IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT, FIJI ISLANDS

CIVIL APPEAL NO.ABU0022 OF 2001
(High Court Civil Action No. HBC0480 of 1997S)

BETWEEN: PORTS AUTHORITY OF FIJI *Appellant*

AND: C & T MARKETING LTD *Respondent*

Coram: The Rt. Hon. Sir Thomas Eichelbaum, Presiding Judge
The Rt Hon Justice John Steele Henry, Justice of Appeal
The Hon. Sir Rodney Gerald Gallen, Justice of Appeal

Hearing: 16 October 2001

Counsel: Mr R.A. Smith for the Appellant
Mr D. Sharma for the Respondent

Date of Judgment: 18 October 2001

JUDGMENT OF THE COURT

In 1993 the appellant awarded the respondent a pilot boat services tender, the material aspects being:

(a) The respondent was to pay $250,000.00 for the purchase of two PAF vessels, MV Anonyma and MV Seniceva.

(b) The appellant awarded the respondent a charter service with an annual rate of $204,400.00 (i.e. $17,033.33 per month). The term of contract was for 5 years.

(c) Fiji Marine Board and International Maritime Organisation Standards would need to be met.

Shortly afterwards the parties entered into a Sale and Purchase Agreement relating to the two ships.

The respondent had to have work carried out on the ships to get them seaworthy and acceptable for registration. After a delay, the sale was completed. There were disputes

between the parties relating to the work carried out and the consequent delay.

Later, and separately, another issue arose. On 10 March 1996 a vessel named *MV Archer* caught fire and was burning in Suva harbour. The appellant requested the respondent to assist with the Seniceva. Although the respondent protested that the Seniceva was a pilot boat not suited for a rescue operation it made the ship available. It assisted with towage and other services. Following legal advice it seems to have been accepted that these services were outside the scope of the pilot boat services contract. A dispute arose over the appropriate value of the services, and the cost of repairing the Seniceva, which sustained damage in the operation.

The parties agreed to refer their several disputes to the arbitration of an experienced barrister and solicitor. The relevant part of the submission to arbitration read as follows:

> *"WHEREAS disputes have arisen between the undersigned C & T MARKETING LIMITED OF Suva in Fiji and THE PORTS AUTHORITY OF FIJI having its registered place of business at Suva in Fiji concerning firstly:-*
>
> > *(a)C&T Marketing Limited's claim for $75,000.00 being the costs of complying with the requirement on the part of the Ports Authority of Fiji to give a valid Bill of Sale over the vessels MN Anonyma and MV Seniceva.*
> >
> > *(b)C&T Marketing Limited's claim for $49,500.00 being charges for services rendered by C&T Marketing Limited to Ports Authority of Fiji.*
> >
> > *(c) C&T Marketing Limited's claim for damages for the repair of MV Anonyma and MV Seniceva amounting to $16,441.00. It is alleged that such repairs became necessary as a result of services performed for and on behalf of Ports Authority of Fiji. It is further alleged that such services were rendered outside the scope of normal Piloted services.*
> >
> > *(d)PAF's claim for $39,062.50 being the interest on the purchase price of the two pilot boats which C & T Marketing Limited did not settle until fifteen months later.*
> >
> > *Alternatively, if it is established that the vessels have not been physically delivered to C & T Marketing Ltd., until September 1995, then PAF claims a hire rate for the two vessels at $200 per vessel per day for a period of fifteen months.*

AGREEMENT TO ARBITRATE

The Parties desire to have those disputes settled by Arbitration.

APPOINTMENT

Now in pursuance of the premises we, C&T MARKETING LIMITED and THE PORTS AUTHORITY OF FIJI jointly appoint you to be the sole Arbitrator to determine all matters in dispute between us as above setforth."

There were formal pleadings. The respondent's statement of claim referred to the first three matters listed in the submission in appropriate detail, concluding:

"In summary the Plaintiffs total claim is as follows:-

	(a)	*$ 75,500.00*
	(b)	*$ 49,500.00*
	(c)	*$ 16,441.00*
Total		*$140,941.00*

The Plaintiff therefore prays for the following relief:

(I) *An award in the sum of $140,941.00*
(ii) *Costs*
(iii) *Such other relief as the Arbitrator may feel deem just."* (sic)

The counterclaim gave details of the fourth item in the submission and concluded:

"WHEREFORE the Defendant Claims:

(a) *the sum of $40,625*
(b) *Damages*
(c) *Settlement* (sic) *thereon*
(d) *Costs*
(e) *Such further or other orders it is deemed just."*

The arbitration proceeded and on 10 October 1997 the Arbitrator issued a document headed "Arbitrator's Decision" which in fact recorded decisions relating to liability alone. It comprised a comprehensive rehearsal of the disputes and of the Arbitrator's reasons for his conclusions that in all but one respect the respondent succeeded on the liability issues.

However, on quantum, although setting out relevant considerations in detail, he did not announce any conclusions but called for further assistance. In regard to the claim for services for the MV Archer the Arbitrator discussed the principles relating to salvage claims and what he described as extra claims allowed in respect of towage being in the nature of salvage. He said

> *"In addressing me on quantum relevant to the second and third claims the parties need to bear these principles in mind."*

He went on

> *"In considering this rather complex matter and the law applicable it was apparent that the parties lacked clarity on the relevant law and the practice on which the law is based. It is for this reason I have made some effort to research and explain these and carefully analyse what has been presented to me. This lack of clarity flows on into the parties analysis and presentation of what quantum should or should not be awarded.*
>
> *It is therefore only fair that the parties, with now a clearer statement of the principles involved, should further consider these and address me on the matter of quantum."*

The one item where the respondent failed on liability related to repairs to the Anonyma.

The delivery of the arbitrator's decision led to an application by the appellant to the High Court to set aside the award and to stay enforcement of the award. The main thrust of the appellant's complaint seems to have been that the Arbitrator had no authority to split the hearing between liability and quantum, a step the Arbitrator took of his own initiative. The appellant also argued that the award was not in accord with the evidence, and that the Arbitrator had taken irrelevant or inadmissible matters into account. It claimed that the Arbitrator was guilty of misconduct, within the technical meaning of that term in arbitration law. In a judgment delivered on 20 May 1998 the Judge held that there had been no misconduct and directed that the matter be referred back to the Arbitrator to allow him to complete his findings on quantum.

Following delays caused by a change of legal advisers for the defendant, the Arbitrator indicated he wished to bring the matter to a prompt conclusion. By letter dated 1 October 1998 he announced that he found the respondent had established "its special damages" namely costs in bringing the vessels to registrable standard, $75,000; costs of services rendered re "Archer", $49,500; and costs of repairs to the Seniceva, $16,441. He stated that interest was payable on these amounts, which in each case represented the amount claimed by the respondent. He then referred to three further items : salvage award, other losses consequent upon the appellant's action, and costs, saying he required submissions in respect of damages, and setting out a timetable for such submissions.

In response the respondent's solicitors submitted a claim for $174,666.60 for salvage, and a further claim for $125,000 under the heading of further loss consequent upon the appellant's actions. We will refer to these two heads of claim as "the additional items". The second was premised on the contention that the appellant's refusal to pay for the services performed by the Seniceva and the repair costs had sent the respondent into severe financial difficulties, leading the bank which had lent on the security of the vessel to realise its security and seize the vessel. On this reasoning the respondent claimed the sum of $125,000 being the value placed on the Seniceva. Together with the items already decided by the Arbitrator and interest and costs the respondent's total claim now came to $577,118.

In reply the solicitors for the appellant maintained that the additional items were outside the ambit of the submission to arbitration. In regard to salvage they raised two further defences, first that since the appellant was not the owner of the Archer it could not be held liable for salvage; second, such a claim was barred by section 41 of the Ports Authority of Fiji Act. We record that these two defences have not been in issue before us.

After this there were further meetings and correspondence, and unsuccessful negotiations between the parties. On 14 December 1998 the Arbitrator issued a document headed "Arbitrator's decision on the quantum of damages." In this he confirmed his award on the three items dealt with in his earlier letter and dealt with interest on those awards. In relation to the salvage claim and the consequential losses he stated:

"The Defendant contends that the "salvage" claim and the consequential losses are not part of the terms of reference and therefore outside the scope of this arbitration. As I have already observed the Arbitration Agreement is brief and doesn't refer to such matters.

However the matter is expanded in the pleadings namely the Plaintiff's Statement of Claim dated 6 March 1997 and the Defendant's Defence and counter-claim dated 26 March 1997.
The Statement of Claim prayer after referring to the Plaintiff's special damage claim then adds
(ii) "Costs
(iii) Such other relief as the Arbitrator may feel deem just."

And similarly the Defendant prays for special damages, general damages, costs and "such further or other orders it is deemed just"
Neither party sought to preclude these claims on the basis they were not intended to be part of the terms of reference both dealt rather with the merits of the respective damage claims."

We are not quite sure what the Arbitrator wished to convey by the last sentence which taken literally is difficult to reconcile with the first. Undoubtedly the first sentence was correct. The appellant's stance was that by way of alternative to its primary contention, namely that these items were not within the submission to arbitration, it would address them on their merits. The Arbitrator appeared to accept the submission did not cover these two items but took the view that in effect, the scope of the arbitration had been extended by reason of the pleadings.

In dealing with the two additional items of claim on their merits, he held that a contract of towage which amount to "salvage towage or in the nature of the towage" could lead to "extra compensation" for the extra work and risks involved. Under this head he awarded $95,000. He also allowed the respondent's claim for the loss of the Seniceva at the figure claimed, $125,000. Together with interest and costs, the final total award was for $501,412.63.

The appellant's response was to reactivate the High Court proceedings and attempt to have the award set aside. Unfortunately, this gave rise to a number of procedural

complications and arguments. The extent of these side issues is shown the by fact that in the appellant's lengthy submissions, the point which is now at the heart of this appeal was not raised until the second last page. In the respondent's submissions in reply the issue was reached at p30. The lack of prominence thus given to the issue by the parties helps to explain why in the judgment dated 28 October 1999 the Judge did not refer to this aspect at all. The main matter he dealt with related to the appellant's attempt to raise a statutory defence based on s.41 of the Ports Authority Act. Having confirmed that the appellant's application to set aside the award was still unresolved, he now dismissed that application and confirmed the award. It is from that judgment that the present appeal has been brought.

Before this Court the sole argument has been whether the awards on the two additional items were within the Arbitrator's jurisdiction. It is beyond question that they were not among those contained in the submission to arbitration. So the issue comes down to whether the parties widened the scope of the submission, either by agreement, or by their conduct.

Mr Sharma's principal argument was that he and counsel then acting for the appellant agreed before the Arbitrator that these additional items were to be included. He submitted argument to us to show that the appellant ought to be bound by counsel's conduct.

There is no record or evidence of such an agreement, and the indications in contemporary documents are against its existence. In their letter of 27 October 1998 the appellant's solicitors raised the question of jurisdiction in plain terms. Had there been an agreement that would have been the obvious reply but instead, in their letter of the next day, the respondent's solicitors said

> *"Your client is attempting is attempting avoid liability by arguing that some of the claims that we have submitted were not included in the Arbitrators Terms of Reference. This appears to be a misconception on the part of the MPAF. What we submitted to the Arbitrator was details of our client's claim for special damages. Any claim on general damages would have depended on the Arbitrators finding on the issue of liability.*
>
> *The Arbitrator found in our client's favour on the issue of liability. Following from this the Arbitrator then discussed the issue of general damages that were available*

to our client under the principles of salvage. The Arbitrator then requested that the parties address him on the issue of general damages i.e. salvage claims. He clearly anticipates that our client will resort to a further arbitration or court action if the salvage claims are not resolved now."

The last sentence is significant. It is tantamount to a concession that the appellant's point may be correct, but that it would be best to have the additional issues dealt with now, thus avoiding the need for separate proceedings. Equally significant is the way in which the Arbitrator later dealt with the submission that these matters were outside his jurisdiction. He said, in a passage already quoted, that the matters had been opened up by the way the prayers for relief in the statement of claim and the counterclaim had been framed. He did not rely on any purported agreement. Thus we cannot accept the argument that the scope of the submission was extended by agreement between counsel.

So far as the pleadings are concerned, the body of the statement of claim simply dealt with the items which had specifically been referred to arbitration. It is true that in developing the claim for $49,500.00 for services rendered, the statement of claim used the term salvage. However, the term was used to support or elaborate the claim for $49,500.00. It may be noted that the respondent's submissions preceding the first award made no mention of the additional items, being confined to the headings (and the amounts) set out in the reference to arbitration, and the statement of claim. As will have been seen, the claim for "salvage towage" was additional to the claim for $49,500.00. In other words it was not a matter of amending an existing claim but of adding a new head of claim, albeit arising from the same basic events as gave rise to the first claim.

There remains the argument based on the prayer for general relief. A prayer for general relief is always limited by two things, the facts which are alleged, and the relief which is expressly asked: *Cargrill v Bower* (1878) 10 ChD 502, 508. Notwithstanding the general prayer the plaintiff must be limited to relief of the kind the statement of claim notifies will or may be asked for: *Dillon v Macdonald* (1902) 21 NZLR 375, 378. For the reasons already stated, the two additional items were outside the scope of the relief of which the body of the

statement of claim gave notice.

In any event, even if the additional items could be regarded as within the scope of the prayer for general relief, this could not, without the other party's agreement, have the effect of enlarging the scope of the arbitration agreement.

Finally, the distinction which the Arbitrator sought to draw between general and special damages does not, with respect, provide any solution. Of the first three items in the submission (a) and (c) clearly could be described as special damages. Item (b) is more arguable but might be placed under the same heading. However, in the context of an arbitration submitting specific disputes for resolution, the distinction is artificial and irrelevant. Even had the respondent overtly claimed general damages, this would have been met by the answer that no such heading had been included in the submission.

One separate matter the subject of discussion before us was the appropriate approach to interest accruing after the date of the award. However, the proceedings before us do not involve that issue, and as we are not seized of it, we decline to give a ruling on it.

For the reasons given we must allow the appeal. We do so with regret, because the appellant had ample opportunity to consider and answer the claims for the additional items, and the Arbitrator dealt with them fully and carefully.

The appeal is allowed and the award is set aside to the extent that the two additional items, together with the interest awarded on them, are deleted. Save as just indicated the award is confirmed. We allow the appellant the sum of $1,500.00 costs together with reasonable disbursements as certified by the Registrar, including the cost of preparation of the record.

Sir Thomas Eichelbaum
Presiding Judge

Rt Hon John S. Henry
Justice of Appeal

Sir Rodney Gallen
Justice of Appeal

FIJI COURT OF APPEAL

Solicitors:
Messrs Munro Leys & Co., Suva for the Appellant
Messrs R. Patel & Co., Suva for the Respondent

D:\CHAND\ABU0022U.2001