10/05; [2005] VSC 163

**SUPREME COURT OF VICTORIA**

# *KUEK v DEVFLAN PTY LTD & ANOR*

**Balmford J**

**10, 18 May 2005**

**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 – 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 – NEW PARTS CONTEMPORANEOUSLY SUPPLIED FROM REPUTABLE SUPPLIER – EXTENT OF WARRANTY CONSIDERED BY MAGISTRATE – CLAIM AGAINST MECHANIC DISMISSED – WHETHER MAGISTRATE IN ERROR: *FAIR TRADING ACT* 1999, part 2A.**

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 carries on the business of mechanic and autoelectrical trading as Lubi's Mobile. After hearing evidence, the magistrate found that there was no contractual relationship between K. and DP/L and dismissed the claim. In relation to the warranty, the magistrate considered the extent of the warranty and dismissed the claim against N. Upon appeal—

**HELD: Appeal dismissed.**

**1. In relation to the magistrate's finding that there was no relevant contractual relationship between K. and DP/L, there was no evidence that the company was known to K. within the material timeframe. Accordingly, it was open to the magistrate to dismiss that claim.**

**2. The magistrate considered the extent of the warranty given by N. by stating that the warranty as to fitness and service in effect mimicked the statutory obligation under the *Fair Trading Act* 1999. The new parts which were fitted to the vehicle came from a reputable supplier. In those circumstances, the magistrate was not in error in dismissing the claim against N.**

## BALMFORD J:

**Introduction**

1. This is an appeal on a question of law under section 109 of the *Magistrates' Court Act* 1989 from a final order made on 22 October 2004 by the Magistrates' Court at Heidelberg constituted by Mr Hassard, Magistrate, whereby the Magistrate dismissed the appellant's claim against the respondents and ordered the appellant to pay the respondents' costs of $5,909.00.

2. On 17 December 2004 Master Wheeler ordered the appeal to be brought on the following questions of law:

> (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 GK4 to the affidavit of Gabriel Kuek sworn 22 November 2004) particularly as to whether such warranty covered:
> (i) initial inspection of [sic] and advice; and
> (ii) consequential damages as a result of work performed.
>
> (c) Did the learned Magistrate in weighing up the evidence of the Appellant's witness [sic] against those of the Respondents, adopt different criteria to wit:
> (i) in the case of the Appellant's witness [sic] Pace and Salameh he rejected their evidence because:
> (a) they were not independent as they were involved in replacing the Appellant's engine; and
> (b) their opinions were based upon their reference to a trade manual or a repair manual (being exhibits GK10 GK11 to the said affidavit) which he found to be hearsay:
> (ii) whereas in respect of the Respondents' witnesses Herzog and Pianozolla, he relied upon their opinion as experts despite the fact that they had never inspected the relevant engine.

3. After hearing some submissions I ruled that question (c) was not an appropriate question on this appeal, as not raising a question of law, and the matter proceeded on the basis of questions (a) and (b) only.

4. The first respondent ("Devflan") carries on a business described as "mechanic and autoelectrical", trading as "Lubi's Mobile". The second respondent ("Mr Nikolovski") is described in his expert witness statement as "a director of [Devflan] a company which he owns together with his wife". On 24 March 2003 Mr Nikolovski carried out some repairs on the appellant's motor vehicle. The repairs involved installing a new timing belt and associated parts. When the work was completed Mr Nikolovski handed an invoice to the appellant, showing total charges of $705.32, which the appellant paid. The heading of the invoice is "Devflan Pty Ltd t/as Lubi's mobile" and the invoice includes the statement "Warranty 12 months or [illegible to me; found by the Magistrate to be 20,000] km."

5. On 13 May 2003, within the warranty period, the engine of the vehicle broke down, and the timing belt was found to be damaged. The appellant brought proceedings in the Magistrates' Court at Heidelberg claiming against both respondents damages of $3,855.90 arising from breach of contract and negligence.

**Question (a)**

6. In the course of delivering his oral findings the Magistrate said:

> First, with whom did the plaintiff contract? As I find the subject contract was with the second named defendant Mr Nikolovski. On his evidence, Mr Kuek initially spoke to Mr Nikolovski by phone after randomly selecting the phone book entry Lubis mobile. Following the first contact phone conversation Mr Nikolovski attended Mr Kuek's home on Monday the 24th March 2003 and carried out repairs. There is no evidence, indeed no suggestion that the corporate personality, the first named defendant was known to Mr Kuek within the material time frame. The contrary is implicit, for his letter of demand dated the 20th May 2003 was addressed to Lubi's mobile, notably not the company. I find there was no contractual relationship between the plaintiff and first named defendant, nor is there any evidence to support an action in negligence against it. The claim against the first named defendant is dismissed.

7. In *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1 at 11; (1972) 30 LGRA 19 Stephen J said:

> In the case of decisions of magistrates the position in Victoria is well established by a line of decisions culminating in *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232, in which the Full Court of this State held that in the case of any question of fact the Court should treat the matter as an appeal from the verdict of a jury and should not make up its own mind upon the evidence but rather confine itself to seeing whether there was evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did come. In saying this the Full Court stated that it was following the view of Herring CJ in *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301. The Chief Justice, in that case, adopted as the test whether "on any reasonable view of the evidence that decision can be supported"; a party aggrieved can thus only succeed if a decision contrary to the view of the magistrate is "the only possible decision that the evidence on any reasonable view can support" (see at VLR p41).

8. I am satisfied, considering the matter on the basis of that passage, that the facts found by the Magistrate are based on evidence upon which he might, as a reasonable man, have come to the conclusion to which he did come. Accordingly, the answer to question (a) must be Yes.

**Question (b)**

9. As to the warranty, the Magistrate said p2:

> As to contractual *sequelae*, I find the specific but unelaborated reference to twelve months or twenty thousand kilometres warranty on exhibit A [the invoice] was a warranty as to fitness and service and in effect mimicked the statutory obligation under the *Fair Trading Act*. In that vein as to the issue of merchantable quality of the components, the plaintiff was confronted with evidence of contemporaneous purchase of new parts from a reputable supplier. As to the quality of the work performed consideration merges with the allegation of negligence.

10. It is clear that the Magistrate had considered the extent of the warranty to enable him to

describe it by reference as mimicking "the statutory obligation under the *Fair Trading Act*". That "statutory obligation" derives from the provisions of Part 2A of the *Fair Trading Act* 1999 ("the Act"), which was inserted in the Act by section 11 of the *Fair Trading (Amendment) Act* 2003, ("the amending Act") and came into operation on 1 June 2004, several months before the making of the order here under appeal. I note that the requirement of merchantable quality, to which the Magistrate refers indirectly, is provided for in section 32I of the Act, one of the provisions of Part 2A introduced into the Act by the amending Act. The answer to question (b) is thus also Yes.

11. Both remaining questions having been answered in the affirmative, the appeal is dismissed. Counsel may wish to make submissions as to costs.

**APPEARANCES:** For the appellant Kuek: Mr D Perkins, counsel. Access Law. For the respondents: Mr M Ravech, counsel. Brygel Lawyers.

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