

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO ANUHCV1999/0252

BETWEEN:

DAYLE NAYLOR

Claimant

and

ST JAMES' CLUB ANTIGUA LIMITED
CAPTAIN PHIL BOYD
HORIZON INTERNATIONAL GROUP LIMITED
BARRY MCGONIGAL

Defendant

Appearances:

Kenrickson Kentish for the Claimant

John Fuller for the 1st Defendant

2003: June 10, December 10, 17

2004: March 15, 17, April 1

JUDGMENT

[1] **MITCHELL, J:** In March 1998, the yacht "Watercolour II" was sailed by its owner into Mamora Bay in Antigua. He entertained his guests on board. At the end of his vacation, he arranged with the dock-master at a nearby hotel to look after his boat while he returned to London for the summer. A hurricane struck while he was away. An insurance adjuster conspired with the dock-master to pretend that the boat had been salvaged and to extort a large sum from him in exchange for its release. The yacht-owner resisted and he has now sued them all for damages. The hotel alone denies it is liable to him. The others have not defended his suit, and he has entered judgment against them for damages to be assessed.

- [2] St James' Club is a sea-side hotel with a dock at Mamora Bay in Antigua. Capt Phil Boyd was the dock-master. He provided services to yacht-owners who frequented the waters off the hotel. Barry McGonigal was a US-based insurance adjuster. He came to Antigua after the passage of Hurricane Georges in September 1998. He claimed to be the representative of Horizon International, insurance adjusters. Mr Dayle Naylor is a successful British physiotherapist with an inclination for sailing yachts. He had recently acquired the 47-foot sloop "Watercolour II." He used it for his own recreation and pleasure and for entertaining existing and prospective clients.
- [3] In March 1998, Mr Naylor sailed Watercolour II to Mamora Bay. He moored it there when his holiday ended. He arranged with Capt Boyd, for a nominal monthly fee, to keep an eye on it while he flew back to London for the summer. Capt Boyd agreed that during his absence he would be responsible for its general care and maintenance. This did not require much more than periodically recharging the batteries, bringing the yacht to the dock if a sales agent requested a viewing and inspection for a potential buyer, and putting it on a hurricane mooring in Mamora Bay if a hurricane should approach. Mr Naylor gave Capt Boyd his contact particulars in case of emergency. For these services, Mr Naylor paid him an agreed fee of US\$150.00 per month by American Express cheques which he left with him. He expected to return to Antigua about six months later with friends and business associates to be entertained on the yacht. There was no written contract.
- [4] Hurricane Georges struck Antigua on 20 September causing much destruction. Capt Boyd did not contact Mr Naylor as he had promised. Meanwhile, Mr McGonigal came to Antigua to take on adjustment jobs. He took up residence at the St James Club. He did adjustment work for the hotel and for other clients. On 11 November, Mr Naylor arrived in Antigua with his friends and a hired crew intending to use the yacht. He travelled from the airport to the St James Club. There, he found Watercolour II chained to the dock. Mr McGonigal and Capt Boyd, with the assistance of the St James' Club staff, had tied a link-chain around the propeller shaft. They had then chained and padlocked the boat to the dock. On board, he found a copy of a "Council of Lloyds Maritime Lien and Salvage Award" dated the same day. From this document, he learned for the first time that he was

indebted to Capt Boyd for an amount of US\$105,650.00. This amount had allegedly been awarded based on an appraisal by Horizon International.

- [5] On enquiring at the hotel, the staff told Mr Naylor that Barry McGonigal represented Horizon International. The management and staff at the hotel knew Mr McGonigal as an honoured guest. He had rented a suite of rooms from them while he went about his lucrative insurance business about Antigua in the wake of the hurricane. They had no reason to suspect that he was a crook. They acted on Mr McGonigal and Capt Boyd's instructions. They consented to their chaining the yacht to the hotel's dock. They would not permit Mr Naylor to remove the yacht without the approval of Capt Boyd and Mr McGonigal.
- [6] Capt Boyd as the person in charge of the yacht could not in law or international maritime practice claim to have salvaged Watercolour II. In fact, there was no maritime lien and salvage award against Watercolour II. Capt Boyd acting with Mr McGonigal had fraudulently made this claim to have salvaged the boat during the hurricane. They sprung this allegation on Mr Naylor only when he returned to resume use of the boat. They left a copy on board the boat for him to find when he arrived on board. It was an impressive and official-looking document, but it was completely concocted in support of their plan to extort money from Mr Naylor.
- [7] Mr Naylor declined to pay either the amount claimed or the smaller amount of US\$45,000.00 that Mr McGonigal offered to accept in settlement. On 17 November 1998, St James' Club's attorneys took out a writ No 383 of 1998 against Watercolour II claiming the sum of US\$106,150.00 due to St James' Club for the alleged salvage services. One of the attorneys swore in support an affidavit based on the instructions of Capt Boyd and Mr McGonigal allegedly acting for St James' Club. It wrongfully claimed that Mr Naylor owed St James' Club the amount of the fraudulent maritime award. A warrant of arrest was issued out of the high court in St John's. The warrant was served on the yacht that day. The attorneys had the implicit if not the express authority to issue and to pursue this

- writ in the name of the company. If St James' Club subsequently instructed them to withdraw the proceedings, they never took any step to do so while the proceedings lasted.
- [8] Mr Naylor consulted with his insurers and lawyers back in the UK. He learned from them that the claim was a fraud. Lloyds of London confirmed that to him and to the court. Mr Naylor retained local and UK solicitors and defended the suit brought to enforce the alleged maritime lien. The high court heard his application. The judge ordered the boat released on 26 November and adjourned further hearing. On 12 February of the following year, the case resumed. The judge heard the evidence and read the various reports and documents that Mr Naylor had obtained from London. No doubt satisfied that the allegations of Mr McGonigal and Capt Boyd were fictitious, he struck out the action.
- [9] The claim in this case is for losses suffered by Mr Naylor in the wrongful acts of the defendants in detaining his boat at the St James' Club dock at Mamora Bay. He claims against them all for damages for the tort of deceit arising from the representations about the maritime lien and salvage award; specifically against Horizon International and Mr McGonigal for professional negligence; against them all for wrongful detention and arrest of the yacht Watercolour II for the period 11 to 27 November 1998; against them all for conversion of the tackle and equipment missing from the yacht; for interest; and for costs. Part of his claim is that St James' Club is liable to him for the actions of Capt Boyd as its employee. None of Capt Boyd, Horizon International or Mr McGonigal have defended this suit, though Capt Boyd filed a defence. Mr Naylor has obtained a judgment in default against them since 10 June 2003 for damages and costs to be assessed. This trial is not for the assessment of the damages payable. It is only to determine whether St James Club is also liable to Mr Naylor. Damages, if any, will be assessed subsequently.
- [10] The witnesses for St James' Club deny that Capt Boyd was their employee. Mr Naylor found Capt Boyd performing services as dock master on the St James' Club dock. Capt Boyd in his filed defence states that he acted throughout as an employee of the St James's Club. Only St James' Club could have produced contrary evidence as to his status. They have produced no evidence of his status other than their self-serving say-so. The

witnesses for the company do not suggest that Mr Naylor was ever informed by a notice or otherwise that Capt Boyd was working there on his own account and that the hotel was not responsible for his acts or neglects. The evidence suggests that a dock-master may not be a normal hotel employee, and may have considerable flexibility in his dealings with and charging of customers. The bill the St James' Club management and staff presented to Mr Naylor contains charges made by the hotel for services that would have been provided by Capt Boyd at the dock. Capt Boyd additionally charged Mr Naylor directly for other services. I have no doubt that Capt Boyd functioned at the dock with the full authority of the St James' Club. I am satisfied that he was their employee.

- [11] St James' Club denies that it attempted to defraud Mr Naylor. At the time of the chaining of the boat to the dock and the subsequent issue of the writ, the management and staff of St James Club accepted the word of Mr McGonigal and Capt Boyd that they had a valid claim against Mr Naylor. They acted on this acceptance and took steps to assist Mr McGonigal and Capt Boyd in their fraudulent enterprise. St James Club wrongfully put its name to the writ which resulted in the warrant of arrest against Watercolour. The instructions to the attorneys to issue the writ came initially from Mr McGonigal and Capt Boyd. But, the attorneys would not have continued with the action if the management and staff of the hotel had not confirmed to them the validity of the claim. I accept the evidence of the acting general manager of the hotel that Mr Naylor owed the hotel a relatively small sum for hotel bills and that the hotel had only been interested in collecting this amount. But, the suit was for the full amount claimed by Capt Boyd. After the issue of the fraudulent writ, the managing director of the company confirmed to the company's attorney's the instructions to pursue the action to collect the money owing. This was a reckless step. It ensured that the action continued for months more than it should have. In the course of this trial, the managing director accepted that there had in fact been no justification for the claim made on the company's behalf by Mr McGonigal and Capt Boyd. He says that once he was advised by his attorney that the claim was unsustainable and the instructions about the award untrue, he instructed her to discontinue the proceedings. However, the proceedings were not discontinued, the attorneys merely withdrawing from

representing the company in the suit. This failure to act on his instructions also ensured that the proceedings continued longer than they should have.

[12] St James' Club denies that it participated in the wrongful detention of Watercolour II. A cause of action for wrongful arrest and detention of a vessel is not new. The test for wrongful arrest is whether or not there is reason to say that the action was so unwarrantedly brought or brought with so little colour, or so little foundation, that it rather implies malice on the part of the arrester, or that gross malice which is equivalent to it¹. The gravamen of the right to recover damages for wrongful arrest or detention of vessels is the bad faith, malice, or gross negligence of the offending party². The test for wrongful arrest and wrongful detention is the same. Mr Naylor has pleaded both in his statement of case. The hotel must accept responsibility for the actions of its management and other staff besides Capt Boyd. They supported him in his claim against Mr Naylor. They actively participated in the detention of the yacht. When he brought the action against Mr Naylor in the name of the company, they did not immediately give instructions to withdraw the suit, but permitted it to proceed through the courts for several months. I am satisfied that St James' Club was grossly negligent when it actively supported Capt Boyd and Mr McGonigal in their illegal seizure of the boat and authorised its chaining to their dock.

[13] St James' Club denies any participation in the fraud or deceit. Fraud or deceit is established when it is proven that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false, and with the intention that the other party should act on it³. St James Club would only be liable to Mr Naylor in the tort of deceit in the circumstances of this case if its management had either knowingly authorised the fraudulent claim, or had authorised it without caring whether or not it was true. Capt Boyd was a mere employee, not management. What he did was intended to profit himself alone, not St James' Club. He was not acting as agent for the St James' Club when he attempted to perpetrate this fraud. Counsel for Mr Naylor

¹ *The Evangelismos* (1858) Moo PC 352 at 359, quoted with approval by Bokhary JA in the Hong Kong Court of Appeal case of *Banque Worms v The Owners of the Ship or Vessel "Maule"*, No 187 of 1994 [1995] HKCA 305

² *Armada Lines Ltd v Chaleur Fertilizers Ltd* [1997] 2 SCR 617

³ *Derry v Peek* (1889) 14 App Cas 337

asks the court to infer that the managing director of St James Club knowingly participated in the attempted fraud. He relies on the managing director's last-minute claim to a dyslexic problem in reading documents shown to him; to the similarity in name between his Horizon Construction company and Horizon Wholesale and Retail business and Mr McGonigal's Horizon International Group; and to the attorney's testimony that the managing director directly instructed her to pursue the action on behalf of the St James Club. However, it stretches credibility to believe that a major hotel owner would knowingly collaborate with these small-time crooks in such a brazen fraud as this one was. I prefer to believe that the management believed that they were pursuing a legitimate claim for monies due to the hotel. St James Club management or staff did not knowingly participate in the fraud. They did not act recklessly, without caring whether the fraudulent allegation was true or not.

[14] Mr Naylor has satisfied me that he has been put to considerable loss and expense. He has spent money on airline tickets, hotel accommodation and car rentals that he would not otherwise have had to bear. He has lost various pieces of boat equipment such as a recorder, rode and fenders that were missing without explanation. He claims exemplary and/or aggravated damages from the defendants for the actions that they took against him which he says were calculated to profit themselves and in cynical disregard for his rights. He also seeks to be compensated for the embarrassment, humiliation and loss to his personal and business reputation and goodwill he suffered before his crew and guests. I have no doubt that he suffered considerable inconvenience and damage to his reputation during the course of the fraudulent claim against him.

[15] For the reasons set out above, St James' Club is not liable to Mr Naylor in the tort of deceit. It is liable to him in the tort of detainee for the wrongful detention and arrest of Watercolour II by its employees, the dock-master, the hotel management who deferred to the dock-master and the crooked adjuster, and to the security and dock staff who participated in the chaining of the boat to the St James' Club dock. St James's Club is also liable to him for the conversion by its employees of the tackle and equipment. It is also liable to compensate him for the embarrassment, humiliation and loss to his personal

and business reputation and goodwill he suffered before his crew and guests. He is entitled to interest and costs. He has asked for an interim order on costs in the amount of \$6,000.00. Such an award is permissible⁴. However, given that the matter including the question of costs is shortly to be concluded, it does not seem appropriate.

[16] Given the findings above, there will be judgment for the claimant against the first defendant for the EC dollar equivalent of:

- (a) the special damages claimed;
- (b) general damages for the wrongful detention of the yacht Watercolour II;
- (c) general damages for the conversion of its tackle and equipment;
- (d) general damages for the loss of business reputation and goodwill;
- (e) interest;
- (f) and costs;

to be assessed as follows.

1. Witness statements on quantum to be filed and served by 18 May 2004;
2. All witnesses to make themselves available for cross-examination;
3. Skeleton arguments to be lodged and served by 1 June 2004;
4. Assessment to take place in chambers before a judge in July.

Don Mitchell, QC
High Court Judge

⁴ Grenada Electricity Services Ltd v Isaac Peters [Grenada C/A No 10 of 2002, delivered 28 January 2003, unreported]