16/74

SUPREME COURT OF VICTORIA

SANKARI & ANOR v MIZZI

Murphy J

31 May 1974

CONTRACT – MOTOR VEHICLE DAMAGED – TAKEN TO REPAIRER – INSPECTED BY INSURANCE COMPANY AND AGREEMENT MADE TO QUOTE GIVEN BY REPAIRER – WHEN VEHICLE REPAIRED OWNER PAID EXCESS AMOUNT DUE UNDER INSURANCE POLICY – OWNER DECLINED TO PAY FOR COSTS OF REPAIRS – WHETHER INSURANCE COMPANY LIABLE FOR THE COST OF REPAIRS – FINDING BY MAGISTRATE THAT INSURANCE COMPANY LIABLE – WHETHER MAGISTRATE IN ERROR.

The complainants' claim for work and labour done and material provided in repairing the defendant's motor vehicle was dismissed by a Magistrates' Court. The car in question had been damaged in a collision and was taken to the complainants who were repairers. They repaired the car but the defendant refused to pay for the work denying that there was any contract between him and the complainants, asserting that any contract that existed was made between the complainants and his insurer Mid Pacific Insurance Company, as principals. The Magistrate accepted this submission and dismissed the complaint.

Before the Magistrate, evidence had been given by the complainant that he had previously done work for the defendant. On this occasion the defendant requested him to commence the job immediately and also asked him for a quote informing him he was insured with the particular Insurance Company. The defendant gave evidence which was accepted by the Magistrate that the male complainant said that no work could be done until after the insurer had authorised the work. A few days later an Assessor from the insurance company inspected the car, negotiated with the complainants to drop his quote a few dollars and then gave the male complainant a document under the letterhead of the company, entitled, "Repair Authority (Repairers Copy) etc". The work being completed, the defendant collected his car and paid the complainants $20 the amount of an excess clause in his policy with the company.

The defendant's claim form lodged with the insurance company authorised that company as his agent to take any action the company considered necessary for the removal and repair of his vehicle. In cross-examination, the complainant had said he expected to be paid by the defendant but sent the account to the insurer because the assessor "had given him the O.K."

On the appeal, Counsel for the complainants submitted that the defendant was, on the facts, primarily liable on the contract, and in any event that the insurer was acting as agent for the owner of the car, that is, the defendant, as evidenced by the claim form the words upon it.

HELD: Order nisi discharged.

1. It was open to the Magistrate to find that the complainants, by their conduct, and by the words used by the male complainant, intended to contract only with the Mid Pacific and not with the defendant himself. When the assessor from the Mid Pacific viewed the car, and assessed the repairs, and issued to the complainants a repair authority, the Mid Pacific entered into a contract with the complainants, that it would pay to them $778.68 less $20 excess, if they, the complainants, would repair the vehicle in accordance with the revised quotation.

2. Once the insurer entered negotiations, such as it did here, and took charge, it was estopped from thereafter questioning the claim by the insured as being outside the terms of the policy.

***Hansen v Marco Engineering (Aust) Pty Ltd* [1948] VicLawRp 37; [1948] VLR 198; [1948] 2 ALR 17 per Fullagar J especially at pp109-112 (VLR), applied.**

3. The contract between the insurer and the repairer was a contract between principals who in the circumstances, intended to contract as such. Moreover, the insurer in this case contracted in such a way as to make it perfectly clear that it was doing so as principal and not as agent for the owner, and the repairer appreciated this. It was the insurer who reduced the quote, who authorised the repairs, and who contracted to pay only the amount which it had authorised. It was only when the insurer had done all of these things that the repairer agreed to proceed. The contract was made then.

4. The Magistrate was correct on the facts of this case in dismissing the complainants' claim.

MURPHY J: ... The defendant, in directing that his car be taken to the complainants' garage, and in requesting the male complainant to hasten the repairs, was I would think, apparently prepared to contract with the complainant for the repair of his vehicle. He, of course, believed that his insurance company would pay the amount of the cost of such repairs.

The complainants were not shown to be connected in any way with the insurer, and the insurer did not choose them to effect the repairs, nor at the commencement did the insurer engage the complainants to perform the repairs.

One question that arises is whether the complainant intended to contract with the insurer of the defendant and whether when the male complainant refused to start the work until be received authority from the insurance company' (see affidavit of Frank Mizzi, para. 5 sworn the 22nd day of June 1973) the complainant thereby indicated that he was prepared to enter into contact only with the insurer and not with the defendant. See *Pollock on Contracts* 13th Edition pp83-4.

In my opinion it was open to the Magistrate to find that the complainants, by their conduct, and by the words used by the male complainant, intended to contract only with the Mid Pacific and not with the defendant himself. When the assessor from the Mid Pacific viewed the car, and assessed the repairs, and issued to the complainants a repair authority, the Mid Pacific in my opinion entered into a contract with the complainants, that it would pay to them $778.68 less $20 excess, if they, the complainants, would repair the vehicle in accordance with the revised quotation. The Insurer exercised its authority under its contract of indemnity with the defendant. Probably the strict legal position would have been more clearly preserved, if the insurer had acknowledged its liability to pay the complainants the full cost of the repairs, and relied upon its contract with the insured, Mizzi, to obtain back from him the sum of $20 excess. See *Bowstead on Agency* 12th Edition pp200 and following.

Every case falls to decided on its own facts and the recent plethora of cases dealing with situations involving the liability to pay for repairs performed to motor vehicles, comprehensively insured, only indicated the variety of circumstances which may exist. See: *Godfrey Davis Ltd v Culling & Hecht* [1962] 2 Lloyds Rep 349; *Cooter & Green Ltd v Tyrrell* [1962] 2 Lloyds Rep 377; *Charnock v Liverpool Corporation* [1968] 3 All ER 473; [1968] 1 WLR 1498; *Brown & Davis Ltd v Galbraith* (1972) 3 All ER 31; (1972) 1 WLR 997; *Lightning Panels v Ben Ari*, unreported decision of Crockett J the judgment being delivered on 26 October 1972. I do not agree with the implied suggestion that I feel may be seen in some of the cases that the law of contract bends to accommodate the practical difficulties of modern day living.

The second argument advanced before me was that the insurer, Mid Pacific, in contracting with the complainants to pay them $758 for the repairs, did so as agent for the defendant insured. And that when the insurer (agent) did not pay the complainants, they were entitled to look to the owner (principal) for payment.

Now it is I think clear that the insurer only entered into the negotiations because:-

(a) It was contractually bound either to repair the vehicle or to indemnify the plaintiff against the reasonable costs of repairs.

(b) It had been put on guard by the claim and notice of the accident, and would possibly have been unable – had it done nothing – to avoid a claim by the insured for a full indemnity for the cost of all reasonable repairs.

(c) It hoped to reduce the cost of the repairs and so reduce its liability under its contract of indemnity with the insured.

Once the insurer entered negotiations, such as it did here, and took charge, it was estopped from thereafter questioning the claim by the insured as being outside the terms of the policy: See: *Hansen v Marco Engineering (Aust) Pty Ltd* [1948] VicLawRp 37; [1948] VLR 198; [1948] 2 ALR 17 per Fullagar J especially at pp109-112 (VLR).

But this is irrelevant to any rights that the third party may have had or obtained against the insured. In *Godfrey Davis Ltd v Culling & Hecht* (above citation) the Court of Appeal considered

a situation not dissimilar factually from that with which I have now to deal. The judge at first instance had decided that what the insurer did it did as agent for the insured. I think it may be assumed that for practical purposes the Brandaris Insurance Company Limited in the *Godfrey Davis Case* did just what the Mid Pacific and International Insurance Company did in the present case. (see p349 of the above mentioned report).

The sole distinction is that there was in that case no purported authorisation given by the insured to the insurer to act as agent for the insured, either in writing or orally, and the agency was said by the learned Trial Judge to be an agency 'as of right'. The attitude of the learned Trial Judge is readily understood by me. On appeal the learned Lord Justices said that to say that the insurer was an agent as of right was too wide a statement, and the Court of Appeal said that on the facts it was not so. For example, Upjohn LJ said:

> 'I can find nothing whereby the defendant (viz. insured) expressly authorised the insurance company to enter into this contract as their agents. Indeed Mr Culling expressly denied that in the witness box, and there is no suggestion of it in the correspondence from start to finish.'

The appeal was allowed and the repairers failed in their action against the insured owner of the car. A little later in the same year the Court of Appeal in *Cooter & Green Ltd v Tyrrell* (above citation) considered another case of a similar nature, and once again held that on facts very similar to those with which I am concerned here, no agency was established.

Again in that case there was no purported authorisation by the owner (insured) of the insurer to act as his agent either in writing, orally, or by holding him out. Does then the writing signed by the insured in this case which writing I have set out above make any material difference to the legal result on the facts in this case?

As the present case concerns only the relationship if any, between the owner of the car (the insured) and the repairer (third party), it appears to me that the signing by the insured owner of the claim form, containing the clause in Question, could only be considered as possibly making the insured an undisclosed principal. There is no evidence that the repairer knew of the document in question. I am not however convinced that the defendant owner of the motor car appointed the insurer his agent to enter into a contract of repair for which he would be liable as principal. That seems to me to run counter to the whole purpose of the exercise, which was to avoid the double dealing which would follow if the owner was to pay for the repairs and only then seek his indemnity from the insurer.

The insurer, in its own interest, seeing that it was to be the one who would pay the cost of repairs, negotiated the contract, authorised the repairs, settled the cost and really, constituted the repairer, its agent, to obtain a release for the insurer from the owner when the authorised repairs were effected. The complainants (repairer) were at all material times fully aware of this situation.

In my view the contract between the insurer and the repairer was a contract between principals who in the circumstances, intended to contract as such. In the 13th Edition of Pollock's *Principles of Contract* at pp83-4 the following passages appear:

> "When a person contracts with an agent whom he does not know to be an agent, the undisclosed principal is generally bound by the contract, and entitled to enforce it, as well as the agent with whom the contract is made in the first instance. It has been held that an undisclosed principal is as much liable as a known one for contracts made by the agent within the general apparent authority of agents in that business. But the limitations of this rule are important. In the first place it does not apply where an agent for an undisclosed principal contracts in such terms as import that he is the real and only principal."

In my view, the insurer of a motor vehicle has no apparent authority to enter into any contract with a repairer so as to bind the owner of the vehicle to pay for the cost of repairs. Moreover, in my view the insurer in this case contracted in such a way as to make it perfectly clear that it was doing so as principal and not as agent for the owner, and the repairer appreciated this. It was the insurer who reduced the quote, who authorised the repairs, and who contracted to pay only the amount which it had authorised. It was only when the insurer had done all of these things that the repairer agreed to proceed. In my view, the contract was made then.

The only effect which the signed authorisation, given by the owner to the insurers, had was to enable the insurer to take charge of and to control the repair work on a vehicle owned by the person signing the authorisation. As between the insurer and the owner, the owner would not have been in any position, following the giving of such authorisation, to sue the insurer for detinue conversion or trespass to goods, if the insurer moved the car from one place to another or altered the car in order to effect repairs which were required.

This is a long way from creating the insurer, the agent of the owner, to contract so as to make the owner liable to someone else in the terms of the contract which the insurer made. The insurer was not, in my view, the agent of the owner of this purpose, it did not at any time appear to be so, nor, I venture, was it ever understood by any of the persons concerned in these transactions to be so.

In my view the Magistrate was correct, on the facts of this case, in dismissing the complainants' claim.
