; (1950) 81 CLR 418 at 438; [1950] ALR 820.
[2] [2005] VSCA 298; (2005) 13 VR 435.
[3] (2004) FCA 1600 [7]-[8].
[4] See, e.g., *Colgate Palmolive Co v Cussons Pty Ltd* [1993] FCA 536; (1993) 46 FCR 225; (1993) 46 FLR 225; (1993) 118 ALR 248; 28 IPR 561, *MT Associates Pty Ltd v Aquamax Pty Ltd & Anor* (No.3) [2000] VSC 163, and also the other authorities cited in *Hazeldene's Chicken Farm* at [17].

APPEARANCES: For the appellant Kuek: Mr PG Nash QC with Mr DJ Hancock, counsel. Access Law. For the respondents Devflan Pty Ltd and Anor: Mr PW Collinson SC with Mr MI Ravech, counsel. Brygel Lawyers.