

**IN THE DISTRICT COURT
AT HAMILTON**

**I TE KŌTI-Ā-ROHE
KI KIRIKIROA**

**CIV-2019-419-000224
[2021] NZDC 13763**

BETWEEN

FREDERICK SCOTT WILSON
Plaintiff

AND

WHITIANGA MARINA SOCIETY
INCORPORATED
Defendant

Hearing: 5 and 6 July 2021

Appearances: G Keene for the Plaintiff
S Rawcliffe and L Fischer for the Defendant

Date of Decision: 3 August 2021

RESERVED DECISION OF JUDGE I D R CAMERON

[1] The plaintiff Frederick Wilson claims damages against the defendant Whitianga Marina Society Incorporated. His 80 foot yacht *Equinox NZ* was moored at the Whitianga Marina. Mr Wilson claims that in breach of its obligations to him that arrangement was terminated on one month's notice, causing him considerable expense and inconvenience to hastily move the yacht from the marina. The marina's position is that Mr Wilson's yacht was there on a month-to-month tenancy permitting the marina to terminate the arrangement on one month's notice.

[2] The background is that from November 2017 Mr Wilson and his partner Leona Reid commenced living in Whitianga. Mr Wilson's yacht was then moored off the Coromandel coast which was not ideal because of safety concerns.

[3] At a Christmas function in December 2018 Mr Wilson met Mr David Munday, the manager of Whitianga Marina. Mr Wilson advised him that he was looking for a marina berth in Whitianga. Subsequently, Mr Munday made various enquiries about the availability of a berth and on 27 February 2019 contacted Mr Wilson stating that "he might have something for me." Mr Wilson texted Mr Munday that same day providing the dimensions of the yacht and stating "I need it long-term." Mr Munday replied by text the same day stating "Cool Fred, I will see what I can do." Then on 28 February 2019 Mr Munday texted Mr Wilson as follows:

I have had a cat [catamaran] taking up R23M berth going up into the waterway.
I might be able to rent it to you long-term. Come to the marina tomorrow and I'll show you.

[4] On 1 March 2019 Mr Wilson met with Mr Munday at the Whitianga Marina and was enthusiastic about taking the berth. Mr Munday wished to check the dimensions of the yacht for himself, so he and Mr Wilson drove the 40 minute drive from Whitianga to Coromandel that day and Mr Munday took his own measurements of the yacht.

[5] Mr Wilson advised Mr Munday that the yacht was for sale and he, Mr Wilson, believed that the best chance of successfully selling the yacht would be at the America's Cup regatta in late 2020, early 2021. Mr Wilson also advised Mr Munday that he was booked to travel overseas for the New Zealand winter and would not be back until at least October 2019.

[6] The size of Mr Wilson's yacht was such that two berths would be required. These two berths, C43 and C44 at the end of one of the "fingers" of the marina, were the ones occupied by the catamaran and which became available for Mr Wilson's yacht.

[7] On 5 April 2019 Mr Wilson's yacht arrived and berthed at the marina. The rental agreed was \$750.10 per month, and Mr Wilson paid the marina the balance of the rent for April together with the rent for May 2019. There was no written agreement recording the arrangement.

[8] After a few weeks Mr Munday advised Mr Wilson that his yacht would require an antifouling repaint given that it was berthed at the marina. This would require the yacht to be lifted out of the water onto the dry dock available at the marina. The scheduled date was 29 April 2019, and on that day Mr Munday and two or three of his staff arrived to arrange the moving of the yacht onto the dry dock. Mr Wilson considered the wind was too strong for the boat to be safely manoeuvred in the marina and onto the dry dock, but Mr Munday disagreed. The scheduled lifting of the yacht had to be postponed, and it is common ground that on that same day Mr Munday sent a text expressing anger to Mr Wilson. Mr Munday is a very experienced yachtsman in his own right and clearly considered that the yacht could have been moved safely on that day.

[9] A few weeks after the arrival of the yacht at the marina Mr Wilson constructed a relatively simple set of steps which were bolted to the pontoon beside the yacht to enable easy access to the deck, the deck being significantly higher than the level of the pontoon.

[10] Subsequently, Mr Wilson and his partner went overseas, and Mr Wilson continued to pay the agreed rent by way of monthly direct debits from his account.

[11] On 10 July 2019 Mr Munday contacted Mr Wilson's son, who was an agreed point of contact, and advised him that the berths being used by Mr Wilson's yacht had been sold and that the yacht would need to be removed, effectively within a month, because according to Mr Munday it was there on a month-by-month basis. Mr Wilson,

then in Thailand, responded to Mr Munday by text dated 10 July 2019, maintaining that the agreement was for a long-term tenancy. Mr Munday replied by text dated 11 July 2019 making it clear that the marina's position would not change. By letter dated 1 August 2019 Messrs Harkness Henry, the legal firm acting for the marina, gave written notice to Mr Wilson that the yacht would need to be moved from the marina by 31 August 2019, and that a failure to do so would result in the marina moving the yacht. The letter advised that the cost of so doing would be claimed against him, including costs for what would be a delay to scheduled pile work on the wharf caused by the yacht not being removed by that time.

[12] Mr Wilson subsequently filed injunction proceedings against the marina, seeking an order that the marina take no steps to end the agreement and precluding the marina from moving the yacht from the berths C43 and C44. The claim was based in contract and estoppel. In a Minute from Justice Downs on 29 August 2019, the injunction application was dismissed.

[13] Subsequently, on 2 September 2019, the yacht was moved from the Whitianga Marina and sailed to Tauranga by Joshua Reid and associates, Joshua being the son of Mr Wilson's partner Leona Reid.

Term of Agreement

[14] Mr Wilson's evidence was that it was understood between the parties that he could have the berths until the yacht was sold, which was thought to be at the time of the America's Cup scheduled for late 2020/early 2021. His evidence was that he saw no need for any further detail to be discussed. When asked what he considered the arrangement to be if the boat had not sold by the America's Cup, he stated that he would then have to talk further with the marina. His position was that this alleged understanding was consistent with the meaning of "long-term" arrangement.

[15] Mr Munday's position was that "long-term" meant weeks or months, but always on a month-to-month basis, with the right of each party to terminate on one month's notice.

[16] If Mr Wilson’s position is correct, then he had the right to leave the yacht in those berths from 5 April 2019 to late 2020/early 2021 as long as he retained ownership of it, with no ability for the marina to terminate the arrangement. This would mean that if, as happened, the marina for commercial reasons wished to sell those berths to a third party, it would be precluded from so doing. To suggest that Mr Munday agreed to this one-sided arrangement without the authority of the marina’s committee is unrealistic and not supported by the evidence.

[17] Mr Wilson’s evidence was that he suspected that Mr Munday wanted to get rid of him from the time of the disagreement over moving Mr Wilson’s yacht onto the dry dock on 29 April 2019. Mr Wilson’s evidence was that such wish was consistent with him not being advised that the berths were for sale. I am satisfied from the evidence of Mr Munday that he had no wish to terminate the arrangement with Mr Wilson for reasons other than the committee had decided to accept an offer from the third party to purchase those berths.

[18] I accept the evidence of Mr Wilson that he believed the arrangement was a longer one than simply a month-to-month basis. I also accept the evidence of Mr Munday that “long-term” in the context that it was used meant in his mind weeks or months, but always on the basis of the right to terminate by either party on one month’s notice.

[19] As such, I find that there was no mutual agreement between the parties as to the term of the arrangement. I find that there was an implied term of the arrangement that it could be terminated by either party on the giving of reasonable notice (see for example *Maui Farms Ltd v Impress Company Ltd.*)¹ This construction of the agreement aligns with what would have been the understanding of a reasonable person in those circumstances.

[20] I am satisfied that Mr Munday knew at the time the arrangement was made that Mr Wilson intended to travel overseas for the New Zealand winter, and so would not be returning until the latter part of 2019. He would have appreciated that it would be more difficult for Mr Wilson to arrange for his yacht to be moved by others and while

¹ *Maui Farms Ltd v Impress Company Ltd* [2018] NZHC 1053.

he remained overseas. I consider that a reasonable period of notice would have been four months in the circumstances. That four months is from the period 10 July 2019 (when notice was first given) to 10 November 2019.

[21] Accordingly, the plaintiff succeeds in its second cause of action that the marina failed to give reasonable notice and was accordingly in breach of contract. The other causes of action are not made out on the evidence. I deal with these as follows:

First Cause of Action – Breach of Contract

[22] Not established on the evidence.

Third Cause of Action – Breach of Good Faith

[23] I find that there was no bad faith on the part of the respondent.

Fourth Cause of Action – Estoppel

[24] I find that there was no representation made to the plaintiff that he would be able to stay in the berths until his yacht was sold or until after the America's Cup. This claim fails.

Fifth Cause of Action – Breach of Fair Trading Act

[25] This fails for the same reasons as the estoppel claim.

Sixth Cause of Action – Breach of Contract

[26] I find that there was no evidence of an understanding that the berths would not be listed with a broker for sale, or that the plaintiff would be offered first option to buy the berths.

Damages

[27] In view of my finding, the only damages sustainable are the difference between the cost of berths from 1 September 2019 (the yacht was moved on 2 September 2019) and 10 November 2019. The amount is calculated as follows:

Cost of alternative berths

(i)	Tauranga City Council – Vessel works Ltd 3/9/19 to 3/11/19		
	September berthage	\$2,401.20	
	October	\$2,566.80	\$4,968.00
(ii)	Gulf Harbour Marina		
	6/11/19 to 10/11/19		
	November 5 days x \$87.50 per day		\$437.50
		Total Berthage	\$5,405.55
	Less berthage at defendant’s marina – 1/9/19 to 10/11/19		<u>\$1,746.60</u>
		Total Financial Loss	<u>\$3,658.95</u>

[28] Accordingly:

- (a) Judgment is entered for the plaintiff against the defendant in the sum of \$3,658.95.
- (b) Costs to the plaintiff on a scale 2B basis.

[29] I am not satisfied that the plaintiff has adequately established that any other damages ought to be awarded.

I D R Cameron
District Court Judge