HC 84-9

BUTTERWORTHS
PO Box 472, Wellington

IN THE HIGH COURT OF NEW ZEALAND
IN ADMIRALTY
NELSON REGISTRY

A.D. No. 3/80

158

BETWEEN ANCHOR DORMAN LIMITED

Plaintiff

A N D The Ship "F/V MARCONI"

Defendant

Hearing: 17, 18, 19, 20, 21 & 31 October, 1, 2, 3, 4, 14, 15, 16, 17 & 18 November 1983

Counsel: R.W. Worth and J.R. Gresson for Plaintiff
T.J. Castle for Defendant

Judgment: 24 FEB 1984

JUDGMENT OF QUILLIAM J

This is an Admiralty action in rem commenced by the plaintiff for judgment for the balance of the cost of work performed on the defendant vessel. In addition to a denial of liability the defendant has claimed a set-off and has counterclaimed for loss alleged to have resulted from defective workmanship by the plaintiff.

MBT

Mr Carl Muollo (the owner) is a member of a family which has for many years been engaged in commercial fishing. A number of fishing vessels have been owned and operated by members of the family, including the owner. In about 1978 the owner decided to extend his activities by acquiring a new and larger vessel. He was not only an experienced fisherman but he has enjoyed a high reputation as an expert boatman and for his activities in search and rescue work.

In about December 1978 the owner entered into a contract with Guard's Sea Service Ltd (Guards) for the construction of a 60 foot wooden fishing vessel to be called the "Marconi". That contract was for the construction of the hull and other wooden parts of the vessel and to supply some additional equipment which is unrelated to the present action. A separate contract was entered into with the plaintiff (Anchor Dorman) in respect of the trawl winches,

the propeller shafts, the auxiliary engine and other equipment, and these are the subjects of the present dispute. It is the defendant's case that virtually all the work done by Anchor Dorman was defectively done so that the owner ought not to have to pay for it and, moreover, that the defects were such as to have involved the owner in very substantial loss by way of repairs and remedial work and loss of profit due to the vessel not being available full-time for fishing.

Although the original contract price was $35,000 the plaintiff has based its claim on an actual cost of $34,388.26. It has claimed an additional $40,693.60 for extras. This is a total of $75,081.86. Credit is given for $8,346.00 paid by the owner on account and so the plaintiff's claim is for the balance of $66,735.86. The defendant has counterclaimed for loss of revenue, repairs and interest totalling $258,282.14, general damages of $55,000 and damages for malicious arrest of $15,000, a total of $328,282.14. In the course of the hearing the claim for malicious arrest was abandoned, as also were a number of the items of special damages.

The action has had an unfortunate history. The writ was issued on 5 December 1980. At that stage it appeared to be a relatively straight forward action for the unpaid balance of the plaintiff's account. A statement of defence amounting to a simple denial of liability was filed. On 26 July 1982 an amended statement of defence, set-off and counterclaim was filed raising allegations of defective work and resulting loss, but those allegations were in the most general of terms and gave no real indication of the nature of the defendant's case. The plaintiff believed that a more precise pleading would follow and so did nothing to seek particulars. Instead the plaintiff set the action down unilaterally for hearing in June 1983. There was an application by the defendant for an adjournment and this was grante by Hardie Boys J who arranged for the case to be given a special fixture in October. The defendant then applied for leave to file a further amended statement of defence, set-off and counterclaim. That application came before me early in October and, being unopposed, was granted. This further

pleading did nothing to clarify the matters which would require determination and still left the allegations in the most general of terms. Unfortunately, the plaintiff did nothing to require the position to be clarified with the result that the action went to trial before it was ready for hearing and the result has been the emergence during the trial of various issues not raised on the pleadings. This most unpromising situation has resulted in a trial of inordinate length and considerable obscurity. This is something which will require careful consideration when it comes to the fixing of costs. It should be mentioned that, by agreement, the counterclaim for loss of revenue was put aside in order that it could first be established whether the plaintiff is under any liability to the defendant which might lead to such a counterclaim being pursued.

I do not propose to set out any extended narrative of the facts because many of the matters canvassed in the evidence do not need to be discussed. Such of the facts as are relevant will appear from the various topics which need consideration.

Several distinct topics have been dealt with in the evidence. They relate mainly to -

1. The auxiliary engine.
2. The intermediate propeller shaft and bearing.
3. The trawl winches.

Before embarking on any of these it is necessary to identify the particular matters upon which a decision may be required.

<u>The Claim</u>

1. What was the contract between the parties?

2. Was the amount claimed by the plaintiff for the reticulation of the hydraulic winch system included in the works quoted in the contract or was it an extra?

3. Is the defendant precluded by the exclusion clauses in the contract from disputing liability to the plaintiff on the ground of defective workmanship?

4. If not, was there defective workmanship such as to relieve the defendant of liability for any part of the amount claimed?

5. For what amount is the plaintiff entitled to judgment?

The Counterclaim

6. Is the defendant precluded by the exclusion clauses from pursuing its counterclaim for loss arising from defective workmanship?

7. If not, is the plaintiff liable for loss in respect of the hydraulic winch system?

8. For what amount is the defendant entitled to judgment?

I should add that the counterclaim in respect of alleged loss arising from the supply by the plaintiff of a defective intermediate propeller shaft was abandoned at a late stage in the hearing following evidence from one of the defendant's witnesses, Mr Guard, which was, in effect, an acknowledgment by him that his company had accepted responsibility by proceeding with the installation of a shaft which he knew was not fit for the purpose. Also there was a great deal of evidence directed to the subject of the auxiliary engine supplied by the plaintiff. The defendant alleged that it was supplied with a used engine when it was entitled to a new one. It was the plaintiff's case that, in the end, the owner agreed to accept the used engine once it had been reconditioned. This was denied. There is no counterclaim for any loss caused to the defendant because of being supplied with a used engine but there is an application for a declaration in respect of this matter, and I propose to deal with that in due course.

I now deal with the various matters in the order in which I have set them out.

1. THE CONTRACT

The keel for the "Marconi" was laid by Guards in January 1979. Anchor Dorman's Sales Manager at that time was Mr Buckeridge. He spoke to the owner in order to see whether Anchor Dorman may be able to supply any of the equipment whic the vessel would need. He evidently received a satisfactory response because on 22 March 1979 he wrote to the owner in the following terms:

> " Approximately one week ago I spoke to you on the telephone about the possibility of your using a Volvo Penta Marine Diesel as the auxiliary engine on the vessel which Guards Sea Services are currently constructing for you.
>
> I am able to supply, ex stock Nelson, one T.M.D.40A which has had the marine gearbox replaced with power take-off. This unit is a continuous 91 h.p. at 3000 r.p.m.
>
> I am enclosing a product bulletin for this unit which will enable you to obtain all of the technical specifications you need.
>
> The fuel usage in an auxiliary capacity such as on the vessel you are having built would approximately average between 3 and 3½ gallons per hour.
>
> Our current price on this unit, ex Nelson, is $11 565.00. "

In response to that letter the owner indicated he was interested in having Anchor Dorman supply the propeller and propeller shafts, the auxiliary engine and alternator, and also an hydraulic trawl winch system similar to that on another fishing vessel called the "Mystery". Accordingly Mr Buckeridge and a fellow employee, Mr Taylor, inspected the equipment on the "Mystery". He then wrote again to the owner on 22 May 1979 and attached his company's quotation

for the various pieces of equipment previously discussed between them. The relevant parts of that quotation are:

" Auxiliary Engine and Alternator

The most suitable engine/alternator combination for this vessel would be a VOLVO PENTA M.D.21.A. Heat exchanger cooled diesel engine, producing 45 h.p. at 3000 r.p.m. with a front mounted power take-off for bilge pump etc. This motor would be close coupled to a Markon 3 phase 7.5 KVA alternator. The complete unit would be base mounted as desired.

Price for this unit complete is $8 346.00, which price includes Sales Tax of $1 640.00, leaving a nett figure of $6 706.00.

Engine Control System

The control system recommended for this vessel is the Canadian Kobelt Stainless Steel Wire over pulley, two station control system, details of which I have enclosed on a separate sheet. An accurate costing of this system can only be arrived at when the exact cable distance between the wheel-house engine trawl winch and control consol is known. However, variation of these measurements do not affect overall cost to a great extent consequently for a two station control system our price would be approximately $1 098.00.

Propeller Shaft and Propeller

Although our Foundry is capable of casting a propeller to suit, it would be more economic for us to buy in a propeller and machine it to suit the shaft. For a stainless steel (Lloyds certificated) shaft 4" in diameter and approx. 12 ft. long, tapered, threaded, keyed with nut etc. to suit would be $2 200.00.

Hydraulic Trawl Winch and Net Roller

In company with our Projects Manager, Mr Dennis Taylor, I have viewed the set-up aboard the MYSTERY and consequently we are certain we can reproduce the same arrangement but with certain improvements. For Anchor-Dorman Limited to provide you with a hydraulically operated split trawl winch capable of

handling 550 fathoms of 3/4" dia. cable and a net roller to suit, plus a control consol, we would be looking at a provisional price of $19 000.00. To install this trawl winch and net roller to the vessel, and to run the hydraulic hoses and connect them a provisional price would be $3 068.00.

To give you an exact figure it would be essential for us to know exactly the location of the trawl winch and net roller, and control consol, distances from engine to winch, etc.

However, to fabricate and install a hydraulically operated split trawl winch, net roller and control consol our provisional price would be $22 068.00.

SUMMARY

To summarise the above, our total price would be

	$
Engine & alternator	8 346.00
Propulsion control system	1 098.00
Stainless Steel certificated Shaft	2 200.00
Trawl Winch and Net Roller, incl. installation provisionally	22 068.00
Total =	$33 712.00 "

On 25 June 1979 Mr Buckeridge wrote again pointing out that work would soon need to begin on installing the equipment in the vessel and asking for a firm order. On 16 July 1979 Mr Buckeridge spoke to the owner and, as a result, placed an order with Moller Marine Ltd for a Volvo Penta auxiliary engine, Model No. MD21A. That engine was duly received but it was not to be required for installation for some time and when Moller Marine asked to have it back for supplying to another customer this was agreed to. It was the intention that another of the same model would be supplied when it was required. When that time came another engine of the same model was not available. An arrangement

was made that the owner would accept a larger engine, Model No. 32A, at the same price as the original one. Mr Buckeridg then wrote again to the owner on 2 October 1979 giving a firm quotation for some of the equipment and the relevant parts of that letter are these:

> " As a result of our discussion in Nelson recently I would like to advise you of our firm quotation for various items of equipment.
>
> 1) To fabricate and install a hydraulically operated split trawl winch and control console, capable of handling 550 fathoms of 3/4" dia. cable, our price would be $19 929.
>
> If you required a net roller, then supply and installation would be an additional $2 882.
>
> I would like to point out that in the almost five months since I gave you a provisional price for the above items, our price has increased by only a little more than 3% for the equivalent items.
>
> 2) To fabricate a certificated stainless steel propellor shaft of 4" diameter approximately 12 ft. long, tapered, threaded, keyed, with nut etc. to suit and for a certificated stainless steel intermediate shaft, 4" in diameter, approx. 14 ft. long, complete with couplings, nuts and bolts etc., and with two split cooper bearings would be $6 295 delivered to Guards Sea Services.
>
> 3) The price for the two station Kobelt wire-over-pulley, engine control system has unfortunately escalated since May, to a current price of $1 729 including installation. "

The result of these letters and discussions was the preparation by Mr Buckeridge of a document headed "Quotation". This comprises a formulation of the work which was to be done by Anchor Dorman and specifies the contract price for that work. This document is central to the whole case and needs to be set out almost in full:

> " We have pleasure in submitting our quotation as follows:
>
> To fabricate, install and commission a Hydraulically operated split trawl

winch ancilliary piping and control consol

To fabricate, install and commission a Single Drum lifting winch (as per discussion with Dennis Taylor and myself).

To fabricate and deliver to Guards Sea Services Limited a 4" dia. Certificated Stainless Steel Propellor and Intermediate shaft complete with couplings, nuts and bolts etc., and with 2 split Cooper bearings.

To supply and install a 2-station Kobelt wire over pulley throttle and clutch control system.

To supply and deliver to Guards Sea Services Limited a Volvo-Penta MD.32A close coupled to a 7.5 kva alternator. The complete unit base mounted and ready to install (this unit already being assembled in our workshop).

Anchor-Dorman will make available, free of charge, delivered to Guards Sea Services 10 tons of metal stampings for the purpose of ballast.

PRICE: $35 000.00 (Thirty five thousand dollars) not including Sales Tax.

DELIVERY:

TERMS & CONDITIONS: Unless otherwise stated above, this quotation is subject to our Standard Terms and Conditions as set out on the reverse side of this form. "

The words "Thanks, Bob" and "Int. Shaft delivered to Guards on 8/5/80" have been added to that document in the handwritin of Mr Buckeridge after the completion of the contract.

Attention is drawn by the document to the standard terms and conditions on the reverse side of the form. Some of these are of relevance for present purposes. They are:

" (1) General:- Excepting where special conditions apply and are referenced on the front of this quotation, acceptance of this quotation includes the acceptance of the terms and conditions as set out hereunder:- No agent or representative of our Company has any authority to make any representations, statements, warranties or agreement not expressed in this quotation.

> (4) Licences, etc.: This quotation is subject where applicable to our being able to obtain all licences (including import licences), permits and authorities whether Government or otherwise and whether within New Zealand or overseas essential to the performance or our obligations and we accept no responsibility for delays or refusals in the granting of any such licences, permits or authorities.
>
> (14) Warranty: (a) We undertake to make good our workmanship and materials free of charge if proved defective within 3 months of delivery, normal use and service ordinary wear and tear excepted, and if such defective workmanship and/or materials are at the purchaser's expense made and left available to us at such place and for such reasonable time as we specify.
>
> (c) Unless expressly provided for in the quotation no warranty is given in respect of and no responsibility is accepted for the design or performance of work done by us.
>
> (d) The foregoing warranties are in Lieu of and to the exclusion of any express or implied condition, statement or warranty statutory or otherwise. "

The evidence does not disclose whether this contract document was posted or handed to the owner, but certainly he had it in his possession and was aware of its contents. He signed it and paid the deposit of $5,000.

The plaintiff's case was that this document comprised the whole of the contract between the parties. The case for the defendant was that the contract included also the three letters written by Mr Buckeridge to which I have already referred.

Although the document headed "Quotation" crystalised the negotiations which had taken place, I am unable to conclude that the intention of the parties was to regard that document as comprising the whole of their contract. It is apparent, on the face of it, that reference to some other source was necessary (as, for example, in respect of the

reference in the second item to a discussion between the owner, Mr Taylor and Mr Buckeridge). Also, the first item is in the baldest of terms and would, on its own, be too vague to carry contractual certainty. Clearly the parties were intending to incorporate reference to some other source and I think it must be accepted that they intended that reference should be made to their earlier discussions and letters. This does not mean that those earlier letters are, in their entirety, to have binding effect. For instance, the letter of 22 May 1979 contains reference to a net roller and it is clear that the owner decided eventually not to have a net roller. The document headed "Quotation" is clearly the basic contract document (and I accordingly refer to it as the contract document), but it is to be construed in the light of those earlier letters and discussions.

While the owner has been critical of almost the whole of the performance by Anchor Dorman of its contract, it needs to be remembered that the counterclaim for damages is made in reliance only on the first and third items in the contract document, namely, in respect of the hydraulic trawl winches and the intermediate shaft and bearings.

2. RETICULATION OF THE HYDRAULIC WINCH SYSTEM

In the first item in the contract document Anchor Dorman offered "to fabricate, install and commission an hydraulically operated split trawl winch, ancillary piping and control consol". Included in the claim for extras to the contract is a sum of $24,161.80 for the reticulation of the hydraulic winch system. This is resisted by the defendant on the basis that the reticulation is included in the expression "install" and forms part of the main contract. To the uninitiated there is certainly at least a superficial attraction to that view. But the evidence for Anchor Dorman was that in the way these things are actually done that view is not correct.

The evidence was that an hydraulic winch system involves basically three parts. First, there are the winches themselves with their motors. Then there is the control

consol which governs the operations of the winches and which has its own set of hoses and piping. Finally there is the system of pipes running through the vessel by means of which the winches and consol are connected. It was said that these connecting pipes comprise the reticulation. The plaintiff's case was that the contract document embraced the installation of the winches and motors and also the consol with the ancillary piping for each but not the reticulation. This was a matter put to three of the plaintiff's witnesses, Mr Buckeridge, Mr Taylor (who was at the time the plaintiff's Projects Manager) and Mr Butters (who is the General Manager) In different terms each gave similar evidence. The most descriptive account was given by Mr Butters, who said:

> " I would liken first in laymen's terms to a house situation where one may engage a company who deals in home appliances to supply and install a dishwashing machine. The person who supplies and installs that machine normally connects into the existing reticulation provided in the house by way of water pipes and electricity supply. It's not expected to provide the prime sources of those functions. The same thing exists in a ship which has certain and distinct functions or systems provided in it e.g. the main propulsion system, the electrical system, the bilge pumping system, domestic water and hydraulic system. So a person who is contracted to supply and commission hydraulic winch and defined as such only, would reasonably expect to install the winch, connect to services supplied by others and test it. "

The owner's evidence was somewhat vague but was to the effect that he had expected the reticulation system to be part of the installation and so covered by the main contract.

The contract document is rather ambiguous and I think it is necessary to take into account the evidence as to what is normal shipbuilding practice and such other circumstances as assistance with interpretation. The matter which stands out most clearly is the cost of the reticulation system by comparison with the original contract price. The

contract document provides for a price of $35,000 to cover the six items referred to. The firm quotation set out in Mr Buckeridge's letter of 2 October 1979 for the fabrication and installation of the "hydraulically operated split trawl winch and control consol" was $19,929. This left a little over $15,000 for the other items. Objection was taken by the defendant to the charge of $24,161.80 for reticulation, but it is obvious that if a reasonable charge for that work is anywhere in the vicinity of that sum then it becomes very difficult indeed to conclude that the parties intended it to be covered by the contract price of $35,000. It is necessary, therefore, to consider whether the charge of $24,161.80 for reticulation may be regarded as reasonable.

Some importance was attached, on behalf of the owner, to the inclusion in the contract document of the word "commission". It was argued that if the obligation from the outset was to commission the hydraulic system, which means to get it going, then the reticulation must have been included because it would not be possible to commission it without the reticulation having been completed. I do not think that follows in view of the part played by the reticulation to which I have already referred. There would seem to be no reason why the system could not be commissioned after it had been connected up to a separately installed reticulation.

The reticulation was recorded in the plaintiff's accounting system as a separate job and all the time sheets, invoices and other dockets relating to that job had been collected into a single file. It was from these documents that the total claim had been calculated. On behalf of the defendant it was argued that an examination of this file showed that 23 men had apparently worked a total of just over 866 man hours on this reticulation and that this was grossly excessive for what needed to be done. Unfortunately neither of the two men who had been principally involved in this work and both of whom gave evidence, namely, Mr Smith and Mr Whale, was challenged in cross-examination on this topic and nor was Mr Taylor, who was in overall charge of that work. Mr Butters was asked about it and challenged

with the proposition that the use of 23 men for 866 man hours was grossly excessive. He was not able to comment from personal knowledge but he resisted the inference that there was an excessive charge. The evidence of Mr Wood, an expert marine engineer called for the defendant, was that the reticulation work comprised only two parallel lines of high pressure piping and two parallel lines of low pressure piping. He therefore expressed the view that this could not properly have involved so many men and such long hours. It was said that the explanation appeared to be that the work had been badly done. There was no evidence at all to support this view. As I have said the men who were responsible for doing the work were not challenged about it and there has been no witness to say that any part of the work was badly done. The claim in respect of this work is fully documented and none of the documents involved has been attacked as being wrong and incorrectly included. I can only conclude that the work was actually done and the amount charged for it is reasonable. In view of this conclusion I am unable to say that the parties could have intended such work to be included in the contract price of $35,000. I therefore find that the charge for reticulation was not in the "quoted works" but is properly claimed in the "further works" as those expressions are used in the pleadings.

3. THE EXCLUSION CLAUSES

A great deal of evidence was directed to the question of whether there were defects in the work done by Anchor Dorman. This was of relevance to the plaintiff's claim in so far as it comprised an affirmative defence upon the basis of which it was said that the defendant was not liable for certain of the amounts claimed. There was, of course, a separate relevance to the defendant's counterclaim, to which I will refer later. While denying any such defects, Anchor Dorman's first answer is that in any event the defendant may not seek to escape liability on this basis because it is precluded from doing so by the exclusion clauses which form part of the standard terms and conditions of the contract document.

The position regarding exclusion clauses has been clarified in recent years. For some time it was regarded as the law that the breach of a fundamental term of the contract could not be excused by the existence of an exclusion clause. This is no longer the case, however, and the expression "fundamental breach" is now given a more restricted meaning. The position is now governed mainly by two decisions of the House of Lords, namely, Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, and Ailsa Craig Fishing Co. Ltd v Malvern Fishing Co. Ltd [1983] 1 All ER 101. The general principle was expressed by Lord Diplock in the Photo Production case at p 848 in this way:

> " A basic principle of the common law of contract, to which there are no exceptions that are relevant in the instant case, is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinative; but in practice a commercial contract never states all the primary obligations of the parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering. But if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words. "

In the Ailsa Craig case an important distinction was drawn between clauses of exclusion and those only of limitation. It was argued by Mr Worth, for the plaintiff, that the present case is one of limitation and I think that is so. The plaintiff relies mainly on cl 14 (a), which I have already set out. That clause does not purport to be a complete exclusion of all liability but only a protection to the plaintiff by the setting of a time limit on the notification of defects and a provision ensuring that the matter is referred back to the plaintiff for rectification. The significance of the distinction between exclusion and limitation clauses is explained by Lord Fraser in the Ailsa

Craig case. He referred to the very strict principles to be applied in considering the effect of clauses of exclusion and indemnity and, at p 105, said:

> " In my opinion these principles are not applicable in their full rigour when considering the effect of conditions merely limiting liability. Such conditions will of course be read contra proferentem and must be clearly expressed, but there is no reason why they should be judged by the specially exacting standards which are applied to exclusion and indemnity clauses. The reason for imposing such standards on these conditions is the inherent improbability that the other party to a contract including such a condition intended to release the proferens from a liability that would otherwise fall on him. But there is no such high degree of improbability that he would agree to a limitation of the liability of the proferens, especially when, as explained in condition 4 (i) of the present contract, the potential losses that might be caused by the negligence of the proferens or its servants are so great in proportion to the sums that can reasonably be charged for the services contracted for. It is enough in the present case that the condition must be clear and unambiguous. "

In the present case Mr Castle, for the defendant, argues that the goods and materials supplied to the defendant were different in type and quality from those supposed to be supplied pursuant to the contract and accordingly were not in fulfilment of the contract. Alternatively, it was said that the equipment supplied was so defective that the plaintiff could not be said to have performed its side of the contract at all. Mr Castle sought to base this argument on the very recent decision of the House of Lords in George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 All ER 737. That was a case concerning a contract for the supply of cabbage seeds. The seed actually supplied was not of the variety agreed to be supplied and was of inferior quality. There was a clause in the contract limiting the liability of the appellants to merely replacing defective

seeds or refunding the purchase price. This clause was held, applying the distinction drawn in the Ailsa Craig case, to be effective to limit the liability of the appellants.

Mr Castle's argument was based upon the principles which had been distilled by Oliver LJ in the Court of Appeal in the George Mitchell case. These, however, had drawn the comment from Lord Bridge, at p 741:

> " My Lords, it seems to me, with all due deference, that the judgments of the trial judge and of Oliver LJ on the common law issue come dangerously near to reintroducing by the back door the doctrine of 'fundamental breach' which this House in the Photo Production case had so forcibly evicted by the front. "

I am unable to regard the George Mitchell case as affording any assistance to the plaintiff. Indeed, it seems to me to provide support for the view that the exclusion or limitation clause in the present contract, or at least cl 14 (a), is capable of being effective according to its terms to limit the liability of the plaintiff. In any event it cannot be said on the evidence that there was any failure of the plaintiff to perform its side of the contract at all. Both the intermediate shaft and the winches actually operated over a substantial period even though it is claimed that they did so less than efficiently.

Although not very elegantly expressed, cl 14 (a) is, I think, clear in its meaning. If the words "if proved defective within three months of delivery" stood alone there may remain a doubt as to whether there was an obligation to notify Anchor Dorman of discovery of the defect. But reading the clause as a whole there seems to be no doubt that this was necessary. The obligation which Anchor Dorman was undertaking was to make good and so it follows that there must be notice to them of the defect. It is also, of course, the case that the undertaking was to make good so long as the defective work was made available to Anchor Dorman to enable that to be done. It is necessary then to consider whether, upon the evidence, cl 14 (a) provides an answer to the

affirmative defence raised. There are two matters in respect of which that defence is raised, namely, the intermediate shaft and bearing, and the winches. The application of the clause to each of those must be considered separately.

(a) Intermediate Shaft

The contract provided for Anchor Dorman to fabricate and deliver to Guards an "intermediate shaft complete with couplings, nuts and bolts, etc., and with two split Cooper bearings". It is claimed that Anchor Dorman failed to perform this contract in two respects. First it substituted for the two split Cooper bearings a single Thordon bearing and, secondly, it failed to machine the shaft and couplings correctly. Again I deal with each of these matters separately.

(i) Bearings

It is common ground that Anchor Dorman changed the bearing from that specified and that it did so without any reference to the owner. The reason for the change having been made is not at all clear. It is necessary, before any propeller shaft could be installed, that it have the approval of the Marine Division of the Ministry of Transport. No formal approval was ever sought in this case for the use of split Cooper bearings. According to Mr Taylor, who was responsible for obtaining any necessary approval, he was discouraged from the use of Cooper bearings by Mr Fitzgerald, the Senior Surveyor of Ships at Nelson. Mr Fitzgerald confirmed in evidence that he did not regard such bearings as very suitable in the particular application involved here, that is, in a position where they were liable to contamination from sea water. On the other hand, Mr Lock, the Senior Engineering Surveyor, and as such Mr Fitzgerald's superior, said that there was no reason why Cooper bearings should not have been fitted. Indeed, as it happens, having had considerable trouble with the intermediate shaft the owner finally, in March 1983, obtained a new shaft and had it fitted with split Cooper bearings and claims to have had no trouble since.

Whatever the justification for it a decision was made to substitute a single bearing made of Thordon which is a relatively new substance. Drawings were prepared by Anchor Dorman and submitted to the Ministry of Transport for approval and were duly approved. On behalf of Anchor Dorman it was sought to place some reliance on cl 4 of the standard terms and conditions as providing some authority for the replacement of the bearing, but I am quite unable to accept that. What happened was that the terms of the contract were changed without reference to the owner and I have no doubt that, apart from the provisions of cl 14 (a), this left the responsibility on Anchor Dorman to show that the change did not result in any detriment to the owner. Whether or not approval was given by the Ministry of Transport to the altered bearing, cl 4 cannot be read so as to have authorised a change without the owner being given the opportunity to indicate whether he agreed to it or not.

There was a great deal of evidence as to the suitability of a Thordon bearing in the circumstances of this intermediate shaft. The evidence indicated to me that it is regarded as an acceptable type of bearing so long as it is installed and adequately lubricated in accordance with the maker's specifications. Certainly this was Mr Lock's view and even though he ultimately condemned the bearing which was installed, in this case he was still prepared to accept that it could be replaced with another Thordon bearing. I am quite unable to conclude that the change to Thordon of itself produced a result detrimental to the owner. There is no doubt that the bearing which was installed showed a considerable degree of over-heating almost from the outset. This could have been due to some fault in the shaft, some inadequacy in the alignment of the shaft, or inadequacy in the lubrication of the bearing, or perhaps to some combinatio of those things. It has not been at all easy, out of the mass of evidence given on this, to say what was the real cause of the problems which the owner experienced with the intermediate shaft. It seems likely that there was an inadequate enquiry by Guards, who installed the shaft, as to the best method of lubrication and it may also well be the case that there were deficiencies in the machining of

the shaft and couplings. I do not think, however, that it has been established that any loss was caused to the owner by the substitution of a Thordon bearing even though that was done without authority.

In case I am wrong about that I should consider whether cl 14 (a) would excuse Anchor Dorman from liablity in respect of it. There is no doubt that the owner was aware of the use of a Thordon bearing at the time of installation of the shaft. He said in evidence that he was not happy about it but he was given to understand by Mr Buckeridge that the Ministry of Transport did not approve of the Cooper bearings and had approved the Thordon substitute. There is no suggestion that this involved any misrepresentation and, indeed, it is in general conformity with the evidence of Mr Fitzgerald. In the result, therefore, the owner accepted the change. The question of defective workmanship and the application of cl 14 (a) really needs consideration in respect of the other aspect of this matter, namely, the intermediate shaft itself.

(ii) <u>The Intermediate Shaft</u>

It seems clear that the owner did experience considerable trouble with the operation of the intermediate shaft. Whether that was due to the shaft itself, the bearing, or a combination, may be put aside for the moment. Upon the assumption that there was, as alleged, defective workmanship in the machining of the shaft and couplings so that the shaft was not running true, the question is whether Anchor Dorman are entitled to the protection of cl 14 (a).

In terms of that clause Anchor Dorman undertook to make good their workmanship and materials if -

(1) There was notification to them that they were proved defective within three months of delivery, and

(2) The defective workmanship and/or materials were (at the purchaser's expense) made and

> left available to Anchor Dorman at such place and for such reasonable time as they specified.

I am, for the moment, prepared to assume that defective workmanship or materials has been established. The shaft was delivered to Guards on 8 May 1980 and it is claimed that trouble was experienced with it as early as the sea trials at about the end of June 1980 and certainly on the trip from Nelson to Wellington on 28 July 1980. It was not, however, until a telephone call from the owner to Mr Butters on 15 September 1980 that any notification was given to Anchor Dorman that there were allegations of defective workmanship. This was, of course, more than three months after delivery. The owner has said that he experienced vibration in the propeller shaft and constant over-heating of the bearing and he believed these things to be attributable to defective workmanship on the part of Anchor Dorman. He did not, however, give notice of that within the prescribed period. When he did so it was not upon the basis of making the work available to Anchor Dorman for correction. Mr Butters denied that Anchor Dorman were under any liability in respect of the intermediate shaft and pointed out that more than three months had elapsed since the date of delivery. Nevertheless, he arranged for the company's Marine Engineering Superintendent, Mr Smith, to go to Wellington on the followin day in order to take measurements of the intermediate shaft and couplings. Mr Smith did so and recorded his measurements. There is a dispute as to whether those measurements show faulty machining, but for present purposes what is of significance is that Anchor Dorman were not called upon by the owner to make good any defective workmanship. Instead, the owner engaged William Cable & Co. Ltd in Wellington to remove the shaft, check its accuracy and endeavour to carry out remedial work. This resulted in the Thordon bearing being replaced by a white metal bearing. It is clear, and indeed I did not understand it to be disputed, that if cl 14 (a) applied it was not complied with. The limitation of liability contained in that clause is, in my view, effective as an answer to the defence based on defective workmanship.

(b) The Winches

A great deal of evidence was given concerning the way in which the hydraulic winch system was ordered, the specifications for it, and its supply and installation. All this I put aside for the moment. In the result, what happened was that an hydraulically operated split trawl winch system was supplied to Anchor Dorman by C.W.F. Hamilton Ltd and was duly installed in the vessel. This work was completed prior to the sea trials at about the end of June 1980. In the course of those sea trials the winches were tested and it was found that the braking system was defective. It seems that the winches did not truly have a braking system at all, but it is convenient to use that expression for the alternative which involved a system of pawls and valves. Anchor Dorman's fitter, Mr Whale, who tested the winches at the time of the sea trials, concluded that what was necessary was to fit a new set of springs inside certain cylinders. This could not be done at once and so an arrangement was made that Mr Whale would go to Wellington later in order to do that work there.

He duly went to Wellington on 8 September 1980 and spent two or three days fitting the springs. Once he had done so that completed all the work done by Anchor Dorman on the hydraulic winch system and so the date of delivery for the purposes of cl 14 (a) would be 12 September 1980. Certainly it could not have been any later than that. No notice was given to Anchor Dorman of deficiencies in the workmanship or materials in respect of the hydraulic winch system until the first amended statement of defence and counterclaim was filed, and then only obliquely. The owner's evidence was that he rang Mr Butters many times in September and October complaining about the winches but was told it was not Anchor Dorman's responsibility. Mr Butters' evidence was that while the owner rang him on a number of other matter he made no mention of the winches. I think that Mr Butters' account must be accepted as correct. On 19 December 1980 the owner's solicitor wrote a long letter to Anchor Dorman's solicitors which appears to be a catalogue of the complaints

which the owner was then making against Anchor Dorman. Nowhere in that letter is there any reference at all to the hydraulic winch system and certainly no complaint of deficiencies in it. There is no suggestion of any other form of notice having been given to Anchor Dorman and no suggestion that the winches were made available to Anchor Dorman for the making good of workmanship or materials. I can see no basis upon which it can be said that cl 14 (a) was complied with and I consider I am obliged to hold that Anchor Dorman is entitled to the protection of that clause.

4. DEFECTIVE WORKMANSHIP

The findings I have made as to the effect of cl 14 (a) mean that the question of whether there was defective workmanship on the part of Anchor Dorman which relieved the owner from payment of part of the amount which would otherwise be owing does not need to be dealt with. In case I should be wrong in those findings I have thought it proper to go on and consider the matter further. It is again necessary to do so under the two separate headings.

(a) Intermediate Shaft

The allegation is that the intermediate shaft and couplings were not machined correctly. It is not easy to arrive at any confident decision as to this. I am prepared to accept that the owner experienced considerable trouble in the form of vibration and this was never finally resolved until in February 1983 the original intermediate shaft was taken out and replaced. At that time also two spli Cooper bearings were installed. I think it probable that at least part of the trouble experienced by the owner was attributable to shortcomings in the machining of the shaft and couplings. The difficulty, however, lies in the fact that at least part, and perhaps the whole, of the trouble may have been attributable to other reasons. To determine this would involve a consideration of the part played by Guards, who installed the shaft and who were involved in the attempts to achieve a satisfactory system of lubrication for it. Having regard to the fact that Guards were not

joined in this action they have not been in a position to present any defence to the suggestion that they were at fault and I could not make any finding against them. Notwithstanding that, I think it probable that there were deficiencies in the work done by Anchor Dorman. I can make no effective finding in respect of that because I am quite unable to say whether such deficiencies were causative of any loss experienced by the owner. The shaft fabricated by Anchor Dorman was used in the vessel for about 2½ years during which time a fairly full programme of fishing was undertaken and the difficulties of attributing any particular problems to the deficiencies in the shaft as opposed, for instance, to problems of alignment, inadequacies of lubrication, and perhaps other causes, are considerable. Ordinarily I would endeavour to make an express finding as to the liability of the plaintiff for defective work in case my decision concerning cl 14 (a) is wrong, but I do not in the present circumstances feel justified in attempting to do so.

(b) Winches

Again I am faced with difficulties because of the fact that C.W.F. Hamilton Ltd were not joined in the action since at least some of the matters of which the owner complai could perhaps be regarded as attributable to the design of the equipment. However, the position here is rather different from that relating to the intermediate shaft becaus there was no contractual relationship between Hamiltons and the owner. It is the owner's case that Anchor Dorman contracted to supply and install the hydraulic winch system, that the result was defective, and that if Hamiltons ought tc bear any part of the responsibility then that would be a matter between Anchor Dorman and Hamiltons in some other proceedings.

It is necessary, first, to determine what the contract was in respect of the winches. It was Mr Castle's argument that the contract was to supply the same set-up as that on the fishing vessel "Mystery" and that this was never achieved by Anchor Dorman. Mr Worth's reply was that there

is no reference in the contract document to the "Mystery" and that it was the contract document alone which bound the parties. I have already indicated that I am unable to regard this as correct. All that the contract document provides is that Anchor Dorman are to "fabricate, install and commission an hydraulically operated split trawl winch, ancillary piping and control consol". It can never have been the intention of the parties that Anchor Dorman could fabricate and install whatever size and type of hydraulically operated split trawl winch it chose. There must have been some specification of what was wanted and it is, of course, to be found in the letters of 22 May 1979 and 2 October 1979 written by Mr Buckeridge, which I have already set out. Mr Worth contended that these letters were not accepted by the owner and it is true that there were things referred to in them which the owner decided not to have and which were not included in the final contract. There is no suggestion, however, that those letters were simply rejected by the owner as having no application at all. They certainly assist in deciding upon what it was that the parties finally agreed.

I am satisfied that the owner made it clear that what he wanted was a winch set-up similar to that of the "Mystery". The difficulty concerns what is meant by the expression "set-up". The owner's case proceeded very largely upon the assumption that that expression required almost a precise duplication of what was on the "Mystery" but I cannot accept that this is what was intended. It seems that the equipment used on the "Mystery" was manufactured by Vickers. That on the "Marconi" was manufactured by Hamiltons. It cannot have been the case that the owner was specifying Vickers' equipment because he knew it was to be supplied by Hamiltons. I think the only reasonable interpretation to place on the expression "set-up" is that it was to be a guide to the general layout, siting and method of operation. If it had involved a duplication of such things as line pulls, engine power, and the like, then there would have been no need for the owner to be asked for the particular information on these matters which he was, in fact, asked to supply.

Although Mr Buckeridge had, at an early stage, indicated to the owner an interest in Anchor Dorman being able to supply the hydraulic winch system and had inspected the "Mystery" at the owner's request, the specifications on which the system was to be based were obtained by Mr Lewthwaite, a representative of Hamiltons, from Mr Guard who, in that respect must be regarded as the owner's agent. If those specifications did not correctly reflect what the owner wanted then that is a matter between himself and Guards.

The owner's evidence was that he told Mr Buckeridge he required a line pull of 3½ tons on either side and that he expected that equipment would be supplied which was capable of achieving that. There seems little doubt that the equipment installed in the vessel was not capable of that. The problem arises out of the confusion which resulted from the separate dealings with Mr Lewthwaite. Mr Guard had told Mr Lewthwaite that what was required was a line pull of 2½ tons on each winch. Mr Guard confirmed this but he claimed that he had insisted on Mr Lewthwaite referring direct to the owne for the final details. Mr Lewthwaite said that there was no suggestion of his seeing the owner and that he received all the information he required from Mr Guard. In this conflict I prefer the evidence of Mr Lewthwaite, who had retained the notes he made at the time and which assisted his memory. In any event, I found Mr Guard a good deal less than reliable in a number of respects. I accordingly accept that the specification given to Mr Lewthwaite by Mr Guard as the owner's agent was that the equipment should be designed for a line pull of 2½ tons on either side.

On 6 June 1979 Mr Lewthwaite wrote to Guards enclosing a list of the equipment which would be required and quoting prices. In this letter he said, "The maximum line pull of 2250 p.s.i. on the bare drum will be approximately 2.1 tons on each drum." Mr Lewthwaite was aware that Anchor Dorman and another company wished to quote for the supply of the winches and on 7 June 1979 he sent to each a list of equipment and prices similar (although for some reason not identical) with that he had sent to Guards. In his letter of 2 October 1979 to the owner setting out Anchor

Dorman's firm quotation, Mr Buckeridge included reference to the winches. This was not described by reference to the line pull beyond saying that it should be "capable of handling 550 fathoms of 3/4" diameter cable". It is not clear from the evidence what the relationship is between that capability and the 2.1 ton line pull referred to in Mr Lewthwaite's letter. There was some evidence, on behalf of the owner, from Mr Dennett, an hydraulic installation specialist, which appeared to be critical of Mr Lewthwaite's calculation concerning line pull, but in the end Mr Dennett acknowledged that he was not claiming there was any error on Mr Lewthwaite's part.

The result of all this is that the contract entere into by Anchor Dorman in respect of the winches was to supply, install and commission a system which was similar in set-up to that of the "Mystery" and which was to have a line pull of 2½ tons on each drum, or perhaps of only 2.1 tons on each drum. Mr Guard, as the owner's agent, had specified 2½ tons and then, again as the owner's agent, had received Mr Lewthwaite's letter which referred to 2.1 tons. The difference may not be significant because it was Mr Lewthwaite's evidence, and I did not understand this to be contradicted, that there is a margin of error allowed in designing such equipment and that what was designed and supplied by Hamiltons was capable of about 2.9 tons. There has been evidence that the winches did not perform up to the owner's expectations and that they did not have a line pull of 3½ tons, but there is no evidence that they failed to perform up to the specifications supplied by Mr Guard and as set out by Mr Lewthwaite in his letter which formed the basis of the contract eventually entered into. It may be that there remains a matter to be resolved between the owner and Guards, but I can only conclude that the owner has not established any right to decline payment to Anchor Dorma on the basis of defective workmanship or materials.

5. AMOUNT FOR WHICH PLAINTIFF ENTITLED TO JUDGMENT

It follows from the findings I have made that the plaintiff is entitled to judgment for the amount claimed, namely, $66,735.86 and interest from 12 September 1980 which was the last day on which work was done under the contract.

6. EFFECT OF EXCLUSION CLAUSES ON COUNTERCLAIM

It is necessary, first, to identify as far as possible the causes of action alleged in the counterclaim. They are most conveniently summarised by reference to the clauses in the counterclaim itself.

Clauses 10 - 22

These appear to allege, in general terms, breach of contract based on the failure to supply "new and/or suitable equipment" and the failure to carry out work in a good and workmanlike manner. So far as I could make out the only equipment and work in respect of which it was alleged that loss had resulted in this way concerned the intermediate shaft and the winches. In the course of the hearing the counterclaim was abandoned in respect of the intermediate shaft, leaving only the winches for consideratic I shall return to this aspect shortly.

Clauses 23 - 30

These allege a cause of action based on breach of contract by Anchor Dorman in its capacity as an expert. Again the only remaining allegation of loss resulting under this cause of action is that relating to the winches.

Clauses 31 - 40, 41 - 48 and 49 - 57

These comprise three causes of action each based upon the provisions of s 16 of the Sale of Goods Act 1908 as to implied terms in the contract. Having regard, however, to my findings as to the exclusion clauses these causes of action cannot succeed. Section 56 of the Sale of Goods Act enables parties to contract out of the provisions of the Act and that is what occurred.

Clauses 58 - 66

These contain an allegation that an agreement was reached as to the replacement of the auxiliary engine. I will deal separately with this. It does not come within the exclusion clauses.

Clauses 67 - 75

These allege breach of duty by the plaintiff as an expert and involve a claim in tort. Putting aside the question of whether a claim in tort can be maintained as well as a claim in contract, the remaining allegation of loss relates again only to the winches.

Clauses 76 - 81

These allege malicious arrest but that cause of action was abandoned.

In addition to the question of loss arising in respect of the winches, the counterclaim also includes a claim for general damages.

I return to the effect of the exclusion clauses on the counterclaim. As I have indicated this requires consideration in respect only of the winches. I do not need to repeat what I have already said. I am satisfied that cl 14 (a) is effective to exclude liability on the part of the plaintiff.

7. PLAINTIFF'S LIABILITY IN RESPECT OF WINCHES

Again it is unnecessary for me to repeat what I have said earlier. Even if cl 14 (a) is not to apply then I should not be prepared to say that it has been proved that what was supplied failed to measure up to the contract specifications.

8. AMOUNT TO WHICH DEFENDANT ENTITLED

As none of the causes of action in the counterclai

has been established there can be no award of damages and this, of course, applies also to general damages and loss of profit.

There remains one matter which is not the subject of any formulated claim for damages and in respect of which there is no suggestion that any loss has been incurred. It is, however, the subject of a claim for a declaration and I must deal with it on that basis. This relates to the auxiliary engine.

THE VOLVO PENTA AUXILIARY ENGINE

I have referred earlier to what occurred regarding the auxiliary engine. After it had been installed it was found to be a used and not a new engine. The contract document does not contain the word "new" with reference to the auxiliary engine and some attempt was made to argue that the contract was not necessarily for a new engine, but I have no doubt at all that what was intended by the parties was that the engine should be a new one. It is clear that the engine which was installed was reconditioned and some parts were replaced by new parts. It was claimed by Anchor Dorman that in the result what the owner got was as good as if not better than new. I find this hard to accept. No doubt it was functioning as well as a new engine could have been expected to function but no purchaser in these circumstances could feel that he had received an article which was just as good as one which was indeed new. Whether the reconditioned engine will last as long as a new one would have must remain a matter of speculation, possibly for many years. It was accordingly not possible to formulate any allegation of loss on the part of the owner arising out of what occurred

It was the plaintiff's case that the owner had actually fared better in the end than he would have done if the engine originally obtained by Anchor Dorman from Moller Marine had been retained and installed. That was a four cylinder engine which, together with an alternator and including sales tax cost $8,346. The replacement engine had

six cylinders and was a more powerful and more expensive engine. There was no suggestion of the owner being charged anything more than the price of the original engine and as what he received was not new he became entitled to a refund of the sales tax which had been debited to him. Accordingly the argument for the plaintiff was that the owner had finished up with a more powerful engine which had been reconditioned and was operating as though a new one and he had been required to pay nothing extra for it. In addition he had received a new engine warranty. The owner, in his evidence, denied having received the warranty but the evidenc for the plaintiff to the effect that he did was unchallenged. In the end the point is of little significance because there does not appear to have been any reason to claim under the warranty during the period it was in force.

The real question which now arises in respect of the auxiliary engine concerns the owner's claim that an agreement was made between himself and Mr Butters, on behalf of Anchor Dorman, as to the basis on which he would accept the reconditioned engine. The owner's evidence was that there was, first of all, an arrangement made between him and Mr Buckeridge that he should accept the reconditioned engine and by way of compensation Anchor Dorman should waive their charges for about seven items of equipment of a total value of $15,000 to $20,000. Mr Buckeridge, however, had no authority to conclude any such arrangement and not surprisingly Mr Butters refused to agree to it. There was then a discussion with Mr Butters himself and the owner's account of this was that he agreed to take the reconditioned engine on the basis that it would be replaced with a new engine as soon as one was available and that, in addition, Anchor Dorman would pay him $2,000 a day during such time as the vessel was out of use while the new engine was being fitted.

Evidence was given on this topic by a Mr Harvey, who happened to be on the "Marconi" at the time when the discussion between the owner and Mr Butters took place. He gave a similar account to that of the owner, namely, that the owner wanted a new engine when one was available and alsc $2,000 per day for loss of fishing time.

Both Mr Buckeridge and Mr Butters gave evidence on this matter. Mr Buckeridge acknowledged that one of the options discussed, in an attempt to solve the problem, was that a new engine should be supplied but he said it was made clear that this was not a possibility because the particular type of engine was no longer being made. He also acknowledge that the owner raised the question of payment being made for the period of interruption to fishing but he was not prepared to acknowledge this was agreed to. The way in which Mr Buckeridge put it was, "In plain terms what Mr Muollo wanted Mr Muollo did not get. It's as simple as that."

Mr Butters also acknowledged that the owner asked for a new engine to be supplied and also asked for compensation while it was installed as well as a substantial quantity of equipment free of charge. He was, however, adamant that this was not agreed to and that the matter was left on the basis that the owner would accept the reconditioned engine with a new engine warranty.

In this conflict I prefer the evidence of Mr Butters. I was impressed by the clear forthright manner in which he gave his evidence. I was conscious of the fact that the owner suffered by comparison with Mr Butters in that he was not at all at ease in the witness box and almost certainly did himself less than justice, but making all allowances for matters such as that I found Mr Butters' evidence more convincing. I have little doubt that the owner's recollection of events has been clouded by the understandable annoyance he felt at the time and by the subsequent problems he encountered with the boat. I think that he has now persuaded himself and genuinely believes that there was an arrangement made as he has described it. I cannot accept, however, that this was so.

It is basic to the owner's account of the matter that there would be supplied a new engine of the same type as that which had been installed. His evidence on this, however, was inconsistent. He acknowledged that he had been told such an engine was not available but he still maintaine

that Mr Butters agreed to supply one. This cannot, of course, have been so and I accept the evidence of Mr Butters that he made it clear there could be no new engine of the same kind supplied. This being so I cannot accept that he ever agreed to supply one. Mr Butters' point was that although the owner was getting a used engine instead of a new one it was still to his advantage because he was getting with it a new engine warranty and also he was getting at no increased cost a better and more powerful engine than that he had originally ordered. It was also the case that the owner was no longer obliged to pay sales tax which applied only to a new engine and so received a credit for what had been paid.

I also find it altogether unacceptable that Mr Butters should have agreed to Anchor Dorman paying $2,000 per day while a new engine was being fitted. It is quite beyond the bounds of credence that a man in Mr Butters' position should have committed his company to such an obligation without any indication of what relationship the sum claimed may bear to the real loss likely to be suffered.

There remains the evidence of Mr Harvey. I have no reason at all to doubt Mr Harvey's integrity but I think what has happened is that he remembers, after a considerable lapse of time, hearing the demands which the owner was making, or at least some of them, and he has forgotten or become confused about the response to those demands. It was not until nearly three years after the event that Mr Harvey even became aware that there was still a dispute concerning the vessel and this was when he received a visit from the owner's solicitor to ask him if he remembered the discussion. Plainly his recollection of what took place is very limited and there are matters which he must have heard but which he cannot now recall. I feel unable to attach any real importance to the evidence he has given and certainly not such as to require me to reach a different conclusion from that I have expressed.

The declaration which was sought in the amended statement of defence with regard to the auxiliary engine is that "pursuant to the contract the defendant is not liable for any sum in excess of the amount agreed upon as aforesaid as the final contract sum". I confess I have been unable to discern what is said to have been "the amount agreed upon as aforesaid as the final contract sum". Whateve that may refer to it remains the position that there can be no declaration which would have the effect of upholding the owner's contention as to an oral variation in the terms of the contract or which might operate as a bar to the plaintiff's right to recover the balance owing.

I should mention that considerable attention was paid, in the course of the hearing, to the alternator which was supplied together with the auxiliary engine (and was said to have been of the wrong capacity) and to a fracture which occurred to the main crank shaft. I have not found it necessary to deal with these because there is no claim in respect of them.

SUMMARY

1. On the claim there will be judgment for the plaintiff for $66,735.86 and interest thereon at 11% per annum from 12 September 1980 to date of judgment.

2. On the counterclaim there will be judgment for the plaintiff.

3. Leave is reserved to the plaintiff to apply for costs.

Solicitors: Butler, White & Hanna, AUCKLAND, for Plaintiff

Castle, Pope, Prosser & Lynn, WELLINGTON, for Defendant