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IMPLICATIONS FOR FAILURE TO PERFORM "ENTIRE CONTRACT" FOR SALE OF VESSEL TO BE CONSTRUCTED - WESTERN AUSTRALIA OF COURT OF APPEAL DISMISSES APPEAL AGAINST JUDGMENT ORDERING SHIPBUILDER TO REPAY INSTALMENT PAYMENTS IN FULL

SCOTT FURY *trading as* FURY CUSTOM BOATS v NASSO [2021] WASCA 171

In dismissing an appeal by the builder of a customised fishing vessel, the Western Australian Court of Appeal upheld findings by the trial judge that the contract was not for the design and construction of a vessel, rather it should be characterised as contract for sale of a completed vessel. In other words, it constituted an "entire agreement" for the supply of a completed vessel, not a severable or divisible contract that entitled the shipbuilder to payment upon completion of certain phases of construction. Consequently, the boat builder's *"contractual right to receive and retain payment was dependent upon him performing the whole of the contract by completing construction of the vessel and delivering it"*. The boat builder's failure to deliver the vessel under the contract entitled the buyer to a full refund of all payments made which consisted of the deposit and an instalment payment.

Background

This case involves a dispute between a boat builder (Mr Fury of Fury Custom Boats) and the buyer (Mr Nasso) for the purchase of a customised dual console fishing vessel.

Mr Fury and Mr Nasso entered into a written contract pursuant to which Mr Fury agreed to build the fishing boat for a fixed price for \$275,400 (**Contract**). As Mr Fury was unable to fund the construction of the vessel out of his own funds, the payments by Mr Nasso under the Contract were structured to provide Mr Fury with sufficient cash flow to do so.

Prior to entering into the Contract, Mr Fury had engaged a naval architect to prepare the designs for the vessel. These costs were paid for by Mr Fury and were not passed on to Mr Nasso. Importantly, under the terms of the Contract, Mr Fury was to retain all rights in respect of the design drawings and the mould that was constructed to build the vessel. However, Mr Nasso did contribute to the design discussions throughout the design and construction processes.

Mr Fury commenced building the vessel in November 2014. By April 2015, Mr Nasso had paid \$115,400 consisting of a deposit and what was described as a "Stage 1" payment. However, it became apparent to Mr Nasso that the vessel was not being built to specification. Mr Fury completed the vessel in early 2016 with his own modifications, and with the understanding that Mr Nasso was no longer the purchaser of the vessel. He also informed Mr Nasso that he could purchase the completed dual console fishing vessel if Mr Nasso agreed to pay a further \$45,000. After a 17 day trial (which is remarkable given the amount in dispute), the trial judge found that:

1. Mr Fury's conduct amounted to a repudiation of the Contract,
2. Mr Nasso accepted Mr Fury's repudiation and lawfully terminated the Contract, and
3. Mr Nasso was entitled to repayment of the \$115,400 by way of restitution on the basis that there had been a total failure of performance by Mr Fury under the Contract.

Court of Appeal

The appeal was brought by Mr Fury on three grounds, namely that the trial judge erred in concluding that (1) Mr Fury's entitlement to retain the deposit and the first stage payment was conditional on the completion of the entire contract (**Entire Contract Ground**); (2) in failing to provide the completed vessel there had been a total failure of consideration (i.e. performance) by Mr Fury (**Failure of Consideration Ground**); and (3) the deposit was non-refundable (**Deposit Ground**). The Court of Appeal held that Mr Fury's appeal failed on all three grounds and dismissed the appeal.

Where a contract is an entire contract, its performance is indivisible and not severable,¹ and complete performance is a condition precedent to payment.²

In respect of the Entire Contract Ground and the Failure of Consideration Ground, Associate Justice of Appeal Morrison (with whom President Buss and Justice of Appeal Vaughan agreed) found that the express terms of the Contract made it clear that it was a contract for the delivery a completed vessel. This conclusion was reached in reliance on, among other things, that Mr Nasso as purchaser "*has no right to possession of the boat, or any part of it, until the whole of the purchase price has been paid and delivery occurs*". The Court of Appeal also found that the payment schedule in the Contract simply set out the timing of payments rather than "*...what the payment is for. ... the references to 'Stage 1', 'Stage 2' and 'On Completion' were simply to stipulate the timing of the payment, rather than to make the payment reflect the value of the construction that had actually occurred.*"³

Proceeding on this basis the Court found that it was a contract for the delivery of the complete vessel and was not a severable contract, and that "*On no reasonable view has Mr Nasso received or retained any substantial part of the benefit expected under the contract.*" Consequently, there had been a total failure of performance and restitution to Mr Nasso of the payments he made to Mr Fury was the "*appropriate remedy*".

In respect of the Deposit Ground, Morrison AJA concluded that the reference to the deposit being "non-refundable" was limited by the surrounding terms. The reference to the "non-refundable deposit" is in the context of the formation of the contract, including the allowance for a cooling off period. Conversely, the reference to the deposit in the payment schedule made no mention of it being non-refundable. In the circumstances, His Honour concluded the deposit was only non-refundable if Mr Nasso withdrew from the contract within the cooling off period.

What to take from this case

Where the subject matter of a contract is something that is to be constructed, the contract must make it clear whether the intention is for the contract to be divisible with the effect that instalment payments are for payment for the performance of work at certain milestone stages, **or** whether the intention is simply to fix the timing of when payments are to be made. Merely stating payments are required upon the completion of the specified milestones will not necessarily be sufficient to create a divisible effect. If there is subsequently a failure to deliver what was contracted for, the full amount of payments made under the contract may be refundable to the buyer.

A further consideration to take account of is that a "non-refundable deposit" will not necessarily be non-refundable; it is essential that all of the contract terms are consistent with a deposit being non-refundable (including when referenced in a schedule of payments).

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¹ Baltic Shipping Co v Dillon(1993) 176 CLR 344

² Phillips v Ellinson Brothers Pty Ltd (1941) 65 CLR 221

³ Morrison AJA @ para 77

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