BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2002/0227

(1) AUDUBON HOLDINGS LIMITED
(2) NORMAN ISLAND SERVICES LIMITED

Claimants

-and-

(1) THE TREASURE ISLAND COMPANY LIMITED
(2) DAVID SIMS
(3) VALERIE SIMS

Defendants

Appearances:

Mr. Stephen Moverley Smith QC, with him Ms. Jessica Chappell and Ms. Emma Sparshott for the Claimants
Mr. Sydney A. Bennett QC with him Mr. Richard G. Rowe for the First and Second Defendants
Mr. Gerard St. C. Farara QC with him Mrs. Tana'ania Small-Davis for the Third Defendant

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2005: October 31st, November 1st, 2nd, 3rd and 4th
2006: March 31

JUDGMENT

Introduction

[1] HARIPRASHAD-CHARLES J: The Claimants have claimed against the Defendants in a breach of contract action in which they allege that the Defendants breached their obligations under the First and /or Second Amendments to a Lease Agreement made on or about 18 March 1999 ("the Lease"). The two amendments deal with existing interest in certain mooring balls placed in the seabed of the waters surrounding Norman Island and more particularly, in the Bight.

[2] The relief sought are as follows:

1) An order that the Defendants provide accurate monthly statements of fees and expenses from 1 October 2001 to date.

2) An account of what is due to Audubon from the Defendants for monies received by the Defendants in respect of mooring fees collected from 1 October 2001 to date for and on account of Audubon.

3) An order for payment of the sum found due on the taking of the account with interest thereon at such rate and for such period as the court may think fit.

4) An order for the provision of copies of the books and records in respect of the revenues from the operations of Norman Island.

5) An order that the Defendants provide copies of all documents which the Defendants have filed with the Government in connection with the moorings.

6) An order that the Defendants and each of them whether by themselves, their agents or otherwise howsoever be restrained from collecting further mooring fees.

7) An order that the Defendants and each of them whether by themselves, their agents or otherwise howsoever be restrained from dealing in any way with all and any interest they or any of them may have in the moorings.

The Parties

[3] The First Claimant ("Audubon") is a Company incorporated under the Laws of the British Virgin Islands. It is the owner of Norman Island, an island in the British Virgin Islands (more particularly described in the Land Register as Parcel 1 of Block 2824A in the Southern Cays Registration Section. The Second Claimant ("NISC") was incorporated in or about November 1999. The Claimants are owned and controlled by Dr. Henry Jarecki.

[4] The First Defendant, The Treasure Island Company Limited ("the Company") was incorporated under the Laws of the British Virgin Islands in July 1996. The Company was formed for the purpose of carrying on business on Norman Island. The Claimants allege that the Company is owned and controlled by the Second Defendant ("Mr. Sims") and the Third Defendant ("Mrs. Sims"). Mr. and Mrs. Sims are husband and wife.

The Evidence

[5] The evidence in this action is voluminous. The trial lasted for 5 days. The Claimants called 4 witnesses to testify on their behalf. Their first witness was Mr. Earl Nemser, an attorney-at-law of the New York Bar. He is now Special Counsel to Dechert, LLP and has been a close adviser to Dr. Henry Jarecki for many years. In particular, he was closely involved with the acquisition of Norman Island by Audubon. Even after the acquisition of the island, Mr. Nemser continued to play a key role. He was the liaison between Dr. Jarecki and Mr. Sims for the Land Lease as well as the Amendments. It is alleged that he unduly influenced Mr. Sims and pressured him to sign the First Amendment which is at the heart of this dispute. Mr. Nemser was extensively and vigourously cross-examined by Defence Counsel.

[6] The legendary Dr. Henry Jarecki was the next witness to testify. Prior to his Company's acquisition of Norman Island, Dr. Jarecki was well known to British Virgin Islanders as the owner of Guana Island, another island in this Territory. It is obvious that he is a man of immense wealth and perhaps, very powerful. Dr. Jarecki was also extensively cross-examined.

[7] The third witness to give evidence on behalf of the Claimants was Mr. John Hartmann. He is the Director of Internal Audit at the Falconwood Corporation in New York. He had a limited role in the issues relating to Norman Island. His involvement extended to investigating and reviewing the accounts which Mr. Sims submitted to Dr. Jarecki in relation to the collection of mooring fees. Indeed, his role in this action was so limited that neither Counsel for the Defendants saw it fit to cross-examine him.

[8] The final witness to testify on behalf of the Claimants was Ms. Sheila George, a solicitor in the Firm of Messrs. Harney, Westwood & Riegels ("Harneys"). Ms. George played a dual role in relation to Audubon's acquisition of Norman Island and subsequent related matters. She served an administrative role given her presence in this Territory and also, as an advisor on legal matters pertaining to the acquisition of Norman Island. Ms. George was involved in conversations with various personnel in the Ministry of Natural Resources in respect of the application for moorings by Mrs. Sims and her grandmother. She was also involved with the drafting of the agreement which was the precursor to the First Amendment.

[9] The Defendants also gave evidence. Mr. David Sims gave evidence on his own behalf. He graduated from the University of Cape Town in South Africa majoring in accounting, auditing and taxation. In 1988, he earned a Bachelor of Commerce Degree (Taxation) with honours. In 1989, he moved to the British Virgin Islands and after working in various capacities in different companies including CITCO BVI Limited, he started his own business, Beacon Capital Management Limited which was formed in or about July 1997 to carry on the business of Company Management.

[10] Mrs. Valerie Sims gave evidence and called two witnesses to testify on her behalf namely Mr. Donald Lettsome and Mrs. Sheila Brathwaite. Her evidence is that in 1894, her great-great grandfather, Henry O. Creque purchased Norman Island and it remained in the Creque family until it was sold to Audubon on 30 March 1999. Her sole nexus to Norman Island lies in the fact that her grandmother, Valerie Nutting was one of the shareholders of Creque Estates and held some 20% of the share capital. Legally speaking, she has no entitlement to Norman Island.

[11] Mr. Donald Lettsome was the next witness to testify. He was a civil servant in the British Virgin Islands for 35 ½ years before he retired in 2001. He was Deputy Permanent Secretary in the Ministry of Natural Resources and Labour prior to his retirement. His duties included responsibility for matters relating to the seabed as well as anything concerning moorings. He is familiar with the dispute. Mr. Lettsome processed the

application by Mrs. Sims to install moorings at Norman Island. The application was made by and in the names of Valerie Creque and Valerie Sims. He stated that the application was approved by Executive Council in both names.

[12] He next stated that there was an attempt to transfer the said moorings to Norman Island Services Company ("NISC") which failed because such rights are only transferable with the approval of Executive Council.

[13] Mr. Lettsome also stated that when the application was made to transfer the moorings to NISC, it fell on him to investigate. Upon his investigation, he recounted that on or about 14 March 2001, he met and spoke with Mrs. Sims about the transfer and she told him that Dr. Jarecki and other representatives of his Company were threatening her and that if she did not transfer the moorings to Dr. Jarecki, she would be forced out of the Island and lose her restaurant.

[14] Mr. Lettsome stated that he did not recall receiving a telephone call from Ms. George concerning the moorings but if he did, he would not have told Ms. George that David and Valerie Sims had applied for permission to install the said moorings.

[15] Under cross-examination, he emphatically declared that he never had a conversation with Ms. George.

[16] The final witness to testify was Mrs. Sheila Brathwaite, Permanent Secretary in the Ministry of Natural Resources and Labour. She was called essentially as a witness to state that she said to Ms. George that the moorings were approved for Valerie Creque and Valerie Sims. She said that she did not mention David Sims because she was reading directly from the file and his name did not appear on the application nor the approval.

[17] This is a civil case wherein the standard of proof is based upon a balance of probabilities. Having had the opportunity of seeing and hearing all of the witnesses, I found the witnesses for the Claimants to be witnesses of candour. I found them to be forthright in

their testimony. I was particularly impressed with the evidence of Mr. Nemser and Dr. Jarecki. As a result, I accepted their testimony as truthful. I am afraid I could not say the same for Mr. and Mrs. Sims. I found them to be evasive and unconvincing. With respect to Mr. Lettsome and Mrs. Brathwaite, I have no reason to disbelieve their evidence. However, I came to the conclusion that there must have been a conversation between Ms. George and Mr. Lettsome which he cannot recall. With respect to the discrepancy between the evidence of Mrs. Brathwaite and Ms. George as to what was told to Ms. George, I accept Mrs. Brathwaite's testimony that she said that the moorings were approved for Valerie Creque and Valerie Sims and she did not mention David Sims. I think that Ms. George innocently recorded "Sims" and concluded it must be David and Valerie Sims. Save for this inconsistency, I found Ms. George to be a credible witness. At the end of the day, I concluded that this discrepancy could be easily resolved by looking at Mr. Sims' evidence and his purported representations to Audubon. First of all, Mr. Sims misled representatives of Audubon about "his" recently approved application and that he had an interest in the moorings. He compounded that misrepresentation by imparting inaccurate figures as to the number of moorings that were approved and in whose name they were approved. I also did not believe Mr. Sims when he said that he was coerced and/or unduly influenced to enter into the First Amendment. His numerous e-mails demonstrate quite the opposite.

[18] I found as a fact that the Sims deliberately withheld information about the application for moorings when they were negotiating the lease agreement. I also found that formal communication in respect of the approval for moorings was not made until 14 June 1999. The e-mail of 12 April 1999 did not disclose "approval for the moorings". It merely stated "we would like to discuss with you the subject of moorings". I am of the view that Mr. Sims was "testing the waters" to inflame a reaction.

[19] With respect to Mrs. Sims, I found her to be an unconvincing witness. To begin with, the Application to lease the seabed for moorings ("the Application") was laced with inaccuracies. Mr. Stephen Moverley-Smith QC for the Claimants has adroitly identified them. Next, her testimony that her husband did things behind her back and then unduly influenced her to sign the First Amendment is incredible. I had the opportunity of seeing

and hearing Mrs. Sims and observing her demeanour. I came to the conclusion that she is a highly intelligent, successful and charming person. She successfully operated "Billy Bones" on a deserted island for at least 2 years even when she had no permission to do so. Not many women are as intrepid and courageous as Mrs. Sims. Then she successfully managed to cajole the aging Dr. Jarecki to grant her a reasonable Lease which perhaps, would have been in subsistence had it not been for the late accounting reports of mooring fees and the miscalculations of the accounts.

The Facts

[20] Before attempting to deal with the issues raised in the claim, it is essential that I outline the facts in this case. Most of what I now state reflects the uncontradicted and unchallenged evidence of the parties. To the extent that there is a departure from any agreed facts, then what is expressed must be taken as positive findings of fact made by me.

[21] Prior to March 1999, Norman Island was owned by a British Virgin Islands company, Creque Estates Limited ("Creque Estates"). One of the shareholders of Creque Estates was Valerie Nutting, the grandmother of Mrs. Sims. She held some 20% of the share capital. Ms. Nutting passed away on 14 May 2002. One of the significant causes of her death was senile dementia.

[22] On 26 January 1996, Mrs. Sims applied for permission to lease the seabed around Norman Island for moorings ("the Application"). Question 1 of the application form required the name of the Applicant which Mrs. Sims inserted as "VALERIE C. CREQUE & VALERIE C. SIMS". But, the only person who signed the application was Mrs. Sims. Question 10 asked "is the frontage owned by the Applicant? Mrs. Sims answered in the affirmative notwithstanding that Creque Estates owned Norman Island. Question 11 inquired if the moorings were likely to affect the water access of other landowners in the vicinity and Mrs. Sims answered that there were no other landowners in the vicinity.

[23] Although they had no entitlement or permission to do so, Mr. and Mrs. Sims took up occupation of a site in the Bight and started work constructing a restaurant sometime in

November 1997. The restaurant opened for business in late December 1997, trading under the name "Billy Bones". The business operated with great success on the island.

[24] During 1998, it appears that there were negotiations between Creque Estates and Mr. and Mrs. Sims for the grant of a one year lease, terminable in the event that Norman Island was sold (a sale being in contemplation). Following a change in the board of Creque Estates, the negotiations broke down and no lease was granted. Mrs. Sims then instituted proceedings against Creque Estates alleging that on or about 10 March 1998, Creque Estates, through its President, William C. Creque entered into an oral agreement to grant her a two-year lease commencing 1 November 1997. She admitted that prior to that date, her occupation had been without permission. In 2002, Mrs. Sims was ordered to pay Creque Estates an amount of $6,188 (equivalent to $364 per month) in respect of her 17 months occupation of Norman Island.

[25] In September 1998, Smith Gore International Limited was appointed to sell Norman Island on behalf of Creque Estates. The island was uninhabited save for Mr. and Mrs. Sims who were at the time operating "Billy Bones". In February 1999, Audubon made an offer to purchase Norman Island. That offer was conditional upon the state of affairs regarding Mrs. Sims being resolved. Thereafter, negotiations took place between Mr. Sims and Mr. Childs of Smith Gore. These negotiations resulted in the Lease that was entered into on or about 28 March 1999[1]("the Lease"). No mention was made of the Application during the course of these negotiations.

[26] The Lease was, at the request of Mr. Sims, in the name of the Company. The obligations of the Company in all respects being jointly and severally guaranteed by Mr. and Mrs. Sims (collectively "Treasure Island"). Treasure Island was granted an annual tenancy of "Billy Bones" at the yearly rate of US$9,000 payable at $750 on the first day of each month without deduction. The annual tenancy was renewable unless written notice was given that it would not be renewed prior to 30 days before expiration. If the Lease were terminated without cause by Audubon within five years, and Treasure Island has not been in default,

[1] See Page 52 of trial bundle.

Audubon would pay to Treasure Island, only after full surrender of the premises, the costs of improvements made prior to the Lease up to a maximum of $150,000. The Lease took effect on 1 April 1999, being the first day of the month following Audubon's acquisition of Norman Island.

[27] The previous day, 31 March 1999, Mrs. Sims had received a letter dated 30 March 1999 from the Ministry of Natural Resources ("the Ministry") which contained notification that the Application had been approved subject to certain conditions. The letter was addressed to "Mrs. Valerie Creque & Mrs. Valerie Sims", PO Box 972, Road Town, Tortola. The Post Office Box is incidentally that of Mr. Sims' Company, Beacon Capital Management Limited. On 1 April 1999, Mrs. Sims wrote to Mr. Bertrand Lettsome of the Department of Conservation & Fisheries thanking him for his kind efforts in processing "our" application to lease the seabed at Norman Island and indicating that the installation of moorings would commence on 15 April 1999.

[28] On 12 April 1999, Mr. Sims wrote on his Company's letterhead to Audubon's New York Attorney, Earl Nemser ("Mr. Nemser") stating, among other things:

> "On another matter: we would like to discuss with you the subject of moorings in the Bight. Perhaps you could give the matter some thought and I will call you in a few days to discuss further. We hope that we may even serve to facilitate Dr. Jarecki's goals without him having to be concerned about submitting numerous applications to government at this time."

[29] Significantly, no mention was made of the Application and its approval.

[30] A discussion subsequently ensued between Mr. Nemser and Mr. Sims wherein Mr. Sims informed Mr. Nemser that an application had been made for 70 moorings but only 15 had been approved. Audubon's BVI lawyers, Harneys verified the position with the Ministry and were informed that 70 moorings had been approved for the Sims.

[31] On 24 May 1999, Mr. Sims and Mr. Howard Watson, an architect acting for Audubon, met at Mr. Sims' office to discuss the installation of a new dock for access to Norman Island

and “Billy Bones” in particular as well as the moorings. Mr. Watson recorded Mr. Sims as referring to “his recently-approved application” for 73 moorings which included 60 in the Bight, 5 in Soldiers Bay and 8 in Privateer Bay. Mr. Sims denied that he ever made such representation.

[32] On 14 June 1999, Mr. Sims e-mailed Mr. Nemser to inform him that “Valerie had received approval for 60 moorings in the Bight.” In the same e-mail, he stated that he had held further discussions with one of the two existing owners of moorings who had indicated a preference to transfer ownership to Mrs. Sims subject to an agreement on price. Mr. Nemser did not reply to this e-mail.

[33] Mr. Sims apparently perceived that Audubon might have been displeased with the tardiness of the information. So, in order to make amends, on 30 June 1999, he e-mailed another letter to Mr. Nemser. In it, he said:

> “Apologies for the delay in getting facts to you regarding the moorings…Valerie had received written approval for a further 60 moorings in the Bight, 8 at Privateer Bay and 5 at Soldier Bay. Her application was submitted over 3 years ago and was approved in writing on March 30.
>
> …We are hoping that Dr. J would let us know his views on the moorings both regarding the existing and newly approved prior to us proceeding any further.
>
> …Again I would like to assure you that we will not proceed without securing Dr. J’s agreement…”

[34] During the intervening period, it appears that Mr. Nemser had raised concerns about Mr. Sims’ uncooperativeness. Mr. Sims was not happy about that so on 4 July 1999, he wrote the following to Dr. Jarecki:

> “From our standpoint, we would like to know whether or what objections you may have to the idea of moorings and or the number thereof…I am aware that you may have some concerns in this area but I cannot address these until I am aware what they are….”

[35] Subsequently, a discussion took place between Mr. Nemser and Mr. Sims in which Mr. Nemser unequivocally told Mr. Sims that he considered that during the negotiations for the Lease, Mr. Sims should have disclosed the existence of the Application and that his failure to do so amounted to a serious case of material non-disclosure which gave Audubon good grounds for rescinding the Lease; if it chose to do so.

[36] Audubon claims that the stance adopted by Mr. Nemser was wholly justified. Audubon says that it had been negotiating with the Sims in relation to the interest they asserted they currently had, and the interest they wish to acquire, in a prime site at Norman Island's main bay. Of fundamental importance to that site and thus that interest, was the means of access to it by boat. Moorings, which provide the means to "park" a boat, were (and are) an essential part of such access. Audubon alleges that the Defendants were deliberately deceptive (and thus it was a misrepresentation) not to disclose the fact that the Application had been made and that, if it were granted, it would fundamentally affect access to the site. The Defendants argue that there was no obligation on their part to declare any such information to Audubon in their negotiation of the Lease Agreement.

[37] It is convenient to interrupt the narrative to remark briefly that the general rule is that mere non-disclosure does not constitute misrepresentation, for there is, in general, no duty on the parties to a contract to disclose material facts to each other, however dishonest such non-disclosure may be in particular circumstances.[2] But, of course, there are exceptions to this rule which shall be elaborated later. Unquestionably, misrepresentation provides grounds for rescinding a contract.

[38] Coming back to the facts. During the week of 12 July 1999, Mr. Sims was in New York on his Company's business. Two days later, he and Mr. Nemser had lunch together. As expected, the moorings came up for discussion. The outcome of the discussion is contained in an e-mail from Mr. Nemser to Harneys namely that Mr. Sims was agreeable (i) to transfer "his" 60 moorings to Audubon; (ii) as long as he had a lease on Norman

[2] See Ward v Hobbs (1878) 4 App. Cas. 13, but doubts have been cast on this case by the House of Lords in Hurley v Dyke (1979) R.T.R. 265.

Island he would service the moorings and be entitled to one-half the revenue derived from them; (iii) he would not apply for more moorings without Audubon's permission; (iv) he would seek to purchase other moorings already issued for Audubon's account; (v) Audubon would pay for the installation of the moorings and (vi) Audubon would decide on mooring rates.

[39] Mr. Nemser asked Ms. Sheila George to incorporate these points into a simple document so that he could present it to Mr. Sims before he leaves New York. The draft was duly prepared and faxed to Mr. Nemser on 16 July 1999. Mr. Sims alleges that the terms were unilaterally drawn up by Mr. Nemser and that the first time he became aware of any specifics was when he saw them incorporated in the First Amendment which was e-mailed to him on 16 and 19 July 1999 respectively.

[40] On 16 July 1999, Mr. Nemser had a meeting with Mr. Sims. Mr. Nemser sought to clarify the true position with regard to the moorings because of the many inconsistencies. He requested documentary evidence which Mr. Sims agreed to provide. He said that he asked Mr. Sims who had actually been given the right to install the moorings. Mr. Sims' response was that the identity of the applicants was immaterial as they were nominees of the Company which dealt with all operations on the island. Mr. Sims claims that these allegations made by Mr. Nemser are utterly false.

[41] Mr. Nemser amended the draft provided by Harneys. He put it into the style with which he was accustomed and at the same time, ensuring that the efficacy of the agreement was intact. The amended draft was then e-mailed to Mr. Sims on 16 July 1999. When Mr. Nemser did not hear from Mr. Sims, he again e-mailed it on 19 July 1999.

[42] On 2 August 1999, Mr. Sims responded stating, amongst other things:

> "Have reviewed the amendment as proposed and have the following comments: Regarding transfer of title etc. I think this particular step should only be taken once I have managed to at the very least secure transfer of Mr. Anthony's moorings (15) to ourselves…. I am not attempting to be devious but merely commenting on what I believe best at this stage."

[43] Mr. Sims' letter concentrated on the moorings of Messrs. Anthony and Sebastien. Mr. Nemser was not interested in that. His interest was to get the First Amendment commented upon and signed. So, the following day, he wrote to Mr. Sims in very unambiguous terms telling him to concentrate on the draft to the First Amendment rather than the acquisition of Messrs. Anthony and Sebastien's moorings. Towards the end of the letter, Mr. Nemser wrote:

> "My suggestion is to put the Anthony/Sebastien matter aside for the moment and reflect as soon as possible, on the kind of deal you and Dr. Jarecki can put together on the moorings you have approval for. Let me know if we can complete this part now and what specific comments you have on the draft I sent you 2 weeks ago."

[44] On 4 August 1999, Mr. Sims responded in a well-structured two-page letter. Firstly, he apologized for the tardiness of his letter. In respect of the draft agreement, this is what he said:

> "The agreement you have proposed with a 50:50 split of the mooring fees seems very reasonable to me. However, as you have proposed tying these to the tenure of our lease, a not unreasonable term at all, I wondered whether it would be possible to obtain greater security of tenure for us than the current one year by way of a side agreement or such like. Do you think this is reasonable?
>
> ...I see not (sic) other terms which need amending or further considerations (emphasis added)."
>
> The future:
> Valerie and I both wish to play a significant role in the future of the island…
>
> As to my role, I have tended to always be involved in financial, legal, labour, immigration and like matters, while also being responsible for the growing of the business, strategic decision making and the like…. I feel that I have the commitment and talent to be another valuable member of Henry's team and trust that you will agree, I will be most suited to generating and implementation of ideas as this has always been my strong point where details become so important." (emphasis added)".

[45] It seems to me that Mr. Sims was so overjoyed about the whole idea that he was even thinking what role he might play in the growth of Norman Island. A week later, Mr. Sims dispatched another e-mail to Mr. Nemser. It stated:

> "I have spent a lot of time thinking further of your draft agreement and essentially feel that what you propose is fair and reasonable and needs no further refinement. Henry has been very kind to Valerie and I regarding the whole existence of Billy Bones and I guess your e-mail advising that we focus on this relationship rather than the buy-out of Sebastien and Anthony reminded us of where our priorities lie. Please advise Henry accordingly."

[46] In light of this response, Mr. Nemser prepared the final draft for signature. On 13 August 1999, Mr. Nemser e-mailed to Mr. Sims an amended draft (revised to reflect the correct number of moorings) for signature. Mr. Nemser says that it is the version exhibited at Exhibit 12 in Mrs. Sims' affidavit. The e-mail is timed at 3.46 p.m. It is common ground that the draft predicated that the Sims would sign both in their personal capacities and as directors of the Company.

[47] Mr. Sims printed out the e-mail which he and his wife subsequently signed. In the course of printing of the e-mail, the signature section became truncated.

[48] Seventeen minutes later, Mr. Sims faxed back the signed document with a covering letter on his company's letterhead addressed to Dr. Henry Jarecki and not Mr. Nemser. I find it apposite to recite the entire letter. It stated:

> "Dear Henry
>
> I am pleased to enclose the signed amendment to Lease in terms of which the ownership, management of and other matters pertaining to the moorings around Norman Island are governed vis-à-vis ourselves.
>
> Both Valerie and I are thrilled that we have been able to come to this agreement and look forward to proceeding with a stronger understanding between us. (Emphasis added)
>
> I have spoken with Howard today about the jetty etc. and we have no problems relocating the jetty to nearly the knoll.
>
> During your absence over the next 10 days, I will speak to Earl about the installation of the approved moorings and related matters."
>
> Best regards, Dave Sims."

[49] At paragraph 41 of his witness statement, Mr. Sims attempted to explain why he wrote such a cover page. He said that he and his wife had given up on getting a fair deal from Audubon so they signed the First Amendment and wrote the cover page. He said:

> "The cover page of the same date attempted to put a good face on what was really a dark impression for us. The only thing I was thrilled about was that I trusted the Claimant would uphold both the terms and the spirit of the agreement by granting us greater security of tenure on the island and that I could at last put the very unpleasant and unexpected attitude of the Claimant behind me. The whole thing was exhausting and mentally draining for both Valerie and I. My inclusion of Valerie's emotions along with mine in the letter was unfair for she never felt that way nor did she consent to my reference to her so saying in the letter."

[50] Three days later, on 16 August 1999, Mr. Sims again e-mailed Mr. Nemser. He declared:

> "Both Val and I spoke to Henry and Val sent him a short fax to say thank for all he has done. He sounded pleased and explained further that we would be very excited by what will happen from here on. He also invited Val and I to fly with him to Mustique in the near future (mid-September) to get a feel for their operation and get some more ideas. We are very much looking forward to this end and as luck would have it there is a 6 page article on Mustique in the latest edition of Caribbean Travel & Life which I could fax you if you don't have immediate access. ...Val is much more settled now and looking forward to progressing with new developments et al."

[51] In his witness statement, I observe that Mr. Sims had not remarked on this aspect of the evidence. Perhaps, it was an omission. But, it appears odd that Mr. and Mrs. Sims would be ecstatically looking forward to a trip to Mustique with a man whom they allege is so intimidating, domineering, powerful and who has changed their lives into sheer misery by coercing them, thorough his Attorney, to sign the First Amendment, against their will. Maybe, Mr. Sims was still too exhausted and mentally drained when he sent the 16 August e-mail. As for Mrs. Sims, it was her husband who wrote that e-mail and according to her, "he was in his own world". She has now grown up and has learnt a lot the hard way. She now makes her own decisions and is not pressured or forced by anybody into doing anything any more. Besides, she now has her own Counsel to represent her so she now has her own voice.

[52] The document faxed back from Mr. Sims on 13 August 1999 was duly countersigned by Audubon and thus became the First Amendment to the Lease ("The First Amendment").

The First Amendment

[53] The First Amendment regulated the position with regard to all 73 moorings for which permission has been granted. Under the First Amendment, Audubon agreed to pay for the acquisition and installation of the moorings and share the revenue generated. The First Amendment provided that the mooring fees would be divided (after deductions) 50:50 whilst their "Billy Bones" tenancy subsisted, and thereafter, 100% to Audubon. Deductions comprised the Defendants' expenses of collection which was agreed would be met by a sum of $1500 per month and maintenance expenses (to include both actual maintenance expenses and 15% of fees to be set aside for future expenses). In return, the Defendants were to do the following:

a) provide all documents they had filed with the Government relating to their application for the moorings;

b) transfer all interests in the seabed and all right title and interest in the approved application and permits to install moorings to Audubon or its nominee;

c) operate the moorings and faithfully collect the mooring fees as requested by Audubon;

d) maintain appropriate records with respect to the moorings and provide monthly statements of fees and expenses and

e) pending Government's approval or in the event that the Government did not fully approve, hold and maintain all right title and interest in the said moorings as trustee for the benefit of Audubon and acts on its behalf in accord with the rights and obligations set out in the First Amendment.

[54] The First Amendment also records the fact that Audubon had been advised by the Defendants that they or their nominees had secured the approval to install the moorings.

[55] The Claimants allege that the Defendants having agreed to act as Audubon's trustees and agents in respect of the collection of mooring fees, owed fiduciary duties to Audubon including:

a) a duty to account to Audubon for such fees collected in the course of so acting;

b) a duty to maintain a separate account in respect of Audubon's share of mooring fees and

c) a duty to preserve and be ready to produce correct accounts of all dealings and transactions in the course of so acting.

[56] It is the Defendants' case that Mr. and Mrs. Sims did sign the First Amendment but they did so in their capacity as directors of the Company, and not in their personal capacity. Furthermore, that they entered into the First Amendment variously under duress, influence or undue influence.

Subsequent Events

[57] Once agreement had been reached on the terms of the First Amendment matters moved forward with Mr. Sims seeking Audubon's approval to the acquisition and installation of the moorings, as he was required to do under the terms of the First Amendment. In October and November 1999, the first 30 moorings were installed in the Bight, Audubon subsequently reimbursing the costs of the mooring balls and of the installation. Fees in respect of these moorings were collected by the Sims from November 1999 onwards.

[58] On or about November 1999, Dr. Jarecki incorporated a service company, the Second Claimant ("NISC") to own the moorings and for Audubon's operations on Norman Island.

Mr. Sims undertook to incorporate and manage the company. Dr. Jarecki directed that monies due to Audubon should be paid to NISC.

[59] Towards the end of December 1999, Mr. Sims produced a standard moorings receipt which included the words "all moorings are owned and maintained by NISC. "Billy Bones" acts as agent for the collection of overnight rental fees."

[60] Mr. Sims began to produce mooring fee collection reports, albeit late. By 30 August 2000, he had reported to Audubon for the period up until the end of July 2000. Mr. Sims wrote that he regretted the delay in getting the reports and said "please be assured this had been due only to pressure of work…and not because of any willful intention to keep you in the dark".

[61] The total amount due to Audubon/NISC was $61,902. Some 4½ months later, on 12 December 1999, Mr. Sims paid over Audubon's share of the mooring fees for the period from inception to end of July 2000.

The Second Amendment

[62] Towards the end of 2000, Dr. Jarecki entered into negotiations with Mr. Sims about the rent to be paid if the Lease was renewed. These discussions led to the Second Amendment, which was entered into on 23 February 2001. The Second Amendment provided that, with effect from 1 April 2001, the yearly rent would be the greater of $100,000 p.a. (an increase by 1110%) or 10% of the gross revenues from the Defendants' operations on Norman Island (excluding the moorings revenues). The Second Amendment also provided that the Defendants would (i) maintain appropriate books and records in respect of the revenues; (ii) provide Audubon with monthly statements on or before the 15th of the following month and (iii) Audubon would have the right to inspect the books and records on reasonable notice.

[63] In February 2001 a further 15 moorings were installed. Again, the costs of the mooring balls and their installation were subsequently reimbursed by Audubon.

Further payments in respect of the moorings

[64] In the meantime, Mr. Sims continued to submit accounts, albeit late, both in relation to what was due to Audubon/NISC for its share of mooring fees and for what was due to the Defendants for the expenses they had incurred on behalf of Audubon/NISC.

[65] On or about 4 September 2001 the Defendants paid to Audubon US$83,793 in respect of the moorings fees due to it under the terms of the First Amendment for the period 1 August 2000 to 18 August 2001 (the date when "Billy Bones" closed for the hurricane season). In fact, as Mr. Sims subsequently accepted, the amount had been miscalculated and a further US$9,129 was in fact owing to Audubon. This further sum was taken into account when a balancing payment of US$43,091 was made by Audubon on 19 October 2001 to reimburse outstanding expenses in relation to the moorings. With this payment, the accounts between Audubon and the Defendants were settled as at 18 August 2001.

[66] "Billy Bones" reopened at the beginning of October 2001 when Mr. Sims began once again to collect mooring fees.

Events of early 2002

[67] On 16 January 2002, Mr. Sims sent to Audubon a letter from Government informing of Government's decision not to transfer the seabed lease to NISC. He also telephoned Dr. Jarecki to relate that since the Government did not approve the transfer he owed no further obligations towards Audubon or NISC with respect to the moorings. Several conversations ensued between Mr. Sims, Dr. Jarecki and Mr. Nemser in which it was explained to Mr. Sims that this was not the case pursuant to the provisions of the First Amendment.

[68] On 17 January 2002, Mr. Sims provided reports for the moorings fees collected between 1 October and 31 December 2001 and stated that US$17,886 was due to NISC. When analyzed by Mr. Hartmann, it was revealed that Mr. Sims had repeated the miscalculations. Mr. Sims however gave an explanation in his defence.

[69] In view of these developments, Audubon took the decision, as it was entitled to do under the terms of the Lease, that it would not, at the end of the current lease, renew the tenancy. So, towards the end of February 2002 notices to quit were served on the Defendants. The Sims left peacefully at the end of March 2002. At the same time, they were notified of the number of breaches of covenants under the lease which had come to Audubon's attention.

Events following non-renewal of the tenancy

[70] Mr. Sims continued to collect the mooring fees despite the tenancy not being renewed. Audubon alleges that this situation was envisaged under the First Amendment, which provided for this contingency in the event the Lease was not renewed, Audubon would not be required to share the fees with the Defendants.

[71] Audubon alleges that contrary to the terms of the First Amendment, Mr. Sims failed either to provide statements of account to Audubon or pay to it any part of the mooring fees that were being collected.

[72] Audubon asserts that in accordance with the terms of the First Amendment, the amount payable to Audubon following the determination of the Company's tenancy on 31 March 2002 was 100% of the mooring fees (less expenses) from 1 April 2002.

[73] The Defendants contend that Mrs. Creque and Mrs. Sims had been given permission by the Government to install moorings and the right to collect mooring fees was accordingly vested in them and they at no time agreed to act as agent for the Claimants or to hold their licence in trust for Audubon. The Defendants next contend that although Mrs. Creque gave her consent to the Department of Natural Resources of her rights to install the said moorings to the Claimants such consent was expressly made conditional upon the approval by the Government of such transfer. By letter dated 9 January 2002, the Government refused permission to Mrs. Creque and Mrs. Sims to transfer their rights to the Claimants. Accordingly, the licence to place moorings and collect fees remained vested in part in Mrs. Creque. In light of that, the Claimants could not have become entitled

to 100% of the mooring fees. The Defendants deny that the Claimants are entitled to any further accounting or to any further payments under the Lease or any purported amendment thereto or that any duties were owed by them to the Claimants after the determination of the Lease and the vacation of the leasehold property by the First Defendant on 31 March 2002.

[74] By a letter dated 20 November 2002, Audubon withdrew its request that the Defendants collect mooring fees. Notwithstanding this letter, the Defendants continue to collect mooring fees but not to account for them to Audubon.

[75] This led Audubon to apply to the Court on 5 December 2002 for the appointment of a receiver in relation to the 45 moorings referred to above. The receiver remains in place pending the determination of the action.

[76] During the course of 2002, in further breach of the First Amendment, the Defendants had without Audubon's knowledge or consent installed the remainder of the 73 moorings, the subject of the First Amendment. The Claimants allege that contrary to the terms of the First Amendment, the Defendants have not accounted to Audubon for any mooring fees generated by these moorings.

[77] In addition, the Claimants allege that in further breach of the requirements of the First Amendment, the Defendants have failed to supply any mooring statements for the period from 1 January 2002 to date (those that they supplied for the period from 1 October to December 2001 were inaccurate as Mr. Sims had continued to perpetuate the same error in calculation he had been alerted to and had acknowledged before).

The main issues

[78] The Defendants have filed separate defences which give rise to the following issues:

a) Who are the parties to the First Amendment?

b) If Mr. and Mrs. Sims are not parties to the First Amendment, are they nonetheless bound by its terms by virtue of the doctrine of estoppel?

c) Was the approval obtained from the Government assignable?

d) Are the mooring fees fruits which do not arise under the permission given by Government?

e) Was the First Amendment entered into under duress?

f) Was the First Amendment entered into under the undue influence of Audubon?

g) (By Mrs. Sims) –Was the First Amendment entered into under the undue influence of Mr. Sims?

h) Was the First Amendment intended to circumvent Government's approval?

i) Do the obligations under the First and Second Amendments continue in force following the determination of the Lease on 31 March 2002?

Parties to the First Amendment?

[79] It is the most basic of legal principles of contract law that a contract cannot generally confer rights or impose obligations arising under it on any person except the parties to it.[3]

[80] The Defendants argued that neither Mr. Sims nor Mrs. Sims is a party to the First Amendment. Mr. Sydney Bennett QC appearing as Counsel for the Company and Mr. Sims argued that under the terms of the Lease, the tenancy is granted to "Treasure Island" which is described as the First, Second and Third Defendants collectively. Thus, the three Defendants would have been the primary obligors to the Lease. However, it is clear from

[3] Halsbury's Laws of England , 4th Ed. Vol. 9, para. 329. Some of the exceptions, for example agency, trust, assignment have not been pleaded or proved.

the signatures appended to the document that Mr. Sims and Mrs. Sims signed as guarantors of the obligations of the Company, a requirement that would have been completely unnecessary had they been primarily liable. Mr. Bennett submitted that the statement of claim is framed on the basis that the Company is the Lessee, and Mr. Sims and Mrs. Sims are merely guarantors. Learned Queen's Counsel next submitted that in any event, the Lease was crafted by the Claimants and any ambiguities must be resolved *contra preferentem* against them.

[81] I agree with Mr. Bennett that any ambiguities in the First Amendment should be construed *contra preferendum* against Audubon because it put the document forward. That is trite law. However, to the extent that this statement is directed towards the document's signature lines, and thus the capacity in which Mr. Sims and Mrs. Sims contracted, it is with respect, incorrect. It is of course the Claimant's main case that Mr. Sims and Mrs. Sims contracted in both their personal capacities and on behalf of the Company, their signatures being the equivalent of a clause which says "we David Sims and Valerie Sims agree to this contract in our personal and corporate capacities." The Claimants argue that if there is any ambiguity about this, it is one created by Mr. Sims and Mrs. Sims as a result of the manner in which Mr. Sims modified the signature lines and the manner in which they signed the document. I agree with the Claimants that applying the *contra preferendum* principle, that ambiguity should be resolved against Mr. Sims and Mrs. Sims; that is, binding them in their personal as well as corporate capacities.

[82] Mr. Bennett QC next submitted that the First Amendment to the Lease confirms that the parties to the Lease are the Company and Audubon. This Amendment, as in the Lease defines the Defendants collectively, in this instance as "Treasure". He contended that it is plain from the manner of execution of the document that the obligations are those of the Company only. The signature is that of the Company only, which name appears in full capitals. Mr. and Mrs. Sims signed as authorized signatories on behalf of the Company.

[83] Mr. Bennett ingeniously submitted that the First Amendment recites that "Treasure has advised Audubon that it or its nominee…." The word "it" according to Mr. Bennett, is

singular and suggests an inanimate object and it could only refer to the Company. This situation, together with the fact that the document is executed by the Company only, emphasize the fact that the obligations in the First Amendment fall only on the Company. The testimony of Mr. Sims is that his intention was that only the Company was to be bound by the Amendment, and that he deliberately adjusted the signature section of the document to achieve this objective.

[84] Mr. Bennett QC advocated that the position is elucidated by the fact that in the Second Amendment, the three Defendants are again collectively referred to as "Treasure" but Mr. and Mrs. Sims signed as guarantors. He reiterated that this would be unnecessary had those Defendants been primary obligors. Learned Queen's Counsel argued that by looking at the Lease as a whole and bearing in mind that it must be construed *contra preferentem* against the Claimants, it seems reasonably clear that:

a) Mr. Sims and Mrs. Sims are secondary obligors in respect of the Lease and the Second Amendment and are accordingly sued prematurely; and

b) Mr. Sims and Mrs. Sims are not bound by the First Amendment, either as guarantors or otherwise.

[85] Mr. Gerard Farara QC appearing as Counsel for Mrs. Sims argued along the same vein as Mr. Bennett but with some embellishment of his arguments. He submitted that Mrs. Sims was not named as a party and she did not sign as a party to the First Amendment. The document visibly states that it is an amendment to the Lease between THE TREASURE ISLAND COMPANY LIMITED (collectively with David and Valerie Sims "Treasure") and AUDUBON HOLDINGS LIMITED ("Audubon"). According to Mr. Farara, the parties are named in full capitals and the reference to David Sims and Valerie Sims is merely descriptive rather than definitive. The reference is to the Lease to which Mrs. Sims is not a party. Learned Queen's Counsel submitted that Mr. Nemser agreed that Mrs. Sims is not a party to the Lease and that neither Mr. Sims nor Mrs. Sims was Audubon's tenant at Norman Island. The First Amendment does not attempt to bring in new parties to the

Lease Agreement nor could it validly do so without an express statement of intention of the new parties to be bound by the Lease and the demonstration of a clear intention to create legal relations with the existing parties.

[86] It is the contention of Learned Queen's Counsel that there was never any negotiation with Mrs. Sims as admitted by Dr. Jarecki and Mr. Nemser although they were both aware that Mrs. Sims was a licensee. Mr. Nemser alleged that whoever was the licensee was Treasure's nominee. Mr. Farara QC attractively submitted that Mrs. Sims never told anyone that she was holding the licence as nominee for Treasure since no-one was even consulting her about her licence. Her evidence is clear that she did not even understand what "nominee" or "trustee" meant. It is submitted that Mrs. Sims was not a party to the First Amendment (nor the Lease) and so could not make a representation that she was Treasure's nominee.

[87] Mr. Farara QC argued that it is manifestly clear that Mrs. Sims signed as an officer for and on behalf of Treasure and not as a party to the First Amendment. He next argued that the First Amendment does not state who are the nominees. What we do know, says Mr. Farara is that it could not be Mrs. Sims because it is the Claimants' case that "Treasure" included the Company, Mr. Sims and Mrs. Sims and it was Treasure who was representing that it had nominees.

[88] At first blush, the arguments of Mr. Bennett and Mr. Farara appear attractive. But in order to decide who are the parties to the First Amendment, it is important to go a step further to consider two things namely (i) what the First Amendment was intended to achieve and (ii) the conduct of the parties before any dispute arose.

[89] Incontrovertibly, the First Amendment was intended to deal with the transfer of all mooring rights granted by the Government.

[90] Mr. Moverley Smith QC submitted that the First Amendment uses the phrase "Treasure" to define the Company, Mr. Sims and Mrs. Sims collectively. According to Mr. Nemser, based

on what Mr. Sims had told him that the Applicants were nominees of the Company, and also to cover the possibility that what he had been told was wrong, he used a broad definition of "Treasure" to include both the Company and each of Mr. and Mrs. Sims and then employed that defined term in the sentence "Treasure as advised Audubon that it or its nominee …."

[91] The cover page of the fax of 13 August 1999 from Mr. Sims to Dr. Jarecki which enclosed the signed First Agreement read:

> "I am pleased to enclose the signed amendment to Lease in terms of which the ownership, management of and other matters pertaining to the moorings around Norman Island are governed vis-à-vis ourselves.
>
> Both Valerie and I are thrilled that we have been able to come to this agreement and look forward to proceeding with a stronger understanding between us."

[92] Mr. Moverley Smith QC asserted that these paragraphs could only have been written on the basis that Mr. Sims and Mrs. Sims had entered into an agreement with Audubon.

[93] Later on, both Mr. Sims and Mrs. Sims treated the First Amendment as being effective to transfer rights to Audubon and thus an agreement that bound Mrs. Sims. In an e-mail dated 2 January 2001 signed off by both Mr. and Mrs. Sims, they stated:

> "Shortly after the conclusion of our current lease, and only weeks after we were advised by Government of their approval for our Moorings Application, we agreed to hand over to Audubon, the rights to 73 moorings. This we did on the understanding and expectation that it would form the basis of a long term business and personal relationship with you. The arrangement to give up the moorings in return for sharing the revenue derived from this source was, and still is, a very significant gesture of goodwill on our behalf…
>
> Many thanks, David and Valerie."

[94] I agree with the Claimants that this e-mail could only have been written on the basis that Mr. Sims and Mrs. Sims were parties to the Agreement: how else could they (as they state) have agreed to hand over the mooring rights to Audubon?

[95] So also are Mr. Sims' e-mails of 21 February 2001 and 22 April 2001. In the former, Mr. Sims wrote thus: "our decision to hand over the moorings, served largely as a tool to pressure us…." And in the latter "…having our gift of the moorings turned against us…." The Claimants asserted that if Mr. Sims and Mrs. Sims had not been parties to the First Amendment, they could never have described its effect in these terms.

[96] Mr. Moverley Smith QC succinctly submitted that Mrs. Sims' actions following the execution of the First Amendment are equally consistent only with her considering herself bound by its terms, for example, applying to the Government to transfer the moorings to the Second Claimant, NISC. I agree.

[97] The evidence of Mr. Sims that he deliberately adjusted the signature section of the document to achieve the objective of him and Mrs. Sims not being parties to the Amendment is in my opinion not only fanciful but dishonest. If Mr. Sims or Mrs. Sims did not wish to be parties to this Amendment, why did they not say so? But having adjusted the signature section, it does however provide confirmation that he understood that the First Amendment, as drafted by Mr. Nemser, did provide for him and his wife to be parties. This is also consistent with Mrs. Sims' evidence in her first affidavit filed in the interlocutory proceedings that Mr. Nemser's draft had them as parties.

[98] It seems to me that the amendment Mr. Sims made to the document did not remove his or his wife's names but simply enabled them to sign once both personally and on behalf of the Company. I agree with the Claimants that if the intention had been simply to sign on behalf of the Company, Mr. Sims would not put anything below the line.

[99] Learned Queen's Counsel for the Claimants submitted that it is essential to compare the Lease and the Second Amendment. In both cases the document provides for the Company and Audubon to execute the documents simply against the word "By" with no further elaboration: in particular there is no stipulation as to who is to sign. The only purpose of providing any stipulation would be to limit the capacity in which the signatory signed, e.g. by adding the word "director". According to Mr. Moverley Smith, no purpose is

served by adding the words "David & Valerie Sims" unless it is to indicate that they are signing both for the Company and in a personal capacity. Once again, I find myself in agreement with Mr. Moverley Smith.

Estoppel

[100] Audubon submits that in the event that the Court were to find that Mrs. Sims is not in fact a party to the First Amendment, then it relies on two different estoppels: estoppel by representation and propriety estoppel.

[101] Mr. Moverley Smith QC intimated that the estoppel by representation which arose by virtue of the representation made by Mrs. Sims by her conduct in signing the First Amendment that she was agreeing to the statement in the First Amendment that "Treasure or its nominee has secured appropriate approval for an application to install fixed moorings in the seabed in the seabed surrounding Norman Island."

[102] Mr. Farara QC argued that there was no misrepresentation to Audubon as at all times, Audubon fully well knew that the Company did not have a licence to install the moorings and that Mrs. Sims was a licensee. He submitted that Audubon knew the truth and so, it could not be misled to the contrary.

[103] Estoppel by representation is essentially a rule of evidence. Its effect was described by Lord Birkenhead in Maclaine v Gattey[4] as follows:

> "Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his detriment, A is not permitted to affirm against B that a different state existed at the time."

[104] It is plain from the above that Mrs. Sims is now estopped from denying the terms of the First Amendment.

[4] [19121] AC 376 at 386.

[105] Secondly, the proprietary estoppel that arose by virtue of the fact that Mrs. Sims was aware that Audubon was relying on the terms of the First Amendment in relation to how the moorings were to be owned and managed. She stood by whilst Audubon expended money on the moorings, for example, paying for the mooring balls and its installation. Consequently, Mrs. Sims is now estopped from denying the terms of the First Amendment.

[106] The argument raised by Mr. Sims in response is that Audubon could not have relied on the statement in the First Amendment because the representation was compelled by Audubon which had full knowledge of the facts:

a) It is clear from the outset that Mr. Sims had indicated to Audubon that Mrs. Sims had received the relevant permission from the Government to install moorings off Norman Island;

b) The first affidavit of Dr. Jarecki, filed in this action on 4 December 2002 stated:

> "…Mr. Sims revealed to me that his wife Valerie had some years earlier applied for, and had recently received approval from Government to install 60 odd moorings in the Bight off Norman Island…."

c) By e-mail of 14 June 1999, Mr. Sims wrote:

> "Valerie has received approval for 60 moorings in the Bight…."

d) By letter dated 18 June 1999, he wrote:

> "Valerie applied for moorings in the Bight over 3 ½ years ago and they were approved quite recently on 30 March 1999."

e) By e-mail on 30 June 1999 to Mr. Nemser, Mr. Sims said:

> "…Valerie has received written approval for a further 60 moorings in the Bight, 8 in Privateers Bay and 5 in Soldiers bay. Her application was submitted over 3 years ago."

[107] Mr. Bennett QC argued that coupled with this, Audubon made its own inquiries and approached the Government through Ms. George who advised it that Mr. Sims and Mrs. Sims had gotten permission to install moorings off Norman Island. It is factually correct that

permission had been granted to Valerie Creque and Valerie Sims. Mr. Bennett argued that in any event, Ms. George testified that in order to receive such approval Mrs. Sims had to produce her family tree and that was the clearest possible evidence that permission had been given to her personally and not on behalf of any other person or entity.

[108] Mr. Bennett submitted that there is no representation in any e-mail or any other communication that the Company had anything to do with permission to install any moorings.

[109] The "full knowledge" in question is said to be that Audubon was told by Mr. Sims that Mrs. Sims had applied for the Moorings.

[110] Whilst Mr. Nemser had been told in writing on 14 June 1999 that Mrs. Sims obtained the approval, and a fax to the same effect was sent to Smith Gore on 18 June 1999; it is also true that on two occasions Mr. Sims was recorded as orally stating that he had obtained the mooring rights (see Mr. Howard Watson's report on 28 May 1999 and Mr. Nemser's e-mail of 14 July 1999)

[111] Further, Audubon's own lawyers, Harneys who investigated the position were under the impression, albeit a wrong one, that the application had been made by Mr. Sims and Mrs. Sims.

[112] Because of the many inconsistencies of information, it was not surprising that Mr. Nemser was confused as to the true position and sought further clarification from Mr. Sims at a meeting on 16 July 1999. Mr. Nemser testified that it was at that meeting that he was told by Mr. Sims that approval had been given to nominees of the Company. Would not all of this been simpler had Mr. Sims produced the approval?

[113] Mr. Sims deposed that he gave the approval letter to Audubon prior to 13 August 1999 when the First Amendment was signed. There is no documentary evidence to verify this.

Further, if the approval letter had been disclosed, it is unthinkable that if it had been received by Mr. Nemser or Dr. Jarecki, they would not have mentioned it.

[114] It is my firm view that Audubon knew nothing beyond the befuddled picture painted by Mr. Sims. The 16 July meeting did not assist in the illumination of the confusion which led to the eventual wording of the First Amendment.

[115] The representations made in the First Amendment were not compelled by Mr. Nemser as Mr. Bennett suggested. They reflected what Mr. Nemser had been told. Furthermore, if there were any misrepresentation, Mr. Sims had every opportunity to correct it. This he did not avail himself of.

[116] It is intimated on behalf of Mr. Sims and the Company that the idea of the Applicants holding the mooring rights as nominees for the Company is illogical because it is the holders of the rights who need limited liability. Audubon says that in fact, it is nothing of the sort: it is the operator of the moorings which contracts with the customer which needs limited liability; not the legal owner. This is absolutely correct.

[117] There is also suggestion that Audubon is not entitled to raise the equitable relief of estoppel because it does not come to Court with clean hands. It is alleged that Audubon had every intention of taking away the moorings from Mrs. Sims without compensation and under pressure and threats and by every coercive means at hand. In my opinion, there is no basis for any allegation of impropriety on the part of Audubon.

[118] Audubon also raises the argument that the terms it proposed to the Defendants which resulted in the First Amendment were more favorable than those proposed by Mr. Sims to Mr. Anthony, which, it would appear, at one stage at least, he was minded to accept as reasonable. It is worth noting that the terms which Mr. Sims proposed to Mr. Anthony did not include any capital payment for the Moorings themselves.

[119] Audubon submitted that the Defendants were given every opportunity to comment on the terms of the First Amendment and did so. They were pleased with the reasonableness of the terms. They choose to accept the terms proposed because they needed to remain on Norman Island. They knew their status. They knew that a commercial risk was involved in starting business on somebody else's land without permission as they did.

Assignment

[120] In his written skeleton argument, Mr. Bennett QC comprehensively dealt with the various licences and whether or not they are assignable. I can do no better than to gratefully adopt his submissions. However, the issue whether the approval given by Government for the installation of the moorings is in fact assignable, is irrelevant because the action does not seek to enforce any assignment of the approval.

[121] In the event that I am wrong to come to this conclusion, I shall briefly deal with a licence coupled with an interest. It is common ground that a licence coupled with an interest is assignable; as is a right created by a contractual licence. A further category of licence which is assignable is one coupled with an equity.

[122] Under the terms of the approval, Government licensed the applicants to install moorings at locations to be determined by a third party, namely the Conservation and Fisheries Department, with a promise, once the moorings were installed, that a lease would be granted in accordance with the Marine Estates Policy.

[123] As Mr. Moverley Smith QC correctly submitted, properly construed, the approval contains (a) a licence to install moorings and (b) a unilateral contract comprising an offer by the Government that if the moorings are installed, it will grant a lease of the moorings in question. Further, Government charged and was paid fees as if it had granted a lease. There is therefore, a licence coupled with an interest, namely the contract to grant a lease if the moorings are installed. Contrary to what was submitted on behalf of Mr. Sims, because the location of the moorings is determined by a third party and the terms of the

lease are in standard form, there is sufficient certainty as to the subject matter of the contract.

[124] On the other hand, the approval can be viewed as a contractual licence (a licence to install moorings, subject to the right for Government to require their consequent removal on reasonable notice) or a licence coupled with an equity (the applicants installed the moorings at the invitation of the Government and with the promise by Government that a lease should be granted.

Fruits

[125] Mr. Bennett QC accepted that a party to a non-assignable contract may agree with third parties for the fruits of that contract.[5] He however argued that in the present case, there is no contract between the Government and the licensees the "fruits: of which were assignable under the First Amendment to the Lease as there was no contractual right to install moorings, merely a privilege to do so pending the grant of a lease.

[126] It is suggested that the collection of mooring fees is without the approval given by Government but as Mr. Moverley Smith QC correctly pointed out, no consequence is suggested. Indeed, this is not shocking for unless there is a contractual provision prohibiting an assignment of the fruits, then clearly a person can agree that he will account to another for the fruits of an activity, such as the collection of mooring fees.

[127] This issue needs no further elaboration.

Duress

[128] The Defendants have pleaded that they entered into the First Amendment variously under duress, influence or undue influence. If established, duress and undue influence would give rise to a right to avoid the First Amendment (influence does not give any such right or remedy). The Claimants argued that the Defendants have not pleaded and cannot now plead that the First Amendment has been avoided.

[5] Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd (1994) 1 A.C. 85 , 104.

[129] In any case, assuming (which Audubon denies) that a right to avoid the First Amendment did arise, that right is lost if the First Amendment is subsequently affirmed by the Defendants once they were no longer under duress or undue influence.

[130] In their defence, the Company and Mr. Sims pleaded that the alleged threats are:

1. Mr. Nemser advised Mr. and Mrs. Sims that unless the rights held by Mrs. Sims and Valerie Creque were transferred to Audubon, Audubon would make representations to the Government of the British Virgin Islands or take whatever action it deemed necessary to prevent the installation of any moorings by the Defendants;

2. Dr. Jarecki made it clear to Mr. and Mrs. Sims that unless the agreement was signed in the terms dictated by Audubon, the Company's lease would be terminated immediately without notice or compensation, in breach of its terms.

[131] In the Further Information provided by the Company and Mr. Sims, it is further alleged that Mr. Nemser also told Mr. Sims that unless Mrs. Sims agreed to turn over to Audubon any right or interest she may have had in installing the moorings, the Company's lease would be terminated immediately and without notice.

[132] At paragraph 27 of his witness statement, Mr. Sims alleged that Mr. Nemser told him in a telephone call in early July 1999 that:

1. "we" would not receive approval for any improvements to the land until the moorings had been given to Dr. Jarecki;

2. unless the moorings were given to Dr. Jarecki the Lease to the Company would be terminated immediately without notice;

3. if the moorings were not transferred, representations would be made to the Government to revoke the approval Valerie Sims had been given and to prevent the installation of any moorings.

[133] The Defendants submitted that the Claimants have not denied the essential points of the foregoing paragraph. In addition, at paragraph 17 of his witness statement, Mr. Nemser said that he told Mr. Sims that he should have disclosed the fact that they had made the application. He also told Mr. Sims that he thought that the failure to tell Dr. Jarecki about the moorings was a serious case of material non-disclosure and expressed the view that it gave Audubon good grounds for rescinding the lease, if it chose to do so.

[134] The Claimants contended that in relation to these threats, that even if they had been made (which is denied):

1. under the terms of the Lease, Audubon had a complete discretion whether or not to agree to improvements to the land;

2. the material non-disclosure of the moorings application did give grounds for rescinding the Lease;

3. as the owner of Norman Island Audubon was quite entitled to make representations to the Government that it should revoke the approval, particularly bearing in mind that moorings in the Bight would interfere with access to the island.

[135] Mrs. Sims pleads in the Further Information supplied in relation to her Defence that she did not speak to either Mr. Nemser or Dr. Jarecki about the moorings. No allegation has been made that any document (whether from Audubon, Mr. Nemser or Dr. Jarecki) contained a threat which induced the Defendants to enter into the First Amendment. As a result, Mrs. Sims can provide no evidence as to the threats allegedly made.

[136] To give validity to a contract the law requires the free assent of the party who is to become liable under it. It therefore allows him to avoid any promise extorted from him by terror or violence, whether on the part of the person to whom the promise is made or that of his agent. Contracts made under such circumstances are said to be made under duress. Duress is the pressure of the big stick on the bottom line.

[137] In order to prove duress it is necessary for the Sims to show that the pressure brought to bear on them or the threat made to them was illegitimate. It is insufficient merely to point to an inequality of bargaining power or to the fact that one party brought commercial pressure to bear on the other, for "commercial pressure, in some degree, exists wherever one party to a commercial transaction is in a stronger bargaining position than the other party."[6]

[138] In Pao On and Others v Lau Yiu Long and another[7], the Privy Council recognized economic duress as a principle though it was not made out on its facts. A threat to carry out something within one's rights does not amount to duress.[8] In the case of Atlas Express Ltd v Kafco (Importers and Distributors) Ltd [9], it was held that where a party is forced to renegotiate the terms of a contract to his disadvantage and has no alternative but to accept the new terms, his apparent consent to the new terms is vitiated by economic duress. Undoubtedly, Atlas Express followed Pao On but turned on its own facts.

[139] The Claimants submitted that the factual position as established by the documentary evidence and cross-examination is as follows:

1. The Defendants chose to establish "Billy Bones" on Norman Island without the consent of the then owners, Creque Estates. In doing so, they took a commercial risk that they might be evicted from the land and thus lose the entirety of their money they had invested in the project.

[6] Universe Tankships of Monrovia v International Transport Workers Federation [1983] 1 AC 366 at 384 per Lord Diplock.
[7] [1980] AC 614 at 635.
[8] Alec Lobb v Total Oil [1983] 1 WLR 87.
[9] [989] 1 WLR 87.

2. At the time Audubon bought the Island in March 1999, at best the Defendants had security of tenure until the end of October 1999.

3. Audubon treated the Defendants very generously in granting the Company the Lease at a very low rent and agreeing to pay compensation in relation to work that had been carried out previously, as well as for any future work for which permission had been given, if Audubon decided not to renew the annual Lease in the first five years and the Company was not in default.

4. The Defendants were anxious to foster a good relationship with Audubon in order to persuade it to renew the Lease.

5. It was Mr. Sims' own view that the Government should be approached to see if the leases granted to Messrs. Anthony and Sebastien could be revoked.

6. Nothing was paid by any of the Defendants for the approval from Government.

7. Mr. Sims in his e-mail of 11 August 1999 spoke to the fairness and reasonableness of the First Amendment.

8. The Defendants were not pressured to sign up the First Amendment. Mr. Sims had from since 16 July 1999 to consider it.

9. In the fax cover page of 13 August 1999, Mr. Sims wrote that both he and Mrs. Sims were "thrilled that we have been able to come to an agreement."

10. In an e-mail of 16 August 1999 to Mr. Nemser, Mr. Sims and Mrs. Sims referred to a fax in which they thanked Dr. Jarecki for all he had done.

[140] From the foregoing, it cannot be disputed that the Defendants had a strong commercial incentive to agree to the First Amendment and that the terms of the Amendment were fair

and reasonable in all the circumstances. It is inconceivable that the Defendants were coerced against their will to enter into the First Amendment. The contrary is true: that they entered into the First Amendment voluntarily.

[141] Mr. Farara QC submitted that the threat to rescind the lease on the ground of material non-disclosure was improper and unlawful as Mrs. Sims did not have a duty to Audubon to disclose her dealings with the Government. The other two Defendants make the same allegation.

[142] There is no doubt that Mr. Nemser genuinely held the view that there should have been disclosure. The legitimacy of this approach as a matter of BVI Law (and indeed as a matter of common law with which Mr. Nemser is familiar) is wholly justified. I am of the view that the Defendants were under a duty to disclose the fact that the application was made. It was a misrepresentation not to disclose this fact which was of fundamental importance to the Claimants. As I earlier stated, the general rule is that mere non-disclosure does not constitute misrepresentation, for there is, in general, no duty on the parties to a contract to disclose material facts to each other, however dishonest such non-disclosure may be in particular circumstances. So, for example, in Percival v Wright[10], a company director who had inside information about certain facts likely to enhance the value of the company's shares was held to be under no duty to disclose this fact to a shareholder from whom he bought some shares. For the same reason it is not possible to set up an estoppel on the basis of an omission to disclose unless a duty to disclose can be established in the particular circumstances of the case. But there are exceptions to the rule, namely, where the contract is within the case of contracts *uberrimae fidei*, where there is a fiduciary relationship between the parties, and where failure to disclose some facts distorts a positive representation. In my judgment, the present case falls within the exception. This area of law is well settled and as such, it is unnecessary for me to go into any lengthy discourse except to state that it is sometimes said that a misrepresentation will not be effective to ground relief in law unless it was material, in the sense that a reasonable man would have been influenced by it in deciding whether to enter into the contract.

[10] [1902] 2 Ch. 421.

Undue Influence

[143] As far as undue influence is concerned, the Claimants asserted that the position here is even more hopeless than duress. As to undue influence, where, as in the instant case, there is no special relationship between the parties such as to give rise to a presumption of undue influence, the onus is on the person seeking to avoid the transaction to establish actual undue influence.

[144] Mr. Moverley Smith QC argued that undue influence has not been pleaded by Mr. Sims or the Company. More importantly though, in relation to Mrs. Sims, she has not pleaded anywhere in her defence that she entered into the First Amendment as a result of undue influence of anybody other than Audubon. So, there is no pleading that Mr. Sims exercised undue influence over her and therefore, that part of the defence must fall away. I agree entirely.

[145] The essence of undue influence is the unconscionable abuse of influence that one person has over another applied so as to preclude the exercise of free and deliberate judgment. It has a connotation of impropriety. In the eye of the law, undue influence means that influence has been misused.

[146] The principle justifying the court in setting aside a transaction for undue influence can now be seen to have been established by Lindley L.J. in Allcard v Skinner[11]. It is not a vague "public policy" but specifically the victimization of one party by the other. It was stated by Lindley L.J. in a famous passage at pp. 182-183:

> "The principle must be examined. What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? Or is it that it is right and expedient to save them from being victimized by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The courts have always repudiated any such jurisdiction. *Huguenin v Baseley*[12] is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance

[11] [1887] 36 Ch.D. 145
[12] (1807) 14 Ves. Jun. 273

> and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud."

[147] Subsequent authorities support the view of the law as expressed in Allcard v Skinner.

[148] In Lloyds Bank Ltd v Bundy[13] it was accepted that the relationship between banker and customer is not one which ordinarily gives rise to a presumption of undue influence: and that in the ordinary course of banking business a banker can explain the nature of the proposed transaction without laying himself open to a charge of undue influence.

[149] The modern tendency is to classify undue influence under two heads, namely Class 1 (actual undue influence) and Class 2 (presumed actual influence).

[150] In Royal Bank of Scotland v Etridge (No. 2)[14], Lord Hobhouse of Woodborough at page 481 stated:

> "Actual undue influence is an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant party to enforce his legal rights against the other. It is typically some express conduct overbearing the other party's will."

[151] Actual undue influence consists of wrongful or unconscionable conduct by way of duress, coercion, excessive pressure, domination, victimization, threats, blackmail, misrepresentation, cheating, fraud or other "insidious techniques of persuasion."

[152] It does not depend upon some pre-existing relationship between the two parties though it is most commonly associated with and derives from such relationship. He who alleges actual undue influence must prove it.

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[13] [1975] Q.B. 326
[14] [2001] 4 All ER 449

[153] It is common ground that Mrs. Sims had no contact with Audubon or Mr. Nemser during the relevant period leading up to the execution of the First Amendment. The climax of Mrs. Sims' case on undue influence is accentuated at paragraph 65 of her closing submissions wherein she stated:

> "I did not want to sign this document. Earl leaned on Dave and Dave leaned on me….I was not happy. I was never happy….I was pressured to sign by my husband. I knew my landlord wanted me to sign, his New York lawyer wanted me to sign and my husband wanted me to sign. I felt like a rock and a hard place. If I signed, I would lose my moorings. If I didn't I will lose my restaurant. …I did what my husband told me to do. I did not have the strength to stand up then. I have it now. I learnt the hard way. I now have my own legal counsel to represent me."

[154] The Claimants stated that even if this were true –and the manner in which Mrs. Sims gave evidence would suggest that it is unlikely to have been – it is not a case she can advance in her pleadings. I have already found that Mrs. Sims is not a credible witness and Mr. Moverley Smith QC is correct to say that it is too late in the day to now advance this.

[155] The Claimants say that in any event, Mrs. Sims was given every opportunity to comment on the First Amendment and did so, three times. It is also a fact that Mrs. Sims had previously engaged lawyers to act on her behalf when legal issues became too technical. She could have done the same in this case if the necessity had arisen. There is no general obligation for a party in negotiations with another to advise that other of the need to obtain independent legal advice.

[156] Learned Queen's Counsel, Mr. Farara relied heavily on the judgment of Lord Denning MR in Lloyds Bank Ltd v Bundy[15]. According to Mr. Moverley Smith, QC, Lord Denning's judgment was the minority judgment and was not followed. This is true.

[157] Moreover, even if the pleading point could be overcome and undue influence exercised by Mr. Sims could be asserted, there is no analogy to be made with the line of cases which culminates with the decision of the House of Lords in Etridge's case. In each of those

[15] [1975] Q.B. 326

cases, the debtor husband has unduly influenced his wife to stand as surety on a loan for the benefit of his business. It is the debtor-surety relationship which is the hallmark of those cases.

[158] In the instant case, Norman Island was Mrs. Sims' dream and it was her attachment to the island through her family roots. It was her restaurant business and it was she who came up with the "wishlist" of her vision for the future. There was nothing about the contents of the First Amendment such as to put Audubon on notice of any impropriety on the part of Mr. Sims. As such, Audubon was not put on notice to warn her or to advise her to take independent legal advice. No such obligation can be made out.

[159] Accordingly, the claim of undue influence is untenable and must fail.

Circumvention of Government Approval

[160] This allegation has not been pleaded. It appears to be based on an assumption that Audubon's case is that it installed 45 Moorings in the Bight. It is said that this constituted a trespass on the seabed and as a result, was an illegal activity. Mr. Farara QC declared that this illegality prevent Audubon from relying on the First Amendment.

[161] Mr. Moverley Smith QC addressed the issue and submitted that it is wrong in every particular. The moorings were installed by a third party, Moorsecure, in accordance with the approval given by Government, at the instruction of the Defendants, pursuant to an agreement reached in the first Amendment. They were paid for by Audubon but are held pursuant to the First Amendment. There has been no trespass on the seabed. Even if there had been a trespass on the seabed, that would not constitute an illegality which prevents Audubon from relying on the First Amendment. If that were the case, a claimant could never claim that he had acquired land by adverse possession; the essential element of such a claim being that a trespass has occurred for a sufficiently lengthy period of time. I find this argument to be attractive and sound and I accept it in its entirety.

Consequences following determination of lease

[162] The Lease came to an end on 31 March 2002. It was not renewed. The issue which now arises is: do the obligations under the First and Second Amendments continue in force following the determination of the Lease. This question must be answered in the affirmative. Such situation was envisaged and as such, was adequately provided for in the Amendments.

[163] I should add that this issue appeared to have been abandoned during the course of the trial.

Conclusion

[164] The defences raised by the Defendants are unsustainable and flawed and must fail. Accordingly, I will enter Judgment for the Claimants as follows:

1) An order that the Defendants provide accurate monthly statements of fees and expenses from 1 October 2001 to date.

2) An account of what is due to Audubon from the Defendants for monies received by the Defendants in respect of mooring fees collected from 1 October 2001 to date for and on account of Audubon.

3) An order for payment of the sum found due on the taking of the account with interest thereon at such rate and for such period as the court may think fit.

4) An order for the provision of copies of the books and records in respect of the revenues from the operations of Norman Island.

5) An order that the Defendants provide copies of all documents which the Defendants have filed with the Government in connection with the moorings.

6) An order that the Defendants and each of them whether by themselves, their agents or otherwise howsoever be restrained from collecting further mooring fees.

7) An order that the Defendants and each of them whether by themselves, their agents or otherwise howsoever be restrained from dealing in any way with all and any interest they or any of them may have in the moorings.

8) The receivership order made on 6 December 2002 is to remain on force until 28 April 2006.

9) Costs to the Claimants to be assessed if not agreed.

Indra Hariprashad-Charles
High Court Judge