

COPY/

KELLY, J.

ROBERT HENRY STARES v. STEAMSHIPS TRADING COMPANY LIMITED.JUDGMENT - Delivered 1st May, 1950.

The Plaintiff, Robert Henry Stares, Trader and Engineer, is the owner of the vessel Kwato of approximately 30 tons gross with two propellers.

The Defendant Company owns and carries on a slipway known as Steamship's Slipway at Port Moresby.

On Sunday, 25th January, 1948, the Kwato was moored near the main wharf at Port Moresby having just completed a trip from Manus, during which trip the vessel struck something but the plaintiff cannot say what was struck. As a result of the striking of the vessel, the plaintiff, with the aid of his crew, had beached the vessel en route and an inspection disclosed that one of the propellers had been buckled and one sheath of copper sheeting had been damaged. The Plaintiff was in a hurry to get to Cairns.

On the evening of 25th January, 1948, the Plaintiff discussed with Sydney Gordon Muddell, an employee of the Defendant Company, as Slip Master of the slipway, and in the presence of George Fairless Haugham, another employee of the Defendant Company as book-keeper at the slipway, the question of slipping the Kwato. It was impossible to slip the Kwato because of the amount of slip work in hand. A decision was made to beach the Kwato; to which decision I shall refer later.

According to the evidence, the Plaintiff's desire to have the Kwato slipped was for the purpose of having the buckled propeller repaired. The Kwato was beached at a site on the foreshore near the Shell Depot. The propeller was repaired, but before that event the Kwato heeled over on the beach and the vessel, together with some cargo, was damaged.

The plaintiff has claimed against the defendant for that damage.

The first issue for decision is whether there existed between the plaintiff and the defendant a contract of service. The defendant contends that the service to be rendered to the plaintiff was gratuitous. I base my finding on this issue on the general rule that when one person employs another to perform work he is charged for such work unless there is an express contrary stipulation; secondly, on the evidence of Muddell and Haugham.

Muddell admitted, in cross-examination, "I did not intend to charge for more than the blacksmith's work on the propeller." A few questions later in cross-examination he stated that he did not intend charging for repairing the propeller "at the moment" and that later it never entered his mind. However, he explained that no charge would be made for beaching the Kwato, as any such charge for beaching would have been charged against a general head or revenue account of the slipway.

Haughan's evidence disclosed that a time card was prepared for work done on the Kwato on the day on which the vessel was beached. That time card was not produced in evidence but two days later Muddell informed Haughan that no charge was to be made in respect of the Kwato. But no evidence has been adduced that any person on behalf of the defendant conveyed to the plaintiff that the work was to be performed gratuitously.

I therefore find that there was a contract for service. Having made that finding, I have to consider whether the work was performed in a proper manner, or whether it was performed negligently, resulting in damages suffered by the plaintiff.

The work of repairing the propeller was effected by an employee of the Defendant Company. There is no contention that such work was not performed satisfactorily. However, incidental to the repairing of the propeller, the Kwato was beached. James Andrew Ryan, at the time in the employ of the Defendant Company, took an active part in the beaching of the vessel. Counsel for each party endeavoured to shelve the responsibility for the decision to beach the vessel on the opposite party. However, to my mind the origin of the decision is not material:- the decision was made and Ryan admitted that the beaching was done under his supervision and direction. This was done with the assistance of two natives supplied by the Defendant Company.

The vessel was beached on the morning of Monday, 26th January, 1948. At about 1.20 p.m. on that day one of the mooring lines broke and the vessel heeled over, resulting in damage to the vessel and to some of the cargo on board.

When beached, the Kwato was moored with six lines - one from the port bow and two from the port stern and one from the starboard bow and two from the starboard stern. These lines were part of the equipment of the Kwato. They had been acquired by the plaintiff some few months previously.

After the six mooring lines had been made fast, the plaintiff said to Ryan "Are you going to shore her? I have the shores on the after deck." To that Ryan replied, "She's alright. She's sitting right." In fact the shores were not used.

It is contended for the plaintiff that this omission to use shores amounted to negligence by the Defendant Company.

Bernard McMahon Ritchie gave expert evidence for the plaintiff. Ritchie is Acting Harbour Master at Port Moresby. He holds a Papuan Coastal Master's ticket. He has been an Administration Officer since 1926. His duties are principally with shipping - as Master and Care and Maintenance Officer of Administration vessels. However, there is no evidence before me that he has ever beached a vessel. I make this comment because of the fact that Muddell, who has acted as Slipmaster in the Territory for 24 years, including 14 years in the employ of the Defendant Company, has, on his own evidence, never beached a vessel. This surprising fact precludes me from assuming that Ritchie has in fact beached a vessel.

Ritchie explains that if he were beaching a vessel, he would use either shores or sand bags, depending on circumstances and the state of the beaching bottom - if on a soft mud bottom, shores would not be sufficient, as the weight of the vessel would come on them and they would tend to force down into the mud. In that case, he would probably "use sand bags also, or sand bags alone might be sufficient." He states "If the bottom was hard, shores would probably be sufficient."

Ritchie expresses the opinion that under the circumstances and conditions surrounding the beaching of the vessel, the mooring with six lines was "anything but sufficient", because these lines "would not support the vessel when beached and unsupported by water." He states that the bed of the foreshore at the site of beaching "is sand over coral, making a hard bottom."

Muddell gave expert evidence on behalf of the Defendant Company. Under cross-examination he stated "If I had been beaching the boat, I would have put sand bags under the bilge. I would not put shores because the keel would penetrate about one foot into the sand and the shores would also penetrate into the sand and give way or be of no use. He also expressed the opinion "it is very bad policy to beach or slip a vessel with heavy cargo aboard - there is an inward pressure from the cargo on the skin, but not the compensating pressure from the water outside."

He also states "The bottom of the foreshore is not the same all the way round the Harbour. It is uniformly a hard bottom, but the amount of over-laying silt varies from time to time. Shores would be more or less useful according to the state of the bottom from time to time."

Unfortunately, no evidence has been adduced as to the actual state of the bottom of the foreshore at the site of beaching at the actual time of beaching.

On this expert evidence, I am to find whether Ryan beached the Kwato negligently.

Despite Muddell's opinion regarding beaching a vessel with cargo on board, the plaintiff himself had beached the Kwato en route from Manus with his cargo on board. Ritchie did not express the opinion that it was bad policy to beach a vessel with cargo on board.

On the evidence, the circumstances of the beaching are:-

- (1) Ryan inspected one site which was condemned. He inspected a second site and had a native dive and inspect the bottom which was reported by the native to be clear.
- (2) Ryan went aboard the Kwato and had the cargo shifted to rectify a list of the vessel. He also inspected the mooring lines and he was advised by the plaintiff that they were satisfactory for the purpose of mooring the vessel.
- (3) Ryan was not satisfied with the first attempt to beach the vessel, but he was satisfied with the second attempt.
- (4) Ryan moored the vessel with six lines - as previously mentioned.
- (5) The plaintiff enquired of Ryan whether he intended using shores, to which Ryan replied "She is quite alright. She is sitting right."

The omission to use shores is, in my opinion, the whole crux of the matter. Under cross-examination in reply to a question why he did not report to Muddell his dissatisfaction at Ryan not using the shores, the plaintiff replied "I bowed to what I thought was a superior knowledge." In reply to a question by me as to whether he would have used the shores, the plaintiff replied "It is customary to shore a boat when beaching her up really high. It is a precautionary measure. She was being beached high. I would have shored the boat."

On the evidence adduced, the plaintiff and Ryan are the only persons who have actually beached a vessel.

Some few minutes after the Kwato heeled over and when Ryan returned to the site, he enquired of the Plaintiff whether the vessel heeled quickly or slowly, and he was advised by the plaintiff that the vessel heeled over very slowly. That point was not followed through, but I feel I am safe in assuming that the very slow heeling of the vessel would indicate that, as Ryan said, at the time of beaching "she was sitting right."

Ryan's evidence is that he intended to have the fore part of the Kwato supported by the water - for that reason he had attached both bow lines.

There is no evidence before me as to the rise and fall of the tides at that time; although Ritchie did give general evidence as to the spring and neap rises and falls at the site of beaching.

At the time of beaching the Kwato, Ryan was employed by the Defendant Company as a rigger and on general duties at the Steamships Slipway. To Muddell's knowledge Ryan had not previously beached a vessel. However, I feel certain that neither party will contend that, at the outset at least, he did not attack his task in a proper and workmanlike manner.

Under cross-examination, Ryan stated, regarding the use of the shores, "I had the intention of putting them in myself at low tide, but at the time we were getting very high tides. That is why she was so high on the beach. But I do not remember Mr. Stares suggesting shores. My idea was to have the bow floating in the water all the time, but unfortunately the tide went further out than I anticipated. Had it not been for the cargo in the hold, she would not have heeled over."

The question then is "Did Ryan, as the employee of the Defendant Company, omit to do something which a reasonable man guided by the considerations which ordinarily regulate the conduct of human affairs would do whilst he, Ryan, was beaching the Kwato for the purpose of enabling the buckled propeller to be repaired?" On the evidence submitted on the point, and bearing in mind the circumstances surrounding the beaching of the vessel, the answer to the question, in my mind, is "No". In my opinion, Ryan committed an error of judgment in not correctly anticipating the fall of the tide but, to my mind, on the evidence, that error of judgment is excusable. I therefore find that the Defendant Company used proper care and exercised reasonable skill in carrying out its agreement with the plaintiff.

Judgment for defendant with costs fixed at £116/19/0, together with Witness expenses of James Andrew Ryan as allowed by Rules of Court.

A. Kelly

J.