02/09; [2009] VSC 29

SUPREME COURT OF VICTORIA

BATCHELDER & ANOR v HOLDEN LIMITED

Beach J

5, 11 February 2009

CIVIL PROCEEDINGS – CLAIM FOR DAMAGE TO MOTOR VEHICLE AND PROPERTY – MOTOR VEHICLE CAUGHT FIRE WHILST IN THE GARAGE OF A PRIVATE HOME – FIRE ORIGINATED IN ENGINE COMPARTMENT OF THE MOTOR VEHICLE AND WAS CAUSED BY AN ELECTRICAL FAULT – DAMAGE CAUSED TO ANOTHER MOTOR VEHICLE AND PROPERTY IN THE GARAGE – CLAIM AGAINST VEHICLE'S MANUFACTURER FOR BREACH OF WARRANTY – FINDING BY MAGISTRATE THAT THE FIRE WAS DUE TO A DEFECT RELATED TO MATERIALS – WARRANTY – WARRANTY DID NOT EXTEND TO DAMAGE CAUSED BY FIRE – FINDING BY MAGISTRATE THAT WARRANTY APPLIED – CLAIM DISMISSED – WHETHER MAGISTRATE IN ERROR: *TRADE PRACTICES ACT* 1974, SS74D, 75AC, 75AT, 75AG.

HELD: Appeal allowed. Remitted to the magistrate for further hearing.

1. The Magistrate found a defect within the meaning of s75AC of the *Trade Practices Act* 1974 ('Act') when he concluded that the fire was caused by an electrical fault and that at the time of the fire there was a defect related to materials. However, there was no analysis as to whether the car's safety was not such as persons generally are entitled to expect and there were no reasons relating to the circumstances required to be considered in determining the extent of the safety of the car.

2. Sections 75AF and 75AG of the Act require a Court to consider whether goods have a defect in that "their safety is not such as persons generally are entitled to expect". They do not require the defect to be identified with any particular level of precision. The fact that it may be more difficult for a defendant to establish a defence under s75AK or s75AN if the "defect" is not or cannot be identified with precision does not alter the proper construction and operation of ss75AC, 75AF and 75AG. It is for the defendant to establish the defence that the defect did not exist at the time of supply.

3. Once the Magistrate had determined the car caused the fire, he should then have determined whether the safety of the car (having regard to all the relevant circumstances) was not such as persons generally were entitled to expect. Whilst it is true the Magistrate found there was an "electrical fault", the Magistrate used the word "defect" in the discussion part of his judgment, and in some circumstances the words "defect" and "fault" are synonymous. Crucially the Magistrate does not appear to have determined whether or not the safety of the car was such as persons generally were entitled to expect. This is a question of fact (or perhaps mixed fact and law) which needs to be determined.

4. In relation to the warranty, the interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause *contra proferentem* in case of ambiguity.

5. Construing the warranty clause and its exclusion in context, for the purposes of the exclusion, damage was not caused by fire where the fire was caused by a "defect related to materials or workmanship". Properly understood, the damage was caused by the defect and was covered by the warranty. Accordingly, absent some other reason for the warranty applying, the plaintiff was entitled to relief in respect of the warranty claim.

BEACH J:

Introduction

1. The first appellant, Mrs Martine Batchelder, and the second appellant, Mr Gary Batchelder, are wife and husband. In 2001, Mrs Batchelder purchased a new Holden Astra sedan. In 2003, after it had travelled approximately 20,000 kilometres, the car was damaged by fire in the garage of the Batchelders' home. Also damaged was a Falcon motor vehicle owned by Mr Batchelder, the garage itself and its contents. The quantum of the Batchelders' loss was $56,008.31.

2. The Batchelders took proceedings in the Magistrates' Court against Holden to recover their loss. In that proceeding, they asserted causes of action:

(a) under s74D of the *Trade Practices Act* 1974 (Cth) ("the Act");

(b) under ss75AF and 75AG of the Act;

(c) pursuant to a warranty provided by Holden; and

(d) in negligence.

3. The Magistrate found that the fire originated in the engine compartment of the Holden and that the fire was caused by an electrical fault. He also found that at the time of the fire there was a "defect related to materials".[1] However, on 28 May 2008, the Magistrate dismissed the Batchelders' proceeding. The Magistrate's principal reasons were that, because the Batchelders were unable to establish the precise nature of the defect in the Holden, they were unable to establish any of their causes of action under the Act. Further, the warranty was held not to apply because of an exclusion. The Batchelders appeal, pursuant to s109 of the *Magistrates' Court Act* 1989 on a question of law, from the order dismissing their proceeding. This appeal concerns the proper construction and application of ss74D, 75AC, 75AF and 75AG of the Act and the proper construction of the warranty exclusion.[2] For the reasons given below, I have determined that the appeal should be allowed and that the case should be remitted for reconsideration by the Magistrate in accordance with these reasons.

The background facts

4. The background facts may be summarised as follows:

(a) Mrs Batchelder purchased the Holden on about 27 July 2001. It was a new car at the time of its purchase and, for the purposes of the Act, was manufactured by Holden.
(b) The car was predominantly driven by Mrs Batchelder, with Mr Batchelder driving it on weekends. It was only driven in the metropolitan area and was not driven by anyone else. When not in use, the car was locked in the Batchelders' garage at home.
(c) On about 4 September 2001, the car underwent a 1500 kilometre service which was unremarkable. On about 6 August 2002, the car underwent a 15,000 kilometre service. Mrs Batchelder complained of occasional starting problems. The service mechanic who conducted the service noted he had checked the car but nothing of any moment was found.
(d) On 19 January 2003, Mr Batchelder drove the car for five or six minutes and then returned home and parked the car in the garage. Approximately 75 – 90 minutes later, an explosion was heard and the garage was found to be on fire. The fire destroyed the car and caused extensive damage to the Falcon motor vehicle referred to above, the garage itself and its contents.
(e) At the time of the fire, the car had done approximately 20,000 kilometres and was approximately 18 months old.
(f) As a result of the fire, the Batchelders suffered a total loss of $56,008.31.[3] That loss was broken down as follows:
    (i) The Holden: $20,448.50
    (ii) The Falcon: $6,681.50
    (iii) Damage to the garage: $25,909.00
    (iv) Damage relating to other contents of the garage: $2,969.31

5. At the time of its purchase, Holden provided a warranty in respect of the car. The warranty relevantly provided:

"Subject to the exclusions shown on the following page, this Warranty covers the correction, during the Warranty Period, of any vehicle defect related to materials or workmanship and advised to a Holden Dealer or Authorised Service Outlet, by repair or at Holden's option by replacement."

The warranty period was three years or 100,000 kilometres, whichever occurred first. The exclusion which defeated the warranty claim in the Magistrates' Court[4] was in the following terms:

"Your Warranty does not extend to the following damage:

Damage caused by an accident, fire, theft or moving objects striking the vehicle.

Damage caused by industrial fallout, chemicals or sealants.

Damage caused by atmospheric fallout or flood, hail, salt, etc."

The reasons below

6. The Magistrate set out in summary form the evidence of those experts called at trial who expressed opinions as to the potential sources and causes of the fire. After setting out the expert evidence, the Magistrate stated:

> "What then is established by the evidence including the opinions of the experts is that:
> (a) the fire originated in the engine compartment of the car; and
> (b) the fire was caused by an electrical fault.
> It is speculative whether there was a failure of insulation on the main battery cables."[5]

These conclusions were undoubtedly open on the evidence.

7. The Magistrate then discussed ss74D, 75AF and 75AG of the Act in general terms before turning to the warranty and the terms of the exclusion. He then said:

> "Absent the exception [the exclusion], the warranty would have applied. At the time of the fire there was a defect related to materials. This is so even though the evidence does not establish the precise nature of the defect. The evidence establishes that it was a 'defect related to materials' which became obvious during the warranty period. However, in my opinion, the exception applies."[6]

8. In respect of the causes of action under the Act, the Magistrate concluded:

> "The plaintiffs' position is that the fire was caused by a 'latent' defect. By which they meant a defect which existed from the time of the first plaintiff's acquisition of the car. Their identification of the relevant time is correct. The circumstantial evidence establishes that the fire occurred in the car's engine compartment and was due to an electrical fault. But it establishes no more. It does not establish the precise nature of the defect and that inability means that they are unable to establish any of their causes of action under the Act. They cannot establish that the defect existed at the relevant times under ss75AF, 75AG and 74D."[7]

I will say more about the last two sentences of this passage below.

The s75AF and s75AG claims

9. It is convenient to start with the Batchelders' claims under ss75AF and 75AG of the Act. Both of those sections concern liabilities for goods that have a "defect". Section 75AC deals with the meaning of goods having a defect. Section 75AC provides:

> "(1) For the purposes of this Part, goods have a defect if their safety is not such as persons generally are entitled to expect.
> (2) In determining the extent of the safety of goods, regard is to be given to all relevant circumstances including:
> (a) the manner in which, and the purposes for which, they have been marketed; and
> (b) their packaging; and
> (c) the use of any mark in relation to them; and
> (d) any instructions for, or warnings with respect to, doing, or refraining from doing, anything with or in relation to them; and
> (e) what might reasonably be expected to be done with or in relation to them; and
> (f) the time when they were supplied by their manufacturer.
> (3) An inference that goods have a defect is not to be made only because of the fact that, after they were supplied by their manufacturer, safer goods of the same kind were supplied.
> (4) An inference that goods have a defect is not to be made only because:
> (a) there was compliance with a Commonwealth mandatory standard for them; and
> (b) that standard was not the safest possible standard having regard to the latest state of scientific or technical knowledge when they were supplied by their manufacturer."

10. Section 75AF of the Act provides:

> "If:
> (a) a corporation, in trade or commerce, supplies goods manufactured by it; and
> (b) they have a defect; and
> (c) because of the defect, goods of a kind ordinarily acquired for personal, domestic or household use (not being the defective goods) are destroyed or damaged; and
> (d) a person who:
> (i) so used; or

(ii) intended to so use;
the destroyed or damaged goods, suffers loss as a result of the destruction or damage;
then:
(e) the corporation is liable to compensate the person for the amount of the loss; and
(f) the person may recover that amount by action against the corporation."

11. Section 75AG of the Act provides:

"If:
(a) a corporation, in trade or commerce, supplies goods manufactured by it; and
(b) they have a defect; and
(c) because of the defect, land, buildings, or fixtures, ordinarily acquired for private use are destroyed or damaged; and
(d) a person who:
(i) so used; or
(ii) intended to so use;
the land, buildings or fixtures, suffers loss as a result of the destruction or damage;
then:
(e) the corporation is liable to compensate the person for the amount of the loss; and
(f) the person may recover that amount by action against the corporation."

12. Section 75AK of the Act provides:

"(1) In a liability action,[8] it is a defence if it is established that:
(a) the defect in the action goods that is alleged to have caused the loss did not exist at the supply time; or
(b) they had that defect only because there was compliance with a mandatory standard for them; or
(c) the state of scientific or technical knowledge at the time when they were supplied by their actual manufacturer was not such as to enable that defect to be discovered; or
(d) if they were comprised in other goods (***finished*** goods)— that defect is attributable only to:
(i) the design of the finished goods; or
(ii) the markings on or accompanying the finished goods; or
(iii) the instructions or warnings given by the manufacturer of the finished goods.
(2) In this section:
"supply time" means:
(a) in relation to electricity— the time at which it was generated, being a time before it was transmitted or distributed; or
(b) in relation to other goods— the time when they were supplied by their actual manufacturer."

13. On one reading of the Magistrate's reasons for judgment, it could be said that the Magistrate found a defect within the meaning of s75AC when he concluded that the fire was caused by an electrical fault and that at the time of the fire there was a defect related to materials. However, nowhere in the Magistrate's reasons is there an analysis as to whether the car's safety was not such as persons generally are entitled to expect.[9] Further, there is no specific discussion in the reasons relating to the circumstances required to be considered in determining the extent of the safety of the car.[10] The Magistrate found that the fire was caused by an electrical fault and there was a defect related to materials. Whilst I would have been prepared to infer from these findings that the Magistrate concluded there was a defect within the meaning of s75AC, the conclusion by the Magistrate that because the Batchelders were unable to establish the precise nature of the defect they were unable to establish any of their causes of action under the Act leads me to doubt whether in fact the Magistrate actually found a defect within the meaning of s75AC.

14. Counsel for the Batchelders submitted that the Magistrate did find a defect, but then erred by holding that the Batchelders were required to establish the nature of the defect with greater precision. There is no doubt that if the Magistrate found a defect within the meaning of s75AC (or found facts sufficient to allow that conclusion to be drawn), then it would be a gloss on the statute and an error to find against the Batchelders on the basis that such "defect" was not established with sufficient precision.[11] Sections 75AF and 75AG require a Court to consider whether goods have a defect in that "their safety is not such as persons generally are entitled to expect". They do not require the defect to be identified with any particular level of precision. That this is so can be seen from cases such as *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd*[12] and *Morris v Alcon Laboratories*.[13] The fact that it may be more difficult for a defendant to establish a defence under s75AK or s75AN if the "defect" is not or cannot be identified with precision[14] does not alter the proper construction and operation of ss75AC, 75AF and 75AG.

15. What was required in this case was, once the Magistrate had determined the car caused the fire, he should then have determined whether the safety of the car (having regard to all the relevant circumstances) was not such as persons generally were entitled to expect. Whilst it is true the Magistrate found there was an "electrical fault", the Magistrate used the word "defect" in the discussion part of his judgment, and in some circumstances the words "defect" and "fault" are synonymous, crucially the Magistrate does not appear to have determined whether or not the safety of the car was such as persons generally were entitled to expect.[15] This is a question of fact (or perhaps mixed fact and law) which needs to be determined. Involving factual elements, it is not appropriate for this Court, hearing an appeal limited to questions of law, to embark on such an inquiry.[16] The matter will need to be reconsidered in the Magistrates' Court. I will say more about the form such reconsideration should take below.

16. In the course of his reasons, the Magistrate said that a reading of ss75AF and 75AG made it plain that there must be a defect in the goods at the time of their supply by the corporation.[17] He then concluded by saying that the Batchelders could not establish that "the defect existed at the relevant times under ss75AF, 75AG and 74D".[18] I should say for the sake of completeness that ss75AF and 75AG[19] do not require a plaintiff to prove that the defect existed at the time of supply.[20] As Kiefel J said in *Carey-Hazell*,[21] it would not be consistent with the requirements of the defence in s75AK(1)(a) to require a plaintiff to establish the existence of the defect at a point before injury. As s75AK(1)(a) sets out, it is for the defendant to establish the defence that the defect did not exist at the time of supply.

17. In the remitted hearing of the Batchelders' claims under ss75AF and 75AG, Holden may wish to advance (consistently with the way the case was originally advanced below) any defence or defences it considers it has available to it under ss75AK and 75AN. Whilst there was some debate before me concerning the failure by Holden to specifically plead defences under ss75AK and 75AN, it seems to me that there are grounds for contending that the trial was conducted on the basis that ss75AK and 75AN fell to be considered. It may be that there should be some amendments to the pleadings so that they conform with the way the trial was or will be conducted. That will be a matter for the Magistrates' Court and nothing in these reasons should be construed as foreclosing or permitting an argument based either on the pleadings or the way in which the case was originally conducted.

The claim under s74D

18. I turn now to consider the claim under s74D of the Act. Section 74D provides:

> "(1) Where:
> (a) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply;
> (b) a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer;
> (c) the goods are not of merchantable quality; and
> (d) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods are not of merchantable quality;
> the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.
> (2) Subsection (1) does not apply:
> (a) if the goods are not of merchantable quality by reason of:
> (i) an act or default of any person (not being the corporation or a servant or agent of the corporation); or
> (ii) a cause independent of human control;
> occurring after the goods have left the control of the corporation;
> (b) as regards defects specifically drawn to the consumer's attention before the making of the contract for the supply of the goods to the consumer; or
> (c) if the consumer examines the goods before that contract is made, as regards defects that the examination ought to reveal.
> (3) Goods of any kind are of merchantable quality within the meaning of this section if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to:
> (a) any description applied to the goods by the corporation;
> (b) the price received by the corporation for the goods (if relevant); and
> (c) all the other relevant circumstances."

19. Much of what I have said in relation to the claims under ss75AF and 75AG is apposite to the claim under s74D. In determining this claim, there needs to be consideration given to the question of whether the car was of merchantable quality. Specific reference needs to be made to s74D(3). In the present case, the matters referred to in that section have not been discussed in the judgment with respect to the car. This analysis needs to be performed. Again, it is not an answer to a claim under s74D to say that the claim fails because the precise nature of the defect cannot be established. Similarly, the existence of s74D(2)(a) tells against any requirement that a plaintiff must establish a defect existed at the time of supply.[22] It follows for like reasons to those given in relation to the claims under ss75AF and 75AG, that the s74D claim needs to be reconsidered.

The warranty claim

20. The Magistrate stated[23] "[a]bsent the exception, the warranty would have applied". In so doing, he rejected a submission on behalf of the Batchelders[24] that the word "fire" should "be interpreted to mean a fire external to the car itself and was not intended to include a fire from within the car, and generated by it".[25] In rejecting this submission, the Magistrate held that the word "fire" should be given its natural and ordinary meaning and not a restricted meaning, because there was "nothing in the background to suggest that something has gone wrong and the parties' intention was otherwise". In order to give the word "fire" a more limited meaning or operation than that given by the Magistrate, it was not necessary to establish that something had gone wrong in the drafting of the exclusion so as to produce a result which did not reflect the parties' intention. The correct approach to the construction of the exception (exclusion) is set out in the joint judgment of Mason, Wilson, Brennan, Deane and Dawson JJ in *Darlington Futures Limited v Delco Australia Pty Ltd.*[26] Their Honours said:

> "[T]he interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause *contra proferentem* in case of ambiguity."[27]

21. Ordinarily, one might think that a warranty exclusion would take a matter covered by the warranty outside its operation. In such circumstances it could be contended that the warranty exclusion is to be given its natural and ordinary meaning so that even though there might have been fault on the part of the person giving the warranty, the exclusion operates to deny any relief under the warranty. However, in this case the warranty exclusion excludes matters that could not be covered by the warranty (for example, damage caused by theft and damage caused by moving objects). It may be that the author of the warranty exclusions was simply attempting to be careful so that there could be no argument about certain events not giving rise to relief under the warranty.

22. The warranty covers the correction by repair or replacement of any vehicle defect related to materials or workmanship that occurs within the three year/100,000 kilometre period. It is intended to be comprehensive, save for some limited exclusions[28] and exclusions in respect of normal maintenance items. Further, the specific exclusion in this case appears under the heading "Damage", suggesting that (as its terms reveal) it is damage externally caused (for example, by theft, moving objects, flood, hail etc) which is excluded. Read in context, the exclusion does not limit the operation of the warranty so as to deny relief if a defect in relation to materials or workmanship causes one of the events referred to in the exclusion (in this case, fire). For example, if, due to a defect in the steering or brake mechanism, a motor vehicle, during the warranty period, went out of control and collided with a tree, Holden could not deny liability for repairing or replacing the damaged vehicle or parts on the basis that the damage was caused by an accident. The same applies in respect of a fire. Construing the warranty clause and its exclusion in context, for the purposes of the exclusion, damage is not caused by fire where the fire was caused by a "defect related to materials or workmanship". Properly understood, the damage is caused by the defect and is covered by the warranty. The analysis is akin to that contained in the public liability insurance cases concerned with the interpretation of "reasonable precautions" clauses where that phrase is not interpreted so widely as to deny cover to the insured if it is negligent.[29]

23. It follows that, absent some other reason for the warranty applying, Mrs Batchelder is entitled to relief in respect of the warranty claim. This matter should be remitted for the purpose of determining the quantum of this claim. Whilst I suspect that the quantum might be $20,448.50, I lack sufficient certainty to determine this matter. Further, it would be undesirable to give a

judgment for a money sum in this Court whilst remitting part of the claim for an additional judgment to be given in the Magistrates' Court. Therefore, I have left that matter for determination in the Magistrates' Court.

Disposition of the appeal

24. The matter must be remitted. During argument, I raised with the parties the prospect that if I was of the view that the matter had to be remitted, whether it should be remitted to the same Magistrate or to a differently constituted Magistrates' Court. In the circumstances of this case, it seemed to me to be wasteful to remit to a differently constituted Magistrates' Court if that course could be avoided. No party made any submission against the course proposed. Indeed, there was general agreement that this course was appropriate.[30] In the circumstances, I propose to direct that the proceeding be remitted for reconsideration before the Magistrates' Court constituted by the Magistrate before whom the same was originally heard.[31]

Conclusion

25. It follows from what I have said above that the appeal should be allowed and the matter should be remitted for reconsideration in accordance with these reasons before the Magistrates' Court constituted by the Magistrate before whom the same was originally heard. I will hear the parties on the form of the order and on the question of costs.

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[1] Page 6 of the Magistrate's reasons for judgment.
[2] Originally, complaint was made by the Batchelders in this appeal concerning the Magistrate's failure to address the claim in negligence. However, this complaint was not pursued.
[3] Whilst this was the total loss, the material discloses that some parts of the loss may not have been suffered by both Mr and Mrs Batchelder, but rather by one or other of them.
[4] And which was contained "on the following page" of the warranty certificate.
[5] Page 4 of the Magistrate's reasons for judgment.
[6] Page 6 of the Magistrate's reasons for judgment.
[7] Page 7 of the Magistrate's reasons for judgment.
[8] The expression "liability action" is defined in s75AA to mean an action under, *inter alia*, s75AF or s75AG.
[9] Cf s75AC(1).
[10] Cf s75AC(2).
[11] This is so whether or not one relies upon the proposition that the sections of the Act under consideration in this case are remedial and thus should be interpreted beneficially (as to which see *Melway Publishing Pty Limited v Robert Hicks Pty Limited* [2001] HCA 13; (2001) 205 CLR 1 per Kirby J at paragraph [90]; (2001) 178 ALR 253; [2001] ATPR 41-805; (2001) 75 ALJR 600; (2001) 50 IPR 257; (2001) 22 Leg Rep 2).
[12] (2004) ATPR 42 – 014.
[13] [2003] FCA 151, and in particular at paragraph [23] where Nicholson J said:
"In applying s75AC a Court in determining the extent of the safety of the goods, is obliged to have regard to all relevant circumstances. If the evidence was that the goods had been causative of injury, the Court would be required to move to a finding of the extent of the safety. Then the Court would be required to determine whether the safety was not such as persons generally are entitled to expect. If that was established, the Court would move to a finding that the goods had a defect before moving to application of the provisions of s75AD. There seems no reason in principle why this process could not commence and continue from an evidentiary foundation which was inferential."
[14] Cf paragraph 17 of the respondent's outline of submissions dated 29 January 2009 herein.
[15] That is, follow the words of the section.
[16] Whilst I do not wish to fetter any decision that might be made on the facts in any reconsideration in the Magistrates' Court, I note that in *Cheong by her tutor The Protective Commissioner of New South Wales v Wong* [2001] NSWSC 881; (2001) 34 MVR 359, the New South Wales Supreme Court held that a defect was present in a retread tyre because the safety of the tyre was not such as persons were generally entitled to expect having regard to what might reasonably have been expected to have been done with the tyre (use on a vehicle on roads). Whilst the Court was unable to determine whether the tyre was faulty at the time of the retread and supply, it was found to be defective because it lasted only 19,000 kilometres before failure. There are obvious parallels between that case and the present case.
[17] Page 5 of the Magistrate's reasons for judgment.
[18] Page 7 of the Magistrate's reasons for judgment.
[19] I will deal with s74D below.
[20] See *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* (2004) ATPR 42 – 014 at paragraphs [182] and following, and in particular at paragraphs [190] and [191]. See also the explanatory memorandum to the *Trade Practices Amendment Bill (No.2)* 1991 (Cth) at paragraph 49. See further *Cheong* (*supra*) at paragraph [70].
[21] *Supra* at paragraph [191].
[22] See generally *Effem Foods Limited v Nicholls* (2004) ATPR 42 – 034, and in particular at paragraphs [17] – [19].
[23] Page 6 of the Magistrate's reasons for judgment.

[24] Or probably more correctly, Mrs Batchelder – as she was the person to whom the warranty was given.
[25] Page 6 of the Magistrate's reasons for judgment.
[26] [1986] HCA 82; (1986) 161 CLR 500 at 510.
[27] See also *Australian Paper Plantations Pty Ltd v Venturoni* [2000] VSCA 71 at paragraph [17].
[28] Limits and exclusions relating to tyres and batteries.
[29] See, for example, *Albion Insurance Company Limited v Body Corporate Strata Plan No. 4303* [1983] VicRp 94; [1983] 2 VR 339.
[30] See T28.22 – T29.2 and T45.22 – T46.15.
[31] See generally *Papercorp Pty Ltd v Nicolaou* [2006] VSCA 143 at paragraph [93], *Cadbury-Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* [2007] FCAFC 70; (2007) 159 FCR 397; 239 ALR 662 at paragraph [114]; 72 IPR 261; [2007] AIPC 92-254; [2007] ATPR 42-161 and *Tuckwell v Egg Marketing Australia Pty Ltd* [2004] VSC 489.

APPEARANCES: For the appellants Batchelder: Mr MP Barrett, counsel. Ligeti Partners, solicitors. For the respondent Holden Limited: Ms K Anderson, counsel. Norris Coates, solicitors.
