

CITATION: *Askbase Pty Ltd v McGregor & Erikkila T/As Far Quest* [2009] NTMC 018

PARTIES: ASKBASE PTY LTD
v
ROBERT MCGREGOR AND SUZANNE
ERIKKILA T/AS FAR QUEST

TITLE OF COURT: Local Court

JURISDICTION: Small Claims

FILE NO(s): 20818043 and 20818045

DELIVERED ON: 20th May 2009

DELIVERED AT: Darwin

HEARING DATE(s): 12th May 2009

JUDGMENT OF: Ms Fong Lim RSM

CATCHWORDS:

Contract – negligence – liability ships master - damages

REPRESENTATION:

Counsel:

Plaintiff: Mr Manning
Defendant: Ms Erikkila

Solicitors:

Plaintiff: self
Defendant: Self

Judgment category classification: C
Judgment ID number: [2009] NTMC 018
Number of paragraphs: 38

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20818043 & 20818045

[2009] NTMC 018

BETWEEN:

ASKBASE PTY LTD
Plaintiff

AND:

**ROBERT MCGREGOR AND SUZANNE
ERIKKLA T/AS FAR QUEST**
Defendant

REASONS FOR DECISION

(Delivered 20th May 2009)

MS FONG LIM RSM:

1. There are two proceedings before the court between the parties. The Plaintiff in both matters is Askbase Pty Ltd and was represented by Mr Manning a director of the company. The defendants were represented by Ms Erikkila. The Plaintiff is the owner of several commercial fishing licences in the NT and McGregor has a Skippers ticket for the appropriate type of vessel. Erikkila is McGregor's de facto partner and business partner
2. It is agreed that by oral agreement the Defendant worked the Plaintiff's fishing vessel for one season of mackerel and one season of barramundi in 2006 and 2007. McGregor was the skipper and Erikkila one of the deckhands. The split of any catch was to be 60% to the Plaintiff and 40% to the crew. The Plaintiff was to pay for provisions, fuel and provide all equipment. The mackerel season went well. Issues arose out of the barramundi season.

3. It is agreed that nets were lost on one trip and that the Jetboat was submerged on another trip. The liability for that damage was not agreed. The Plaintiff did not carry insurance on the vessels or the equipment.
4. In 20818045 Askbase has sued the McGregor and Erikkila for the recovery of monies on a dishonoured cheque paid by the defendants for the lost nets. The cheque was for the cost of lost nets less reimbursement for provisions owed by the Plaintiff to the Defendants. In that matter the Defendants counterclaimed for an underpayment of monies owed on catches sold to the Plaintiff. The defendants also claim \$1133.58 for the reimbursement of provisions and airfares of \$3660.29.
5. In 20818043 the plaintiff claims \$9740.00 for damage to the jet boat and the Defendants counterclaimed the underpayment for the catch claiming that the Plaintiff did not pay the Defendants proper market price for the catch over the barramundi season. That counterclaim is for \$11860.00
6. Both proceedings were ran together given the clear overlapping of the issues between the parties.
7. The issues to be decided are:
 - (a) What were the terms of the contract between Mr Manning and Mr McGregor regarding price of fish, and damage to boats and equipment. If the agreement was for payment on market price what was the market price for the fish caught.
 - (b) Are the Defendant's liable for the loss of nets and the damage to the Jetboat and if so what was the value of that damage.
 - (c) Did the Plaintiff promise to pay the Defendants' airfares from New Zealand in 2007?
8. Mr Manning gave evidence of an agreement with Mr McGregor that defendants would come to Gove and fish for barramundi in the 2007 season, the split would be 60/40 with the defendants being responsible for payment

of the crew. He gave evidence that the agreed price was \$16 per kilo for Barra and \$10 per kilo for salmon. He agreed with the defendants' figures that over the season they unloaded approximately 10 ton of barramundi and 4 ton of Salmon. The price was agreed as a "beach price" and the Defendants had invoiced him on the basis of that price. All invoices were paid in full and at the end of the season in July.

9. Mr Manning says he had a conversation with Mr McGregor about settling up the accounts including compensation for him regarding the lost nets. Prior to that meeting part of the money for the catch had been paid and after it was agreed that they pay him \$7136.65 for the cost of the lost nets less the reimbursement for provisions. They swapped cheques and Mr McGregor went on his way. Ms Erikkila was not at that meeting. Mr Manning produced to the court an invoice from his company to the defendant dated the 10th July 2007 which he says in his Defence to counterclaim he handed to Mr McGregor at the time they swapped cheques. Mr Manning also produced to the court a quote from Darwin Ship Stores dated the 16 Sept 2008 which he says supports his claim for the loss of the nets.
10. The Court also heard from a Mr Groves who has worked for Mr Manning for 20 years both as a 1st mate and skipper. He gave evidence of always agreeing a "beach price" for his catch upon return from a trip and being paid his percentage at the end of the season. He knew nothing of insurance over the boats he skippered and says he would be willing to take responsibility for any damage to the boat or equipment. Mr Groves also gave evidence that he paid for his own airfares to and from Perth and claimed them as a tax deduction.
11. Ms Erikkila gave evidence that she and her partner had come into the NT looking for a mackerel fishing license, they were referred to Mr Manning as perhaps having a licence available for sale. Manning told them he did not have a licence available but they could work his boat "the Ruby" for the

season. During that time while they were at sea they were contacted by Mr Manning several times trying to convince them to take the boat out barramundi fishing once the mackerel season had finished. They eventually agreed to do so after a Christmas break in New Zealand. Ms Erikkila suggested they were induced into undertaking the barramundi fishing by Mr Manning saying how profitable it would be and he would pay for their airfares from New Zealand to return for the season. She accepted that there may have been a misunderstanding about this issue. She gave an explanation of how the nets got lost and how the Jet boat was damaged. She produced a letter from Mr McGregor denying any discussions of a “beach price” and denying any agreement to pay for the nets.

12. Mr Manning was not an impressive witness he was evasive in answering questions in cross examination and had a convenient loss of memory regarding his dealings with Ms Erikkila. He did not produce any relevant primary documentation regarding his claim for damages for the replacement of the nets and the repairs to the Jetboat. Even after he was given the opportunity of a short adjournment to go and get his documents from his office he did not produce them to the court although he said they existed. His evidence at times was inconsistent with what he claimed in his “pleadings” eg he claims in his pleading that he never offered more than \$9.50 per kilo for the salmon and yet in his evidence in chief stated he paid \$10.00 per kilo. He produced an invoice (P1) which he says in his pleadings he handed to Mr McGregor on the day they swapped cheques however his cheque was cleared on the 9th of July which is indicative that the “invoice” was produced after the meeting. When questioned about the inconsistency he stated he “didn’t recall” claiming he handed the invoice over at the meeting in the pleadings. He suggested that may have been something his wife put in because she typed up the court documents from his notes.
13. Mr Manning could not adequately explain why he did not have a discussion with the defendants about the damage to the jetboat knowing it had been

damaged at the time he says he swapped cheques with the Defendants. Mr Manning also insisted that he did not have any business dealings with Ms Errkila because deliberately only ever dealt with Mr McGregor yet he then conceded in cross examination that he had discussions with her about provisions and payments to the crew.

14. Mr Groves was also an unimpressive witness his evidence seemed rehearsed and in any event he could only give evidence of what he usually agreed with Mr Manning. His evidence that none of he or his crew were paid at the end of each trip and were prepared to wait until the end of the season, about 8 months, was inconsistent with his reasoning for accepting a “beach price”. He says he accepted a beach price because that meant they didn’t have to wait for the fish to be sold before they got paid yet they were prepared to wait 8months to end of the season which was surely after the sale of the fish from the earlier trips in the season. His claim that he never considered insurance on the vessels and would he happy to pay for the loss of a boat while he was skipper without question is unbelievable.
15. Ms Erikkila on the other hand was clear and concise in her evidence she gave a believable account of what happened with the nets and the jet boat and did not attempt to give evidence about matters she could not. She conceded that she was not at the final meeting with Mr Manning however it was clear that she certainly had prior dealings with Mr Manning regarding outstanding payments owed to crew, when she and Mr McGregor took over the responsibility for the crew and the purchase of provisions.
16. The absence of Mr McGregor at the hearing posed difficulties for the defendants and even though I accepted a letter from him as evidence of what he recalls regarding some issues I have to place less weight on that evidence than that which has been subjected to cross examination. In any event Mr McGregor did not address all of the issues which he might have been asked to do if he had been present in court eg he could not be cross examined

regarding his liability as the Master of the vessel for the loss of the nets or the damage to the jetboat.

17. It is clear from the evidence before the court that there was an agreement on the percentage, 60/40, owner/skipper and crew, the Plaintiff would pay for provisions fuel etc, the price would be \$16 per kilo for barra but the price for Salmon is a little less clear. The handwritten notes apparently produced by Mr Manning's wife shows the price for salmon at \$9:00 per kilo (even though Mr Manning said in his evidence that it was \$10:00 per kilo) and the defendant's invoice of the 10.4.07 which correlates with that note shows that was the basis upon which the defendants invoiced the Plaintiff.
18. Given the documentation I find that the original agreement was that the Plaintiff would pay the Defendants \$9:00 per kilo for Salmon. It is also clear from the evidence that there was no express agreement regarding payment for by product. There is no mention of by product in the handwritten calculations provided to the Defendants by the plaintiff (D3) when they took over the responsibility of paying the crew.
19. In their "pleadings" the defendants claim that they agreed to the prices because they didn't know any better and only found out that the Plaintiff was not paying them market price for the fish after the commencement of these proceedings. The Defendants also claim in their pleadings that Mr Manning held the incentive of buying a licence from him "over them" however that allegation was not repeated in Ms Errkila's evidence in court. The issue of payment for by – product is clearly a matter which has raised its head a result of proceedings being commenced.
20. I find that the evidence shows the agreement regarding the by product was that the defendant process it and the Plaintiff keeps it to cover costs of fuel etc. There is no claim by the Defendants for the value of that by product only a complaint that they were required to give over that by product to Mr Manning to cover cost of fuel etc. and a feeling of being "ripped off".

21. It is clear that the Defendants feel they have been “ripped off” by the Plaintiff in relation to the price paid for the fish they caught. They say they have never heard of a “beach price” until Mr Manning used the term in the prehearing conference they say they were always expecting to get market price for the fish.
22. Whether the agreement was based on a “beach price” or “market price” the Defendant’s agreed to the price paid by issuing invoices for that amount and accepting payment on that amount. There is no evidence they agreed under duress or that there was unconscionable conduct by Mr Manning. The Defendants entered into a commercial arrangement with Mr Manning and were responsible to themselves to establish a fair price.
23. There was a hint in the pleadings that Mr Manning held out the sale of licence as an incentive to agree to these conditions however there was no evidence produced to support that claim if anything Ms Erikkila’s evidence was that they accepted the terms and because they wanted to buy the licence but that was their choice it was not at Mr Mannings instigation.
24. There is an allegation that Mr Manning misrepresented the market price and there was some evidence that Mr Manning onsold the fish for more than what was paid to the Defendants however the Defendants were not newcomers to this industry, they may not have fished for barramundi before but they were experienced in commercial fishing. They were not induced into the contract because of a misrepresentation regarding the price of the fish, they agreed that was the price they would be paid. If they have agreed to that price then it is not of any relevance to that contract that Mr Manning was able to obtain a better price when he sold the fish to the retailers. There was some suggestion that Mr Manning had the upper hand because the Defendants were new to the barramundi industry however they did not investigate the prices obtained for the fish until after they had the dispute with Mr Manning, that inaction on behalf of the Defendants implies they

were happy with the prices until Mr Manning decided to pursue them for the cost of his lost nets.

25. In relation to the claim for the loss of nets the Defendants accepted the nets were lost and explained the circumstances under which they were lost. Ms Erikkila gave evidence that the nets had been loaded up onto the dinghy and they were advised by “Dan” they could leave the nets on the dinghy and tow it around to their next stop. Mr McGregor apparently took the advice of Dan and subsequently the dinghy overturned and the nets were lost. Ms Erikkila states that they took the advice of Dan because he had been held out to be an experienced deckhand at barramundi fishing by Mr Manning.
26. While the Defendants accept that they were prepared to talk to Mr Manning about the loss of the nets Mr McGregor did not accept that the responsibility for that loss nor did they accept the value Mr Manning is placing on those nets. Mr McGregor did however admit that he drew a cheque to Mr Manning for the loss of those nets without any intention of honouring that cheque because Mr Manning was withholding monies owed to the crew and was unlikely to pay them if the matter of the nets was not sorted out. This was at a time that the crew were all in need of their pay because they were back on shore and required accommodation etc.
27. It is trite to say that on the open sea the Master of a vessel has responsibility for the safety of his crew, the vessel and equipment on board. For Mr McGregor to attempt to abrogate that responsibility to a deck hand cannot be accepted. Mr McGregor was the Master of that vessel and as such was responsible to the owner to make appropriate decisions. He made the decision on the advice of his deck hand however the ultimate responsibility must lie with him. There is no evidence that anything the Plaintiff did contributed to that decision and therefore Mr McGregor must be found responsible for the loss of those nets. The fact that Mr Manning did not have the equipment or the vessel insured does not affect Mr McGregor’s liability.

I find the defendant McGregor negligent in relation to the nets by not ensuring the method of transporting them was a safe way to transport them. The fact that McGregor was willing to discuss the issue with Mr Manning could be inferred to be an acknowledgment of at least some responsibility.

28. The onus is on the Plaintiff to put before the court sufficient evidence to prove the value of those nets. The Plaintiff produced an invoice (P1) to Mr McGregor stating the amount owed but did not produce any evidence of how that amount was calculated even though he stated he had those documents. Mr Manning was given a short adjournment to collect his documents from his office just down the road from the courthouse but still failed to produce them. Instead he produced a "Quote" from Darwin Ship Stores for the replacement of the nets, that quote was produced in September of 2008, the nets were lost in March/ April 2007. The nets had been replaced by the Plaintiff when the Defendants took the vessel out for another trip in May 2007 however at that stage the Plaintiff did not advise the Defendants the cost of that replacement. Mr Manning gave evidence that all nets were new while Ms Erikkila gave evidence that only one net was new the others seemed to be a season old. Mr Manning's evidence is that the cost of netting was in fact more expensive in 2007 than 2008 however did not produce any evidence to support that assertion. If Mr Manning used a quote from Darwin Ship Stores to establish the cost of the nets in 2007 then his contention nets were more expensive than in 2008 is not supported. In P1 the costs is set at \$8270.23 less than the \$8476.90 on the 2008 quote. Mr Manning seemed to be making it up as he went along he was clearly trying justify his position without taking care to look at the documentation before the court.
29. It is clear that contrary to Mr Manning's "pleadings" that he handed P1 to Mr McGregor at the time they swapped cheques, the invoice was in fact created after Mr Manning's cheque was cleared through the defendant's account on the 9th of July and could have been created any time after that.

30. Mr Manning's reliability as a witness is seriously questioned he had a cavalier attitude towards the court proceedings and his obligation to prove his case. Accordingly I find that while the Defendants action of drawing a cheque which they never intended to honour is reprehensible I do not view it as evidence that they had accepted the liability for the nets at the value set by Mr Manning in that invoice. It is quite possible that the amount of the cheque was the original value quoted to Mr Manning by Darwin Ship Stores for the nets and not a contra amount, taking into account the provisions that were owed to the Defendants.
31. The evidence produced to the court by the Plaintiff for the lost nets is not sufficient to prove on the balance of probabilities that the nets were worth what was claimed by the Plaintiff therefore the Plaintiff has not proved his case regarding those damages. Mr Manning has however confirmed in his evidence that he owed the Defendants the sum of \$1133.58 for provisions and there will be judgment in favour of the Defendant for that amount.
32. In relation to the claim by the Defendants that the Plaintiff had promised to pay for their airfares from New Zealand if they returned to run the boat for the barramundi season it is the Defendant's burden to prove that claim. The evidence from Ms Erikkila is Mr Manning said he would pay their fares and they assumed that was to induce them to come back. Mr Manning claims he was helping them out because they needed the money. Ms Errkila produced a bank statement to show that she and Mr McGregor were not in need of funds having savings of some \$211000.00 at the time. While Mr Manning vehemently denied paying airfares for any of his crew he then conceded he had done so for "Dan" twice in the past as a bonus. The whole nature of Mr Manning's evidence and the internal inconsistencies within his evidence makes him an unreliable witness. While Ms Erikkila conceded that Mr Manning's promise to pay for their airfares may have in his mind been a promise to pay and then be reimbursed by the Defendants it was her understanding that Mr Manning was to pay for the fares as an inducement.

33. I find that where Mr Mannings evidence conflicts with Ms Erikkila's evidence in relation to this issue hers is more reliable and consequently find that the Plaintiff is liable to the Defendant's for \$3660.29 for airfares from New Zealand.
34. In relation to the damage to the jet boat, it is accepted by the defendants that the boat was submerged under the main vessel and was damaged extensively. They place the blame for the failure of the jet boat on poor maintenance and a freak of nature. It is claimed by Mr McGregor that the boat was poorly maintained and required constant attention while at sea. On this occasion the boat required a new starter motor and Mr Manning provided the wrong one. The boat was moored up to the side of the main vessel when something caused it to be thrown up against the side of the vessel and then slide under it. The jet boat was then retrieved by the crew and towed back into Darwin. At the time of the boat being tied to the side of the main vessel the weather was calm and the only explanation could give was there was a freak wave which caused it to be hit up against the boat.
35. The Defendants assumed that because the lid was off the engine hatch in the jet boat it was more vulnerable to sinking which is what it did. If the Defendants were negligent in the way they tied up the jet boat then they would submit that the only reason the boat sank the way it did was because it needed work done on it in less than ideal circumstances and that was required because of lack of maintenance. The ships log (D1) did show some record of maintenance issues with the jet boat even though Mr McGregor states in his letter he did not record all of the issues they had with the jetboat those entries do show some work was required on the boat March and May. The Defendant's defence to any claim for the damage to the jet boat is that the boat would not have needed to be repaired at sea if the Plaintiff had maintained it to an adequate standard. When asked about maintenance on the jet boat Mr Manning was again vague in his answers

making the comment that it was serviced every 2 months and had been built by himself.

36. I find on the balance of probabilities that damage to the jet boat was most likely caused by an act of god and therefore the Defendants should not be found liable for it.
37. If I am wrong about that the Plaintiff has not provided to the court any cogent evidence about the cost of repairs to the boat and that along with a possible finding of contributory negligence for failing to maintain the boat to an adequate standard, leads me to find that the Plaintiff has failed to discharge his evidentiary burden to prove those damages. Damages are an element of the cause of action in negligence and therefore the Plaintiff has not proved his claim.
38. My Orders are as follows:
 - (a) on file number 20818043 the Plaintiff's claim is dismissed and there be judgment in favour of the Defendants for \$1133.58 for expenses plus \$3660.29 for airfares.
 - (b) on file number 20818043 the Plaintiff's claim and the Defendants' counterclaim are dismissed.

Dated this 20th day of May 2009.

Tanya Fong Lim
RELIEVING STIPENDIARY MAGISTRATE