

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 5 OF 2001

BETWEEN:

NANNY CAY RESORT AND MARINA LTD.

Claimant

and

THE OWNERS AND OTHER INTERESTED PERSONS
IN THE AUXILLIARY VESSEL " GODDESS ATHENA"

Defendants

Appearances:

Mr. T. Merrigan for the Claimant

Mrs. M. Price-Findlay for the Defendants

2002: January 21.
February 7 and 11.

JUDGMENT

[1] **MATTHEW J. Ag:** On June 8, 2001 the Claimant issued a writ claiming the sum of \$2,382.00 being dockage of the vessel "Goddess Athena" while it was berthed in the Nanny Cay Marina at the "T" head of Dock "B" for the period March 1, 2001 to May 9, 2001.

- [2] On the same day, the vessel was arrested by the Admiralty Marshall on the instructions of the Claimant.
- [3] The Defendants filed an Appearance on June 19, 2001 and on July 13, 2001 paid into court the sum of \$3,132.00, which they say, was to prevent the arrest of the vessel.
- [4] On October 11, 2001 the Defendants filed their Defence in which they denied owing the Claimant the amount claimed, or any amount for mooring or dockage fees.
- [5] The hearing of this matter took two days, January 21 and February 7, 2002. At the hearing, Julian Smith and Paul Warnock gave evidence for the Claimant and Anne Greenwood gave evidence on behalf of the Defendants.

EVIDENCE

- [6] Julian Smith stated that he worked at Nanny Cay Marina from October 1, 2000 until April 1, 2001, firstly for Caribbean Marine Centre in Receivership until November 30, 2000 when the ownership was changed to the present owners, and later for the present owners until he left Nanny Cay.
- [7] He stated that the normal berthing place for the "Goddess Athena" was the "T" head at the end of the "B" dock which measured 88 feet in

length. The overall length of the "Goddess Athena", he said was about 84 feet.

[8] He stated that when the new owners took over they had an investment plan and as a result of that plan there was an increase in the rates for berthing.

[9] He stated that he wrote a letter to Anne Greenwood, who he believed was the owner of the vessel, on January 23, 2001 informing her that from March 1, 2001 the "Goddess Athena" would have to pay \$1,550.00 per month for berthing at Nanny Cay.

[10] It is not in dispute that before and after November 30, 2000 and until the letter of January 23 the "Goddess Athena" paid \$617.50 per month for berthing at the said Marina.

[11] He stated that the figure \$1,550.00 was arrived at by charging \$1.00 per foot of the vessel multiplied by the number of days of the month less a discount of 25 per cent. The amount was arrived at by accepting a length of 65 feet for the vessel although it was in fact longer than 65 feet.

[12] He referred to what he called a "flier" which contained charges for Boatyard Services at Nanny Cay. He said the document was sent to the customers with their invoices for January 2001.

- [13] He said that before he sent the letter he had met with Anne Greenwood and her husband. He said himself and Anne Greenwood walked along the docks and discussed alternative dockage facilities for the vessel. He also spoke to them in their office on the premises of Nanny Cay Marina.
- [14] He said he received letters dated February 9 and 20 from Anne Greenwood and he referred to a fax dated February 20, 2001 he sent to Anne Greenwood followed by a letter of the same date.
- [15] He made reference to the dockage agreement between CMC in receivership and Virgin Athena Charters Limited of which Anne Greenwood is a director. The agreement is dated September 2, 1993.
- [16] Smith stated that by his letter dated January 23, 2001 the Claimant was offering the Defendants a new contract. He was not sure whether he had sent any other correspondence to the Defendants after his letter of February 20, 2001.
- [17] He spoke of a further letter written to him by Anne Greenwood on February 27, 2001.
- [18] When he was cross-examined by Mrs. Price-Findlay, he admitted that the old rates remained in force after November 23, 2000 and that he did not at any time provide the Defendants with a berthing contract.

- [19] He said that the reason why he did not provide them with a berthing contract was because there was already in force a contract signed by them; although he advised that CMC in Receivership was no longer in control of Nanny Cay Marina.
- [20] He said he remembered telling Anne Greenwood that he would discuss alternative dockage for "Goddess Athena" with the new owners but he did not correspond with the Defendants about the alternative dockage.
- [21] Upon re-examination by Mr. Merrigan he stated that Nanny Cay had about 10,000 contracts with customers.
- [22] Paul Warnock took over from John Smith as General Manager of Nanny Cay Resort. He said he began his employment in the third week of March 2001 and is still on the job.
- [23] He referred to the document described above as the "flier" and he said it contained the standard rate for the Marina's tenants, which were in effect from the time he commenced employment at Nanny Cay.
- [24] Warnock stated that when he arrived at the Marina, there was a 22 foot length vessel which did not agree with the new rates. He wrote the owners a letter and within one or two days, they left the Marina.
- [25] But Warnock did not write any letter to the Defendants neither did he speak to them. He said Neville Brown, one of the directors of the

Claimant, wrote two or three letters to the owners of "Goddess Athena".

[26] He stated that the vessel was docked at the "T" head of the "B" dock in March 2001 and it left in May 2001 and has never returned to the Marina. Warnock was not cross-examined.

[27] Anne Greenwood stated that she is a director of a locally formed company called Virgin Athena Charters Limited and that the company has a lease with another company which owns the vessel "Goddess Athena".

[28] In her evidence, she referred to a number of documents which form part of the exhibits in the case and since in my conclusions below I will be looking at the relevant documents, I need not elaborate on her testimony about these documents.

[29] She gave evidence of two increases in the rates in the years 1994 and 1997 but in both cases there were prior discussions between Mervyn Poulter, a former General Manager of Nanny Cay and herself. She said that the rate before the letter of January 23, 2001 was \$9.00 or \$9.50 a foot which worked out at \$617.50 a month.

[30] She stated that the first response to her letter was a telephone call from Neville Brown on April 2, 2001 which did not settle the matter. Next on April 9, 2001 Neville Brown visited her office and among other

things, in a rude manner, asked her to remove her boat from Nanny Cay.

[31] She said that during the unpleasant experience with Brown she managed to eventually get him to agree to let her stay at the Marina until the end of May 2001 but nothing was said about the rate of payment.

[32] She referred to a letter sent by Brown on the said April 9, 2001 which did not reflect what was agreed at her office. The letter contained conditions for her remaining at Nanny Cay which were never addressed at their meeting in her office.

[33] She gave evidence of payment of three cheques to the Claimant all of which I shall deal with below, and stated that after the vessel left the Marina on May 9, 2001, she did not owe the Claimant any money at all.

SUBMISSIONS OF COUNSEL

[34] Learned Counsel for the Defendants submitted that the Claimant claims the sum of \$2,832.00 but no evidence has been led as to how the sum came about nor did either of the Claimant's witnesses state that the Defendants owe any monies to the Claimant.

[35] It was also submitted that there was no evidence either from the documents referred to nor in the oral evidence that there was a 5

percent interest rate attached to any monies due by the Defendants to the Claimant and this aspect of the claim is not sustainable.

[36] Referring to *Halsbury's Laws of England, Fourth edition, Volume 9 paragraphs 226 to 228* and later to *paragraphs 245, 256 and 261* Counsel submitted that there was no concluded contract between the Parties.

[37] In respect of costs in this action Counsel referred to the *Civil Procedure Rules 2000* and in particular to *Rules 65.2, 65.5 and 65.75* and submitted that it would appear that the rules regarding prescribed costs, and not fixed costs, would be applicable in the case.

[38] Learned Counsel for the claimant submitted that the previous contract between Caribbean _____ Centre (In Receivership) Ltd. And the Defendants was discharged on November 30, 2000 when the Claimant became the owner and operator of the Marina.

[39] Counsel submitted that there was a transition period which commenced from December 1, 2000 to February 28, 2001 in which the new owners reviewed all the former owner's contracts with the numerous tenants and repair contractors located in their newly purchased marina, boatyard, hotel and buildings.

[40] Counsel submitted that a new offer of a contract was made to the Defendants by the claimant by the letter of January 23, 2001 when Julian Smith informed the Defendants that as of March 1, 2001 new

discharge rates would become effective in the _____. Counsel said he extended a written offer to the Defendants of \$1,500 monthly dockage for the "Goddess Athena" or the T-Lead of B dock.

[41] Counsel submitted that additional terms to the offer were contained in Julian Smith's letter of January 25, 2001 addressed and delivered to all marina customers with the new rate sheet enclosed.

[42] Counsel submitted that the new dockage rates commenced with the "Goddess Athena" _____ at the T-Lead of the B dock, that the Defendants had not removed the vessel from the marina and therefore by reason of this conduct the Defendants accepted the discharge rate being contained in Smith's letter of January 23, 2001. Counsel mentioned the case of **ROBERTS V HAYWARD** (1828) 3 C & P 432 which stated:

"A tenant can accept an offer of a new tenancy by simply staying on the premises".

[43] Counsel submitted that the Defendants breached the contract by failing to pay the March 2001 discharge for the "Goddess Athena" by April 9, 2001 and the Claimant accepted the breach as _____ of the discharge contract and served a notice to _____ in the Defendants on April 9, 2001.

[44] Counsel submitted that the Claimant was therefore entitled to damages in the amount of \$2,832.00 as well as interest which accrued

at the rate of 5 per cent on \$117.47 a _____ a total of \$3,380.88.

[45] Counsel set up an alternative claim in _____ during his final submissions in the event that the Court finds that the Parties were not bound by the contract in the amount of \$4,465.72 plus interest at 5 per cent for May 9, 2001 by reason of the Claimant's negligence.

[46] On the issue of costs Counsel submitted that the Claimant requests Ltd. Costs be set in the amount of \$1,000 and awarded to the successful Party in the action.

CONCLUSIONS

[47] In his opening address, Learned Counsel for the Claimant stated that this was a case on contract in which an offer was made on January 23, 2001 and acceptance followed on March 1, 2001. It therefore behoves me to look at the correspondence between the Parties.

[48] On January 23, 2001 Julian Smith informed Anne Greenwood that from March 2001 new rates would apply and that the monthly charge for the "Goddess Athena" would be \$1,550.00. By letter dated February 9, 2001, Anne Greenwood expressed surprise alleging that there was no contract between her company and the present owners. She asked for a copy of the berthing contract that the Claimant wishes to propose.

- [49] She sent a reminder on February 20, 2001. On the same day, Julian Smith sent her a fax telling her that he is waiting for a confirmation from Cameron Mc Call and would reply to her in the next few days.
- [50] But on the same day, she got a letter from Julian Smith stating it was a response to her letter of February 9, 2001. In the first part of the letter Smith spoke of the general improvements that have started in the Marina. In the second part, he says in effect that there is already a contract between them effected on September 2, 1993, obviously referring to the agreement between CMC in Receivership and Virgin Athena Charters.
- [51] In the letter Smith refers to clauses 4 and 7 of the agreement and says that the terms of the agreement clearly allow the Claimant to change rates on dockage and utilities at the Company's discretion.
- [52] Smith is wrong. Nothing in that agreement gives the Claimant that discretion even on the assumption that it is applicable between the Parties. What kind of contract would that be? The Agreement does not even speak of rates. Clause 4 deals with termination and by clause 7 the owners are obligated to comply with the Company's rules and regulations.
- [53] I need not refer to the letter of February 27, 2001 written by Anne Greenwood to Julian Smith. It does not take the case further and all it does is to exhibit an unfavourable view of the witness. I need say no more.

- [54] In three other letters to Cameron Mc Call dated March 21, 2001, March 26, 2001 and April 9, 2001 Anne Greenwood seems to be still asking for a settlement of terms despite her attempting to give legal opinions in the letter dated March 21, 2001 as she had done earlier in her letter dated February 27, 2001.
- [55] In his letter to Anne Greenwood dated April 9, 2001 Neville Brown referred to his meeting with Anne Greenwood earlier and he gives two conditions for allowing the Defendants to remain at Nanny Cay until May 31, 2001.
- [56] Neville Brown did not give evidence and Anne Greenwood stated that he agreed her vessel would remain at Nanny Cay without any such conditions. I have no reason to disbelieve her. I therefore pay little attention to his following letter dated April 11, 2001 where he expressed his disappointment that she had not made payments based presumably on the new rates.
- [57] On April 11, 2001 Anne Greenwood in a letter to Neville Brown sent a cheque for \$1,721.00, which included the dockage fees for the "Goddess Athena" of \$617.50 for the month of March 2001. In his letter to her dated April 17, 2001 Neville Brown acknowledges receipt of the cheque.
- [58] I find a bit of arrogance on the part of Neville Brown where he said "You were advised of the increased rates which pertain from 1st

March. As I explained to you, new dockage fees have been applied across the Marina and they are not negotiable." In that letter he told Anne Greenwood that she is required to move from Nanny Cay by Wednesday May 9.

- [59] On April 30, 2001 Anne Greenwood wrote a letter to Neville Brown in which she included a cheque for \$1,441.47 and that figure contains the sum of \$617.50 for dockage fees for the "Goddess Athena" for the month of April 2001. In his letter dated May 2, 2001 Neville Smith acknowledges receipt of that cheque.
- [60] Neville Brown stated that the cheque was placed to her account but this left a balance of \$3,302.73. On May 9, 2001 Anne Greenwood wrote her last epistle to Brown in which she enclosed a cheque for \$301.32 and this contained dockage fees for the "Goddess Athena" for the 9 days in May amounting to \$179.28.
- [61] The next communication between the Parties was a demand of \$2,382.00 by Solicitors for the Claimant.
- [62] It seems to me that the issue between the Parties is in effect whether the Defendants are liable to the Claimant for the increased dockage fees for the period March 1 to May 9. The difference between the new rate and the old rate is \$932.50 a month and the sum claimed is about the amount that would result if \$932.50 is multiplied by the period the ship remained at Nanny Cay.

- [63] I have no doubt that there was no contract entered into by the Parties to this case either on March 1, 2001 or any other period by which the Defendants had to pay dockage fees of \$1,550.00 per month.
- [64] It seems to me that the present owners did not wish to write another contract between the Parties as it would mean writing 10,000 other similar contracts. As Julian Smith hinted that would be costly.
- [65] I find that the Defendants paid the Claimant all dockage and other dues which they were obligated to pay from March 1 to May 9, 2001 and are not liable to the Claimant. The suit is accordingly dismissed.
- [66] I have considered the submissions of the Parties in respect of costs as well as *Rules 65.2 (1) and (3); 65.4; 65.5 and 65.7* I order the Claimant to pay the Defendants costs in the sum of \$2,000.00

A.N.J. MATTHEW
High Court Judge, Ag.