BRITISH VIRGIN ISLANDS

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

Claim No. BVIHCV2000/0071

BETWEEN

SMITH'S FERRY SERVICES LIMITED

Claimant

And

BVI PORTS AUTHORITY

Defendant

Appearances:

Dr Joseph S. Archibald QC and Ms Anthea Smith [of J.S. Archibald & Co.] for the Claimant
Mr Paul Webster QC and Ms Willa Liburd [of O'Neal Webster] for the Defendant

---

2007: 24 April
24 July, 17 August

JUDGMENT

Introduction

[1] HARIPRASHAD-CHARLES J: On 5 December 2000, Smith's Ferry Services Limited ("the claimant") instituted these proceedings against BVI Ports Authority ("the defendant") seeking overpayment of port dues in the sum of US$91,818.00. The claim is defended and the Defendant has counterclaimed for the sums of $7,750.00 for unpaid rental as well as $164,881.01 for unpaid berthage fees. The matter took over 6 years to be heard essentially because there were talks aimed at an amiable settlement of the dispute which sadly, failed. This is unfortunate as the facts and issues surrounding this matter are not convoluted. Be that as it may, the matter was trenchantly argued by both parties when I heard it exactly 3 months ago. The delay in handing down a more expeditious judgment is much regretted.

The factual matrix

[2] The claimant carries on a ferry service business operating within the British Virgin Islands (the "BVI") and the United States Virgin Islands (the "USVI"). It is not disputed that the claimant operated the following vessels during the periods in question namely:

Name of vessel	Tonnage
o Marie Elise	22.38
o Daphne Elise	71.29
o Bomba Charger	71.29
o May Flower	88.00

[3] The defendant is a statutory corporation of the Government of the BVI established under the BVI Ports Authority Act, 1990, Cap 1990 ("the 1990 Act") which came into effect on 27 November 1990. Prior to the establishment of the defendant corporation, ports and marine services in the BVI were carried on and regulated by the Ports & Marine Services Department of the Government.

[4] The purposes of the defendant are, among other things, to provide and maintain all port and harbour services and facilities in the BVI and to collect the dues and charges authorized by the 1990 Act.

[5] The thrust of the claimant's claim is that the defendant collected port charges and harbour dues from 1 July 1987 to February 1999 from the claimant for the use of port facilities in the BVI but should have only collected port charges because the law dealing with harbour dues was repealed in 1985[1].

[6] On 2 February 2001, the defendant filed a defence and counterclaim. In its defence, the defendant denied that it collected port charges and harbour dues from the claimant. It alleged that if it did collect the port charges and harbour dues as alleged, the amount collected from the claimant is far less than the amount which the defendant was by law empowered to collect from the claimant for the use of the defendant's port facilities and the difference is due and owing to it by the claimant. The defendant does not admit that the

[1] See paragraph 5 of the Statement of Claim.

claimant made any overpayment of monies to it and does not admit the monies claimed in the statement of claim.

[7] In its counterclaim, the defendant claimed the sum of $7,750.00 for rent owed to it by the claimant for occupation of the defendant's ticket office at the West End Ferry Terminal for the period 1 June 1994 to 31 December 2000. The defendant alleged that the rental of the office was $150.00 per month and was increased since January 1991 to $250.00 per month but the claimant has unilaterally refused to pay the said rent alleging that the office space was not worth the increased rental. In addition, the defendant claims the sum $164,881.01 for berthage fees which the claimant has failed, neglected or refused to pay for the use of its facilities at West End and Road Town, Tortola for the period January 1997 to June 1999.

[8] In its reply and defence to counterclaim, the claimant maintained that the defendant is indebted to it in the sum of $91,818.00 and denied that the rental of the ticket office is $250.00 per month. The claimant stated that it has been paying $150.00 per month and receipts have been issued by the defendant for such amount.

The evidence

[9] The sole witness to testify on behalf of the claimant was Mr Ira Leopold Smith ("Mr Smith"). He is the managing director/ owner/ principal shareholder of the claimant and unquestionably, an illustrious son of the soil and a sagacious businessman. Prior to managing his own business, Mr Smith was a civil servant and President of the Civil Service Association. At age 69, he is a key player in his business despite his deteriorating eye sight.

[10] Mr Smith deposed that during the course of the operation of the four vessels between 1 July 1987 and the end of February 1999, the defendant collected harbour dues from the claimant for the use of port facilities in the BVI although it is his clear understanding that the laws dealing with and requiring payment of harbour dues were repealed in 1985 by Act No. 6 of 1985 and that the laws concerning the payment of port dues were repealed in 1985 by Ordinance No. 19 of 1985. He later deposed that despite the fact that harbour dues were no longer payable, the defendant continued to collect these dues notwithstanding his protestations. He objected both orally as well as in writing.

[11] Mr Smith indicated that the bundle of documents[2] which he has submitted to the Court included details of the port charges collected from the claimant subsequent to the Ports Authority Regulations 1995 ("the 1995 Regulations") coming into force. He stated that following discussions with Mr Creque, (then the Director of Port Authority) they agreed to audit his exhibits which were done by Mr Gaskin who was then the Financial Controller of the defendant.

[12] Mr Smith stated that the bundle of documents[3] which he prepared from the claimant's records, by and large, compares with that prepared by the Customs Department except that its compilation shows a lower figure because the claimant was unable to find some of its receipts. I pause here to observe that the claimant has proffered no receipts at all to corroborate its claim despite the fact that Mr Smith admitted in cross-examination to having the receipts at his house.

[13] Upon perusing the compilation, on the first 7 pages, Mr Smith outlined a summary of over-payment of harbour dues and port charges for the period July 1987 to December 1999. The other pages alleged the number of trips made daily, the name of the vessel or vessels used, the cost per trip and the total cost per day. This is organized in such a conscientious manner that each page represents a month during the period July 1987 and December 1999 with the days of each month unmistakably delineated. In some cases, there are 2 reports for each month. Mr Smith explained that when that occurred, it represented the sailing from different ports in the BVI to other ports in the USVI.

[14] According to Mr Smith, he had no knowledge that port dues were commonly referred to as berthage although he has been operating vessels since 1986 and has been involved with boats since 1961. He stated that harbour dues were paid each time the vessel entered the port coming from a foreign country and it relates to entry and net tonnage of the vessel. He said that port dues were paid the first time coming into port for the day and it relates to 24 hours or part thereof.

[2] See Bundle 3A - Claimant's documents, pages 220-251.
[3] See Bundle 3A, pages 21 to 251.

[15] In respect of berthage, he stated that he had never paid berthage in respect of any of his vessels and he has never had an invoice for berthage nor a notice sent to him to pay such berthage. He said that as far as he understands it, berthage is tying up a boat to jetty and leaving it there and for this one needs permission. He added that his vessels never berthed using the defendant's facilities.

[16] Mr Webster QC appearing for the defendant extensively cross-examined Mr Smith who did not renege from his assertions as contained in his witness statements. He insisted that the defendant charged the claimant for harbour dues when the legislation was repealed. Mr Smith intimated that his claim is solely for harbour dues and not port dues.

[17] The defendant called two witnesses to testify on its behalf. The first to take the stand was Mr Gene Creque. He is the Deputy Managing Director of the defendant. He has a wealth of experience having worked with the ports and harbours for the government of the BVI in various capacities since 1973 and he continued as an employee of the defendant after it was established. He is quite au fait with the ongoing dispute between the parties. Mr Creque does not agree with the allegations raised by the claimant particularly that the defendant charged the claimant for harbour dues when it should not, as the legislation had been repealed. He insisted that the claimant owed the amounts which were counterclaimed by the defendant for unpaid rental and unpaid berthage.

[18] The next witness to testify on behalf of the defendant was Ms Myrthlyn Hodge. She has been employed with the defendant since 1991 and became the Financial Comptroller in November 2002. Like Mr Creque, she is aware of the ongoing dispute between the parties. She personally reviewed the calendar from the claimant. She stated that the defendant had to resort to the Court for a subpoena in order to obtain the records from the Comptroller of Customs because the defendant does not have the responsibility of collecting the fees and dues payable for entering the ports. She asserted that it is the responsibility of the Customs Department to do so and this is mandated by legislation (first, the Ports and Marine Services Act, 1985 and it continued under the 1990 Act).

[19] She testified that a register of payments was provided to the defendant by the office of the Comptroller of Customs and she was involved in the preparation of a compilation showing the figures actually collected from the claimant and the figures that should have been paid by the claimant based on the calendar she received. Ms Hodge also outlined the provisions under the different legislations that governed the amount and the type of fees and dues payable at the ports by vessels between 27 November 1990 and 31 December 1996. She concluded that from the calendar provided by the claimant, it appeared that the calculations of the dues payable were done using outdated rates. She said that under the outdated rates, the claimant would have paid $5.00 per entry for three of its vessels and $2.00 for the smaller vessel. However, since 1 June 1988, it was actually liable to pay $20.00 per entry in respect of the three larger vessels and $10.00 in respect of the smaller one with a maximum of $30.00 for all four vessels per day.

[20] In cross-examination, Ms Hodge stated that she found that some of the custom documents were missing but she did not find out the extent of the missing documents or why they were missing. She said that she has only seen log books from the Customs Department but has not seen invoices, charges or bills.

[21] Ms Hodge conceded that the defendant has not sent any written notice to the claimant particularizing the berthage fees which is alleged in the counterclaim.

[22] In general, I found Mr Smith to be a witness of candour and forthrightness and as such, I have no reasons to discredit his testimony. I also found both Mr Creque and Ms Hodge to be truthful and honest witnesses and as such, accepted their evidence.

[23] It is common ground that the central issue which arises for determination in this protracted litigation relates solely to harbour dues. To this issue, there are discrepancies in the evidence adduced by the claimant as opposed to the evidence of the witnesses for the defendant. This will be dealt with later on in the judgment. However, some ancillary issues flow from this central issue namely: (i) did the claimant pay both harbour dues and port dues when it should have only paid port dues? (ii) were port dues commonly refer to as berthage?

and (iii) whether the charges levied against the claimant in respect of port dues and harbour dues were charged at rates below those specified by legislation in force at the relevant time?

The legislative framework

[24] In my opinion, the nucleus of the dispute lies in the interpretation of various legislations. It is therefore a convenient stage to consider the legislative framework which has been succinctly set out by the defendant and which I gratefully adopt.

[25] The starting point is section 5 of the Harbour and Wharves Act, 1955 which imposed harbour dues on vessels entering any harbour in the BVI.

[26] Additionally, section 4 of the Port Dues and Charges Act, 1972 imposed dues and charges on all vessels using the ports in Tortola. Explicitly, the Fourth Schedule imposed a berth charge on vessels as follows:

Ferries 10 – 50 NRT (net registered tonnage)	$2.00 per day
Ferries 50 – 200 NRT	$5.00 per day

[27] Then in 1985, Parliament passed the Ports and Marine Services Act ("the 1985 Act") which repealed the Harbour and Wharves Act, 1955 as well as the Port Dues and Charges Act, 1972 save for the Schedule to the latter Act which "remains in force until Port Dues and Charges are prescribed under this Ordinance"[4].

[28] The Ports and Marine Services Regulations 1988 (made under section 87 of the 1985 Act) prescribed port dues at the following rates:

- Vessels not exceeding 40 tons GRT $10.00 for the first 24 hours or part thereof, and $7.00 for each additional hour.

- Vessels 40 – 200 tons GRT $20.00 for the first 24 hours or part thereof and $15.00 for each additional hour.

[4] See s. 91(1).

[29] Section 100 of the 1988 Regulations limits the above rates to $30.00 per vessel per day. Accordingly, an 88 ton vessel like the May Flower, making three trips from the USVI at $20.00 per trip in one day, would be limited to the maximum of $30.00 for that day instead of the aggregate charges of $60.00. These charges replaced the charges in the Schedule to the 1972 Act. As Mr Webster correctly submitted, this is noteworthy because at paragraph 14 of his witness statement, Mr Smith used the rates in the Schedule to the 1972 Act to calculate the rate of harbour dues per vessel per trip.

[30] In 1990, the defendant was created. It was established by section 3 of the 1990 Act which came into existence on 27 November 1990 when the Act became effective. Section 99 contains the transitional provisions which exempt the defendant from any liability incurred prior to its establishment. Section 99 (1) provides:

> "All liabilities incurred by or on behalf of the Ports and Marine Services Department in respect of any of its functions under the Ports and Marine Ordinance, 1985 and subsisting at the commencement of this Act shall, as from such commencement, have effect as if they have been incurred by the Crown."

[31] Section 15 (3) of the 1990 Act retained the existing rates, fees, dues and other charges under the 1988 Regulations *"until rates and charges are fixed under the 1990 Act".* In other words, the rates and charges under the 1988 Regulations were the applicable rates when the defendant was created. These rates remained in force until 1 January 1997 when the Ports Authority Regulations 1995 ("the 1995 Regulations") became effective. These Regulations provide that all vessels entering the BVI and using a facility operated by the defendant must pay harbour charges[5]. The prescribed rate for vessels remaining at berth for more than one hour after disembarking passengers is $1.85 per foot of vessel length for the first 24 hours and for each subsequent 24 hour period, the rate is $2.75 per foot of vessel length.

Applying the law to the facts: the claim

[32] I now turn to consider the application of the law to the particular facts of this case. The claimant's claim is for overpayment of harbour dues from 1 July 1987 to February 1999.

[5] See section 96.

Again, the defendant has helpfully broken down the claim into three discrete time periods. In my opinion, this is the most convenient method in dealing with the claim. But before I do so, there are a few factual findings that I have come to in my analysis of the evidence. I find as a fact that the names harbour dues, port dues, and berthage were interchangeably used by the Customs Department as asserted by Mr Creque. I also agree with Mr Creque that the Department not only collected fees associated with entry into the ports but also other fees such as passenger tax. I find as a fact that the format used by the Customs Department was sometimes difficult to follow as some of the forms were completely blank except for the column marked 'total'.

Pre 1990

[33] The claimant claims for overpayment of harbour dues for the period 1 July 1987 to 27 November 1990 in the amount of $11,986.00. During the period, the legislation governing the collection of various charges for the use of port facilities was the Ports & Marine Act 1985 which established a Ports & Marine Services Department.

[34] The defendant was created on 27 November 1990 pursuant to the section 3 of the 1990 Act. Section 99(1) of the said Act expressly provides that "all liabilities incurred … shall… have effect as if they had been incurred by the Crown."

[35] Learned Queen's Counsel, Dr Archibald who is always so persuasive and loquacious, was practically wordless when I requested him to interpret section 99.

[36] In my judgment, section 99 is clear and unambiguous. The section exempts the defendant from any liability incurred prior to its creation. Therefore, the defendant is plainly not liable for any sums claimed prior to its establishment. Any alleged overpayment made by the claimant prior to the establishment of the defendant lies against the Crown and not the defendant which is a body corporate separate and distinct from the Crown.

[37] Thus, the sum of $11,986.00 which is claimed during this period must be dismissed.

27 November 1990 to 1 January 1997

[38] Dr Archibald QC vehemently argued that at page 21 of the Claimant's Bundle of documents is a summary of overpayments and not a summary of payments. He submitted that the $2.00 fees for vessels under 50 tons and $5.00 for vessels more than 50 tons are harbour dues which the claimant is claiming. He argued that under section 91 (2) of the 1985 Act, the schedule to the 1972 Act remains in force in 1985 so the $2.00 and $5.00 were saved but when the 1998 Act was passed, it created port dues. He argued further that the uncontradicted evidence is that the claimant paid harbour dues. According to Dr Archibald QC, the claimant was paying both port dues and harbour dues so it should be refunded all that it has paid in harbour dues.

[39] Mr Webster QC submitted that this aspect of the claim has effectively been dealt with in the witness statements of the defendant's witnesses[6]. Learned Queen's Counsel submitted that during the period 27 November 1990 to 1 January 1997, the 1995 Regulations were not in force and the relevant charges would have been under the 1988 Regulations. The Defendants would have been liable to pay the prescribed fees under those Regulations until the end of 1996. Mr Webster QC referred to Ms Hodge's witness statement [7] to explain how the defendant worked out the compilation. He argued firstly that it appears from the calendar and witness statement of Mr Smith that the claimant was under the erroneous belief that dues and charges should have been assessed at rates set out in the Schedule to the 1972 Act when this schedule was effectively repealed by the 1988 Regulations which were adopted by section 15 of the 1990 Act.

[40] He next directed the Court to the Defendant's bundle-3B. According to him, for the period 27 November 1990 to 1 January 1997, the examples clearly illustrate that there has been a significant underpayment by the claimant. He submitted that Section 90 of the 1990 Act which requires Ports Authority to send a notice in writing as to the undercharge before it can be collected does not apply to the defendant as they are defending not claiming under the Act.

[6] See paragraphs 5 -13 of the witness statement of Gene Creque and paragraphs 5 – 14 of the witness statement of Myrthlyn Hodge.
[7] See paragraphs 8, 9 and 10.

[41] It appears that during this period there was no legislation authorizing the collection of harbour dues. The charges that were applicable in this period pursuant to the 1988 Regulations were only port dues and no other charges or fees. From a perusal of the calendar provided by the claimant, it was paying $2.00 and $5.00 for harbour dues during this period and for the years 1996 to 1998 with the exception of February 1996 and June to October of 1997. It also paid port dues. From the legislative provisions cited above, the applicable payments for this period were $10.00 and $20.00 respectively depending on the size of the vessel.[8]

[42] The defendant is saying that the Customs Department was using outdated forms and though the forms had harbour dues, what essentially had been collected were port dues. In the absence of tangible evidence, this amounts to mere speculation. In any event, it does not explain the instances where the claimant paid both harbour dues and port dues. The defendant submitted that the sums collected were less than what the claimant should have actually paid. Certain examples elucidated this point.

[43] There is some dispute as to whether this payment of port dues was on entry or for the entire 24 hours. The Third Schedule to the 1988 Regulations states that for the first 24 hours or part thereof this $10.00 and $20.00 should be paid and prescribed a sum for any subsequent 12 hours or part thereof. This appears to indicate that the sum is payable for 24 hours or any part of the 24 hours at first and then an additional sum for subsequent 12 hours or part thereof. Section 100 of the said Regulations muddled up the matter as it limits the port dues for vessels arriving from USVI to $30.00 per day implying that the prescribed port dues were to be paid on entry. Fortuitously, I do not have to consider which interpretation is correct as the matter before me can be determined without coming to any conclusions on this point and also, the fact that it is not in the public interest as the entire Regulation has been repealed.

[44] From the calendar, it appears that the claimant has underpaid not overpaid during the period November 1990 and 1 January 1997. Mr Creque testified that from their calculations, the sum of $119,010.00 should have been paid by the claimant during this period and only

[8] See Third Schedule of the Ports and Marine Services Regulations and section 15 of the 1990 Act

$79,890.00 was paid. Mr Smith said that he made an overpayment but he has not produced any receipts to support his testimony. Without the receipts, I am unable to find that he has proved this overpayment. Be that as it may, the claim for overpayment for this period is untenable and must fail.

[45] For completeness, I will deal with the submissions in respect of the 26 cents, 52 cents and 95 cents which Mr Creque referred to and said that if the claimant had paid this amount, though negligible, then it would have been entitled to a refund of those sums. Dr Archibald QC stated that when added together, the sum is far from negligible. However, there is no evidence before this court that any sum in that amount was paid for the period of the claim. From the calendar, it appears that the sum paid was always the $2.00 and the $5.00 (port dues) and no other additional payments in any amount that could be considered harbour dues under the 1955 Act. The sum claimed for this period is dismissed.

January 1997 to February 1998

[46] Mr Webster QC submitted that the BVI Ports Authority Regulations, 1995 came into effect on 1 January 1997. Regulation 96 provides that all vessels entering the BVI and using a facility operated by Ports Authority must pay harbour charges at a rate of $1.85 per foot of vessel for the first 24 hours for vessels remaining at berth for more than 1 hour after disembarking passengers. He added that harbour charges were being introduced for the first time, which I have to agree with. Regulation 116 provides for lower charges which could be imposed by the Customs Department.

[47] Section 19 (1) of the 1990 Act is instructive. It states:

> "The Minister may give the Authority general directions in writing as to the performance of its powers under this Act on matters which appear to him to affect the public interest and the Authority shall give effect to such directions."

[48] Although illuminating, Regulation 116 is rather unhelpful because all it does is to allow the Managing Director to charge a lesser fee, but it does not allow him not to impose any fee whatsoever. The case here is that the Minister told the defendant not to collect harbour dues under the BVI Ports Authority Regulation. Section 19(1) of the 1990 Act clearly gives

the Minister the power to give the defendant general directions whereupon the defendant has to give effect to those directions.

[49] The defendant was therefore not collecting the harbour dues under the BVI Ports Authority Regulations because of directions given to it by the Minister. Legally, it could not collect any other fees or charges under the earlier legislations as they are effectively repealed. I think that one of the grievances of the claimant is that the defendant collected harbour dues from it without collecting same from its competitors. This is inequitable. The 1990 Act saved the port dues under the Ports and Marine Services Regulations until fees and charges are prescribed under that Act. It follows, therefore, that those port dues can no longer be collected after 1 January 1997. Any payment that the claimant can prove that it paid during this period should be refunded. It is not precluded from doing so as it had given notice to the defendant that there was an overcharge.

Proof of special damage

[50] Learned Queen's Counsel Dr Archibald argued that the claimant is entitled to the damages. He submitted that the evidence of Mr Smith is clear: that he paid harbour dues as well as port dues and there is absolutely no evidence to contradict it. He cited the case of Grant v Motilal Moonan Ltd and Another[9] to bolster up his submission. Learned Queen's Counsel submitted that the present case bears close affinity with Grant's case. In that case, the appellant produced in evidence, without objection, the list which she had prepared on the day following the accident. The authenticity of the prices shown on the list was not challenged in cross-examination. However, the appellant confessed in cross-examination that she did not have any receipts verifying the prices that she had paid for these items; nor could she remember the specific year or years in which she had bought them. She also admitted that she had failed to obtain the services of a valuator to value the damage.

[51] Mr Webster QC submitted that the claimant's claim is for special damages and the burden is on it to prove every amount claimed and as such, it needs to supply data to support its claim. He next argued that the claimant is simply asking the Court to accept what it has provided without any supporting documents. According to Learned Queen's Counsel, the

[9] (1988) 43 WIR 372.

defendant had written 8 letters to the claimant requesting information. He referred to the claimant's bundle of documents.[10] He submitted that the claimant has not put before the court any supporting documents although Mr Smith said that he has them at his house. Mr Webster submitted that Mr Smith is a very meticulous man. He failed to produce the documents in his possession with the result that the defendant had to expend money to go to Court to get documents from the Customs Department in this matter when it is the claimant who must prove its case.

[52] Mr Webster argued that Mr Smith must come to court and show that this is indeed an overpayment. He argued further that this is more so, here as the defendant did not collect monies from the claimant. He submitted that the only evidence coming from the claimant is that it paid certain sums of money as harbour dues and port dues when it should have only paid one and nothing else as the exhibits do not support the claimant's claim.

[53] Mr Webster argued that the present case is distinguishable from Grant's case. He said in that case, the attorney for the respondents did not call evidence in rebuttal unlike the present case. Mr Webster submitted that 8 letters of requests were made to the claimant to produce that proof which he said, he has at his house and to date, he has failed to do so. According to Learned Queen's Counsel, the claimant has not proven the overpayment.

[54] In my considered opinion, Grant's case is distinguishable from the present case but particularly helpful. Briefly, the facts are as follow: a vehicle driven by the second respondent and owned by the first respondent crashed into a house occupied by the appellant and damaged a number of household furniture and other articles. She sued for negligence and claimed $20,000 in damages. The special damage was particularized in the pleadings. The appellant obtained judgment in default because the respondents failed to enter an appearance or file any defence. At the hearing before the Master for assessment of damages, she produced a list of the damaged articles which she had compiled on the day of the accident and against each article she noted its price. She admitted that she no longer had receipts for the articles and she could not state when they had been purchased. She also admitted that she did not get a valuator to value the articles. The respondents did not

[10] See page 255 –letter from defendant's solicitors requesting information since February 2002.

challenge the prices nor call any evidence but submitted that the appellant was required to prove the value of the articles.

[55] The Court of Appeal in Trinidad and Tobago held that although special damage must be pleaded, particularized and proved strictly, the appellant had prima facie established the cost of the articles and as the respondents had not attempted to challenge the values placed on them, the only courses of action properly open to the Master were to accept the appellant's claim in full or to apply her mind judicially to each item and its value.

[56] Bernard CJ stated that the method and/or sufficiency of proof of special damages must depend on the particular circumstances of the case. To come to that conclusion he relied on Ratcliffe v Evans[11] and Gunness v Lalbeharry.[12] In Ratcliffe v Evans, Bowen LJ stated at (pages 532-533):

> "In all actions accordingly on the case where the damage actually is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pendantry."

[57] In my judgment, the circumstances of the present case would suggest that more certainty and particularity should be insisted upon. Mr Smith is a punctilious businessman. He painstakingly and scrupulously compiled the records which are before the Court. Before he filed the claim, he notified the defendant of the alleged overpayments that the claimant made. He had been asked on numerous occasions to submit proof of the allegations which were levied against the defendant. This, he has woefully failed to do although he admitted that he has the proof of payments at his house. In civil litigation, the maxim "he who asserts must prove" has not been relaxed. The claimant must prove its case on a balance of probabilities. To state that the claimant has overpaid and compile its own records is not what is required particularly when the proof is available.

---

[11] [1892] 2 Q.B. 532

[12] (unreported from the Court of Appeal in Trinidad and Tobago).

[58] In Bonham-Carter v Hyde Park Hotel Ltd.[13] the Lord Chief Justice stated:

> "On the question of damages I am left in an extremely unsatisfactory position. Plaintiff's must understand that if they bring actions for damages, it is for them to prove their damage; It is not enough to write down the particulars, so to speak, throw them at the head of the court saying 'this is what I have lost; I ask you to give me the damages'. They have to prove it."

[59] From the documents provided by the Customs Department to the defendant (though some of the documents are missing), the defendant has accepted and/ or is not challenging that the claimant made some payments during the period in question. In that event, those unchallenged invoices will be accepted as proved. This is in the amount of $14,414.50.

The counterclaim

Rent

[60] The defendant counterclaimed for unpaid rental as well as berthage. In respect of the counterclaim for rent, Mr Creque stated that in 1991, the defendant constructed a new office at the West End Ferry Terminal for the claimant. He deposed that it was a larger office and that accounts for the increase in the monthly rental from $150.00 to $250.00. The claimant refused to pay the increase in rent despite entering into occupation of the larger space. He said that the defendant wrote to the claimant on 7 December 1992 requesting that Mr Smith attends to finalize a lease for the new space. Mr. Smith failed and/or refused to attend and as a result, the rent for the new office space was never agreed.

[61] Mr Smith admitted that he rented the office space but the lease he signed required the payment of $150.00 per month. He testified that he was presented with a new lease requiring the payment of $250.00 per month but he did not sign it for several reasons. I need not elaborate on those reasons as they are not germane to the issue to be determined. Mr Smith stated that the claimant paid $150.00 monthly when billed by the defendant. He stated that the claimant has never paid $250.00. He tendered evidence to support his contention.[14]

---

[13] (1948) 64 TLR 177

[14] See Exhibit "ILS 1".

[62] Dr Archibald QC submitted that this counterclaim must fail as there was no agreement for the new rent. He surmised that the correct approach, to which I agree, is to issue a notice to quit to the claimant and thereafter, the defendant should take whatever action it sees fit.

[63] Mr Webster QC made no closing submissions in respect of the counterclaim for rent.

[64] It is trite law that for a contract for a lease to be valid, there must be final agreement on the terms of the lease, that is to say, on the parties, the property, the consideration or rent, the duration of the lease and any other special terms.

[65] It is clear from the evidence that there exists a lease agreement between the defendant and the claimant for $150.00 monthly and there was no final agreement on the increased rental of $250.00 monthly as conceded by Mr Creque. As a result, this aspect of the counterclaim must fail.

Berthage

[66] The defendant has also counterclaimed for berthage in the amount of $164,881.01. Mr Webster QC submitted that for the period 1 January 1997- through 1998, charges were no longer tonnage but length and not at the rate connected pre- 1997. He further submitted that the position of the claimant is that its vessels did not berth at the defendant's port for more than 1 hour. He said this is a question of fact for the Court as Mr Creque has testified that he has seen vessels belonging to the claimant berthed at the defendant's port facilities overnight during the relevant period. He submitted that if the court finds that the vessels spent more than 1 hour at any of the ports during the relevant period, it is liable to pay harbour charges as specified in the 1996 Regulations and the only issue is the assessment of those charges. He invited the Court to find that this amount is $150,466.51 as was calculated by Mr Creque and Ms Hodge. He argued that this amount claimed has not exceeded the statutory limits and there is no reason why the claimant should not pay as there is statutory basis for such payment.

[67] In any case, where the evidence of the witnesses is diametrically opposed, it is a notoriously difficult task for a judge to determine who is telling the truth or who is not. This becomes

more complicated when the judge has found that all witnesses, as in the present case, are honest and forthright. Providentially, I do not have to answer this factual question in light of the insurmountable legal hurdle which the defendant faces under section 90.[15]

[68] Section 90 of the 1990 Act states:

> "(1) Subject to subsection (2), where the amount paid for any harbour or charges is found to be incorrect, then if such amount is-
>
> (a) an overcharge, the person who paid the rate or charge is entitled to a refund of the amount of the overcharge;
>
> (b) an undercharge, the amount of the undercharge may be collected from the person who paid the rate or charge.
>
> (2) Notwithstanding anything contained in any other Act, such overcharge or undercharge shall not be refunded, or collected, as the case maybe, unless notice in writing containing such particulars as may reasonably be necessary is given –
>
> (a) by the person claiming such overcharge, to the Managing Director; or
>
> (b) by the Managing Director to the person against whom the amount of such overcharge is claimed,
>
> within six months after the goods were accepted or the services rendered, as the case may be, by the Authority, so however, that where such undercharge is caused by any information or description subsequently found to be incorrect, such period of six months shall commence from the date of the discovery by the Managing Director of the correct information or description."

[69] Mr Webster argued that the legislation clearly imposed a charge for harbour charges after January 1997 and we should not be caught up with words as none of them are defined terms He argued that the amounts are due and have not been collected, however, it is a matter for the Court.

[70] Dr Archibald QC submitted that the counterclaim for berthage has miserably failed because from the evidence of the defendant's own witnesses, no notice has ever been sent to the claimant as mandated by section 90.

[15] See paragraphs 70 – 72 of judgment.

[71] Section 90 is plain and unambiguous. It clearly states that the undercharge cannot be collected unless within six months after the date when the services were rendered or the mistake was discovered, the defendant sends to the person a notice in writing setting out the particulars. Six months have passed since the services were rendered (January 1997 to February 1998) and the mistake (if there was one) would have been discovered from at least the date of the defence and counterclaim which was dated 2 February 2001.The defendant conceded that no notice was sent to the claimant although Mr Webster based his defence on the fact that the defendant is claiming the sum in its defence and therefore, the section is inapplicable.

[72] Attractive though this argument is, a counterclaim is a claim. I therefore agree with Dr Archibald QC that section 90 is applicable. It is also mandatory in its term and therefore, the defendant is statutorily barred from claiming any berthage from the claimant.

[73] For this reason, the counterclaim for berthage is untenable and must fail.

Conclusion

[74] In the premises, I will enter judgment for the claimant in the sum of $14,414.50. The defendant will pay prescribed costs to the claimant on the sum of $14,414.50 as well as prescribed costs on the counterclaim of $172,631.01 minus $14,414.50. If my calculation is correct, the total prescribed costs amount to $33,732.15.

Indra Hariprashad-Charles
High Court Judge