

08/06; [2006] VSC 74

SUPREME COURT OF VICTORIA

ROUMELIOTIS v WEBB

Williams J

24, 25 January, 6 March 2006

CIVIL PROCEEDINGS – CLAIM FOR WORK AND LABOUR DONE AND MATERIALS SUPPLIED IN SUM OF \$5315.19 PLUS INTEREST – COUNTERCLAIM FILED FOR \$40,000 – CLAIM FOR DAMAGES, LOST INCOME AND WAGES – ALLEGED NEGLIGENCE IN CARRYING OUT REPAIRS TO A BOAT ENGINE – FINDING BY MAGISTRATE THAT DUTY TO TAKE REASONABLE CARE IN CARRYING OUT REPAIRS BREACHED – CLAIM DISMISSED – FINDING BY MAGISTRATE THAT THE AMOUNT OF LOSS THE SUBJECT OF THE COUNTERCLAIM EQUALLED THE AMOUNT OF THE CLAIM – WHETHER MAGISTRATE IN ERROR.

W. carried out repairs to "patch up" the engine of R.'s boat in the sum of \$5315.19. The engine failed on a subsequent trip and it was replaced by another party at the cost of \$15,625. When W.'s account remained unpaid, W. took proceedings claiming the amount of the debt plus interest. R. filed a counterclaim seeking damages for the cost of the replacement engine plus lost income and the cost of wages. At the hearing, the magistrate found that in carrying out the repair work W. breached his duty to take reasonable care thereby causing loss and damage to R. W.'s claim was then dismissed. In relation to the counterclaim, the magistrate found that the loss and damage caused by W.'s breach amounted to losses equal to the amount of the debt namely, \$5315.19. Upon appeal—

HELD: Appeal allowed.

If R. succeeded in relation to the counterclaim, there was no evidence upon which the Magistrate could have reasonably concluded that the amount of damages to which he was entitled was exactly the amount of the claim or the debt alone. Such a finding was not open on such evidence as there was before the Magistrate. The dismissal of the counterclaim is not explicable on the basis of an implied finding of contributory negligence on the part of R. Even if the cost of the replacement engine were to be ignored, the evidence as to the cost of the parts purchased by R. to carry out the wasted repairs would appear to have supported either a small order in relation to the claim (which is not the subject of the appeal) or a small order in relation to the counterclaim.

WILLIAMS J:

1. This is an appeal from the dismissal of a counterclaim in the Magistrates' Court at Korumburra on 1 July 2005.
2. By a Complaint, filed on 27 August 2003, the respondent ("Mr Webb") had claimed the sum of \$5,498.67, being a debt of \$5,315.19, together with interest, from the appellant ("Mr Roumeliotis") in relation to work and labour done when repairing Mr Roumeliotis's fishing boat in May 2002.
3. By a Notice of Defence, filed on 21 October 2003, Mr Roumeliotis admitted that, on or about 7 May 2003, Mr Webb undertook mechanical work and labour on his behalf "to the sum of \$5,315.19 to a boat engine". Mr Roumeliotis denied his indebtedness, claiming to have suffered loss and damage, and foreshadowed a counterclaim in relation to Mr Webb's alleged negligence.
4. By Particulars of Counterclaim, filed on 4 October 2004, Mr Roumeliotis alleged that Mr Webb had breached an implied term of the agreement by failing to carry out the repairs with due care and skill. He alleged that he suffered loss and damage, being the cost of a replacement engine, lost income and the cost of wages. Abandoning the excess of his claim, Mr Roumeliotis sought damages in the sum of \$40,000 by the counterclaim.

Background

5. Mr Roumeliotis carried on a fishing business. His boat engine needed to be repaired after it had failed at sea during a fishing trip. He arranged for Mr Webb, a motor mechanic, to come to his boat to assess the situation and it was agreed that Mr Webb should "patch up" the engine,

so that Mr Roumeliotis and his crew could return to sea. The engine was repaired and it failed again, after a subsequent trip. Eventually, it was replaced by a third party, at a cost of \$15,625 to Mr Roumeliotis.

6. At the hearing, Mr Webb and Mr Roumeliotis each gave evidence. Each called a witness to the conversation between them which took place on the fishing boat, before the repairs were carried out. There was evidence from Mr Webb that he had provided an estimate of the cost of rebuilding the engine at a sum in the vicinity of \$17,500. Mr Roumeliotis gave evidence that he had spent "close to \$6,000" for the parts used by Mr Webb in the repairs. Counsel for Mr Webb told the Court that an invoice for \$3,789.76 relating to the purchase of parts was tendered in the Magistrates' Court^[1].

7. Mr Roumeliotis also adduced evidence from an expert witness, Mr David Padfield, to the effect that the boat engine failure was caused by a split in the hose attached to the reservoir in the cooling system.

8. The Magistrate's reasons are recorded in the transcript, immediately after a reference to the withdrawal of the last witness and concessions by counsel for Mr Roumeliotis and Mr Webb's solicitor, to the effect that the issue for the court was one of fact and that no legal submissions were to be made. The transcript continues:

"His Honour: Well, I find both the plaintiff and the defendant not to be truly creditable or credible witnesses. Let me say that from the outset, I do accept some of the evidence from both of them but not all from either of them. In relation to Mr Webb, while Mr Webb was giving his evidence I must say that I was thinking that if I sat here today as a coroner which I often do, and I was looking into the death of the number of sailors or sea or fisherman (sic) or whatever you want to call them, that were on board a boat that was sent out in a boat (sic) that was known by a marine engineer to be a hand grenade, whether I would be recommending to the Attorney General that that marine engineer be charged with manslaughter. That's what I was thinking.

I am extremely distressed to hear that your client, Mr Ludbrook, is prepared to let people go to sea in a boat and an engine that he described as a hand grenade, that's just beyond my belief that someone should hold himself out as a professional person and to give that evidence and not only did he say it once but he said it a number of times. I'm not satisfied that he is entitled to succeed in his claims. He was engaged as a professional to carry out work with a duty of care and failed to carry out that work with anything close to the required standard of duty of care, so the claim will be dismissed. Now I also have problems with your counterclaim Mr Foster. How far do you want me to proceed with the counterclaim?

Mr Foster: Well, Your Honour - - -

His Honour: Can I indicate on the face of it, I don't see that your client's entitled to anything either in his counterclaim. He's had the work done months later, he's given evidence, as again, I didn't find him to be credible in relation to the evidence he gave in relation to the repairs and how it occurred, but how can you show me he was any worse off as a result of this work and required - the same work had to be done regardless. I don't believe that your client should succeed in the counterclaim either and I have nothing before me that should make me change my mind. Now I will give you a brief opportunity of explaining to me on what basis the counterclaim is laid, or you can withdraw it at this point?

Mr Foster: Your Honour, the basis of the counterclaim is in relation to various invoices that have been paid and which ...

His Honour: They may well have been paid but they would have been paid anyway. If your client had not taken the - had the motor repaired by Mr Webb he would have been up for the same expenses having it done elsewhere that he's finally been up for.

Mr Foster: Right, what the difference is, if I can put it this way, those parts at the very least which had to be put into that - \$6,000.00 worth of parts to be put into that engine that was otherwise then destroyed and then got a new engine for \$17,000.00 - - -

His Honour: Your client didn't want to spend the money to have the old engine rebuilt Mr Foster.

Mr Foster: Your Honour, I can't take that matter any further, that's a question of fact, but I do say it's as far as damage are concerned - - -

His Honour: I find that as a fact that he was anxious to get back on the water as quickly as possible with as little expense as possible. Not satisfied in relation to the counterclaim.

Mr Foster: Your Honour, I can't take that matter any further."

9. The learned Magistrate then stated that he would not make any order as to costs, because neither party had succeeded in its claim and the defence of each of the claim and the counterclaim would probably have resulted in the same amount of costs being incurred.

10. Although the learned Magistrate's reasons are hard to follow, it is common ground that they should be construed as containing findings that:

- (a) the parties had agreed that Mr Webb should "patch up" the boat engine, so that Mr Roumeliotis could return to the sea as quickly as possible, with the least expense to him;
- (b) Mr Roumeliotis did not want to incur the expense of having the boat engine rebuilt by Mr Webb;
- (c) Mr Webb carried out repairs to the engine;
- (d) the repaired engine subsequently failed and was replaced;
- (e) Mr Webb breached his duty to take reasonable care in carrying out the repair work, thereby causing loss and damage to Mr Roumeliotis; and
- (f) the loss and damage to Mr Roumeliotis caused by Mr Webb's breach amounted to losses equal to the amount of the debt, namely \$5,315.19^[2].

The grounds of appeal

11. The appeal was brought under s109 of the *Magistrates' Court Act* 1989 and Order 58.06 of the *Supreme Court (General Civil Procedure) Rules* 1996. Mr Roumeliotis only appealed in relation to the order dismissing the counterclaim. The questions of law stated in the notice of appeal, filed on 29 July 2005, were:

- "1. Did the learned Magistrate err by finding that as a result of the damage to the engine, the same repairs or works were required on the engine as the Appellant had originally sought from the Respondent?
- 2. Did the learned Magistrate err by finding that the amount to be paid by the Appellant to the Respondent to have the boat engine repaired was equivalent to the expense that the Appellant would have incurred in having the boat engine repaired elsewhere?
- 3. Did the learned Magistrate err by omitting to refer to or consider the expert evidence of Mr David Padfield including the expert report prepared by Mr Padfield dated 13 April 2005?
- 4. Did the learned Magistrate err by finding that the counterclaim must be dismissed because the Appellant did not desire to have the boat engine rebuilt?
- 5. Did the learned Magistrate err by finding that the counterclaim must be dismissed because the Appellant desired to have the boat engine repaired as quickly as possible with as little expense as possible?
- 6. Did the learned Magistrate err by finding that the Appellant had suffered no loss and damage?"

12. Essentially, the questions of law were amended to ask whether:

- (a) a reasonable Magistrate could rely on Mr Webb's evidence to find that a full engine rebuild was required as at the date the engine was delivered to him for repair;
- (b) if the Magistrate did reasonably come to that conclusion, his Honour erred in law because there was no evidence upon which he could reasonably conclude that the cost of rebuilding the engine at that time would have equalled the cost of its subsequent replacement; and
- (c) a reasonable Magistrate could have come to the decision on the evidence that precisely \$5315.19 was spent as a result of Mr Webb's negligence, to exactly offset the amount of the claim.

The appeal proceeded on the basis of the reformulated questions.

13. Counsel for Mr Webb submitted that, in effect, his Honour had, impliedly, found that the amount of loss and damage sustained by Mr Roumeliotis totalled the amount of his claim and had been set off against it. He argued that the evidence was not conclusive that there had been any amount expended by Mr Roumeliotis greater than the amount of the claim. He relied upon the imprecision in the evidence in relation to the amount spent on parts for the repair and the estimate of cost. He noted Mr Roumeliotis's evidence that he had spent "close to \$6,000" for the parts used by Mr Webb in the repairs. He referred to an invoice reflecting expenditure of \$3,789.76 and noted that there was no evidence about the alleged loss of income or repairs.

14. In any event, counsel for Mr Webb submitted, his Honour might be taken to have found that Mr Roumeliotis was guilty of contributory negligence in not having the engine rebuilt, when it was necessary. His decision was submitted to be consistent with a finding that Mr Roumeliotis was one hundred percent responsible for the loss of \$15,625, being the cost of the replacement engine. He referred to the evidence of Mr Webb's estimate of the cost of replacement at the outset. He argued that the evidence justified a finding that Mr Roumeliotis was, ultimately, no worse off.

Conclusion

15. The learned Magistrate's reasons do not explain the process by which he arrived at his conclusions. The extent to which he accepted or rejected the evidence is unclear. It would seem that his Honour must have found that Mr Roumeliotis was entitled to precisely the sum of \$5,315.19 by way of damages under the counterclaim, in order to justify the dismissal of the claim on the basis of a set off.

16. If Mr Roumeliotis succeeded in relation to the counterclaim, there was, in my opinion, no evidence upon which the Magistrate could have reasonably concluded that the amount of damages to which he was entitled was exactly the amount of the claim or the debt alone. Quite apart from the fact that the hearing had proceeded on the basis that liability only was to be determined, such a finding was not open on such evidence as there was before the Magistrate, in my view^[3].

17. I am not persuaded by Mr Webb's argument to the effect that his Honour's decision to dismiss the counterclaim is explicable on the basis of an implied finding of contributory negligence on the part of Mr Roumeliotis. Even if the cost of the replacement engine were to be ignored, the evidence as to the cost of the parts purchased by Mr Roumeliotis to carry out the wasted repairs would appear to have supported either a small order in relation to the claim (which is not the subject of the appeal) or a small order in relation to the counterclaim.

18. I would allow would answer the reformulated questions of law as follows:
(a) yes; (b) yes; and (c) no.

19. The appeal should be allowed. I will hear the parties as to the form of orders and costs.

^[1] T 63.

^[2] Rule 13.14 of the *Supreme Court (General Civil Procedure) Rules* 1996 allows the setting off of the appellant's claim for damages against the respondent's claim for debt.

^[3] See: *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1 at 11; (1972) 30 LGRA 19 *per* Stephen, J.

APPEARANCES: For the appellant Roumeliotis: Mr J Foster, counsel. Birch Ross & Barlow, solicitors. For the respondent Webb: Mr P Pascoe, counsel. Oakleys Rickard, solicitors.
