IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

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M.96/83

BETWEEN RUSSELL GAELIC

Appellant

AND NORTHLAND DIESEL LIMITED

Respondent

Hearing: 21st June, 1984

Counsel: Ramsdale for Appellant
Carter for Respondent

ORAL JUDGMENT OF SINCLAIR, J.

This appeal arises from a decision in the District Court at Whangarei in November, 1983 consequent upon some damage which had been done to a launch owned by the Appellant.

The brief facts are that the Appellant owned the launch and the motor had apparently siezed with arrangements being made for that motor to be taken out of the launch by the Respondent and for it to repair it and then replace the motor.

After the motor had been taken out it is accepted by all parties that the launch, then being alongside a portion of the wharf in the Whangarei town basin, was tied too short. As a result, as the tide receded the boat was eventually left suspended in mid air being held by the mooring ropes, but that allowed the boat to tip on to its side and when the tide came in water entered the vessel with the result that damage was done not only from seawater which entered the vessel, but also from oil which had remained in the sump after the engine

had been removed.

Because of that damage the owner of the launch, Mr Gaelic, sought to recover the cost of the repair from the Respondent and three grounds were alleged: firstly it was alleged that there had been a breach of the contractual duty which the Respondent had to the Plaintiff and it is summed up in paragraph 6 of the amended counter claim which pleads an implied term of the contract to the effect that the Respondent would take all reasonable and adequate precautions to prevent damage occurring to the launch whilst it was in its possession and/or control. The second claim was based in bailment and the third in negligence.

I wish to dispose of the bailment argument firstly and then return to the remaining two causes of action. To my mind this was not a contract of bailment. The Respondent was an independent contractor who was employed to do repairs on the motor of this launch and for that purpose it was necessary for the motor to be removed and taken to the Respondent's premises. The Respondent was an independent contractor and this is not a case of it doing work on the vessel itself, but only on a portion of the vessel, with the result that at no stage in my view in law did the whole of the launch come into the possession and control of the Respondent. Admittedly they were to be paid for the work they did on the motor and the motor certainly was bailed to them during the course of that work. But where there is a bailment for valuable consideration there are four requirements: firstly, there must be a chattel in existence; secondly possession of the chattel must be capable of transfer from one party to the other and must actually be transferred; thirdly, the custody of the chattel must be the

object of the transfer and possession; fourthly, the transfer or custody must be temporary and not permanent.

For the Respondent to carry out its contract there was no necessity for it to have possession and control of the vessel. All that it required was for the vessel to be so positioned that it could remove the motor and take it away for the necessary work to be done upon it. In my view the Respondent was in no different position from a person who might have been asked to go down to this particular vessel and carry out a repair on the radio on board. Under no circumstances could it be said that that technician would have been a bailee of the boat, nor do I think that this present case is in any different situation.

In any event, even if I am wrong in that assumption there is a finding of fact by the District Court Judge on the evidence that Mr Gaelic was on board the vessel after the motor had been removed and after the Respondent's employees had left. If there had been any bailment that ended with Mr Gaelic's return to the vessel and he once again was in control.

Having disposed of that argument the next matter is to consider what was the contract and has there been any breach in relation to it. Admittedly the contract was for the removal of the engine and in so doing for reasons which Mr Pascoe, an employee of the Respondent, thought fit he left the oil in the sump of the boat. He realised that it had to be removed at some time but he gave evidence that having regard to the level of it he did not consider that it was necessary at that point to remove the oil. Some evidence was given by

an insurance assessor that to leave the oil there was somewhat sloppy, but Pascoe gave a reason which apparently commended itself by implication to the District Court Judge.

Mr Dorling's evidence was to the effect that to leave the oil there could result in damage being done if the wash of another vessel rocked the launch at its tied up position which would result in oil spilling out and that it was also a fire hazzard, but that is not the nature of the damage this case is concerned about. If oil had slopped out as a result of the wash of the vessel alongside then the damage would have been minor and probably would not have amounted to anything very great at all; certainly the Court was not concerned with a fire. But one must look at what caused this damage and the cause of the damage was as the result of the boat being tied up too short and it tilted with the outgoing tide and water came in on the incoming tide.

Evidence was given by Mr Pascoe that when he left the vessel it had been tied in such a way as would take account of the rise and fall of the tide in the town basin and that when he saw it later it was not tied in the manner in which he had left it. The District Court Judge was entitled, after having seen the witnesses, to accept that if he thought fit so to do. Having so found that, in my view, is a finding that the Respondent through its employees has discharged its duty both in respect of its liability in contract and in negligence.

I accept Mr Ramsdale's criticism of part of the judgment which seems to suggest that Mr Gaelic himself may have re-tied the ropes. That may be an over simplification of the situation. The basis of the District Court's finding on that particular

aspect was some evidence from one of the Respondent's employees, a Mr Rapana. His evidence was to the effect that he had overheard Mr Gaelic remark that the boat was not tied how he had left it. The District Court Judge has inferred from that that Mr Gaelic had retied the boat. That certainly is an inference which was open to him, but of course it is not the only inference. If one accepts Mr Ramsdale's criticism of the District Court Judge's drawing of that inference, it leads necessarily to the inference that Mr Gaelic was there after the departure of the Respondent's employees and that what he saw after the damage had occurred led him to pass the remark that the vessel was then not tied as he had left it. In other words there has been the intervention of some third person. In those circumstances can it be said that the Respondent is liable? In my view the answer to that is in the negative.

Mr Ramsdale suggested that there should have been periodic visits back to the vessel. In my view that is not a duty which was incumbent on the Respondent. Mr Gaelic had the control and possession of the launch and if anybody should have inspected it in those circumstances it was the person who had the custody and control, namely Mr Gaelic himself.

In all the circumstances I do not consider that this is a judgment which should be interfered with in any respect at all and the appeal will be dismissed. The appeal having failed, costs should follow the event. Costs will be allowed in the sum of $200 and disbursements.

SOLICITORS:

Marsden Woods, Inskip & Smith, Whangarei for Appellant
Connell, Lamb Gerard & Co., Whangarei for Respondent