IN THE COURT OF APPEAL OF NEW ZEALAND CA 81/94

New Zealand 1

BETWEEN **BALTIMAR APS LTD**

Appellant

AND **NALDER & BIDDLE LTD**

First Respondent

AND **PORT NELSON LTD**

Second Respondent

Coram: Richardson J
Casey J
Ellis J

Hearing: 20 June 1994

Counsel: Miss J E Sutton for Appellant
L J Taylor and I W Thorpe for First Respondent
No appearance by Second Respondent

Judgment: 30 June 1994

JUDGMENT OF THE COURT DELIVERED BY CASEY J

On 13 May 1994 Master Thomson entered summary judgment against the appellant Baltimar Aps Ltd and the second respondent Port Nelson Ltd in favour of the first respondent Nalder & Biddle Ltd for possession of its property described as "a dismantled marine railway". This had been shipped by it from the port of Tracy in Quebec to Nelson on one of the appellant's ships under a contract containing standard "Liner" terms approved by The Baltic and International Maritime Conference. The appellant claimed a lien for unpaid freight and unloaded the goods

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in Nelson in November 1992 into the custody of Port Nelson Ltd as warehousemen. Nalder & Biddle maintain that all the freight due has been paid and issued the present proceedings alleging conversion and detinue and seeking possession of the goods and damages against both defendants. It applied for and obtained summary judgment for possession and a declaration of liability, leaving the amount of damages to be assessed later.

Baltimar filed a notice of opposition to the summary judgment in which it asserted its entitlement to a lien, alleging that this question was an integral part of the wider issue in the claim, which should be determined by arbitration in London as provided for in the contract. At the same time it applied for stay of proceedings and reference to arbitration. Port Nelson Ltd also filed a notice of opposition, pleading that it was bound to hold the goods under the provisions of the Mercantile Law Act 1908 pursuant to the notice of lien given by Baltimar. In giving judgment against both defendants the Master also refused a stay of proceedings. Baltimar now appeals against that judgment and refusal and although both Nalder & Biddle Ltd and Port Nelson Ltd are cited as respondents, the latter took no part in the appeal.

In the contract the volume of the goods was given as about 3,387 cubic metres, and the freight was expressed as a lump sum of US$280,000. After loading the Ship's Master suspected that the volume was considerably greater and arranged for a cargo surveyor's report which found it to be about 6,745 cubic metres. On 4 November 1992 (before the cargo was unloaded) Baltimar wrote to Nalder & Biddle Ltd informing them of the excess in these terms :

> "As you are aware, the quantity of cargo loaded onto the vessel in Canada was greatly in excess of that which was booked on your behalf by your agents in Montreal, and

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> declared on the relevant Booking Notes relating to the shipment of the plant from Canada to Nelson.
>
> This letter will serve to advise you that pursuant to Clause 11(e) of the Booking Notes, the cargo has been remeasured and found to be 3,083.62cbm in excess of the total of the declared quantities, viz. 3,387.68cbm. We have calculated that the additional freight payable on that excess is, at the basic rate, US$254,868.00, but on the penal rate payable under the provisions of the same clause, US$509,736.00. It is not our intention to claim the latter amount at this stage, but we reserve the right to do so should our claim become the subject of arbitration or litigation."

After requesting telegraphic transfer of US$254,868, the letter concluded with advice that failing payment Baltimar would invoke the provisions of cl 12 of the contract and exercise its lien for freight.

By arrangement between them an independent survey was carried out in Nelson after discharge of the cargo on 10 November under which the excess volume was calculated at 2,599 cubic metres and on this basis Baltimar reduced its claim to US$214,824, while reserving its right to charge double under cl 11(e) of the contract unless payment was made by 16 December 1992. In the meantime, on 4 November 1992, notice was given to Port Nelson Ltd by Baltimar's agents advising them of its lien for unpaid freight of US$254,868 with the request that they hold the cargo to the agent's instructions until the lien should be discharged either by payment or by deposit of the amount outstanding with Port Nelson Ltd, as provided by the Mercantile Law Act 1908. The amount has not been deposited and we were informed that negotiations between the principals were fruitless. The present proceedings were issued in February 1994, about the same time as Baltimar's London solicitors wrote giving notice that their client intended to submit the disputes to arbitration in accordance with the contract and put forward the names of four possible arbitrators. No further steps have been taken pending the outcome

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of the present litigation. Counsel accepted that there is a stay of execution of the Master's order for possession until delivery of this judgment.

The Contract

The following are the relevant clauses :

11. **Freight and Charges**

(e) The carrier is entitled in case of incorrect declaration of contents weights, measurements or value of the goods to claim double the amount of freight which would have been due if such declaration had been correctly given. For the purpose of ascertaining the actual facts, the Carrier reserves the right to obtain from the Merchant the original invoice and to have the contents inspected and the weight, measurement or value verified.

12. **Lien**

The carrier shall have a lien for any amount due under this contract and costs of recovering same and shall be entitled to sell the goods privately or by auction to cover any claims.

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Both these clauses are standard terms but the following are special to this contract :

3. **Jurisdiction** - Any dispute arising under this Bill of Lading shall be decided in London and arbitrators to be commercial men, not lawyers.

22. If space available, the Charterers (scil. Shippers) have the option to load additional cargo at pro-rata freight.

The Mercantile Law Act 1908

These are the relevant sections :

"23. **Continuation of lien for freight if shipowner gives notice** - (1) If at any time when any goods are landed from any ship and placed in the custody of any person as a wharf or warehouse owner the shipowner gives to the wharf or warehouse owner notice in writing that the goods are to remain subject to a lien for freight or other charges payable to the shipowner to an amount to be mentioned in such notice, the goods so landed shall in the hands of the wharf or warehouse owner continue liable to the same lien, if any, for such charges as they were subject to before the landing thereof.

(2) The wharf or warehouse owner receiving such goods shall retain them until the lien is discharged as hereinafter mentioned, and if he fails so to do shall make good to the shipowner any loss thereby occasioned to him.

(3) On production to the wharf or warehouse owner of a receipt for the amount claimed as due, and delivery to the wharf or warehouse owner of a copy thereof or of a release of freight from the shipowner, the said lien shall be discharged.

24. **Lien to be discharged on deposit with warehouse owner** - The owner of the goods may deposit with the wharf or warehouse owner a sum of money equal in amount to the sum so claimed as aforesaid by the shipowner, and thereupon the lien shall be discharged, but without prejudice to any other remedy which the shipowner may have for the recovery of the freight.

31. **Warehouse owner's protection** - Nothing in this Part of this Act shall compel any wharf or warehouse owner to take charge of any goods which he would not be liable to take charge of if this Part of this Act had not passed, nor shall he be bound to see to the validity of any lien claimed by any shipowner under this Part of this Act."

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It is not disputed that notice of lien was duly given to Port Nelson Ltd and that it is a "warehouse owner". Accordingly the central issue in the case is whether Baltimar was entitled under its contract to a lien for unpaid freight in respect of the excess volume alleged. Baltimar submitted that this was a question for the arbitrators in London. The Master held otherwise, holding that the Court was entitled to satisfy itself that a genuine dispute existed before declining jurisdiction in favour of arbitration. He concluded that there was no enforceable provision in the contract for recovery of excess freight and if the shipowner had a claim, it was for damages only, which could not support a lien claim under cl 12 of the contract. In any event, once the cargo was discharged the lien was continued by virtue of the Mercantile Law Act and not under the contract. Accordingly any dispute about its existence at that stage is solely a matter for the New Zealand Courts.

With respect, this last conclusion overlooks the point that the rights and duties under the Act arise only if there is a valid contractual lien and that question has been expressly reserved by the parties for arbitration. The New Zealand Court would certainly have jurisdiction to decide whether the other requirements of the Act had been complied with but, as noted above, there is apparently no dispute about them.

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The Arbitration Act

Section 4 of the Arbitration (Foreign Agreements and Awards) Act 1982 applies to every arbitration agreement providing for arbitration in any country other than New Zealand and subsection (1) reads :

> "If any party to an arbitration agreement to which this section applies (or any person claiming through or under that person)

> commences any legal proceedings in any Court against any other party to that arbitration agreement (or any person claiming through or under that other party) in respect of any matter in dispute between the parties which the parties have agreed to refer to arbitration pursuant to that arbitration agreement, any party to those proceedings may at any time apply to the Court to stay those proceedings; and the Court shall, unless the arbitration agreement is null and void, inoperative, or incapable of being performed, make an order staying the proceedings."

The long title states that the Act is to implement an International Convention on the Recognition and Enforcement of Foreign Arbitral Awards, referred in subsection 2 as that adopted by the United Nations Conference at New York in 1958 and a copy is set out in the Schedule. Article II.3 stipulates :

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

The English Arbitration Act of 1975 was passed to give effect to the convention and s1(1) is virtually in the same terms as our s4(1) above, except that after the reference to any party applying to the Court "to stay those proceedings;" it reads :

> "....and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed **or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred**, shall make an order staying the proceedings."

It will therefore be seen that our Act follows the language of Article II.3 in limiting the Court's power to exclude arbitration, whereas the English Act extends it to cases where there is "not in fact any dispute". Under s5 of our Arbitration Act

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1908, which relates to domestic arbitrations, the Court has an even wider discretion and may make an order staying the proceedings "if satisfied that there is no sufficient reason why the matter should not be referred in accordance with a submission". This section does not apply to s4 of the 1982 Act (ibid s4(5)). The provisions therein for stay are mandatory. In the absence of the specified disqualifying conditions the Court has no discretion.

It has long been the position that a mere refusal to pay an amount that is indisputably due will not constitute a dispute entitling the defaulting party to an arbitration. (See e.g. ***London & North Western Railway v Jones*** [1915] 2 KB 35). The Court can give summary judgment - see ***Ellis v Wates Construction*** [1978] 1 Lloyd's Rep 33, a "domestic" building arbitration.

"The Fuohsan Maru" at p26 of the same volume involved an international arbitration agreement under the 1975 English Act. There the majority of the Court of Appeal (Lord Justices Browne and Geoffrey Lane) would have given judgment for part only of the large damages claimed had it been capable of quantification, applying ***Ellis v Wates Construction***, but as it was not, they concluded the whole claim should go to arbitration. Lord Denning M.R. dissenting would have given judgment for what on his assessment would have been the minimum damages payable. It is clear that the qualification about there not being in fact any dispute between the parties included in the Arbitration Act of 1975 was material to their conclusion that a stay could have been refused. The current English position is summarised in the following passage from *Mustill & Boyd - Commercial Arbitration (Second Edition) at p124 :*

> "Where the claimant contends that the defence has no real substance, the Court habitually brings on for hearing at the same time the application by the claimant for summary judgment, and the cross-application by the defendant for a

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> stay, it being taken for granted that the success of one application determines the fate of the other."

The authors cite *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 Lloyd's Rep 463, [1977] 1 WLR 713, *The Alfa Nord* [1977] 2 Lloyd's Rep 434. *SL Sethia Liners Ltd v State Trading Corpn of India Ltd* [1986] 1 Lloyd's Rep 31 can also be added to the list. In all these cases the Court could rely on the extended wording of the English Act to justify an enquiry into the reality of the dispute. The Master acknowledged the absence of a corresponding provision in our 1982 Act, but for practical commercial reasons and in the interests of comity between the Courts of New Zealand and England he concluded that a similar approach should be taken here, adding "even on the wording of our 1982 Act as it stands, the Court has jurisdiction, even if necessary by resorting to inherent jurisdiction, to go as far as inquiring into the question of whether or not there is a genuine dispute".

With respect we are unable to agree with this conclusion. The language of s4(1) of the 1982 Act is quite clear and follows that of Article II.3 of the Convention, which the Act was passed to implement. In note 7 at p465 Mustill and Boyd point out that the added words in the English Act -

> "do not appear in the New York Convention. They owe their origin to the report of the Mackinnon Committee (Cmd.2817), which had noted complaints that s.1(1) of the Arbitration Clauses (Protocol) Act 1924, a precursor of s.1 of the 1975 Act, was being abused. The words were added by s.8 of the Arbitration (Foreign Awards) Act 1930."

The clear inference from this note is that prior to 1930 the Courts had no power to investigate the reality of the dispute. In an earlier passage at p123 the authors mount a strong criticism of this development in international arbitrations :

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"Whatever might be the position as regards a defence which is manifestly put forward in bad faith, there are strong logical arguments for the view that a bona fide if unsubstantial defence ought to be ruled upon by the arbitrator, not the Court. This is so especially where there is a non-domestic arbitration agreement, containing a valid agreement to exclude the power of appeal on questions of law. Here the parties are entitled by contract and statute to insist that their rights are decided by the arbitrator and nobody else. This entitlement plainly extends to cases where the defence is unsound in fact or law. A dispute which, it can be seen in retrospect, the plaintiff was always going to win is none the less a dispute. The practice whereby the Court pre-empts the sole jurisdiction of the arbitrator can therefore be justified only if it is legitimate to treat a dispute arising from a bad defence as ceasing to be a dispute at all when the defence is very bad indeed. The correctness of this approach is not self-evident. Moreover, in all but the simplest of cases the Court will be required not merely to inspect the defence, but to enquire into it; a process which may, in matters of any complexity, take hours or even days. When carrying out the enquiry, the Court acts upon affidavits rather than oral evidence. The defendant might well object that this kind of trial in miniature by the Court is not something for which he bargained, when making an express contract to leave his rights to the sole adjudication of an arbitrator."

We find this reasoning compelling, especially in this case where the parties have expressly excluded lawyers. The discussion about the Court pre-empting the arbitrator's jurisdiction goes a long way to dispel any suggestion that it retains an implied power to rule on whether there is a genuine dispute. Moreover, to hold there is such a power is to ignore the mandatory terms of s4(1) of our Act, which are quite unambiguous. There may be a case for intervention if the party seeking the arbitration is acting in bad faith and thereby abusing the Court's process by applying for a stay, but there is no suggestion of that here. Resort to arbitration in respect of a mere refusal to pay an amount indisputably due could amount to such an abuse.

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The foregoing comments apply, of course, only to international arbitration agreements governed by the 1982 Act: the discretion given to the Court to order a stay in domestic arbitrations allows a different approach - see e.g. ***Royal Oak Mall Ltd v Savory Holdings Ltd & Anor*** (CA106/89; 2/22/89) where this Court adopted the English practice of enquiring into the reality of the defence on applications for stay and summary judgment.

For these reasons we are satisfied that the Master was wrong to refuse a stay and that the central issue in these proceedings - namely, the dispute in relation to the amount of freight and other sums payable to Baltimar and its entitlement to exercise and maintain its lien - should be determined by arbitration in accordance with cl 3 of the contract. In these circumstances we do not think it appropriate to comment on counsel's submissions about the interpretation of that document.

We allow the appeal and set aside the summary judgment and the orders for possession of the goods made against the appellant and the second respondent, the orders for costs, and the declaration of liability. We order that all further proceedings be stayed pursuant to s4(1) of the Arbitration (Foreign Agreements and Awards) Act 1982. In the High Court the appellant was ordered to pay Port Nelson Ltd's costs: we direct that those costs now be paid by Nalder & Biddle Ltd and that it pay Baltimar's costs of $2,000 in the High Court together with disbursements as fixed by the Registrar there, and the sum of $3,500 to the appellant in this Court together with disbursements and the costs of preparing and printing the case on appeal, as approved by the Registrar.

M.E. Casey J

<u>Solicitors:</u>
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Bell Gully Buddle Weir, Wellington, for Respondents

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