

IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
Civil Appeal No. 18 of 1977

Between:

INDUSTRIAL (S.P.) LTD & ANOR. Appellants

- and -

WARWICK GEORGE MATHIESON &
ANOTHER Respondents

K C Ramrakha for Appellants
P I Knight for Respondents

Date of Hearing: 21 November 1977
Delivery of Judgment: 25th November 1977

JUDGMENT OF THE COURT

Henry J.A.

This appeal raises a question of ownership in respect of a yacht hull. It is conceded that ownership is vested in either the second appellant (which we shall call "Structural Steel") or second respondent (whom we shall call "Jackson"). The learned judge found that Jackson was the owner. From this finding the present appeal has been brought.

Structural Steel is duly registered as a private company under the provisions of the Companies Ordinance Cap. 216. It has a nominal capital of 50,000 ordinary shares of \$1 each. The issued and paid up capital is \$2 held as to \$1 by Jackson and as to \$1 by Ernst Gunter Eggers one of the first appellants whom we shall call "Eggers". Structural Steel was formed with the object (inter alia) "to build, equip, charter, purchase or otherwise acquire and maintain ships, steamers, launches and vessels of every description".

On April 29, 1971, Structural Steel wrote to Jackson the following letter:-

"With reference to our last telephone call we herewith have pleasure in confirming our verbal quotation for the fabricating, erecting and welding of one(1) only steel hull for centre board round bilge Yacht as per plans supplied by you.

It is understood that all material required shall be supplied by you, whilst we shall be responsible for all machinery and equipment necessary for the construction of this vessel. Our prices as quoted is \$15,000 Fijian.

Thank you for your verbal acceptance and to keep the Company's records in order would you kindly confirm your acceptance in writing."

On May 11, 1971 Jackson replied as follows:-

" In answer to your letter dated 29th April, 1971, I have pleasure in accepting your quotation of \$15,000 Fijian for the building in Suva of a steel hull 94' O.A. as per my plan. I agree to supply all materials necessary for the construction.

We will have to get together on the details but I do not foresee any problems. Although the deckhouse is not shown in the body plan I presume you have allowed for labour on this and the deck openings etc. I will of course be responsible for all woodwork. At the moment I have an idea that I might like the deckhouse in alloy - should this involve additional work over and above that required for steel we can adjust this accordingly.

It is understood that the steel work will be finished to recognised yacht standards and although no time limit is expected priority will be given to this work and it will proceed with all reasonable speed consistent with good workmanship".

Eggers at all times acted on behalf of Structural Steel in the transactions which followed. The only evidence given was that of Jackson and the designer of the yacht hull who was engaged and paid by Jackson. A number of documents were produced. Eggers was not called.

In November 1972 Structural Steel commenced work on building the said yacht. The steel and plating were supplied by Jackson. The shed in which the work was carried out belonged to Jackson and the land used was land leased to Jackson. It was contended on behalf of appellants that Jackson held the land as trustee for Structural Steel but the learned judge held otherwise. There is no ground upon which this finding ought to be set aside. Jackson has paid to Structural Steel sums of upwards to \$30,000.

The basic submission of Mr Ramrakha for appellants is that the said letters of April 29, 1971 and May 11, 1971 do not contain an offer and acceptance sufficient to constitute a contract. Counsel claims that the letter of May 11, 1971 was a counter-offer, and, although he did not say so, by implication his argument is that the counter-offer has not been accepted. Counsel's argument was that both parties contributed to the cost of the yacht and that it remained the property of Structural Steel. This last contention suffers from the fault that it fails to predicate how the yacht became the property of the Structural Steel which, of course, is the issue.

A proper construction of the letter of April 29, 1971 discloses that it contains two separate factors, viz:

- (a) the confirmation of a verbal quotation to Jackson for fabricating, erecting and welding of a steel hull in accordance with plans supplied by Jackson and that all machinery and equipment necessary were to be supplied by Structural Steel which was to be paid \$15,000 in Fijian currency.
- (b) All material was to be supplied by Jackson.

The first paragraph of the letter of May 11, 1971 is a clear acceptance of both conditions set out above. The next paragraph is not a counter-offer. It deals with the question of details and draws attention to the fact that Jackson presumed that certain allowances have been made and makes it clear that he is responsible for all woodwork - also that he might like to change the deckhouse to alloy in which case he would be responsible for any additional work.

The parties in due course acted in accordance with the two letters. Jackson provided and paid for all materials used. On September 19, 1972 an invoice was sent to Jackson for progress payments which was entirely in accordance with the terms of the letter of April 29, 1971. The document asked for a progress payment of \$4,000 to confirm Jackson's order for a 94 foot steel centreboard yacht "per your plans and specifications of which construction will commence immediately". This document clearly recognises a pre-existing contractual situation which can only refer to the two letters earlier set out. A letter (undated) (Ex. 18) made a demand for the price of \$15,000 also for some additional payments in accordance with the consumer index price. This letter

clearly recognised the price of \$15,000 and made a claim against Jackson for extras. The origin of the claim based on the rise in the consumer price index is not explained. The letter is clearly a claim that the work on the hull had been carried out and that the sum of \$15,000 was payable. Credit was given for periodical payments made on account by Jackson.

We have set out the above to show that Structural Steel claimed that it was entitled to \$15,000 being the amount payable to it for "fabricating, erecting and welding" the steel hull. The clear inference is that Jackson carried out his part, as indeed he deposed he did, by supplying all material and paying for it and that he was liable personally for the work done including extras.

We are of opinion that the said two letters did constitute an offer and acceptance and that no counter-offer was made. If and to the extent that the terms of the letters were varied or added to, that was by agreement of the parties during the course of the contract because it is clear that extras were incurred and paid for. The fact that there were extras itself postulates that there was an agreed price and details from which it could be said that extra work was done which was not provided for in the original terms between the parties. The additional paragraph in the letter of May 11, 1971 was no more than an indication that Jackson might ask for and pay for some variation. This he could do only if Structural Steel agreed because the terms of the letters did not impose any obligation on Structural Steel to do extra or different work. That was a matter of further agreement.

The relationship between these two parties clearly emerges from the said two letters and the manner in which the parties acted on them and carried out their respective roles. Structural Steel undertook and did certain work and labour on materials supplied by Jackson. Such materials were purchased by Jackson in accordance with the said letters. The property in these materials belonged to Jackson and no contract was made with Structural Steel whereby these materials became its property. In short, Structural Steel did work and labour on Jackson's materials which resulted in a hull being built from materials owned by Jackson. The fact of such work would not pass any property in the materials to Structural Steel unless there was an express agreement to that effect. None was proved.

The main contention of counsel for appellants in the Supreme Court appears to be that the contract was one for the sale of goods, that is, in line with the cases relating to the construction of a vessel under a shipbuilding contract e.g. Reid v. Macbeth & Gray (1904) A.C. 223. Such a contract is for the sale of goods and is not a contract for work and labour. In Clay v. Yates 1 H & N 73; 25 L.J. (Ex) 237, 239 Pollock C.B. said:

"The true rule is this, whether the work and labour is of the essence of the contract, or whether it is the materials which are found".

Marten B. at p. 240 said:

"I do not think it is profitable to go into other cases, for in the common sense and understanding of mankind this is clearly a case of work and labour and materials."

In the present case all that Structural Steel supplied was work and labour and the contract was clearly one for work and labour on materials supplied and owned by Jackson. We were informed at the Bar that labour comprised only 18% of the total cost although that of itself is not important. The contract was not for the sale of a chattel.

Reference must be made to a contention of counsel for appellants in this Court. Counsel referred to an affidavit made by Jackson in the course of some interlocutory proceedings. For the purpose of showing that Structural Steel was not the owner of the said hull, a copy of the accounts of Structural Steel prepared by the chartered accountants of the company, was produced. The accounts which was "as at December 1973", did not list the said hull as an asset. They did, however, show that Jackson had advanced \$15,999 to the company. There is no evidence to prove that Jackson accepted these accounts as correct or that he agreed to make or did make any such advances. The course of conduct and the documents produced show that the dealings between the parties conformed with the two letters.

In paragraph 1(d) of the Statement of defence Structural Steel put forward a defence that a contract was entered into the terms of which (inter alia) included:

- (i) that the Structural Steel would undertake to construct Steel Hull as its property;

- (iii) that the Structural Steel would hire the necessary machinery and equipment from Industries South Pacific to (Pacific) Limited the First Defendant Company to complete the said Steel Hull;
- (iv) that the Jackson would advance moneys to the Structural Steel as and when required to complete the said construction;
- (v) that Jackson would supply all materials by way of loan for the construction of the said Steel Hull to Structural Steel.

No evidence was called to support this allegation and it is contrary to the documentary evidence. This contention fails.

The appeal is dismissed with costs to be fixed by the Registrar and the judgment in the Supreme Court is affirmed.

(Sgd.) T. Gould
VICE PRESIDENT

(Sgd.) C. Marsack
JUDGE OF APPEAL

(Sgd.) T. Henry
JUDGE OF APPEAL