

IN THE DISTRICT COURT
HELD AT AUCKLAND

NP No 5362/98

BETWEEN

V SKOKANDIC

Plaintiff

AND

SIMUNOVICH FISHERIES

Defendant

Date of Hearing: 20/21 March 2000

Date of Judgment: // April 2000

Counsel: Mr R Parmenter for Plaintiff
Mr A Ivory and Mr M Keall for Defendant

RESERVED JUDGMENT OF JUDGE J D HOLE

Solicitors:

Daniel Overton & Goulding for Plaintiffs

Craig Griffin & Lord, Solicitors DX CP31003 for Defendant

1. The three remaining plaintiffs, Vedran Skokandic, Helena Farrington, and Peter Abbot have issued proceedings against the defendant. They claim that certain misrepresentations were made which induced each of them to enter into contracts with the defendant to crew the fishing vessel Peterson which sailed from New Zealand to South West Africa on 13th March 1997. They say that the representations made at a meeting on 12th March 1997 were:-

- a. That quota for 3,000 tonnes of orange roughy whole fish was in place;
- b. That Namibian documentation was in place;
- c. That the plaintiffs would be better off going to Namibia in terms of earnings than if they stayed in New Zealand; and
- d. That orange roughy cut fish would get between US\$2.50 and US\$3 per kilo.

It is alleged that the representations were untrue in that:

- a. There was no quota in place;
- b. There was no Namibian documentation in place;
- c. The plaintiffs earned significantly less as a result of their trip to Namibia than if they had been fishing in New Zealand waters;
- d. The average rate for orange roughy cut fish was \$2.00 per kilo; and

2. In response to the allegation that the plaintiffs each entered into a contract of engagement with the defendant, the defendant states in its statement of defence that any contract of engagement entered into by the plaintiffs to crew the Peterson was between each of them and the skippers from time to time of the vessel. The defendant denies that its officers made the representations complained of. Finally, it admits that upon the vessel's arrival in South West Africa there was no quota in place in Namibia; there was no documentation in place to fish in Namibian waters; and the port price for Orange Roughy on the south-west coast of Africa at the time was US\$2.00 per kg headed and gutted.

Issues

3. There are two issues for determination:


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- (a) Was there a contract of engagement entered into between the defendant and each of the plaintiffs;
- (b) If so, did the defendant (through its officers) make misrepresentations which induced each of the plaintiffs to enter into the contracts.

Parties to the Contract

4. As previously indicated, the defendant says that it did not enter into any contract of engagement with any of the plaintiffs: such contracts as may have been entered into by the plaintiffs were with the skippers of the vessel. It is claimed that this was in accordance with the custom and practice of the New Zealand fishing industry as described in the evidence of the Executive Secretary of the New Zealand Fishing Industry Guild, Mr McKinnon, and the evidence of Messrs Simunovich and Wilkinson. The plaintiffs say that even if it was the usual custom for contracts of engagement of fishing vessel crew to be with the skipper and not the owner of the vessel, in this case there is clear evidence which supports the proposition that each of the contracts was with the defendant and not the skippers. Further, the plaintiffs submit that even if such customary practice is established, it is always open for a fishing company and crew to contract out of what has been described as the invariable practice or custom: and that happened here.

5. The evidence of Mr McKinnon was that there are two ways in which skippers and crew are customarily engaged on New Zealand fishing vessels. These are:

- (a) For most vessels, being all but the largest deep-water vessels, the fishing company engages the skipper, and sometimes the mate, and the skipper engages the crew. It is often the case also that the engineer goes with the vessel and is employed by the fishing company because of his familiarity with the vessel's mechanics.
 - (b) For the relatively few large deepwater vessels the fishing crew may be engaged by the fishing company on contract, and the staff in the on-vessel factory are employed as employees by the fishing company.
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6. He said that the Peterson is not a deep-water vessel. Accordingly that in the normal course of events the terms of engagement of skippers and crew would fall under category (a) above.

7. Notwithstanding the expert evidence of Mr McKinnon, there was evidence before the Court that on occasions the company was prepared to enter into contracts directly with the crew where the relevant vessel was engaged in an exploratory mission. Two occasions were cited and in each case a written contract was entered into. It was submitted that on each of these occasions the crew sought a collective contract with the company because of the dangerous nature of the mission. The defendant says that this did not apply here. It is accepted that there was no written contract.

8. Notwithstanding the company's pleaded position, and the expert evidence of Mr McKinnon, there is a substantial body of evidence which points to the defendant having contracted with each of the plaintiffs in this instance. Factors supporting this conclusion are:

- (a) All returns filed with the Inland Revenue Department produced in evidence indicate that the payer of remuneration to each of the plaintiffs was the defendant.
- (b) Messrs Wilkinson and Simunovich both agreed that all the defendant's accounting records indicated that payments of remuneration were directly from the defendant to the plaintiffs; and not from the defendant to the skippers and thence to the plaintiffs.
- (c) In this case there were three skippers involved: One took the vessel from New Zealand to Punta Arenas; the other two were involved in the exploratory and fishing voyages subsequently undertaken by the vessel. Given that there was at least one change of skipper in the middle of a voyage it is difficult to see how the skippers could have been contracting parties particularly if the enforceability of the contracts is considered.
- (d) Surprisingly in the circumstances, it was apparent that the plaintiff Helena Farrington was unaware of the fact that she had entered into a contract of engagement with the skipper Greg Clifford (who was her boyfriend at the time).

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- (e) Mr Simunovich stated that it was the defendant's practice to return the crew at its cost when the skipper agreed that a member of the crew should be repatriated to New Zealand. In the circumstances it seems surprising that the defendant would do this if it had no contractual liability to do so. Indeed neither Vedran Skokandic nor Peter Abbot were required to pay for their return to New Zealand: the defendant paid the fares home.
- (f) Mr Simunovich agreed with Helene Farrington's testimony to the effect that he was personally involved in the negotiation of the retainer. If the retainer was not the defendant's contractual responsibility then it seems strange that he would have been involved in its negotiation. This is especially so given the fact that each of the three skippers was at the meeting. He told the Court that he took part in the debate concerning the retainer "on behalf of the company".

9. Apart from the expert evidence of Mr McKinnon and the defendant's pleaded position (which was inevitably reinforced by Messrs Wilkinson and Simunovich) the only other evidence supporting the suggestion that the contract was with the skippers is the fact that in the case of Miss Farrington and Mr Abbot it seems that the skipper (Greg Clifford) invited them to join the crew (not so in the case of Mr Skokandic who was asked by an officer of the defendant). This, however, can also be explained if he was the agent of the defendant to do so. It seems that he was. Likewise, it is accepted by all parties that the skippers had the complete authority over the crew when the vessel was at sea: however, there need not have been a contractual nexus between the plaintiffs and the skippers for this to occur.

10. I conclude that the plaintiffs have satisfied me on the balance of probabilities that each of their contracts was with the defendant and not the skippers.

The Representations

11. There is a complete conflict between the evidence of each of the plaintiffs and that of Mr Simunovich as to what was said at the meeting of 12th March 1997. Each of the plaintiffs claim that Vaughan Wilkinson was at that


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meeting. Mr Simunovich and Mr Wilkinson deny this. This is important because it is alleged by the plaintiffs that it was Vaughan Wilkinson who made the representations. Mr Simunovich denies making the representations. From the plaintiffs' point of view, it could be argued that his denial is irrelevant because the plaintiffs claim he was not at the meeting. Given his memory of the meeting and in particular his evidence under cross-examination concerning the debate over the retainer I am satisfied that he was at the meeting.

12. I have greater difficulty in determining if it is proved that Mr Wilkinson was at the meeting. Both Helene Farrington and Vedran Skokandic were adamant that he was and Miss Farrington, in particular, ascribed several of the representations directly to him. The plaintiff, Peter Abbot, however was not so sure. He was asked if he would like to reconsider his recollection of who was present and he answered "No not really because this meeting took place quite a long time ago so people were in and out discussing different things, so to be 100% sure exactly who was and wasn't there I can't say. I'm pretty sure that Vaughan (Wilkinson) was there at some stage during that meeting because at the end of the day he was the one that was dealing with the trip as far as we knew."

13. One can understand Mr Abbott's reasoning. The proposal to undertake the exploratory voyage to investigate the South West African orange roughy fishing fields came about principally, it seems, from the scientific research of Mr Wilkinson. Notwithstanding his equivocation in this regard, I am satisfied that the project was initially "his baby". Further, when the vessel was stationed at Walvis Bay it was Mr Wilkinson who was the senior company officer on shore. Despite his denials that he had anything to do with matters pertaining to the crew, it is clear that he had a significant involvement with all aspects of the operation whilst he was at Walvis Bay. It is significant that when Mr Abbott returned to New Zealand and had not received his remuneration it was to Mr Wilkinson's door that he turned.

14. Notwithstanding the defendant's claim that Mr Wilkinson was not at the meeting, the preponderance of evidence indicates that it is likely that he was



there for at least part of it. Miss Farrington's and Mr Sokandic's evidence is very strong; Mr Abbot is not so strong but paints a likely scenario particularly given Mr Wilkinson's involvement in the project. It seems strange that he would not have put in an appearance.

15. It could be argued that because of the defendant's pleaded position that it had no contract with the plaintiffs, it could have been somewhat cavalier in its inducements to the plaintiffs to embark upon the voyage: it would have had no contractual liability for any misrepresentations made. In this case it is accepted that the officers of the defendant knew perfectly well that the company had no quota to fish in Namibian territorial waters, that the voyage was of an exploratory nature primarily to investigate fisheries in international waters and possibly within Angolan waters. Furthermore the company knew that the port price for Orange Roughy in Africa at that time was \$2.00 per kg headed and gutted (and Miss Farrington admits that she knew this too). The defendant concedes that no Namibian documentation was in place at the time of the meeting. Thus, if representations were made by officers of the defendant as alleged by the plaintiffs then those officers would have known that such representations were false. On this basis, then, the plaintiffs are alleging that the officers of the defendant at the meeting deliberately told them lies.

16. When one considers the seriousness of the allegations made, the evidence of each of the plaintiffs must be examined with particular care. Significantly, Peter Abbott could not identify exactly who it was who made the various representations. He merely says that "they" told us about a trip to Namibia and it is clear that "they" meant (in the context of the whole of his evidence) those persons who from time to time came in and out of the meeting. Helene Farrington's evidence is more particular. She attributes the representations particularly to Mr Wilkinson but also (to a lesser extent) to Nigel Goodinson. Vedran Skokundic's evidence is lacking in particularity. The relevant paragraph is paragraph 2 of his evidence in chief where he said "I have read the briefs of evidence of Helene Farrington and Peter Abbott. I agree with their evidence about the meeting at SFL's workshop and the details they give. As far as I was concerned, going to Africa with SFL was a

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big opportunity to make a lot of money in a hurry. SFL had a quota of 1500 tonnes of Orange Roughy H and G which we would catch as fast as we could pull it in. Since Peterson could hold 200 tonnes H & G, we thought it was going to take 8 trips to catch the quota and that each trip would take about 3 weeks. Therefore in six months we would have earned over NZ\$100,000. There was nothing standing in our way." Thus, the only specific evidence comes from Miss Farrington; she did not detract from her story under cross examination; but, essentially, apart from the vague assertions from Mr Skokandic, she was on her own with no corroboration.

17. In considering the plaintiffs' evidence it is important also to consider the surrounding circumstances. Whilst he did not absolutely concede the point, it seems likely that at the time of the meeting Peter Abbott owed the skipper, Greg Clifford, money. Furthermore, it was clear from his evidence that he was well aware of the Namibian fishery and the riches that could be obtained from it. He did not need anybody from the defendant to tell him. Helene Farrington also was well aware of the rich orange roughy grounds off the coast of Namibia. Significantly, on 11th March 1997 she wrote in her diary "got call, going to South Africa tomorrow 1.00pm yippee". From paragraph 2 of Vedran Skokandic's evidence it seems that he also was well aware of the attractive prospects of the South West African fishery. He had crewed on Peterson for some years and in the normal course of events could have been expected to continue his practice.

18. It is also significant that the meeting at which it is alleged the various representations were made was held on 12th March 1997. The vessel sailed the following day.

19. When one looks at the totality of this evidence it is difficult to be satisfied on the balance of probabilities that the defendant made the representations as pleaded. I think there could have been some generalised and enthusiastic talk; but that is insufficient to found a representation in these circumstances.

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20. In case I am wrong in this conclusion it is necessary to inquire if such representations as may have been made induced the plaintiffs to enter into the contracts of engagement.

Were the plaintiffs induced to enter into the contracts by the representations.

21. At paragraph 192 of volume 8 The Laws of New Zealand the learned authors state:

"A party seeking to establish misrepresentation must establish that the misrepresentation induced the party to enter the contract. This will necessitate proof that the misrepresentation affected the plaintiff's decision to enter the contract. It will also require proof that the representor intended to induce the representee to contract, or that the representor's conduct was such that an ordinary person in the shoes of the representee would be induced to enter into the contract."

At paragraph 193 it is stated (inter alia)

"however if the misrepresentation had some effect on the decision to enter the contract, it is immaterial that there were other factors also influencing the decision."

22. Much of the evidence affecting a conclusion on this issue overlaps with that concerning the previous issue. The evidence seems to establish that before the meeting of 12th March 1997 each of the plaintiffs was well aware of the potential riches of the South West African fishery. The diary entry of Miss Farrington on 11th March 1997 seems to indicate that she had already made up her mind to sail with the Peterson before the meeting of 12th March 1997. Furthermore, as she put it, being able to sail on the same vessel as her boyfriend, Greg Clifford, was "a bonus". In these circumstances she has considerable difficulty in satisfying me that she was induced to enter the contract by the representations which she alleges were made on 12th March 1997. Insofar as Peter Abbott is concerned, I have already indicated that his alleged indebtedness to Greg Clifford was a factor which he undoubtedly took into account in his decision to sail with the Peterson. Furthermore, he had sailed with Greg Clifford on many occasions previously and there plainly was a close relationship between the two men. Insofar as Vedran Skokundic is concerned, he was shortly to get married and this may well have been a factor influencing his decision. In addition it was his practice to crew on the Peterson. Notwithstanding all of this, however, it is accepted that all that is

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required is *"if the misrepresentation had some effect on the decision to enter the contract"*.

23. The real problem which each of the plaintiffs face is that the vessel sailed the day after the meeting. Whilst it is accepted that each of the plaintiffs could have withdrawn at the time of the meeting, nonetheless, it seems that each of them had already decided by the time of the meeting that they would sail with the Peterson. Certainly some details needed to be worked out such as retainer. However, it seems that in principle in each case the decision was made. In these circumstances it is difficult to escape the conclusion that even if representations were made at that meeting that they significantly influenced any of the plaintiffs in reaching a decision. It is for the plaintiffs to prove their case and, in my opinion, the evidence adduced on behalf of each of them is insufficient to satisfy the onus upon them.

Conclusion

24. For the reasons set out above, I conclude that none of the plaintiffs has managed to prove on the balance of probabilities the allegations made against the defendant. In these circumstances there will be judgment for the defendant.

25. Counsel are requested to submit memoranda in writing as to costs within 14 days of the date of this judgment. Costs are accordingly reserved.


J D Hole
District Court Judge