IN THE HIGH COURT OF NEW ZEALAND
IN ADMIRALTY
TAURANGA REGISTRY

AD. 3/92

ADMIRALTY ACTION IN REM

BETWEEN J.G. MANNIX

Plaintiff

AND THE SHIP NAM SANG

Defendant

Hearing: 2, 3 February 1994 (At Rotorua)

Counsel: J. Long for plaintiff
G. McArthur for defendant

Judgment: 3 February 1994

(ORAL) JUDGMENT OF HILLYER J

This is a motion by the defendant seeking security for costs from the plaintiff and, as I understand it in the alternative, an order setting aside a bail bond. The motion is not expressed to be in the alternative but, as I understand the argument of counsel for the defendant, he accepts that if the plaintiff has to give security for costs it would be proper to permit the bail bond that has been posted to remain.

The history of the matter which goes back to approximately December 1987 is set out in some detail and it appears with some care in an affidavit sworn by the

plaintiff dated 28 September 1993. The plaintiff's father Gavin Mannix owned the boat "Nam Sang" through one of his companies Triton Holdings Limited. The plaintiff's father was it appeared a successful property developer and had a number of different companies of which Triton Holdings Limited was one. The plaintiff, however, believed that his father was the actual owner of the boat.

At the time these matters began the plaintiff was working in Australia when his father telephoned him and asked him to come back to New Zealand to do some work on the boat. The boat apparently needed repairs and also someone to sail it. A salary was agreed on the telephone of $200 per day plus any costs and disbursements he had to incur on the boat. On that basis the plaintif came back from Australia and started to work on the boat but he did not receive payment from his father. His father told him that money was "a bit tight" at the time because he was setting up a large restaurant in Tauranga.

The plaintiff at the time was 25 years of age and understandably trusted his father. He worked on the vessel until March 1988 at which stage he went overseas again. Before he left he discussed the question of payment with his father who said that he would want more work done on the Nam Sang in the future. His father promised him that if he could not pay him in the normal way then he would transfer the boat to the plaintiff; a

written agreement was drawn up and signed which is exhibited to the plaintiff's affidavit.

That agreement states that the owner of the boat was Triton Holdings Limited. Until that stage the plaintiff had believed that his father owned it but did not think there were any difficulties in the matter since his father owned Triton Holdings Limited. The plaintiff says he was not aware of any mortgages or debentures over the boat. He therefore came back to New Zealand in May 1989 and went on working on the boat until March 1990. He told his father that he wanted to be paid. He says he had spent in excess of $20,000 of his own money on disbursments on the boat. His father suggested that the boat be taken to New South Wales for sale. The plaintiff took the boat to Church Point in Sydney and commenced work on it; he worked there until July 1990 when he returned to New Zealand.

The plaintiff says that the total debt he is owed in respect of the boat in terms of time and disbursements is approximately $100,950. He set out in some detail the nature of the work done which included dry docking, repair and replacement of damaged timber and pulpit, preparation for painting and anti-fouling the boat, sail repairs and maintenance, motor maintenance, purchase and installation of automatic bilge pump, sailing the boat for party groups on instructions from his father, repainting the cabin and bulwark, further motor

maintenance, replacement of safety dingy, cleaning the exterior of the boat, replacing bow straps, refastening bolts through Keelson, replacing swing compass, replacing rotten timber, preparing the boat for category 1 rating for sailing overseas, sailing back to New South Wales and carrying out extensive repairs following that trip.

He says he did not realise that his father had been made bankrupt but that in fact was the situation when in February 1991 his father agreed to sell the boat to him. Eventually a transfer of the boat was signed by the plaintiff's father but the Registrar of Ships advised the plaintiff in August 1991 that there were mortgages on the boat which had to be discharged before the sale. Those mortgages were apparently given to a Mr J.G. Russell in connection with the building of the restaurant in Tauranga.

It appears the plaintiff believed that he could do nothing more in the circumstances. His father had no money and was bankrupt. He could not obtain a transfer of the boat to himself; he simply, he says, took no steps because he thought he had no remedies.

In January or February 1992, however he says, he was talking to a lawyer at a social occasion. The lawyer looked into the matter and suggested that he would be able to sue the vessel under the Admiralty Rules. Eventually that was done. On 26 June 1992 the writ in

this action was issued. The plaintiff became concerned, however, that the boat was being taken out of the country and discussed the matter with his solicitor friend. It was decided that a barrister should be consulted to see what could be done. The barrister advised in September 1992 that the boat could be arrested. After saving the necessary funds the plaintiff instructed this to be done. On 17 February 1993 the defendant ship was arrested.

In the meantime, on 12 August 1992, a notice requiring extremely detailed particulars of the statement of claim was served. No response has been made by the plaintiff's legal advisers to that notice On 28 August 1992, however, a statement of defence was filed. No application for an order that further and better particulars be filed has been made to the Court.

On 19 May 1993, to enable the boat to be used, a bail bond was lodged by the defendant for release of the boat. It is that bail bond which the defendant seeks to have set aside.

The plaintiff has filed a detailed affidavit setting out his financial position. It is accepted by the defendant that the plaintiff is impecunious.

The basis on which security for costs will be ordered has been set out in a number of different cases. I have been referred in particular to the decision of Davison CJ

in **Bell-Booth Group Ltd v Attorney-General** (1986) 1 PRNZ 457 and to the decision of Master Williams Q.C. in **Nikau Holdings Ltd v Bank of New Zealand** (1992) 5 PRNZ 430. Those cases emphasise that the granting of security for costs is a matter which depends solely on the exercise of the Courts "balancing" discretion, weighing all the circumstances of the case to achieve the ends of justice. There is no burden one way or the other. The Court should not allow the rule to be used oppressively to shut out a genuine claim by a plaintiff of limited means. On the other hand, an impecunious plaintiff should not be allowed to use his inability to pay costs as a means of putting unfair pressure on a defendant. It is inherent, however, in the whole concept of security that the Court has the power to order a plaintiff to do what he is likely to find difficulty in doing, namely, to provide security for costs which ex hypothesi he is unable to pay.

On behalf of the defendant, Mr Long has set out in his careful submissions the factors that should be considered, he submits, on this question of security for costs. He refers first to the plaintiff's acknowledged impecuniosity; that is accepted by the plaintiff. Indeed, that is why the plaintiff submits he should not have to give security for costs. He is simply unable to do so; if he was ordered to do so he would be unable to proceed with his claim and the defendant would escape

liability for a sum which the plaintiff says is undoubtedly due.

Mr Long then referred to the plaintiff's delays in progressing the claim. There have certainly been delays, as I have set out, but they have not been, in my view, such extensive delays as would indicate that the plaintiff's claim is without merit which is the real basis on which such delays should be considered on this application. If a plaintiff brings an action which is without merits, and that is demonstrated by the fact that the plaintiff does not pursue his action actively, that could be a basis for ordering security for costs but that in my view is not the situation here. Such delays as there have been, have I think been sufficiently explained by the plaintiff in the details I have set out of the history of this matter.

In the same way, Mr Long has referred to the plaintiff's failure to reply to the request for further and better particulars; but there again, the failure to comply with the very long and detailed request, which might well be better covered by interrogatories in some cases or by discovery in others, is not in my view sufficient to require the plaintiff's case to be struck out, which would be the effect of granting the request for security.

The delay in the arrest of the vessel is also referred to by Mr Long. Again, that arose, as I have set out,

simply because the plaintiff understandably did not know that he could take action in that way.

Basically, what Mr Long is putting forward is that, in the light of the fact the defendant has in effect had to give security by giving a bail bond over the vessel, the plaintiff equally should give security to put the parties in an equal position. Mr Long submitted that there is no question but that ordering security would have an effect on the plaintiff; but he says in the Admiralty jurisdiction, which is predisposed towards security in a way no other jurisdiction of the High Court is, requiring security for costs from the plaintiff would merely put the parties on an equal footing.

I do not regard the matter in that light. The Admiralty jurisdiction can be invoked to arrest a vessel substantially because a vessel, unlike most property, can be removed so easily from the jurisdiction. Unless some method of securing debts incurred in the repair of a vessel existed, it would be very difficult to persuade anybody to do any work on a vessel without being paid in advance. This Admiralty jurisdiction fundamentally prevents the vessel being taken out of the jurisdiction until payment is made or security is given for costs incurred in repairs to the vessel. That is normally done where there is a dispute as to the amount, by the posting of a bail bond so that the vessel can be taken out of the jurisdiction without the danger that the

moneys owed for repairs on the vessel could be left unpaid and debts in that way escaped.

The jurisdiction to order security for costs from the plaintiff is in my view an entirely different matter. It does not follow that because the defendant in an Admiralty case has had to give security for any amount owing that the plaintiff should therefore give security for costs. The basis for each type of order is entirely different.

The application for security for costs will therefore be refused on the basis basically that there is on the papers as I read them a prime facie claim by the plaintiff, although that of course will depend upon the evidence that is given when the matter comes to hearing and the impression that the different witnesses will make on the trial Judge. The questions of delay, as I have said, would not be sufficient to require security; basically if security is required the plaintiff will be deprived of his rights.

That then requires me to consider the question of setting aside the bail bond. The bond of course was posted pursuant to the Admiralty Rules and enabled the vessel to leave the jurisdiction without the possibility of it not coming back within the jurisdiction and the plaintiff thereby being deprived of his rights against the vessel. I have dealt with the question of delays which the

defendants says would justify setting aside the bail bond but if there had been such delays, as would require so drastic an action, those delays would be the basis for an application to strike out the plaintiff's claim. Merely to remove the bail bond on the grounds of delays would not be a proper use of the jurisdiction of the Court to deal with questions of delay. In any event, as I have said, I do not consider the delays that occurred in this case are such as would require any drastic action. The matter has been substantially delayed by the defendant by this application.

A suggestion was made that Mr Russell or his company, Downsview Nominees Limited, would be prepared to give security in lieu of the bail bond but, in the absence of any evidence that that security would be an adequate substitute for the bail bond, I would not be prepared to consider such an alternative.

I am therefore of the view that it would not be proper to set aside the bail bond. The defendant's application in that regard will be refused.

I have considered the question of costs in this matter and whether although the plaintiff has in effect succeeded in his opposition to the defendant's motion, I should nevertheless reserve the question of costs until the action is heard. This application, however, has been a separate and distinct matter in which I think the

question of costs should properly be dealt with without delay.

I therefore order that the defendant pay the plaintiff the sum of $1,500 by way of costs plus any disbursements to be fixed by the Registrar.

P.G. Hillyer J

Solicitors: Jackson Reeves & Friss, Tauranga, for plaintiff
Russell McVeagh McKenzie Bartleet & Co, Auckland, for defendant