

CITATION: *Lutz Edgar August Frankenfeld v Bridge Autos Pty Ltd* [2003] NTMC 004

PARTIES: LUTZ EDGAR AUGUST FRANKENFELD

v

BRIDGE AUTOS PTY LTD

TITLE OF COURT: LOCAL COURT AT DARWIN

JURISDICTION: SMALL CLAIMS

FILE NO(s): 20214679

DELIVERED ON: 9 MAY 2003

DELIVERED AT: DARWIN

HEARING DATE(s): 16 JANUARY 2003, 23 JANUARY 2003

DECISION OF: JENNY BLOKLAND SM

CATCHWORDS: CONTRACT – Implied term – reasonable care and skill in motor repairs: *Helicopter Sales (Aust) Pty Ltd v Rotor-Work Pty Ltd (1974) 132 CLR 1*; *Zorba Structural Steel Co Pty Ltd v Watco Pty Ltd (1993) 115 FLR 206*

REPRESENTATION:

Plaintiff: Self Represented

Defendant: Mr W Cowley

Judgment category classification: [B]

Judgment ID number: [2003] NTMC 004

Number of paragraphs: 28

IN THE LOCAL COURT
(SMALL CLAIMS)
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20214679

BETWEEN:

**LTUZ EDGAR AUGUST
FRANKENFELD**
Applicant

AND:

BRIDGE AUTOS PTY LTD
Respondent

DECISION

(Delivered 9 May 2003)

Jenny Blokland SM:

Introduction

1. The plaintiff, Mr Frankenfled, seeks to be compensated for the damage he alleges occurred to his motor vehicle, a Mercedes 380 SEL V8 Sedan after it was repaired by the respondent, Bridge Autos Pty Ltd. The plaintiff alleges the defendant should have checked the main tensioner and chain guides in the motor prior to affixing a new single chain; that a failure to do so led to the chain breaking causing further damage to the motor when in the ordinary course of events, it would not have done so. Bridge Autos Pty Ltd defends the matter on the basis that damage was caused or contributed to by a previous repairer and by Mr Frankenfled insisting on the cheapest repair method available. The defendant counter-claims for the cost of dismantling the engine of the vehicle to determine the cause of damage.

Summary of the Plaintiff's Evidence

History of the Vehicle Prior to the Bridge Autos Repairs

2. Mr Frankenfeld gave evidence that he purchased his Mercedes Sedan second - hand in 1998. He is a Mercedes enthusiast with some experience in motor vehicles. In cross-examination he stated he has owned seven Mercedes Benz vehicles. Agreeing with another proposition put to him in cross-examination, he said he also has some experience generally in the motor vehicle industry; he works as a business consultant within the industry. He drove this particular vehicle regularly, however in June/July of 1999 the chain for that first motor broke. As a result of advice from Adrian Motors, he purchased another motor from *German Star* in Melbourne that was reconditioned by Adrian Motors at 117,885 kms. It appears to be accepted that this is low mileage for a Mercedes. Adrian Motors advised that in relation to the chain, once the main chain tensioner is damaged or not operating properly, it breaks the guides and damages the motor as there is nothing holding the tension in the motor. As a result, Adrian Motors stripped the motor down and replaced the chain guides that needed replacing. The good guides were not replaced and there was no reason to do so. In cross-examination Mr Frankenfeld agreed he did not know how many of the original guides were replaced, if any.

3. It is common ground that Mercedes recommend, in relation to single timing chain motors, that in the event of repairs to the motor, the chain tensioner should be completely renewed. It is recommended that when the tensioner is replaced, that the guides are checked as wear on the guides causes the chain to lose its tension. Tendered in court (*Exhibit P1*) is the extract from the Mercedes Engine Manual. I note it states: *Chain tensioner, tensioning and slide rails. In the event of repairs, completely renew chain tensioner.* Tendered also in evidence also (*Exhibit P2*) was the Mercedes-Benz *Service Bulletin, October 1995*. The relevant parts are:

As a result of normal wear over time to various components of the valve timing mechanism, and in conjunction with certain engine operating conditions, it is possible for valve damage to occur on the above engine types due to the chain jumping a tooth on the left hand camshaft gear. This can occur if there is insufficient tension on the chain at all times.

*Installation of chain tensioner, part no 116 050 1811.....will minimise this possibility **providing** the chain has not been damaged already due to running with insufficient tension, **and/or** the upper chain guide on the left hand bank has not been damaged (cracked/broken) due to impacts by a loose chain.*

*We suggest that when any vehicle with the above engine types comes into the workshop, approval be requested from the customer to inspect the chain and guide system for wear or unserviceable components. Both rocker covers should be removed and a careful inspection made of the chain, timing gear teeth, and all visible chain guides, (particularly the upper guide on the left hand bank). After careful inspection, renew parts as required **plus** install the above tensioner if this has not already occurred. It would also be advisable to renew the upper left hand chain as a matter of course.....Ensure all workshop personnel are familiar with this bulletin.*

4. From the time of those repairs (August 1999), Mr Frankenfeld gave evidence that the car ran *perfectly well* for over two years and was regularly serviced each 5000 kms by Adrian Motors.
5. In November 2001 it developed a very loud noise in the motor that Mr Frankenfeld described as *like a machine gun going off*. He consulted Adrian Motors. At that time he was advised Adrian Motors did not have the time to repair the vehicle as it was believed there was something substantially

wrong with the motor. He was advised by Adrian Motors that Bridge Autos were the experts and that they would be able to fix it. The reconditioned motor at that stage had done about 26,000 kms. Mr Frankenfeld said he simply wanted the noise fixed.

The arrangement with Bridge Autos

6. Mr Frankenfeld took the vehicle to Bridge Autos and consulted the service adviser Tom Sliwinski. Mr Frankenfeld advised he had a severe metallic noise in the motor. He mentioned there could be damage to the guides as he had been told this was a possibility by Adrian Motors. Mr Frankenfeld said in evidence that Mr Sliwinski told him, *well we do have a lot of problems with the timing chains on these and they do also make a bit of noise*. He stated that he believed Mr Sliwinski would give it to the workshop and *get it diagnosed to see what the problem is*. He said Mr Sliwinski phoned him on or about 7 November 2001 and told him that he would sort out the problems with the noise utilising his mechanics but that Mr Sliwinski mentioned he didn't have a chain that he had quoted for the previous day at \$152. Mr Frankenfeld said he told Mr Sliwinski he could use a spare one that he had in his boot that he always carried especially for holidays. In cross examination Mr Frankenfeld was asked why he carried a spare chain around and why he didn't carry the associated guides. He explained he had one guide in the glove box that was an unused one from Adrian Motors; that when he goes on trips he carries lots of spare parts; because the timing chain is so difficult to obtain, that if it broke on a trip he would be unable to fix it and if he had a spare he would at least be able to tow it to a garage to have the chain replaced.
7. Mr Frankenfeld left the chain on the dash. He thought the quote Mr Sliwinski gave him was for the cost of the chain only, (I gather, prior to his chain being made available). The actual written quote was for \$146, being, labour costs and with *gst*, \$166.10. He said that although the quote had said

labour costs he assumed it was the cost of the chain because that was roughly what the chains cost. He thought that ultimately however, the quote was for labour costs, not the chain, because Mr Frankenfeld ended up supplying the chain himself. No other work was quoted for at that time. In cross-examination it was put to Mr Frankenfeld that the instruction from Mr Frankenfeld was simply to fit the timing chain, essentially to do no other work. In support of this Bridge Autos relied on the Repair Order (*exhibit P3*). In response Mr Frankenfeld said that he did not make a request in those terms. He said, *I didn't know what was wrong with the car.*

8. Mr Frankenfeld assumed Mr Sliwinski still had to get advice from his mechanics about what the problem was. Mr Frankenfeld told the court he assumed that was still to be done at the outset. He said he believed when he picked up the car, the car had been tested by Bridge Autos which is why some of the documentation read *Tested Vehicle, good on road*. Mr Frankenfeld paid the \$166.10. In cross examination it was put to Mr Frankenfeld that he could not have phoned the technician at the time that he said as the times recorded from the time clock do not fit Mr Frankenfeld's time frame. Mr Frankenfeld replied that he did speak to the technician and that is why he left the chain on the dash. He repeated his evidence that he was contacted by Bridge Autos because Bridge Autos had said to him that they did not have a chain.
9. Mr Frankenfeld said he was surprised to only pay that amount of money because he was surprised that the chain was all that was wrong with the motor. He said he expected to pay a lot more, had Bridge Autos found anything else wrong with the motor. Mr Frankenfeld took the car home on the night of 7 November 2001. The car seemed to be running well. The noise had certainly gone. Mr Frankenfeld agreed in cross-examination there was no discussion of what particular guides had been replaced and over what time frame and mileage. He said the timing chain had only done 26,000 kms since the previous repair. It was suggested to him that this represented low

mileage after such a major repair and he was asked further in cross-examination whether he had considered the cost of the repair ought to be covered by Adrian Motors. Mr Frankenfeld replied that the car had run perfectly well for two years since the Adrian Motors repair and he could not answer further on whether the original repair was done correctly.

The emergence of the next problem

10. Mr Frankenfeld told the court that on 15 July 2002 he was driving to work; there was a loud bang in the motor; he was driving around a round-about; there were very low revs on the motor; he swerved to the left and parked on a dirt strip; he arranged a tow truck to take the car into town; he phoned Mr Sliwinsky from Bridge Autos; Mr Sliwinsky told him essentially not to worry, that the car was still under Bridge Autos warranty and that they would fix it. Mr Frankenfeld arranged for the car to be taken back to Bridge Autos. Mr Frankenfeld said he phoned Mr Sliwinsky who told him it would be fixed, but that he was a bit short of staff at that time. In cross-examination Mr Frankenfeld denied a suggestion that he must have heard an abnormal noise for some time longer between the repair from Bridge Autos and the chain breaking.

The defendant's response to the problem

11. Mr Frankenfeld said that about a week later Mr Sliwinski phoned him and asked him to come in and talk to their mechanic; that the valves were bent but that he was lucky they were not broken. Mr Frankenfeld did go and speak to the mechanic who he knew as *Hans* (Johann Scheister) who was called by Bridge Autos in these proceedings. Mr Frankenfeld said that Mr Scheister showed him what had caused the chain to break and that Mr Frankenfeld asked him *Did you look at the main tensioner guide?* and that Mr Scheister said *No, I forgot* and words to the effect of *Oh well, you know, I was that busy, we just didn't think the chain was fed through.* Mr

Frankenfeld expressed some disbelief at this omission and asked Mr Scheister to show him the tensioner.

12. Mr Frankenfeld said nothing happened for a few days and Mr Sliwinsky rang him and asked him to come in and have a talk to the service manager. He spoke to Wayne Cowley (who appeared for Bridge Autos in these proceedings) and Mr Sliwinsky. Mr Frankenfeld was told at that meeting that it was another guide in the motor at the bottom of the motor that had caused the problem and that therefore Bridge Autos would not be paying for the damage. He was shown a guide further down the motor. Mr Frankenfeld said the main tensioner was ignored. Mr Frankenfeld was quoted \$3000 plus labour costs for Bridge Autos to fix the car. At the time of hearing the car was still parked at Bridge Autos.
13. In cross-examination Mr Frankenfeld denied a suggestion that he had said words to indicate that the previous repairer may have only changed the top guides. He says he wouldn't say such a thing when walking to the car to inspect it at Bridge Autos (as suggested).

Expert evidence called on behalf of the plaintiff

14. The plaintiff called Mr Robert Sanders, an automotive engineer with 40 years experience who told the court he had *done quite a bit of Mercedes work, not currently, but in the late 70's and early 80's*. He explained that some of the Mercedes engines in the 70's and 80's had single rather than duplex chains and that the single chain engines were *very very weak* in comparison with the duplex chains. Mr Sanders inspected Mr Frankenfeld's vehicle on 20 August 2002. He explained that the usual cause of the noise reported by Mr Frankenfeld is faulty guides and tensioners as the single chain puts a lot of pressure on these parts. If the tensioner was placed under pressure, the single chain was likely to jump teeth. Mr Sanders's observation of the engine was that the right hand chain guide was totally destroyed; the left hand guide was damaged caused by the excessively loose

chain; the engine valves were damaged because of the timing chain failure; he concluded that the new timing chain was fitted to this vehicle without the guides and tensioner being inspected which he said was *extremely bad practice, given that single row chains on these engines, are extremely unreliable.*

15. In cross examination Mr Sanders explained a reference he had made to a *modified tensioner*. He said that a modified tensioner was available as a safer option for a replacement part but that they had to be specifically ordered from Mercedes. He said he wouldn't have expected Adrian Motors to have known about the ability to order the modified tensioner as a general repairer would not know, however he would have expected Bridge Autos, as Mercedes Dealers to know. He said later that it would have been pertinent for Bridge Autos to inspect the motor and see the damage on the guides and to have advised on a new tensioner. He said they would have seen the damage on inspection.

16. On whether a mechanic should simply fit a chain at a customer's request, Mr Sanders said that a qualified dealer would be expected to know the *pros and cons*; he added that it would be *pertinent* to tell the customer that they should have the vehicle inspected or *tell him to take the vehicle away*. He also explained that the motor would not have made the telling noise when it left Bridge Autos because the chain was new and in those circumstances, even if the tensioner was almost on the way out, the new chain would mean that the noise would not start immediately. He said he assumed Adrian's would have checked the guides because they had the front cover off and everything would have been exposed. He also said in cross examination on the question of how long the tensioner guide would last, *it depends whose crystal ball we're using*. He said 100,000 kms on the tensioner wouldn't be *abnormal*. He agreed that 27,000 kms, (the mileage at that stage put to him as that between Adrian's Motors and Bridge Autos), would be

premature wear but that he couldn't really say finally given the nature of the single chains.

17. Mr Frankenfeld also called Mr McInnes, a mechanic from Adrian Motors who worked on Mr Frankenfeld's vehicle when the motor was brought up from German Star. He said he replaced all the guides that needed replacing and the timing chain was put on. He said it was standard procedure to replace the guides that needed replacing. He agreed in cross examination that he had not taken the front cover off but that he had the sump off so he could see the relevant parts using a light on a stick. He also said in cross examination of the guides and tensioner exhibited in court, that the damage *looks a lot more like the chain's come too tight, like the tensioner's jammed or something like that. It's possible that when the chain's stretched, maybe the tensioner's come out, dropped, jammed, to cause that sort of damage.*

Evidence Given on Behalf of Bridge Autos

Mr Tomasz Sliwinski

18. Mr Sliwinski is the service adviser at Bridge Autos. He had a job card made up for Mr Frankenfeld's car and said he confirmed that Bridge Autos were replacing the timing chain. The instruction at the front of the repair order stated *To attend to, removal and replacement of supplied timing chain* and the price quoted was \$152. Mr Sliwinski could not recall whether Bridge Autos were unable to supply the chain but he said he was advised Mr Frankenfeld had one in his car. He said it was possible that a conversation occurred around lunchtime on 7 November advising Mr Frankenfeld that Bridge Autos did not have a chain. Mr Sliwinski said the repair was completed on the same day, (7 November) and the vehicle was picked up at 4.00pm. He agreed in cross examination that there did not appear to be anything else wrong with the car. Mr Sliwinski said as far as he was concerned, the requested repair was straight forward, completed, the car was road tested and there were no other noises. Mr Sliwinski said there was

nothing more requested than fitting the timing chain. He stated that when a customer says they want a specific job done, then that specific job will be done, *no more, no less*.

Mr Johann Scheister

19. Mr Scheister was the motor mechanic who carried out the repairs to the vehicle as an employee of Bridge Autos. Mr Scheister said in evidence that he had a discussion with Mr Frankenfeld prior to the repair and Mr Frankenfeld told him the timing chain rails had been replaced previously by Adrian Motors. He took the valve covers off and could see the top guides. He said that in order to replace the bottom guides you have to strip the engine. He explained that it was necessary to re-set the tensioner. He said he checked the top guides but not the bottom ones as he would have had to strip the engine to do that. As I understand his evidence, he didn't believe the instructions meant that he had to check the bottom guides. He initially denied in evidence that he had told Mr Frankenfeld that he did not check the tensioner. He then said in evidence *I remember no conversation Mr Frankenfeld*. Mr Scheister also told the court that he had worked on Mercedes cars previously including cars of the type in question but he had never had one with the single chain. He said in answer to one of my questions that he wasn't aware there could be problems with the single chain.

Findings and Conclusions

20. There are a number of approaches that can be taken to resolving this matter at law, either through contract law or torts (duty of care). In terms of the facts, Mr Frankenfeld bears the onus of proving the material facts on the balance of probabilities. Analysing this problem under contract, first it is necessary to examine the agreement between the parties. Mr Frankenfeld says he spoke to representatives from Bridge Autos and wanted the vehicle repaired. He wanted the noise fixed and knew about part of the likely

problem, given the history of the vehicle and the known problems of the single chain. Bridge Autos indicate that Mr Frankenfeld essentially instructed them *only* to replace the chain, *nothing more, nothing less*. I find Mr Frankenfeld's version more probable. He is a Mercedes enthusiast; he has a history of spending money on his vehicles; I find it inherently unlikely that he would be so prescriptive in what he sought in terms of repairs. There is an inconsistency in Bridge Autos case that assists me in concluding Mr Frankenfeld's version more probable, namely, that Mr Sliwinski was very firm that the instructions were indeed prescriptive and yet Mr Scheister, who, notwithstanding the alleged prescriptive nature of the instruction, did carry out, he says, certain checks on the guides and tensioner. He says it was only the bottom guides he did not check. Further, the expert evidence in this case concerning the usual practice of mechanical repairers given by Mr Sanders, who I was very impressed with as a fair and impartial witness, led me to the conclusion that it is unlikely that a qualified repairer would accept such prescriptive instructions. The following exchange occurred in cross examination between Mr Cowley (for Bridge Autos) and Mr Sanders:

“Mr Cowley: If a person comes in with a specific request, that specific request is carried out?

Mr Sanders: And the request is?

Mr Cowley: Replace, supply timing chain?.....

Mr Sanders: Put it this way, Wayne, the situation is as I've experienced it over the years, as a qualified repairer and a dealer, you're generally expected to know the pros and cons of what you can do and what you can't do. And as a general rule, you'll find that it would be considered pertinent for you to enter – tell the gentleman that he wants – that he's got to have everything inspected or tell him to take the vehicle away. Because at the end of the day you you're considered to be the expert on the job. And that is where it all boils down to. I've been caught myself, over the years. You do what someone asks you to do, and then when it goes wrong, you end up wearing it because you're expected to know better. But that's simple,

I know it doesn't always work out when you're dealing with service advisers and customers."

21. The quote given to Mr Frankenfeld does not satisfactorily resolve this issue. It appears Bridge Autos either initially quoted for the cost of the chain, until it was provided by Mr Frankenfeld or quoted for the labour involved in replacing the chain. In my view the quote does not, in these circumstances finally answer the question of whether the terms of the contract were specifically to replace the chain or to do what was necessary to fix the motor including the chain. In as much as there is a conflict in the evidence about whether Bridge Autos phoned Mr Frankenfeld to request a chain, I prefer Mr Frankenfeld's version. Mr Frankenfeld remembers the conversation clearly and that that was why he put the chain on the dash. Mr Sliwinski said it was possible such a conversation had occurred. I find in this matter there was an agreement to fix Mr Frankenfeld's car to the extent that was needed to fix the motor that was obviously in need of repair as evidenced by the noise.
22. It is clear that in a contract for skill and labour and the supply of materials there are terms implied in the contract that reasonable care and skill will be exercised in the performance of the work and that the materials used will be reasonably fit for the purpose intended: *Helicopter Sales (Aust) Pty Ltd v Rotor-Work Pty Ltd (1974) 132 CLR 1*; *Zorba Structural Steel Co Ltd v Watco Pty Ltd (1993) 115 FLR 206*. In this regard, I rely in part on the evidence given by Mr Sanders concerning prudent practice when working on this type of problem with this type of vehicle. The evidence indicates Bridge Autos are reputed to be, amongst other things, qualified Mercedes dealers. When repairing a vehicle of this type, and involving the single chain motor, reasonable care and skill required Bridge Autos to inspect the guides and tensioner and to replace any worn guides. Further, it required Bridge Autos to either obtain a modified tensioner if reasonably available or in any event, to completely renew the chain tensioner: (*Exhibit P1*) or proceed in the way recommended by *Mercedes Benz* in the relevant service

bulletin: (*exhibit P 2*). On balance, Bridge Autos did not follow the proper procedures required for repairs of this type. Bridge Autos case is that it was never required to take these steps as that was not what they were contracted to do, however, it is clear to me after going through the evidence that Bridge Autos did not check the guides and tensioner save for the top guides that would have been viewed as a natural part of replacing the chain. There is also the evidence from Mr Frankenfeld that Mr Scheister admitted he forgot to do so and Mr Scheister's initial denial of that conversation is not clear. Mr Scheister, when cross examined said he did not remember such a conversation. Even if Mr Scheister's evidence is accepted, namely that he was told Adrian Motors had checked the guides on a previous occasion, that does not relieve Bridge Autos, according to the Mercedes Bulletins and instructions from proceeding in the recommended manner. Bridge Autos are a Mercedes repairer and knew of the recommended way to proceed. I note also it is not denied that representatives of Bridge Autos told Mr Frankenfeld not to be too concerned with the breakage because the repair warranty would cover the damage. Consequentially, I find Bridge Autos in breach of the implied term that reasonable care and skill be exercised.

23. The next issue is whether the repair caused the loss. There are two issues here. First is the apparent inherent weakness of the single chain motor: (*Evidence of Mr Sanders*). That is largely answered by the fact that this very weakness must be considered carefully by the repairer and why the particular Mercedes service procedures must be followed. Never the less, Mr Sanders did say in his evidence that 100,000 kms would not be an abnormal distance to be expected from a properly serviced tensioner. He did also say that the distance would depend on *whose crystal ball* was used. His evidence was that on inspection the guides and other parts of the engine were damaged due to the *excessively loose* chain caused by the chain being fitted without the guides and tensioner being inspected. The second issue relevant to causation is whether there was an underlying weakness due to the

possibility of Adrian Motors not having replaced the bottom guides at a previous repair. The evidence indicates: (*Mr McInnes and Mr Sanders*) that Adrian Motors did inspect the guides and replaced the guides that were required to be replaced. It must also be remembered that after the previous repair by Adrian Motors, the car was driven by Mr Frankenfeld for around two years without any problems, although that was said to represent mileage of around 26,000 kms prior to the Bridge Autos repair. Mr Sanders indicated that this would be considered premature wear but that he assumed everything was *kosher* after the Adrian Motors repair because of the manner of their repair work. Since the Bridge Autos repair, the motor had only covered 9,739 kms and around eight months on the road before the breakage. On balance, I find the manner of the repair by Bridge Autos to be the substantial cause of the damage to Mr Frankenfeld's motor, however, due to the inherent weakness of this type of motor there are certain contingencies that need to be addressed in the assessment of damages.

24. There was a faint suggestion in the proceedings that Mr Frankenfeld had contributed to the damage by not getting the car repaired earlier, in that it was assumed he must have heard the noise earlier than the day he reported. I find this scenario unlikely and reject it. Mr Frankenfeld is a Mercedes enthusiast who appears to invest a great deal of energy in and attention to his car. On that basis I find it most unlikely he would have allowed an untoward engine noise to go unchecked.
25. I have resolved the issue primarily utilising contract law but in this situation, in my view, the same result would be achieved in tort, breach of duty of care.
26. To repair the damaged motor, on Bridge Auto's estimate that was reported to Mr Frankenfeld, the cost would be around \$8,500. Bridge Autos did not provide any material to the court during the hearing on assessment of damage. Mr Frankenfeld wants to be compensated for this amount and have

the car fixed *down south*. In my view, given the evidence by Mr Saunders on the difficulty involved in predicting the longevity of the single chain and given that after a proper repair the motor ran for only 26,000 kms before the chain required repair again an adjustment needs to be made in the assessment. In my view, given the contingencies, damages should be \$6,000.

27. Bridge Autos filed a counter-claim for their costs in dismantling the engine to determine the cause of the problem. As they believed they were not responsible, they assert that Mr Frankenfeld should pay for the dismantling and the inspection. Given the findings already outlined, the counter- claim cannot succeed.

Orders

1. Judgment for the plaintiff in the sum of \$6,000.

2. The counterclaim is dismissed.

Jenny Blokland SM