IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.486/79

BETWEEN JOHN MOORE

Plaintiff

A N D WESTPAC BANKING CORPORATION

Defendant

AD.357

IN THE MATTER of the Admiralty Act 1973

A N D

IN THE MATTER of an application under Section 12 of the Admiralty Act 1973

BETWEEN WESTPAC BANKING CORPORATION

Applicant

A N D JOHN MOORE

Respondent

Hearing : 30th April 1984

Counsel : B.S. Travis for Plaintiff
B.H. Clark for Defendant

Judgment : 30th April 1984

(ORAL) JUDGMENT OF BARKER J

On 27th April 1979, the plaintiff issued proceedings against the Commercial Bank of Australia Limited (as one of the

constituents of the present defendant was then known) claiming damages and declarations. Various amended pleadings were filed as were several interlocutory applications; it is unnecessary to detail them. However, under the latest amended statement of claim, damages only are claimed by the plaintiff. The declarations previously sought have been abandoned. Consequently, the plaintiff was entitled to set the action down for trial before a Judge and jury of 12; his praecipe was filed on 16th July 1982.

On 16th September 1982, the defendant filed a motion under Section 19A of the Judicature Act 1908 for an order that the action be tried by a Judge alone and not a jury. In a reserved judgment delivered on 19th October 1982, Sinclair, J. dismissed this motion. He described the plaintiff's claim in his judgment as arising out of damage to a fishing vessel, the property of the plaintiff; the vessel was the subject of a charge in favour of the defendant; the vessel was seized by the defendant purportedly in pursuance of its powers under the instrument by way of security. It was further alleged that whilst the vessel was in the control of the defendant or its agents, it was negligently damaged and that, as a result of such negligence, loss was sustained which was quantified at $42,000.

Sinclair, J. noted in his judgment that the affidavit then filed in support of the defendant's motion before him did not disclose that the case was mainly one in which difficult questions of law would be involved; therefore, the threshold to jurisdiction under Section 19A(5) of the Judicature Act 1908 had not even been crossed. He noted that counsel did not

challenge that there had been a wrongful seizure. He noted that all the case involved, as it was then presented to him, was an allegation that, whilst the vessel was in the control of the defendant or its agents, damage had occurred which had resulted in loss. He considered the case a simple one of negligence which could be readily explained by a Judge to a jury and that there was no justification for depriving the plaintiff of his right to a jury trial.

No appeal was lodged from that judgment; the time for appeal has long since passed. Further pleadings were then filed. At callover on 20th July 1983, I permitted the filing by the defendant of an amended statement of defence.

The amended pleadings of both parties reveal a somewhat more complex situation than that which came before Sinclair, J. Mr Travis, who has only recently become involved in this matter, very rightly acknowledges that the defendant's case for Judge alone trial was not properly put before Sinclair, J. and that, had that Judge the benefit of the information now provided to me, he may well have come to a different conclusion.

I am not prepared to speculate on that submission; it will become necessary, when considering Mr Travis's submissions, to cover matters which might properly have been addressed to Sinclair, J.

The plaintiff is anxious to obtain a fixture for his case which is long overdue for final resolution; however, a

fixture is not presently sensible because of the present motion by the defendant which is made under Section 12 of the Admiralty Act 1973. This section is very brief; it reads as follows:

> "12. Transfer of proceedings from or to admiralty jurisdiction - The Court may, of its own motion or upon application, at any stage order that any proceedings be transferred from or to the Court in its admiralty jurisdiction."

Counsel have been unable to refer me to any precedent under the section; reference to cases under the English rules regarding the assignment of causes to various divisions of the High Court is not of much help because of the somewhat different organisation of the English High Court.

Mr Travis's submission is that, in the absence of any precedent, it is possible for this Court to take an approach similar to that directed under Section 19A of the Judicature Act; it may consider whether this is an appropriate case for trial by jury. The reason for this suggested approach comes form a specific provision in Section 19A(6) of the Judicature Act which makes it clear that a proceeding in the Admiralty jurisdiction of the Court shall not be heard before a jury.

Mr Clark acknowledged that, in at least two respects, the action of the plaintiff against the defendant could be heard in the Admiralty jurisdiction; Section 4(1)(c) and (e) of the Act are in point; namely, the case concerns a claim in respect of a charge of a ship and a claim for damage received by a ship. However, both counsel acknowledge that, just because a claim

happens to fall within one or other of the numerous parts of Section 4(1), it does not necessarily follow either that the proceedings have to be instituted in the Admiralty jurisdiction or that the Court should necessarily transfer them to that jurisdiction.

Counsel was in some doubt as to the proper interpretation in Section 12 of the word "Court"; under Section 2 of the Admiralty Act, "Court" means "any court upon which jurisdiction is conferred by this Act". Out of an abundance of caution, Mr Travis filed a motion not only in the present action but also in the Admiralty jurisdiction as well. Almost identical affidavits in support of both applications were filed. Mr Clark makes no point over there being two applications made out of an abundance of caution.

It is quite clear that the pleadings and affidavits now disclose a more complex situation than that which was presented to Sinclair, J. The documentation of the defendant, since the arrival of Mr Travis on the scene, has shown a marked improvement from that somewhat criticised by the learned Judge in his judgment.

The plaintiff alleges that, at the time when the defendant took possession of his vessel, it was seaworthy and worth $45,000; that it sunk after it came into the hands of the defendant's agents and that they were negligent in the 29 respects detailed in the second amended statement of claim; this included an allegation that there was used an inappropriate method of raising the vessel from the seabed and, in particular, a method known as the "coffer dam" method was not

used.

An affidavit by a solicitor for the defendant lists some seven allegedly difficult questions of law as follows:

(a) The extent of the applicant's liability as a mortgagee of the vessel.

(b) The effect of the intervention of malicious third parties.

(c) The liability of the applicant in tort to the plaintiff.

(d) The effect upon the applicant's liability of the undertaking signed by the respondent in respect of the Detention and Preservation Order that was made in the action in April 1980.

(e) The respondent's liability to arrange insurance prior to the taking of possession by the applicant and the applicant's liability to arrange insurance thereafter.

(f) Salvage rights and the effect of the seizure.

(g) The effect in law of the abandonment of the vessel.

To these questions, Mr Travis added an 8th, namely, the liability of the defendant's agents. He submitted also, that the nature of the enquiry was difficult because the case involved a number of technical matters of considerable complexity, particularly affecting the method of raising the vessel; in these circumstances, assessment of quantum was also difficult. Cumulatively, counsel submitted that the whole case was inappropriate for hearing by a jury; the complexities were such that the chances of a new trial or of misdirection etc. were enormous and that the task of the Judge would be extremely difficult in properly directing a jury on the difficult questions of law perceived.

Mr Clark, who has had considerable experience in civil jury trials in the days when they were frequent, shared my personal view that this case would be extremely difficult to run before a jury, both for counsel and for the Judge. However, he stressed, quite rightly in my view, that the right of a trial by jury belongs not to counsel or the Court but to the plaintiff; that the plaintiff has withstood successfully a challenge to that right made by the defendant. He submitted that the present application of the plaintiff was a somewhat "back door" method of review of or appeal against Sinclair, J.'s decision.

Mr Travis raised a number of other considerations. Most of the witnesses in this case are marine assessors, salvage experts and the like; in the course of their duties, they are liable to travel frequently and to be called away at short notice. For this reason, he envisaged that in a Judge

alone trial, such persons could be part-heard or called out of order - devices which would not be possible in a jury trial.

Counsel also submitted that there would be difficulties in bringing all these experts together and that the trial would be lengthy; to which the answer is that lengthy civil juries with experts are not unknown. Indeed, only last month in this Court, there has been a civil jury trial lasting 3 weeks. Any genuine case of difficulty in the co-ordination of witnesses could be met by an appropriate application for a special fixture under Rule 250B.

Mr Travis made some reference to English cases and in particular to the decision of the English Court of Appeal in "The Tojo Maru", (1962) 2 Lloyds L.R. 436; that was a successful application to transfer a claim from the Commercial Court to the Admiralty Division; the issues did not involve any particular knowledge of ships or the skill of seafaring men; they were largely issues of law. In the view of Lord Denning, M.R., the natural place for determination of this case was the Admiralty Division. He sounded the confident note:

> "We are proud to know that the Court of Admiralty has the confidence of shipowners and seafaring men all over the world. They have come here for many years from countries far and wide, relying on its experience and skill in all maritime disputes. This case is typical. It is a dispute between the Japanese shipowners and the Dutch tug-owners about damage done in the Persian Gulf. Let it be decided in the Court of Admiralty where arrangements will be made, I am sure, for a well-qualified Judge to hear this very important case."

Unfortunately, in our small country, we do not have Judges as qualified as those in the Admiralty Court in England to deal with Admiralty cases. The experience of some (but not all) Judges of Admiralty matters is confined to yachting occasions. We just do not have in this country a specialist Admiralty Court. There is no bank of expertise in this class of case buillt up by specialist Judges. Mr Travis's application under Section 12 of the Admiralty Act, filed on 9th December 1983, is only the 357th Admiralty proceeding strictu sensu filed in the records of this, the busiest registry in the country, since the Court records began well over a century ago.

There is therefore no virtue in asking for the matter to be referred to a specialist Admiralty Court as there would be in England. With one exception, the issue raised by this motion is whether the matter should be determined by a Judge alone or by a jury.

The decision is discretionary - to be decided on the particular facts of the case. For the reasons which I shall give, I do not think that the discretion should be exercised in favour of the present defendant which seeks removal.

The factor most inimical to the defendant's application is that of delay. This application should have been made years ago - shortly after the proceedings were filed in 1979 or at the very latest, shortly after the plaintiff had set the action down for hearing in July 1982. It may well be that, had the defendant applied then, rather than take the course of applying under Section 19A of the Judicature Act, it may well have

succeeded on an application under Section 12 of the Admiralty Act. If it had chosen to apply in that way and at that time, it could not be said, as it can now be said, that the plaintiff's right to a jury had been supported by the Court.

It may well be that, in appropriate cases, matters relevant under Section 19H of the Judicature Act could also be relevant on an application under Section 12 of the Admiralty Act. If the application had first been brought under Section 12 of the Admiralty Act, then I should have been extremely sympathetic to the defendant's application. However, the reason why I am not now sympathetic is caused by the defendant's action in pursuing a somewhat half-baked application under Section 19A of the Judicature Act before Sinclair, J., which, on the material placed before the learned Judge, had little prospect of success.

The criteria under Section 19A of the Judicature Act are of course limited by the terms of that section. The discretion under Section 12 of the Admiralty Act is much wider; I should not have thought it would be so difficult to remove the right of jury trial by means of that section as it might be under Section 19A.

However, the present application by the defendant can only be construed as a somewhat back-handed way of seeking to deprive the plaintiff of his established right to a trial by jury. I do not think that in the exercise of my discretion, it is proper for me, under the guise of an application under another statute, to be seen to review the decision of a brother

Judge which seems to me to have been beyond question on the material placed before him.

Having said all that, I again indicate that, in my view, this case is unsuitable for a jury. It will be very difficult for all concerned; Mr Clark very sensibly indicates that he would try to conduct the trial for the plaintiff on the basis of having the jury resolve factual matters and leaving any questions of law for the Judge. It seems to me that there are many factual matters which a jury could, not without difficulty, give answers to. I am not particularly moved by statements that a jury will have difficult in deciding between experts. In the days of the personal injury litigation, juries not infrequently had to consider diametrically opposed views from equally qualified experts; they still do from time to time in criminal cases - particularly with psychiatric evidence.

The only other matter which has caused me some concern is Mr Travis's reference to Rule 33 of the Admiralty Rules 1973. This is a long rule which, in general terms, entitles the Court, on its own motion, or on the application of any party, to appoint an independent expert to enquire into and report upon any question of fact or information. Under Rule 33(8) such a party can be cross-examined on his report; under Rule 33(11), the fact that there is a Court expert restricts the rights of the parties to call one expert each, save in exceptional circumstances.

The rule is generally a very helpful one and will

assist the Court in coming to a speedy determination of technical cases. It is quite clear, as Mr Travis submits, that this rule would provide a genuine advantage in using the Admiralty procedure; it is the only consideration in the defendant's favour in view of the defendant's already unsuccessful application for a Judge-alone trial.

I now balance the undoubted benefit to both parties and to the Court by the possible use of Rule 33 against the other factors. I first note that it is by no means automatic that the Court would grant leave for an expert to be appointed. On a somewhat cognate topic, I refer to my judgment in Beecham Group Limited v. Bristol Myers Company, (1980) 1 N.Z.L.R. 185. In that case, against the opposition of one party, I ordered a scientific adviser to be appointed under Rule 5 of the Patent Rules 1956.

Balancing the convenience to the parties that a Court expert might provide against the now established right of the plaintiff to a jury trial, I consider that the right to a jury trial is something which should not lightly be taken away from the plaintiff; delay must count against the defendant. Had the defendant genuinely in the early stages of the proceedings wanted to avail itself of its right to apply for a Court-appointed expert, then the use of this feature of the Admiralty Rules would weigh much more heavily in the defendant's favour; had the application been made in the first year of the litigation, rather than in the 6th year, it would be more likely to succeed.

The interests of justice surely are that this action be determined promptly. For the reasons given, I consider that

this action should not be transferred to the Admiralty jurisdiction.

I stress that this case is confined to its own facts; I am not seeking to establish any rules for the application of Section 12 of the Admiralty Act. Indeed, I think the occasions for its use should be kept flexible. Nor am I saying that considerations such as those specified in Section 19A of the Judicature Act or the undesirability of juries in complicated civil cases generally should not form part of the Court's consideration. I consider the factor of delay weighs so heavily against this defendant in the circumstances that it is seeking to undo the plaintiff's successful opposition to its attempt to take away the plaintiffs right to trial by jury.

I therefore direct that the action remain in the list of civil jury cases for hearing; it is to be called over on 31st May 1984.

If there are difficulties for either party in being ready for trial because of the unavailability of witnesses, then I shall be sympathetic to any application for a special fixture.

The plaintiff being legally aided, I must therefore give consideration to costs on this motion. Costs to the plaintiff $200.

R.D. Barker J.

SOLICITORS:

Chapman, Tripp & Co., Auckland, for Westpac.
Beckerleg, Cockle & Manley, Auckland, for Moore.