ALL ENGINEERING LTD v PACIFIC PARASAIL LTD (ABU0045 of 2010)

COURT OF APPEAL — CIVIL JURISDICTION

CALANCHINI AP, CHANDRA and BASNAYAKE JJA

12, 28 September 2012

Damages — assessment — appeal against judgment — boat immobilised due to repair — loss of earning — whether damages rightly awarded in absence of proof — knowledge of defendant — rough and ready approach to assessment.

The defendant appealed against a judgment awarding damages to the plaintiff. The plaintiff operated a business providing recreational water sports using boats. One of the boats was repaired by the defendant, however the repair failed. It took 26 days for the boat to be back at work and the plaintiff claimed special damages and unspecified general damages.

Held –

(1) The damages recoverable are such as may fairly and reasonably be considered arising naturally from the breach of contract. The parties were known to each other through their businesses. Whilst the plaintiff used boats for his business, the defendant attended on their repairs. When a boat is kept out of business, the loss caused would have been within the knowledge of the defendant.

Hadley v Baxendale [1854] 9 Exchequer 341; *The Mediana* [1900] AC 113; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, applied.

(2) The judge adopted a rough and ready approach and took a robust view of the evidence, and came to a correct conclusion having considered the facts and the authorities.

Appeal dismissed.

Cases referred to

AG of Fiji v Cama (2004) FJCA 31; *Newbrook v Marshall* [2002] 2 NZLR 606; *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254; *Tai Hing Cotton Mills Ltd v Kamsing Knitting Factory* [1979] AC 91; *Walsh v Kerr* [1989] 1 NZLR 490, followed.

F. Haniff for the Appellant.

A. Patel for the Respondent.

[1] Calanchini AP. I have had the opportunity of reading the judgment of Basnayake JA and agree with his reasons and conclusion.

[2] Chandra JA. I agree with the reasons and conclusion arrived at by Basnayake JA

[3] Basnayake JA. This is an appeal against the judgment dated 15.9.2009 of the learned High Court Judge, at Lautoka. By this judgment the plaintiff respondent (plaintiff) was awarded the sum of $38,582 as damages and $13,890 by way of interest and $300 for costs.

[4] The plaintiff is a limited liability company engaged in the business of providing recreational water sports, in Beachcomber and Treasure Island resorts. The plaintiff had engaged a number of boats for its diving operations, taking tourists from Beachcomber and Treasure Island. One such boat used was named *"Kalo"*. This was fitted with a 6 cylinder *"Yanmar"* diesel engine. In December,

2002, this engine was found to be faulty and the defendant appellant (defendant) was entrusted, among other functions, to machine and fit in a *"valve seat"* in to the number three cylinder. This was done and the boat was back in operation. However in February, 2003, the engine that was repaired by the defendant failed. The Managing Director, Praveen Kumar, of the defendant company had admitted that it was the same cylinder (No3) to which they had fitted a valve seat that had failed. The plaintiff claims that it took 26 days for the boat to be back at work and claims a sum of $ 38,581.99 as special damages and unspecified general damages, interest and costs.

[5] In a writ of summons filed on 16.2.2004 the plaintiff had itemised the damages claimed in detail, which made the figure of $38581.99. Of this sum $26,000 was claimed for loss of earnings. That is, $1000 per day from 1.2.2003 to 26.2.2003, the period during which the boat was immobilised due to repair. The balance sum was for the repair and incidental expenses. The defendant in a statement of defence admitted to fitting a valve seat and other repair.

[6] The defendant denied negligence and breach of representation and agreement. The defendant put the plaintiff in to strict proof of all the allegations. However the defendant did not specifically challenge the fact that the plaintiff had had to spend monies on the boat for the repair. Further, the defendant did not challenge the fact that the boat was out of business for the period from 1.2.2003 to 26.2.2003.

[7] Prior to the commencement of the trial both parties had filed lists of documents. The plaintiff filed a supplementary list on 27.3.2007. This list contained 20 documents and a bundle of papers containing correspondence between the Solicitors. At the trial the matters in dispute were with regard to the negligence of the defendant and the quantum of loss the plaintiff suffered. Of the documents, P2 is a letter dated 5.3.2003 addressed to Praveen Kumar of the defendant company, where reference was made to loss of earnings. The plaintiff also marked a document, P5, in which a detailed description was given with regard to the claim for the loss of earnings for the period 1.2.2003 to 26.2.2003.

[8] At the trial Anthony Paul Cottrell and Mr. Alexander, a professional metallurgist, gave evidence for the plaintiff. Praveen Kumar and A.J. Kumar, a supervisor, gave evidence for the defendant.

Judgment of the High Court

[9] All the evidence was taken before another Judge. However the parties agreed for the present Judge to deliver the judgment after reading what was recorded. After considering the evidence, the learned Judge found that there was an express representation, and hence a term of agreement, that the defendant would use material suitable for a valve seat. The learned Judge found that the defendant had failed to carry out the repair in a competent, professional and workmanlike manner and there was a breach of that term by the defendant which has caused the failure of the engine and the loss resulting there from.

[10] With regard to damages, the learned Judge has based his decision on the judgment of *Hadley v Baxendale* [1854] 9 Exchequer 341. The learned Judge stated that "because of the close relationship of the parties over the years, Mr. Kumar knew that the vessel was used as a dive boat and that he must have known or ought to have known that any lay up of the vessel could cause loss of business earnings to the plaintiff. The learned judge found that the loss and damage suffered by the plaintiff was a natural consequence of the defendant's breach (emphasis added).

[11] Praveen Kumar had been the Managing Director of the defendant company. Anthony Paul Cottrell and his wife owned the plaintiff company. The defendant company was engaged in machining, regrinding crank shaft, head refacing, replacing valve and seat and all sorts of machine manufacture. The plaintiff had been engaging Praveen Kumar previously and relied on his expertise. Praveen Kumar and Anthony Cottrell had been associating for more than 20 years, during which time Praveen Kumar had been engaged for various repairs of the plaintiff's boats. Praveen Kumar had stated in evidence that he is a specialist on this work entrusted and that the plaintiff relied on his expertise for work he did and trusted his judgment.

[12] It is not disputed that the seat valve to cylinder No3 had to be replaced and the defendant undertook to manufacture one as the plaintiff did not have a genuine part to replace. Praveen Kumar, who is the Managing Director of the defendant company stated in evidence that the valve seating was done for others and that this was the first time that anyone ever complained. However when the engine failed after it was repaired, a genuine valve seat was supplied by Cottrell and was fixed. It is evident that up to the time of trial the engine fitted with a genuine valve seat did not give any trouble. Undisputedly the trouble was with regard to the valve seat manufactured by the defendant company, fitted when the engine first gave trouble.

Submissions of the learned counsel for the Appellant

[13] When this appeal was taken up for argument the learned counsel for the defendant did not pursue an argument with regard to the liability of the defendant and confined his submissions to quantum.

[14] The learned counsel for the defendant submitted that the plaintiff had pleaded the loss suffered as special damages which needs to be proved. He submitted however, that the learned High Court Judge has considered the damages as general damages. The learned counsel submitted that even if it was considered as general damages, it still needs to be proved. As there is no proof of special damages the plaintiff should not have been awarded any damages.

Hadley v Baxendale (1854) 9 Exch 341

[15] In this case steam mill owners in Gloucester sent away a broken shaft to London to have a new one made to the same design. The carriers returned the new shaft late, with the result that the mill owners (who carried no spare) lost considerable profits. The jury had awarded the mill owners those lost profits as damages for breach of contract. Alderson B held "that in cases of breach of contract, the damages recoverable were such as fairly and reasonably be considered either arising naturally, that is according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach of it" (emphasis added). Since there was no evidence that when the contract was made, the defendant had known or had reason to know that late delivery would leave the mill idle, it followed that the loss of profit were irrecoverable as a matter of law.

[16] In *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 laundry proprietors lost a lucrative government contract when an improved boiler was delivered late. Those profits were held recoverable from the sellers only in so far as they could be shown to have had the requisite knowledge of the surrounding circumstances. Asquith L J held *"thus everyone, as a reasonable*

person is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in the ordinary course…But to this knowledge, which a contract breaker is assumed to possess whether he actually possess it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the *"ordinary course of things"* of such a kind that a breach in those special circumstances would be liable to cause more loss" (emphasis added).

[17] Salmond (Salmond & Heuston on Law of Torts twentieth edition at 517) states that "general damages is that kind of damages which the law presumes to follow from the wrong complained of and which, therefore, need not be expressly set out in the plaintiff's pleadings. Special damages on the other hand, is damage of such a kind that it will not be presumed by the law and it must therefore be expressly alleged in those pleadings so that the defendant may have due notice of the nature of the claim. Thus in the case of a collision between two ships, due to the negligence of the defendant, the plaintiff will be able to recover general damages for the loss of the use of his ship during the repairs (*Carslogie Steamship Co Ltd v Royal Norwegian Government (The Carslogie)* [1952] AC 292 even if it be not used for trading or profit (*The Hebridean Coast* [1961] AC 545).

[18] Lord Halsbury LC in *The Mediana* [1900] AC 113 at 117 asked *"what right has a wrongdoer to consider what use you are going to make of your vessel?…Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by showing that I did not usually sit in that chair or that there were plenty of other chairs in the room"*.

[19] It is not disputed that the plaintiff and the defendant knew each other for over 20 years. It was admitted that the plaintiff was operating water sports activities on Beachcomber and the boat repaired was used by the plaintiff for business; that is to transport tourists. Praveen Kumar, Managing Director of the defendant company, admitted that the plaintiff was operating water sports activities at Beachcomber and that the boats were used in the business. Praveen Kumar also admitted that Mr. Cottrell relied on the expertise of Praveen Kumar and that Cottrell relied on the judgment of Praveen Kumar.

[20] Applying the principles formulated above it would appear that the damages recoverable are such as may fairly and reasonably be considered arising naturally from the breach of contract. The parties were known to each other. They got to know each other through their businesses. Whilst Cottrell used boats for his business, Praveen Kumar attended on their repairs. When the engine failed at the time material to this case, Praveen Kumar had gone to the boat yard to inspect the damage. They had a cordial relationship. When a boat is kept out of business, the loss that is caused would have been within the knowledge of Praveen Kumar, being associated with Cottrell for so long.

[21] Within a very short period after the catastrophe (engine failure) Praveen Kumar was informed as to the loss caused to the plaintiff. However, Praveen Kumar never disputed the amount claimed. Even at the trial no questions were asked from Cottrell disputing the loss of earnings and the costs of the repair. The only thing the defendant wanted was strict proof.

[22] Justifying the amount claimed, the learned High Court Judge relied on a judgment cited by the learned counsel for the defendant, namely, *AG of Fiji v Cama* (2004) FJCA 31 where damages were assessed despite the lack of actual

and precise proof. The Court of Appeal dismissing the appeal relied on Richardson P in *Newbrook v Marshall* [2002] 2 NZLR 606 at 614. Richardson P held that "where there are variables involved, as usually occurs in assessments of business profits or losses, if precise figures had to be proved few plaintiffs could succeed. Where as here, it is established that a particular factor was causative but its precise contribution to the loss could not be correctly calculated in precise dollar terms, a more robust approach is required of the courts. Quoting Lord Mustill in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 at 269) that *"the assessment of damages often involves so many unquantifiable contingencies and unverifiable assumptions that in many cases realism demands a rough and ready approach to the facts"*.

[23] Richardson P also cited *Walsh v Kerr* [1989] 1 NZLR 490 at 494 where the Court of Appeal of New Zealand held thus "there are cases where, although the assessment can only be largely speculative and the evidence is exiguous, the Court will do the best it can to arrive at a figure if satisfied that there has been some real damage. Cooke P cited the Privy Council case of *Tai Hing Cotton Mills Ltd v Kamsing Knitting Factory* [1979] AC at 106 where Briggs C.J. plainly arrived at a figure of damages upon a wrong basis. Considering the circumstances their Lordships have come to the conclusion that *"the ends of justice would best be served if they were to fix a new figure of damages as best they can upon the available evidence, such as it is"*.

[24] Having relied on the above judgments the Court of Appeal held in *AG of Fiji v Cama* (supra) *"that there can be no doubt that Eagle has suffered some real and substantial damage resulting from the loss of or damage to the items in the schedules. Because of uncertainty concerning the value of those items and the accepted fact that some, but not many, of the items may not have been owned by Eagle, the loss cannot be precisely proved. In those circumstances the Judge was entitled to take a robust view and to make a broad brush assessment of loss"*.

[25] The learned High Court Judge having found a similar situation here stated that I therefore adopt a *"rough and ready"* approach advocated by Lord Mustill and take a *"robust view of the evidence"*. I am of the view that the learned Judge had come to a correct conclusion having considered the facts and the authorities. Therefore this appeal is without merit and dismissed with costs fixed at $3000.

The orders of the Court are:

1. Appeal dismissed.
2. Judgment dated 15.9.2009 affirmed.
3. Costs $3000 to be paid to the Respondent by the Appellant.

Appeal dismissed.