Set 3

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A. No. 428/83

BETWEEN DRILLING SPECIALTIES LIMITED (In Liquidation) a duly incorporated company having its registered office at Papakura and carrying on business as Well Drillers

Plaintiff

A N D BAYLIS BROS LIMITED a duly incorporated company having its registered office at Hastings and carrying on business as Machinery Manufacturers

Defendant

Hearing: 23, 24 and 25 July 1984

Counsel: A. Galbraith for Plaintiff
M.B. Wigley for Defendant

Judgment: 20 August 1984

JUDGMENT OF QUILLIAM J

This is an action for damages for breach of contract.

The plaintiff company, prior to going into liquidation, carried on business at Papakura as well drillers. For this purpose it owned and operated a drilling rig. Its business comprised the drilling operations required by customers and also the sale of such equipment as was normally required for the customers' purposes. This included pumps, casing and other equipment.

During 1978 there was so much work offering that the plaintiff could not accommodate it all and had to turn some away. It had a smaller drilling rig as well but that was found to be operating at a loss and so was closed down. It was decided that a new rig should be purchased comparable in capacity with the rig already being operated. Mr Prestney,

the plaintiff's director and principal shareholder, learned that the defendant had experience in building the kind of rig the plaintiff wanted and so he entered into negotiations with Mr Baylis, one of the directors of the defendant. The outcome was that Mr Prestney placed an order for the manufacture and supply of a drilling rig.

It is unnecessary to give in detail the course which events took. It is sufficient to say that the defendant constantly failed to meet the agreed delivery date with the result that the plaintiff was prevented for a period of five weeks from commencing operations with the rig. It claims damages for loss occasioned by that period of delay. When the rig was put into operation a series of design and manufacturing faults emerged with the result that there were a number of stoppages while repairs were effected. The second part of the plaintiff's claim is for loss occasioned by the rig not being available during those stoppages which it is claimed together total 26½ days. There is almost no dispute on the issue of liability and the real contest has concerned the proper measure of damages to which the plaintiff is entitled. The amount claimed for the first period, after amendment, is $6,207, and for the second period $8,368.17 (which includes the cost of repairs), a total of $14,575.17, together with interest on that sum. It was agreed that there should be deducted from whatever the plaintiff was entitled to recover a sum of $422.50 by way of set-off, although this had not been pleaded.

Some of the items claimed were not in dispute. This applied, in particular, to the cost of repairs to the rig. The main argument centred upon the way in which loss of profits should be calculated. It was common ground that while the rig was not working there must have been a loss to the plaintiff but the accountancy method which should be used to calculate that loss was a matter in dispute. The plaintiff's claim was formulated on the basis that there should be a calculation of the gross profit the rig would have been expected to earn during the periods in question and that there should be deducted from the gross profit the direct

operating expenses which would have been incurred and also a proportion of the company's fixed overhead costs. Upon the facts of this case it became apparent that this method could not stand up to examination and, in particular, because it was not appropriate to take into account a proportion of overheads. The evidence made it clear that the overheads would not have been affected by more than a trifling amount by the addition of a second rig. Mr Galbraith, on behalf of the plaintiff, accordingly elected to invite me to deal with the claim as one for general damages and on this basis argued that the loss could be shown to be even greater than had been claimed. I return to this later.

For the defendant it was contended that the accountancy method adopted by the plaintiff was wrong, that some of the assumptions on which the plaintiff's claim was formulated had not been established, and that the proper method was to arrive at the gross profit percentages for the rig operations and the sales of materials on the basis of the 1978/79 accounts and then apply them to the circumstances as they were likely to have existed in the following year.

There were certain basic assumptions which had to be made for each method and as these were in dispute it is necessary that I resolve them as a preliminary matter. The calculation of gross profit depended, first, upon the rate per hour at which the rig would have been charged out. The plaintiff's claim was based upon a rate of $36 per hour and the defendant's answer upon a rate of $34 per hour. The latter figure was adopted by the defendant's accountant, Mr Palairet, because he had seen in the plaintiff's records invoices in which jobs had been charged out at $34 per hour. Mr Palairet had not seen some of the records of the company and also had not been aware that on some jobs the charge-out rate was supplemented by a contract rate for certain aspects of the work. Upon the basis of the records produced and the explanations given by Mr Prestney, I have no doubt that the appropriate rate for the new rig, had it been working during the periods in question, was $36 per hour.

A second assumption concerned the number of hours during the year the new rig could have been expected to work. The plaintiff's claim was based upon 2,000 hours. Mr Baylis's evidence was that this was an excessive estimate and that he would not have expected it to work for any more than half that number of hours. Mr Palairet's calculations, however, which were based upon his understanding of the number of hours actually worked by the new rig and the periods of time it was unable to work because of breakdowns, and projected to cover a full year, reached a total of 1,432 hours. Accordingly Mr Baylis's evidence appeared unlikely to be correct. Moreover, Mr Palairet's premises were incorrect in so far as he had been unaware of several contracts on which the new rig had worked. The total number of hours for a full year must remain a matter of estimate but it is likely to have been closer to 2,000 than to 1,432.

A third matter, which affected the calculations on the second part of the claim relating to time lost due to repairs, concerned the number of days which should be regarded as having been lost. This had been calculated by Mr Prestney on the basis of his records as 26½ days. It was argued for the defendant that some of the periods the rig was not working appeared unduly lengthy having regard to the nature of the repair work needing to be done, and to the plaintiff's obligation to mitigate its loss. I could see no evidence to suggest that there were any unreasonable delays of this nature. Indeed, several of the breakdowns occurred in the course of contracts being carried out and it seems most unlikely that the plaintiff would have permitted any unnecessary delays in getting the rig working again. In any event the plaintiff's claim is based upon five weeks of lost time and 26½ days is a little more than five normal working weeks and so some allowance has been made for contingencies.

The principal argument concerned the proper approach to the calculation of loss. What needs to be arrived at is the amount which the rig would have earned during the two periods of lost time and to deduct from that the expense which would have been incurred in achieving it. There is no doubt

that the plaintiff must have suffered some loss upon each of the two occasions it was unable to use the rig. The plaintiff's claim is formulated as a claim for special damages but it faced difficulties of proof in establishing its claim on that basis. The prayer for relief contains the general prayer for further or other relief and so Mr Galbraith elected to proceed as on a claim for general damages although, of course, these could not exceed the amount actually claimed.

This is a course which now has the express approval of the Court of Appeal. Newmans Coach Lines Ltd v Robertshawe (unreported, 16 December 1983, No. C.A. 122/82) was the case of a bus being put out of use by an accident for which the respondent was liable. The bus was one of a large fleet of buses. The claim had been formulated as one for special damages based on a calculation of the nett profit per kilometre which the bus would have earned if it had remained in service. At first instance Greig J held that no loss had been established because the appellant had other buses available to do the work the damaged bus would have done. The Court of Appeal considered the loss of availability of the bus was itself something for which the appellant was entitled to claim and that if it could not establish an earnings loss then it was entitled to recover compensation for loss of use. In that case there had been a claim only for special damages. Although there was a prayer for general relief the question of general damages, as an alternative, had not been argued at first instance and so the Court of Appeal remitted the case to the High Court for the assessment of general damages. What has happened in the present case is that Mr Galbraith, recognising that the claim for special damages may not have been fully sustainable (although this was not actually conceded), elected to rely instead on the prayer for general relief and to pursue his claim as one for general damages. It seems clear he was entitled to do so and I accordingly turn my attention to this aspect of the matter.

This is a case in which the items of earnings and expenditure are within a narrow compass. There are none of

the considerations which arise in a large organisation where loss can readily be absorbed by the use of other equipment or services. Within reasonable limits it is possible to make a fair assessment of the number of hours in a year the new rig could have been expected to work. It should be mentioned that the plaintiff went into voluntary liquidation on 30 April 1980 at a time when it was still solvent and for reasons not connected with the present claim. The result was, however, that the calculation of loss must be based upon a period of less than a year's working of the new rig.

As I have said, I accept that the new rig would, in a full year, have worked for something between 1,432 and 2,000 hours. For present purposes I adopt what may well be a rather conservative figure of 1,600 hours. At $36 per hour this would give a gross profit for the year of $57,600. There must then be deducted the operating costs. These are shown in the figures extracted from the company's accounts in this way:

Fuel (actual = 6 months $551) x 2 for one year	$1,102
Insurance (actual)	1,553
Licences (actual)	23
Repairs (actual = 6 months $341.70) x 2 for one year	683
	$3,361

There are then set out further items which are not properly chargeable. On the basis of these figures the loss for five weeks would be $5,215. This is a sum in excess of the amount claimed for loss of profit for each of the five weeks' periods. It is a somewhat rough and ready approach but it gives a basis for making an assessment of general damages. There are, in addition, the uncontested items to which I have referred and which need to be taken into account, as well as

the loss of profit on sales which could have been expected of pumps and other materials. A further item which was not the subject of agreement was $500 for trained staff on standby during the first period of delay. The main objection to this item was that the men may have been employed in gainful work of a different nature during that time. The only evidence on this was that of Mr Prestney, who said that the men were given such work as chipping weeds, cleaning out, and generally assisting wherever possible. It may be that the claim in respect of these men ought to be discounted to some extent, but it remains one of the matters to be taken into account.

I am satisfied that, upon a general damages approach, the plaintiff has succeeded in establishing a substantial loss during each of the periods in question. Allowing for the items not in dispute, but making an assessment on a conservative basis in order to allow for contingencies which cannot readily be identified with precision, I arrive at a sum for the first period of $5,000 and for the second period of $8,000, a total of $13,000.

There will be judgment for the plaintiff for $13,000, reduced by $422.50 by way of set-off, with interest at 11% per annum as from the date of issue of the writ, namely, 26 March 1981, until the date of judgment. The plaintiff is also entitled to costs according to scale, with disbursements and witnesses' expenses as fixed by the Registrar. I certify for a second day at $300 and a third day at $200. In view of the fact that the plaintiff's affidavit of documents turned out not to have been complete there will be no allowance for discovery.

Solicitors: Rice, Craig, Gray & Co., PAPAKURA, for Plaintiff

Langley Twigg & Co., NAPIER, for Defendant