IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

No A 232/83

BETWEEN JOHN RICHARD BRADEY
of Wellington, Teacher

Plaintiff

AND ANCHOR-DORMAN LIMITED
a duly incorporated company having its registered office at Wellington and carrying on business as ship builders

Defendant

Hearing : 25 November 1983

Counsel : S S Williams for plaintiff
R M Gapes for defendant

Judgment: 13 February 1984

JUDGMENT OF WHITE J

On 21 June 1983 the plaintiff issued a writ against the defendant claiming an order for the return of items of plant and equipment, (or) judgment for the value of the items amounting to $20,000, and general damages $5,000. It is claimed by the plaintiff that he owns, and is entitled to possession of, equipment intended by the plaintiff to be used in or upon a yacht the defendant contracted to build for the plaintiff. The equipment is at present stored on the defendant's premises in Nelson, and it is alleged that the defendant has wrongfully retain

and converted the equipment to its own use. It is also claimed that the plaintiff has incurred expense and has suffered"inconvenience and worry" in not being able to obtain possession and has lost the use and enjoyment of items of equipment. These proceedings followed a dispute between the parties regarding a contract for the construction of a yacht for the plaintiff by the defendant. That dispute was referred to arbitration. The award is at present the subject of litigation.

On 18 July 1983 a motion for an order staying the present proceedings was filed on the grounds that it was a term of the contract that the parties would resolve disputes and differences between them by arbitration.

Mr Butters, general manager of the defendant, in an affidavit in support of the application states (in para 2) that the questions in issue in these proceedings "centre around the construction for the plaintiff of a yacht by the defendant at its premises in Nelson". In his affidavit in reply the plaintiff asserts that his claim in the present proceedings is unrelated to the construction of the yacht. He deposes that "the only connection is that the items of plant and equipment which are the subject of these proceedings will probably be installed by me in, or used on the yacht".

Mr Butters states in para 3 of his affidavit that the construction contract was constituted by the documents to which he then refers. The quotation, dated 28 February 1980, included three appendices. Appendix I was the price schedule. Appendix II was stated to be the schedule of owner's supply items.

The plaintiff, in para 3 of his affidavit, has comments to make on the documents. First he annexes Appendix I which was not exhibited by Mr Butters. As to Appendix II stated by Mr Butters to be "the schedule of owner's supply items" the plaintiff states that it also included items which were specifically excluded from the contract.

Mr Butters quotes the arbitration clause in para 4 of his affidavit and goes on to refer to the disputes which arose leading to an arbitration before a sole arbitrator. The latter's award was published on 30 March 1982. He awarded the sum of $54,470.25 to the defendant. The plaintiff moved to set aside or remit the award. That application (M 235/82) was heard by the Chief Justice on 27 October 1982. An order was made remitting the award to the arbitrator for reconsideration in accordance with certain directions. The plaintiff has appealed against the decision and the appeal is set down for hearing on 5 December 1983.

It seemed to me that the determination of the question in the present proceedings might be affected by the result of the appeal to the Court of Appeal, but I was informed by counsel that the present question would not be so affected.

I turn then to para 6 of Mr Butters' affidavit. He there states that certain items are required to be supplied by the plaintiff free of charge to the defendant for installation by the defendant. It was claimed that they included some of the items in para 3 of the statement of claim including "rigging, winches, bilge pumps and electrical equipment" while "the remaining items are all intended either for incorporation into or use on the vessel".

The plaintiff, in para 6 of his affidavit accepts that there were items he was to supply free of charge to be installed as part of the contract (see Appendix II, Exhibit A, to Mr Butters' affidavit). He then refers to the second part of Appendix II which "lists items which are specifically excluded from the scope of the contract", mentioned, it was stated, "to make it clear that the defendant's contract did not require the defendant to supply or instal these items". The plaintiff agrees (para 7 of his affidavit) that certain items are required to be supplied by him in terms of the contract.

I now quote a passage from para 7 and the whole of para 8 which purport to state the position as to the items in question.

> "7. ... However, all of the items mentioned in para 6 of Mr Butters' affidavit, in common with all of the items mentioned in para 3 of the statement of claim, are not included in the list of items to be supplied by me and some are specifically excluded from the contract under the second part of Appendix II. The rigging referred to in para 3 of the Statement of claim is the rigging referred to in the second part of Appendix II which is 'running rigging'. This rigging was specifically excluded from the contract. The winches referred to by Mr Butters are chromed bronze winches which were not included in Appendix II as an owner's supply item. There is only one bilge pump included in the list in para 3 of the statement of claim. It is not included in the 'hand pumps and foot pumps' item in the first half of Appendix II. It is a spare bilge pump which may not even be used by me on the yacht, certainly not immediately. I am considering selling this pump. The electrical equipment mentioned in para 6 of Mr Butters' affidavit has nothing to do with the defendant's contract. All electrical work on the yacht, apart from the electrical work relating to the engine, is being carried out by a separate contractor whom I have engaged. The 'electrical equipment including lights, cable and rectifier' item in para 3 of the statement of claim is not related to electrical work on the engine.
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> 8. Many of the other items mentioned in para 3 of the statement of claim are mentioned in the second part of Appendix II and are therefore items specifically excluded from the contract. These include anchors and chain, life rafts and life jackets and sails. All of the items are outside the contract. I am under no obligation to supply them and the defendant's contract does not call for them to be fitted or installed or otherwise worked upon by the defendant. I am not committed to using any of the items on the boat and indeed may not do so in the case of some items."

In para 7 of Mr Butters' affidavit he refers to other matters which it is intended to put in issue in either the current proceedings or future arbitration proceedings if that course should prove necessary. These are matters which are not accepted by the plaintiff and are referred to by the plaintiff in his affidavit (see para 9).

Mr Butters says in para 8 of his affidavit that as the parties have already agreed to resolve their present disputes by arbitration it is desirable that the dispute which is the subject of these proceedings, including the claims by the defendant referred to in para 7 of Mr Butters' affidavit should be similarly resolved. The plaintiff's attitude is set out in his affidavit (see para 10) where he refers to a copy of the arbitration agreement, dated 27 November 1981. He claims that "the questions there referred to the Arbitrator are quite unrelated to the claim in the present proceedings". The plaintiff in following paragraphs (paras 11 - 14) refers in detail to the risk of damage and deterioration to his property held by the defendant in storage.

I now quote the arbitration clause :

"If any dispute or difference shall arise touching the construction of any clause or provision herein or in any accompanying documents forming part of a contract arising out of acceptance of this quotation or touching the respective rights or obligations of either party or in anywise having

> any relation to the subject matter of such contract or any claims arising thereunder or in relation thereto the same shall be submitted to and settled by arbitration in accordance with the provisions of The Arbitration Act 1908 and any amendments thereto."

It should be noted that I postponed considering my reasons for judgment in this case when a memorandum was filed by Mr Gapes on 6 December 1983 giving notice that attempts were being made to resolve the question. Later that month I was informed by the Registrar that the negotiations had been unsuccessful.

In support of the application to stay, pursuant to s 5 (1) of the Arbitration Act 1908, Mr Gapes submitted that the principles applicable, as set out in Halsbury 4 Ed Vol 2 paras 561 - 565, apply in New Zealand. That was not disputed.

Mr Gapes dealt first with the condition that the matter in question must be within the scope of the arbitration agreement, submitting that the essence of the contract concerns the construction of the yacht. As to the nature of the dispute Mr Gapes referred to the plaintiff's allegations that he "owns and is entitled to possession of certain items of plant and equipment intended to be used in or upon the ...yacht", and that the defendant has stored the items and retained and converted them. It was submitted that some or all of the items are to be incorporated in the yacht and that there is an issue involving interpretation of the contract in the light of the custom in the industry which can be best carried out by an experienced arbitrator. In

dispute, Mr Gapes submitted, was the failure to pay accounts rendered by the defendant and other questions under the award, and associated matters also suitable for arbitration. Further, it was submitted, that the claim in lieu of possession for $20,000, and the claim for loss of use, were suitable questions for arbitration. Lastly, there was a substantial counterclaim.

It was submitted that looked at as a whole the matters for determination should be decided by an arbitrator. It was contended there was no doubt that the arbitration clause was wide in its terms to ensure that any dispute even remotely connected with the construction of the yacht should be decided by arbitration. Mr Gapes submitted that the clause in the present case could be compared with the relatively brief clause considered in Roose Industries Ltd v Ready Mixed Concrete Ltd (1974) 2 NZLR 246, 247. The clause in that case read :

> "Any dispute which may arise between the parties to this agreement shall be settled by arbitration in accordance with the Arbitration Act 1908 and any subsequent amendments."

McCarthy P said of this clause, "the clause...could really not be wider". And it was further stated in the judgment of the Court of Appeal :

> "The Court should restrict the operation of such a wide clause no further than necessary, and on that reasoning should exclude...only claims which are entirely unrelated to the commercial transaction covered by the contract."

Mr Gapes submitted that distinct sections of the arbitration clause applied in the present case. First, it was claimed that disputes touch the construction of Appendix II, namely, rights and obligations of both parties clearly related to the subject matter of the contract. It was submitted that the plaintiff had contended that the contract should be construed in his favour in that the items came within the list in the second Appendix rather than the first list in the Appendix. Then, regarding the rights and obligations of the parties, Mr Gapes submitted that the disputes included the right to possession of the items, the obligation of the plaintiff to make payment to the defendant,and the obligation of the defendant to install certain items. In those circumstances, it was submitted, applying words used in Russell on Arbitration 20 Ed p 84, "all matters in difference between the parties", was a most general and comprehensive form of words allowing an arbitrator to consider "all questions affecting the parties' civil rights". It was argued that the disputes were clearly related to the subject matter of the contract and within the clause. Accordingly, it was submitted, the burden of showing cause why effect should not be given to the agreement to arbitrate was on the plaintiff. It was submitted that this was a case where all claims arising out of the same transaction, some of which were already the subject of arbitration, should be dealt with in the same way - see UDC Group Holdings Limited v Systems & Programmes (NZ) Limited - (A 65/81, Wellington, judgment of Hardie Boys J 25 May 1981).

Mr Williams pointed to the plaintiff's affidavit as showing that the only connection with the contract was that items of equipment held by the defendant would probably be installed by the plaintiff, and that there was no obligation to supply all the items in question. They were simply items being held by the defendant without charge and without obligation to fit them on the yacht or do any work upon them. Mr Williams, in response to the claim for storage charges (which was denied), submitted that the claim could relate only to items the plaintiff was bound to supply.

Referring to Hill v Taupo County Commission & ors 1964 NZLR 348, 351 Mr Williams contended that the defendant had raised nothing by way of defence in the present proceedings. He submitted that even if it could be said that there was a defence to the claim for conversion paragraphs 6, 7 and 8 of the plaintiff's affidavit made it clear that none of the items in the statement of claim is an item which is required to be supplied. Further, it was submitted, no affidavit in reply to the plaintiff's evidence had been filed. That being so it was submitted the onus on the applicant for a stay had not been discharged. Furthermore, it was submitted, the apparent absence of a bona fide defence to the plaintiff's claim ought to weigh heavily in favour of the plaintiff in the exercise of the Court's discretion.

As to the plaintiff's claim that all the items referred to in para 6 of the affidavit are not included in the list of items and are specifically excluded, it must be noted that the plaintiff agrees that some items were required to be supplied

for incorporation in the construction of the boat. The rigging winches, bilge pumps and the equipment which Mr Butters referred to as examples of items which the plaintiff had to supply were, the plaintiff says, all excluded from the contract. The plaintiff's assertion is that the rigging is the rigging in the second part of Appendix II which is running rigging.

Without going into detail, sails, rigging and winche are matters of argument, as I have indicated. The point then made by Mr Williams, however, is that the evidence of the plaintiff has not been challenged by an affidavit in reply or an application to cross-examine the plaintiff. In those circumstances, and bearing in mind that the onus was on the applicant, it was submitted the defendant has failed to show there is a dispute within the arbitration clause. The explanation for differing views, Mr Williams submitted, was that Mr Butters must have misunderstood the position regarding the items the plaintiff has claimed.

Mr Williams also submitted that if there is a dispute such dispute was nevertheless not within the submission to arbitration.

Referring to the language of the clause Mr Williams argued that the dispute could not be said to "touch" the construction of the contract. He accepted that the clause was broader to the extent that it referred to "rights and obligations...in anywise having any relation to the subject matter of such contract or any claims

arising thereunder..." He submitted, however, that in giving effect to Roose's case (supra) the rule is stated in the headnote that "where an arbitration clause is in wide terms the Court will limit the operation thereof to conform with what seems to it to have been the intention of the parties" - see McCarthy P at p 248. It must be noted, however, that the limitation, as already noted, was stated by McCarthy P at p 249, in the following words :

> "The Court should restrict the operation of such a wide clause no further than necessary, and on that reasoning should exclude...only claims which are entirely unrelated to the commercial transaction covered by the contract."

Mr Williams submitted that it was evident from the language of the clause that the parties intended to restrict the clause to the subject matter of the contract, or the interpretation of the clause, and not to extend it to a claim for conversion of the plaintiff's chattels. It was argued that the subject matter of the contract was the construction of the yacht. That being so, Mr Williams argued that the claim arising out of conversion of the chattels should be held to be unrelated to the construction having regard to the evidence that the items in question would probably be installed by the plaintiff but that even that was not necessarily certain. It was submitted that the mere possession by the defendant of the chattels with no right to retain them or right of control over them was insufficient to show there was a dispute relating to the construction of the yacht.

As to the words in the clause, "or any claim

arising thereunder" Mr Williams submitted the words should be construed as relating to earlier categories in relation to the subject matter, namely, the construction of the yacht. Considered realistically, Mr Williams submitted that evidence of the existence of a dispute was so sparse that the Court was not in a position to conclude that the onus had been discharged.

Mr Williams dealt with clause 6 of Mr Butters' affidavit which begins by referring to items which the plaintiff is required to supply free of charge for installation by the defendant. Mr Butters there states, "such items include some of the items...including rigging, winches, bilge pumps and electrical equipment. The remaining items are all intended either for incorporation into or use on the vessel". It was submitted by Mr Willian that the position is explained in the plaintiff's affidavit which shows that most of the items do not "go to the construction of the yacht". It was contended that a dispute as to whether or not the chattels are part of the construction contract does not provide grounds for granting a stay. He submitted that where the dispute or difference relates to jurisdiction that is a question which should not be left to the arbitrator but should be decided by the Court. See Russell, 20 Ed p 91, where it is stated :

> "It can hardly be within the arbitrator's jurisdiction to decide whether or not a condition precedent to his jurisdiction has been fulfilled. It has indeed been said bluntly that an arbitrator has no power to decide his own jurisdiction."

Mr Williams submitted that it was insufficient merely to claim that there was some dispute without establishing a prima facie case concerning it.

As to the facts as they appear the circumstances are not agreed. The facts, however, in my view, do "centre round" the construction of the yacht. I have to consider the facts as deposed to in the affidavits. No application was made to cross-examine either deponent. No affidavit in reply to the plaintiff's affidavit, which deals with the various categories of items of equipment was filed but in my opinion the position remains uncertain. I am unable to agree that on the evidence before me I should find that there is no bona fide defence to the plaintiff's claim for the return of the equipment. Clearly items of equipment of various kinds were brought to the construction site in Nelson and stored by the defendant. There is a dispute as to items to be installed as a part of the defendant's work in constructing the yacht. There is no dispute that the arrangements made were concerned with equipment intended to be used on the yacht and the storage of the equipment was to that extent related to the transaction. The agreement that items of equipment would be brought to the site to be installed, or simply to be stored for installation by the plaintiff, or another expert, when the defendant's work was done was no doubt a commonsense arrangement which in my view should be regarded as a part of the commercial transaction entered into. It was out of these arrangements that the dispute has arisen. The arbitration clause, as Mr Williams

accepted, is very wide, including the words, "or in anywise having any relation to the subject matter of such contract or any claims arising thereunder or in relation thereto". In my view it cannot be argued successfully that the dispute is not related to the contract for the construction of the yacht. That being so words of Lord Dunedin in Hirji Mulji v Cheong Yue Steamship Co Ltd 1926 AC 497, cited by Lord Porter in the leading case of Heyman v Darwins Ltd 1942 AC 356, 394 apply, namely, "if they have got to have recourse to the contract it seems to me that the dispute is a dispute under the contract."

For these reasons I am satisfied that the subject matter of the present proceedings is within the scope of the reference to arbitration. The right to a stay under s 5 of the Arbitration Act 1908 being subject to the discretion of the Court it is necessary to consider whether the plaintiff in the present proceedings is able to show that there is no sufficient reason why the matter should not go to arbitration. The general principles to be applied have been referred to, and can be stated briefly. In Astro Vencedor v Mabanaft Gm b H 1971 2 All ER 1301, 1306, Mocatta J said, after reviewing the authorities :

> "The decision must in every case depend on the facts, but the Court should, if the circumstances allow, lean in favour of giving effect to the arbitration clause to which the parties have agreed."

The onus on the plaintiff in the present case arises under s 5 of the Act which provides that the Court may grant a stay "if satisfied that there is no sufficient

reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration."

It was accepted by Mr Gapes that there was no evidence regarding the second part of the statutory requirement. Mr Williams submitted that the Court must have some evidence to support the plaintiff's affirmative proposition and must also be able to conclude that the application is not sought merely to delay : see Piercey v Young 1879 14 Ch D 200, 209. It was claimed that the plaintiff's affidavit shows that delay will be prejudicial to the plaintiff and that delay in arbitration proceedings is likely having regard to the defendant's desire to have other claims referred to arbitration. In the circumstances of the present case it was submitted it could be years before an arbitration was heard to dispose of all matters contemplated by the defendant.

The question of delay resulting from arbitration was relied on as an important consideration in Mr Williams' submissions. In my view that was a natural reaction to matters raised referred to in Mr Butters' affidavit. I have noted, however, that in his argument in reply Mr Gapes stated that it was not intended that the subject matter of the present case was "tied to other matters which would arise in the future". I proceed, therefore, on the basis that the subject matter of the present proceedings are the matters in dispute regarding the

equipment and that there is no reason why these should not be dealt with by arbitration without any undue delay. That being so I do not regard the claims as to damage and deterioration as factors which support the submission that the stay should be refused.

In considering the facts on which the decision of the Court depends in exercising its discretion it is the nature of the claim which is relevant, as the cases show. For example the nature of the claim was considered by Roper J in Anthony Argyle Ltd v UEB Waihi Ltd (A 19/83 Invercargill, unreported, judgment 18 October 1983) and by Hardie Boys J in UDC Group Holdings Ltd v Systems Programmes (NZ) Ltd (A 65/81, Wellington, unreported, judgment 25 May 1981). In the former, Roper J found that it was not a case where "the expertise of the available arbitrators" was a consideration of weight and that the primary submission in support of a refusal of a stay was that "difficult questions of law" were involved. It was pointed out that that was regarded as a factor of great weight in the Roose case (supra). Holding that there was no call for "an arbitrator of a particular character..." and that what was required was "knowledge of the law and the rules of evidence and the ability to conclude when an onus had been met..." in a case involving "the law relating to bailment, negligence and breach of statutory duty", Roper J decided that arbitration "would be wholly inappropriate", and refused the application to stay. Roper J referred to my decision in Codelfa-Cogefar v Attorney General 1981 2 NZLR 153 (granting a stay) pointing out that in that case "complicated engineering questions"

called for "someone skilled in that field to conduct the inquiry" even though difficult questions of law were likely to arise.

In the latter case Hardie Boys J declined the application to stay in a case where some of the matters in dispute in the proceedings were not within the arbitration clause. In refusing the stay in those circumstances the learned Judge was careful to point out that he did not decide the matter "on any ground relative to the complexity of the factual issues or the possible difficulty of the legal questions involved".

In my reasons for judgment in the Codelfa case I pointed out that in the Roose case the complicated questions of: weighed heavily in the exercise of the discretion as they did in the case Roper J was considering. In the present case, in my view, the subject matter of the proceedings is largely a dispute over the facts. The questions of fact, in my opinion, are of a class which can conveniently be dealt with by an arbitrator. The words of Lord Porter in Heyman v Darwins Ltd (supra) seem to me to be apt in applying the principles in the present case. At p 391 he said :

> "The parties have chosen to refer their differences to arbitration, and to arbitration they should go in the ordinary course unless there is some good reason to the contrary, as, for example, where there is nothing but law to be decided..."

I again emphasise that Mr Gapes made it clear in his reply that in referring to other matters of dispute as appropriate for arbitration it was not intended to suggest that the subject matter of the plaintiff's present proceedings would be delayed for that reason. Mr Gapes' explanation was important in considering the nature of the claim and the question of undue delay.

In Piercy v Young (supra) Sir George Jessel MR said, at p 209, that "the Court should have required an affidavit to be produced of readiness and willingness to refer to arbitration at the time when the motion was heard in the Court below". The need for an affidavit is not disputed. Subject to an appropriate affidavit being filed and referred to me I propose to make an order granting a stay. If necessary I shall hear counsel as to the form of the affidavit and as to costs within twentyone days.

Solicitors for the plaintiff : Young Swan Morison McKay (Wellington)

Solicitors for the defendant : Butler White & Hanna (Auckland)