

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CLAIM NO. 560 OF 2001

BETWEEN:

FANTASEA TOURS LIMITED

Claimant

V

1. BUHLERS YACHTS LIMITED
2. MATTHEW LLEWELLYN
3. DESMOND LLEWELLYN

Defendants

Appearances:

Mr. S.E. Commissiong for the Claimant

Mr. J. Delves for the Defendants

2007: November 12;

2008: June 9, 10 & 26;

September 22.

JUDGMENT

[1] **MATTHEW J (Ag):** On January 31, 2005 the Claimant filed a claim form requesting the following:

1. Damages for breach of contract to build, launch and deliver a 60 foot luxury catamaran;
2. Damages for negligence in the performance of the said contract;
3. Special damages totaling \$658,514.00 for
 - (a) wasted fuel in the amount of \$435.00;
 - (b) \$49,049.71 for correction of defective work;
 - (c) \$4,628.28 for fixtures;
 - (d) \$25,135.45 as preliminary costs of repairing other defects;
4. Damages for the continuing daily loss of profit estimated at \$1,500 per day;

5. Damages for loss of the Claimant company's business reputation;
 6. A mandatory order compelling the Defendant to launch the Claimant company's luxury catamaran; and
 7. Costs.
- [2] A statement of claim of 77 paragraphs within 12 foolscap pages accompanied the claim form in which it is difficult to differentiate between pleadings, arguments and evidence.
- [3] In short the Claimant alleged that it entered into an oral agreement with the Defendant company through the Second Defendant that the latter should build a 60 foot luxury catamaran for the Claimant at a cost of \$897,000.
- [4] According to the Claimant the Second Defendant agreed that the construction should take no more than 8 months. The construction would be basically on credit terms, the Claimant paying in installments as the work progressed.
- [5] The Claimant alleged that consequent upon a conversation with the Defendant it agreed to purchase the engines for the boat and it did so.
- [6] The Claimant paid the Defendants \$40,000 on April 10, 2000 and later \$10,000 in February 2001 to show its commitment to the project.
- [7] The Claimant alleged that the Second Defendant complained that money was tight and as a result it obtained a loan of \$600,000 from the National Commercial Bank to finance the project about March 2001.
- [8] The Claimant alleged that about that time the Second Defendant handed him a document headed "Proposal" which contained terms of payment different from those earlier agreed upon in or around April 2000.

- [9] The Bank later approved the loan for \$600,000 upon condition that the catamaran was to be completed by November 2002, that is within 7 or 8 months of the first draw down of the loan.
- [10] By mid November 2002 the total payments to the Defendant was \$250,000. The catamaran was not completed by November 2002.
- [11] In March 2004 the catamaran had still not been delivered to the Claimant but a further \$113,000 had been paid to the Defendant in 2003.
- [12] About that time the Bank's Manager commissioned a marine surveyor to make a report to him on the progress of construction of the catamaran.
- [13] Consequent upon the report of the marine surveyor, the Bank's Manager summoned a meeting with Mr. Earl Halbich, the principal representative of the Claimant Company, and Mr. Matthew Llewellyn, the main spokes person for the Defendant. According to the Claimant at that meeting on March 20, 2004 the Second Defendant agreed that the catamaran would be completed and delivered within three months after receiving a further loan of \$250,000.
- [14] The catamaran was supposed to be delivered by July 2004. The Defendant had not delivered by November 2004.
- [15] In the meantime the Claimant alleged that there were certain defects in the construction of the catamaran and he had to employ workers to correct plumbing, electrical and steering systems.
- [16] The Claimant alleged that by December 2004 the catamaran was in a position to be delivered. The Claimant stated that on December 17, 2004 the Third Defendant, in the absence of the Second Defendant who was overseas, presented a bill to the Claimant of \$332,725.00 which was the alleged balance owed on the catamaran and that the

catamaran would not be launched until full payment. On December 22, 2004 the Third Defendant presented a corrected balance of \$144,687.00.

[17] The Defendants continued to refuse to launch the catamaran until they were compelled to do so by injunctive order made by Bruce-Lyle J on February 9, 2005.

[18] The Claimants gave particulars of its losses stipulated in the claim form.

[19] The First and Second Defendants filed their defence on April 8, 2005 and they denied that they represented to the Claimant that the First and Second Defendants are one and the same. They alleged that at all material times the arrangements to build the boat were between Earl Halbich and the First-named Defendant.

[20] The Defendants alleged that the First Defendant built a 60 foot catamaran in 1995 called "Ocean Mist" for a Barbadian, Ian Banfield, and in 1999 Mr. Halbich who frequently visited the boat yard told the Second Defendant he wanted to get a 60 foot catamaran like the "Ocean Mist".

[21] They stated the parties had many meetings before any conclusions to construct the catamaran. Subsequently, there was agreement to build the boat for the Claimant. Mr. Halbich did not provide the Defendants with any specification. The First named Defendant proceeded to construct the boat.

[22] The Defendants agreed that the contract price was \$897,000 but denied agreement that construction would take place in 8 months. They said 10 months would have been the minimum time to build a boat of that size.

[23] The Defendants alleged that the understanding would be that Mr. Halbich would go to look for his financing while the First Defendant began to build the boat.

- [24] The Defendants agreed that the first amount paid by Mr. Halbich was \$40,000 on April 10, 2000 but by that time 4 pieces of the hull had already been built at a cost of approximately \$65,000.
- [25] The Defendants alleged that they did present to Mr. Halbich the document entitled "Proposal" but the document was not back dated and it is the basis upon which the Parties agreed that the construction would be continued.
- [26] The Defendant, Matthew Llewellyn denied that he agreed with Mr. Halbich that he would complete the catamaran by November 2002. He said at all times the agreement was that the boat would be completed once the payments for the work were made on time.
- [27] The Defendants alleged that at no time was the work performed in an unprofessional or unsupervised manner.
- [28] The Defendants admitted that the Second Defendant attended the meeting with the Bank Manager and Mr. Halbich on March 20, 2004. They stated that the Second Defendant went to the Bank only to assist Mr. Halbich to get the money as he was having difficulty in getting it and had even sought the assistance of the Prime Minister. They said it was not a "demand of the Bank that any Defendant visit with it."
- [29] They do not admit that at the meeting the Second Defendant agreed that the catamaran would be completed and delivered three months after receiving the further sum of \$250,000 and the balance of \$116,000 would be paid on delivery of the catamaran. The Defendants admitted receiving \$250,000 by June 18, 2004.
- [30] The Defendants agreed that the first figure of \$332,725.06 being the balance on the boat given by the Third Defendant as of December 17, 2004 was incorrect and the correct figure was \$144,687.00. They alleged that the present outstanding balance is \$84,687.00.

[31] In their counterclaim the Defendants state that the boat has been launched and delivered to the Claimant pursuant to an order of the Court. However, the outstanding balance presently amounts to \$84,687 and remains unpaid.

[32] The Defendants counterclaim for:

1. Balance of the contract sum of \$84,687.00; and
2. Costs.

EVIDENCE:

[33] Earl Halbich, Peter Glen Nicholas and Joseph Charles Browne gave evidence for the Claimant and Matthew Llewellyn gave evidence for the defence.

[34] Earl Halbich stated that he is a tour operator and he knows Matthew Llewellyn at Buhler's shipyard. He stated that Matthew told him that in British Columbia he used to build houses for young couples without any down payments and they would pay him later by installments.

[35] He said from the 1990's he had decided to purchase a 60 foot catamaran and Vance Buhler produced a draft of a catamaran for him. He said before he could ask Vance to build the boat for him Vance had left St. Vincent but recommended Matthew highly. He contacted Matthew who put him at ease with a proposal he could not refuse, in short, to build the boat on credit terms.

[36] He said he paid the Second Defendant \$40,000 on February 19, 2000 and that started the business relationship. They estimated the cost of the boat would be between \$880,000 to \$900,000. Matthew told him he could pay him as he would have to pay a bank and he agreed. He paid Matthew another \$10,000 on February 19, 2001.

- [37] By March 12, 2002 he gave the Second Defendant another \$50,000 making a total of \$100,000 towards the construction of the boat. The witness stated he began to feel uneasy with the manner in which the construction of the boat was proceeding.
- [38] He discussed the slow pace of the work with Matthew who told him if he could find money to buy the two engines for the boat he would be able to continue with the construction. He agreed.
- [39] He said later the Second Defendant produced to him a document for signature and told him it was a mere formality. He signed the document as "I still accepted Matthew as a reasonably honest and straightforward person." He did not think what he signed was an agreement.
- [40] He said he discussed the slow pace of the work with Matthew who appeared to be preoccupied with the construction of his exercise gym. Matthew explained to him that he had money problems and asked whether he could come up with \$600,000 and leave outstanding \$396,577.00, without any regard for the existing agreement.
- [41] He agreed and found the money with the help of his family and his bankers. He said it was made clear to Matthew if that money was found that the construction would be completed within seven months from the date of the first payment and Matthew agreed.
- [42] The Claimant stated that he got the funds "but did not pay all of it to Matthew at one time because we feared he would spend most of it on his gym; so he was paid \$10,000 immediately on 26th March, 2002."
- [43] He said construction started again without effective supervision, Matthew's "mind was fixed on the construction of his gym." From the loan of \$600,000 he advanced Matthew another sum of \$140,000 on November 13, 2002.

- [44] The witness stated that Matthew continued to work at a very slow pace “thereby justifying my impression that he was diverting my payments to the construction of his gym and leaving my boat to languish in the hands of unsupervised workmen.” What an unwarranted statement!
- [45] The witness stated he paid a further amount of \$50,000 on January 10, 2003 and had then purchased the two engines from Miami for \$177,902.18. Between March 12, 2003 and October 2003 he said he paid sums amounting to \$103,000.00 totaling up to date \$580,902.18.
- [46] The witness stated after that the following:
“I then came to the firm conclusion that Matthew’s time and money had been directed to the construction of a very large wall building he was constructing to open a new exercise gym. He spent a considerable amount of time at the place, in rebuilding parts of its Southern boundary walls which had been broken and necessarily in fitting the gym with a vast array of exercise machines and weights.”
- [47] He stated that by June 2003 Matthew again became desperate for money.
“Contrary to the terms of our agreement Matthew started to ask for money very frequently ... He had in fact been receiving extra money; it is simply that he needed large amounts of money quickly to finance the completion of his exercise gym.”
- [48] The witness stated that to avoid confusion with Matthew he decided to approach the Bank for some more money to pay him. He said the Bank agreed to advance \$250,000 on condition that Matthew finish the catamaran as quickly as possible. He said that on March 26, 2004 Matthew Llewellyn signed an undertaking that his company would be prepared to complete and deliver the boat within three months after receiving the amount of \$250,000.
- [49] The witness stated that the work was not supervised after Matthew received the money and it led to substandard work. The engines, rudders and shafts had to be removed and reinstalled. The electrical wiring of the boat was not up to standard. He said Matthew and his workers were incompetent in the field of marine wiring.

- [50] He said he advised Matthew that his company had received numerous bookings for the charter of the catamaran and they were losing business because of his delay in the completion of the boat.
- [51] The witness stated that Matthew admitted that he knew the Claimant was losing money every day the work was delayed but gave the excuse, which the Claimant did not accept, that the material to be used in the catamaran had not arrived in Saint Vincent.
- [52] The Claimant stated that after hearing Matthew's admissions for the delay he assembled a team of workers to do certain work on the boat to get it ready for launching which was effected after an order of the Court.
- [53] He said the catamaran was still not complete after the launching and there were still things to be done.
- [54] When he was cross-examined he stated that he was to deduct what he spent on finishing the boat, that is about \$66,000, and the balance to be paid to the Defendant.
- [55] He said he had to correct a lot of defects in the boat after it was launched in the amount of \$250,000. He said the Court order was not to remedy the defects and pay the balance to Mr. Llewellyn.
- [56] He said he was not aware how the gym was built for it was not his business. But he had the feeling that the Defendant diverted his money to the gym; but he did not say so. He said he was not so sure that he made a serious allegation against the Defendants.
- [57] He agreed that it is correct that he acted for his company and that his boat operates in St. Vincent and the Grenadines. He agreed the boat yard was a small operation between 2 and 6 persons in 2001 although there used to be as many as 10 persons working in the yard in later years.

- [58] He said the agreement was that the Defendants build the boat and he would pay monthly. The Second Defendant had stated that he had enough materials and if the Claimant gave the Defendant a certain sum of money Defendant would build the boat.
- [59] He said he signed the "Proposal" document dated April 17, 2000 and shortly after that the Parties had discussions about the figure of \$600,000. The witness said he agreed to try to obtain the money. That was about March 2001.
- [60] He indicated that the National Commercial Bank upon giving the loan for \$600,000 wanted to ensure that the boat would be completed within six to seven months after the disbursement.
- [61] He agreed there was a further need for a loan of \$250,000 which would complete the construction of the boat leaving a balance of \$69,674.82. Delivery was to have been three months after the first draw down of the \$250,000.
- [62] He indicated that the work was not completed by October 2004 and he thereafter commenced doing work on the boat in the evenings after the boatyard was closed with his workmen with Mr. Llewellyn's permission. He said that from time to time when he went to the boat yard he had observed things were being wrongly done and he had to point them out to the workmen for correction.
- [63] He gave evidence of having to buy water tight hatches; and wanting e-strips; clear plastic on the cockpit; and electric toilets.
- [64] He said he was always aware of the nature of the boats which the Defendants built but his boat was different.
- [65] When he was re-examined he said he asked for changes to the engine beds because they were not correctly aligned. He said all boatyards in the world must have sea trials before payment.

- [66] Peter Glen Nicholas, a marine electrical technician from Trinidad and Tobago gave a witness summary in which he stated he was retained by Halbich in 2004 to evaluate the electrical work on the catamaran at Buhler's shipyard in Calliaqua.
- [67] He stated that at the time he examined the boat in September 2004 only 20 per centum of the vessel was wired but 50 per centum of the cables used in the installation was not marine grade.
- [68] He said no wire connectors were used and the wires were twisted and taped. He said the cabin lights were badly located and cables were negligently routed. Holes were negligently drilled for cable access and some were too large.
- [69] He found electrical cables were submerged in almost two feet of water at the bottom of the bilge. His conclusion was that the electrical work was sub-standard.
- [70] He said that a ship with that quality of electrical wiring would not be permitted into any United States port.
- [71] He gave viva voce evidence to the same effect stating that the boat he examined was a catamaran 60 feet long and 30 feet wide.
- [72] Under cross-examination he reiterated that the electrical work had started but it was not completed. He said he did not do any remedial work at that point in time.
- [73] But he said he and his assistant had to replace the soaked wires and do the marine standard; and that was not difficult for him to do. He said he saw the boat after that but he was not an expert in boat valuation nor an engineer. Re-examination was declined.

- [74] Joseph C.L. Browne also gave a witness statement. He is a marine surveyor and consultant who had done marine surveying in the Eastern Caribbean especially in Saint Vincent and the Grenadines and Saint Lucia.
- [75] In March 2004 he said he was requested by the Chief Executive Officer of the National Commercial Bank of Saint Vincent and the Grenadines to give an estimate of the cost of completing the vessel to Lloyds A1 rating as a seaworthy vessel. He said he did the survey and produced a report dated March 9, 2004. Exhibit JCB1.
- [76] In his general comments in that report he said that the value of the vessel at the time was US\$179,000 and it would take approximately US\$172,000 to complete the vessel.
- [77] Later in September 2004 the Acting Assistant Loans Operation Officer asked him to conduct another survey of the vessel and he produced another report dated September 28, 2004.
- [78] In his general comments he stated that the alignments to the shafts had been corrected and with all the factors considered he estimated that the then value of the vessel to be US\$320,000.
- [79] Under cross-examination Browne stated he was not familiar with the fittings that were agreed by the Parties. He did not look at the size of the engines which were covered.
- [80] He said the major concern was the shaft installation in his earlier report. He said when he returned in September that had been corrected.
- [81] He said he had no idea why a boat builder would put the starboard shaft at an angle. It does not make the shaft easier to work on if it is necessary to make repairs to the shaft.

- [82] When he was re-examined he said the propeller shaft and eventually the propeller has to be parallel to the heel or centre line of the vessel otherwise the vessel would go round in circles.
- [83] In answer to the Court he said in doing his surveys he did not consider the contract between the Parties neither did he see the schematic drawing of the catamaran so he could not use the latter.
- [84] The Second Defendant gave a witness statement which he signed on February 26, 2006. He said he is a businessman and one of the shareholders and a director of Buhler's Yachts Limited. He said he is the major owner of the Defendant company and essentially it is owned and operated by himself.
- [85] He said at all material times the arrangements to build the boat was made between Earl Halbich and the First Defendant as he did not build boats.
- [86] He said Halbich saw the "Ocean Mist" he built for Ian Banfield and said he wanted a boat like that with some differences. The price of the boat was US\$300,000 and the reasonable time for construction of the boat was ten months minimum.
- [87] He said the initial discussion took place in or about October 2000. The understanding was that Mr. Halbich would go to look for his financing of the boat while the Defendant began the construction. He said Buhler's Yachts bought material and fabricated parts of the hull even though the Claimant had not yet paid any money.
- [88] He said the first amount paid by the Claimant was \$40,000 on April 10, 2000. He paid a further \$10,000 on February 19, 2001.
- [89] He gave a list of the Claimant's payments beginning April 10, 2000 to October 20, 2003 amounting to \$353,000 plus the engines which the Claimant bought for \$177,000.

- [90] He said the description of the work done on the 60 foot catamaran is not accurate as the work always exceeded the amount of money the Claimant paid.
- [91] He said Halbich got the loan of \$600,000 from the Bank but all did not go into the Defendants' account or into the boat.
- [92] He said that just about the time the initial \$40,000 was paid by the Claimant the Parties entered into the contract which was dated and signed on April 17, 2000.
- [93] He said if the Claimant had paid the installments as stated in the contract the boat would have been completed in about 10 months.
- [94] He said it was never contemplated by the Defendant nor was it the understanding of the Parties that the boat would be delivered to the Claimant for trials up to 4 months.
- [95] He said the standard arrangement regarding all boats that the Defendants had built during the eight or so years was that once the owner is ready to settle all outstanding contract sums the Defendants and the owner take the boat for a run to the Grenadines over a period of one day to ensure its seaworthiness and to determine any adjustments which may be necessary.
- [96] He stated that the Third Defendant told him the Claimant wanted the boat launched but could not pay the remaining and outstanding balance. Halbich wanted the immediate use of the boat but wanted the Defendants to wait one year or whatever period suited him, for its money.
- [97] He said the boat he agreed to build for the Claimant was a work boat for the use of day tours and not a luxury boat for which he never provided specifications.

- [98] He stated that Mr. Halbich frequently visited the shipyard telling the workers what to do or what not to do and the many delays caused were due to the many changes Halbich requested.
- [99] He stated that the Defendants could not deliver the boat within the three months promised to the Bank because of Halbich's continuous interference and changes.
- [100] Under cross-examination he stated he was the major shareholder and the Managing Director of the company. He said it was incorrect that Halbich and himself discussed the construction of the boat since 1999.
- [101] He said he could not remember giving Halbich a plan but he said he wanted a boat like the one we were building for the Barbadian.
- [102] He said it was from past experience that he arrived at the figure of \$897,000 for the cost of construction of the boat. He said he never went to school to learn to build boats but had 18 years of practical experience.
- [103] He said it was not totally true that he agreed with Halbich that he would build the boat from materials already had in the boatyard and Halbich would pay later at intervals. He said part of it is true for he had materials.
- [104] He said his understanding was that Halbich did not have the money and had to go to the Bank. He said he started the boat before he got a single cent from the Claimant.
- [105] He said he could not remember Halbich telling him it would be very difficult for him to get loans to build the boat. He told him he would have to go to the Bank to get money to pay for the boat.
- [106] He said he thought it was about the year 2002 that he started the boat and it took him one year to get money from the Claimant to continue the construction.

- [107] He said that whenever the Claimant asked why progress on the construction was not going on he would say to him that he needed materials as the materials he had was finished.
- [108] He said he could not remember the dates and times he received money from the Claimant but by March 2002 he had received \$100,000.
- [109] Still under cross-examination, after the adjournment, he said the proposal was signed on April 17, 2000 after he had started to build the boat. He agreed he told the Claimant he could buy the engines and the Claimant did so.
- [110] He said there were many times he asked Halbich for money and he would not come up with the money but later he found the money.
- [111] He said he could not remember promising the Bank that as a condition of its giving the Claimant the loan he would complete the construction of the boat within seven or eight months.
- [112] He said he could not remember in 2004 accompanying the Claimant to the Bank for a loan of \$250,000. Later he said he remembered going to the Bank on an occasion when there was a promise to complete the boat in 3 months.
- [113] He said he cannot remember being told he could go to the bank at any time for portions of the \$250,000 once Mr. Halbich had signed a cheque to pay him.
- [114] He said he was satisfied he exercised adequate supervision over the construction of the catamaran. He said he heard Mr. Peter Nicholas talk about the wiring but said that during the construction it rained and one could find water in the boat.

- [115] He said not to his understanding the wiring was wrong for he had been using that method of wiring since the 1970's. He said he heard Nicholas say the cables were badly routed but that is untrue as there were no specifications for building the boat.
- [116] He said that he disagreed that wires in water overnight would damage the wire.
- [117] He said he read the two reports by Mr. Browne and did not agree with them in totality. He said he installed the propeller shaft in the manner he was accustomed to. He said he did not go to school but he had practical experience in mounting propeller shafts.
- [118] He agreed that while the construction of the boat was going on he was doing construction on his gym but it was incorrect that he spent much time on the gym and neglected the boat.
- [119] When he was re-examined he said it was not a problem to make changes in the course of construction. He said Mr. Halbich did not buy the engines he expected and that necessitated the change to the engine beds.
- [120] He said he had built about 10 to 12 boats since 1994 and it was not a mistake to place the shaft as he did. It was placed in that manner to make accommodation if you have to pull out the shaft.
- [121] He said the Defendant corrected it to the satisfaction of the Claimant. He said his entire boatyard was not covered and when the hull has been constructed the boat is pulled into the yard to install the 60 foot tall mast.
- [122] He stated that rain water in a boat does not damage it and if water gathers in the fiber glass construction it is either bailed out or mopped.
- [123] He said that nothing was said by the Claimant as to where to put wires or switches; nothing about the consol; or where to place the rudder or shaft; nothing about the

placement of the toilets; no specifications about the bilge pump; and what you use to complete the boat.

[124] The witness said he was guided by the way he worked with Mr. Buhler.

[125] He said the Claimant's payments delayed completion and time was spent to make changes.

[126] He said he had different arrangements with the Claimant in respect of a dive boat which he had earlier sold to him.

CONCLUSIONS:

[127] On the first day of the trial learned Counsel for the Claimant tendered certain exhibits which were objected to by learned Counsel for the Defendants. They were Exhibits EH 15, 16, 19 (three of them) and EH 20 (three of them).

[128] EH 15 is a letter dated December 30, 2004 written by the Acting Senior Lending Officer of the National Commercial Bank to Mr. Earl Halbich confirming that between April 13, 2004 and June 18, 2004 an amount of \$250,000 was credited to the account of Matthew Llewellyn.

[129] Learned Counsel for the Defendants submitted that these documents are subject to the hearsay rule. Learned Counsel for the Claimant contended that was a document which related to the main actors in the case. In my judgment Exhibit EH 15 is admissible in these proceedings.

[130] EH 16 was a letter dated September 1, 2003 to Buhler's Yachts Limited by Kim Halbich, the wife of Earl Halbich, to Mr. Llewellyn of Buhler's Yachts Ltd pertaining to the catamaran. I agree with learned Counsel for the Defendants that Earl Halbich should not tender that exhibit. I hold therefore that Exhibit EH 16 is inadmissible.

- [131] The other exhibits are of the same genus. They are letters written by various persons to the effect that they intended or needed to hire the catamaran for sea cruises. In a letter dated January 13, 2005 the Manager of Corea & Co (1988) Ltd wrote to Mrs. Halbich requesting an update on the current status of the Fantasea Tours catamaran. In an undated letter Hazeco Tours wrote "TO WHOM IT MAY CONCERN" verifying that the company had contracted the catamaran to carry out their Grenadines tours at a stated price. In the third letter, EH 19, written on November 15, 2004 Wind and Se Ltd wrote to Kim stating they needed a catamaran for their operation for the season 2004 to 2005. All three letters are between persons who are not parties to the case. I rule all three of them inadmissible.
- [132] The first EH 20 exhibit was a letter dated January 13, 2005 from Dan Malone "TO WHOM IT MAY CONCERN" and for the same reason I hold it inadmissible. Another EH 20 exhibit was on a letterhead of "FANTASEA TOURS" pertaining to catamaran charters for December 2005 and January and February 2006. It is indecipherable and highlights the practice of some solicitors on just throwing documents at the court without explanation. I hold that document is inadmissible.
- [133] The third EH 20 document is a letter from Vincy Aviation Services Ltd to Mr. Halbich dated December 30, 2004 speaking of an agreement between them concerning the catamaran which was intended to commence on July 1, 2004. I hold that letter to be admissible in these proceedings. Its effect will be pronounced upon below.
- [134] An issue has been made about the Parties to the agreement. I will deal with that briefly. The main architects were Earl Halbich and Matthew Llewellyn. Both are the major shareholders in their respective companies. The proceedings were conducted sometimes as if they were between the two natural persons; at other times between one natural person and the company on the other side, and yet at some times between the two companies. One only has to look at the receipts. EH 6 dated March 26, 2002 is a receipt from Earl Halbich signed by Susan Llewellyn; EH7 dated November 13, 2002 is a payment

to Buhler's Yachts by Kim Halbich; EH 10 is a payment by Earl Halbich on March 12, 2003; and the first two receipts dated February 19, 2000 and February 19, 2001, Exhibits EH 2 and EH 3 are receipts from Fantasy Tours. In my judgment the proper parties are before the court as stated in the Claim Form.

[135] The next issue is the terms of the contract which learned Counsel for the Defendants submitted were subject to change in the course of the relationship between the Parties.

[136] I believe the original terms of the contract were oral and that the Defendants did agree to undertake the construction of the catamaran on credit terms especially as the Defendants had sufficient material in their boat yard to make a start. They in fact did so and constructed the hull costing \$65,000 without the Claimant paying one cent as they allege.

[137] The first payment of \$40,000 made by the Claimant was February 19, 2000. But that oral agreement was too good to be sustainable, that one Party would incur construction costs approximately US\$330,000 with no repayment schedules at all. Imagine the first deposit being \$40,000 and one year afterwards the second \$10,000.

[138] It is evident Matthew Llewellyn could not keep to the terms of that agreement with the best will possible and so he changed the agreement to what is in the proposal at EH 5 which Mr. Halbich signed. Halbich agreed to the change. In paragraph 12 of Halbich's witness statement he said, "He appeared as though he wanted to change our arrangement. If that was so fine, but he never told me that."

[139] Mr. Halbich is a businessman operating boat charters for over 20 years according to paragraph 3 of his witness statement and could not be in any doubt about the significance of the Proposal. It was the first time any specifications were put down concerning the catamaran which was to be built. He had given none whatsoever. All he wanted was a boat like the "Ocean Mist" with some differences. The proposal had a payment schedule which was very different from their original arrangements. How could he imagine that was a mere formality? I do not believe him.

[140] There was another change to the original terms when Mr. Halbich agreed to purchase the engines for the boat which as he stated in paragraph 15 of his witness statement was the most expensive part of the catamaran. He purchased both engines for the cost of \$178,000 approximately as indicated in Exhibit EH 9.

[141] Another change in the original terms was when Halbich agreed to get a loan from the bank of \$600,000. At paragraph 16 of his witness statement he said:

“We agreed to accommodate Matthew’s new request and found the money with the help of our family and our bankers.”

I have no doubt that by then the original oral agreement had been changed drastically and was perhaps rescinded.

[142] Evidently the loan of \$600,000 did not bring solace to the Parties and it is not at all clear that all of that money was paid to the Defendants. The evidence is that the Claimant handed the Second Defendant money at intervals, the first advance being \$140,000 paid in November 13, 2002. If the old agreement had been drastically changed so did the construction period of eight to ten months which was first mentioned.

[143] In paragraph 22 of his witness statement the Claimant stated that by October 24, 2003 his total payments were up to \$580,902.18. That is substantially correct as my own addition results in the figure of \$573,000.

[144] More money was required to finish the boat and the Claimant knew that despite his apparent obsession with Matthew Llewellyn’s gym. He decided to approach the bank to get some more money to pay the Defendants as he stated in paragraph 29 of his witness statement.

[145] The Bank agreed to advance the Claimant another \$250,000 on condition that Matthew finish the catamaran within three months. Exhibits EH 14 and EH 15 are quite relevant here. Together they provide agreed terms between the Parties especially as regards the time for completion of the contract.

[146] On March 9, 2004 the Bank had obtained a status report on the construction from Joseph C.I. Browne, marine surveyor and consultant, which stated that it would have required US\$172,000 to complete the boat.

[147] By letter dated March 26, 2004 Matthew Llewellyn wrote the Chief Executive Officer of the National Commercial Bank on the company's letterhead stating among other things:

"We are prepared to complete and deliver the boat within three months, after receiving the amount of \$250,000
Balance to be paid on delivery.
Yours faithfully,
Signed:-----
Matthew Llewellyn."

Exhibit 15 states that he was paid \$100,000 on April 3, 2004; \$50,000 on May 15, 2004; and \$100,000 on June 18, 2004. In his final submissions learned Counsel for the Defendants admitted that the last draw down from the \$250,000 was on June 18, 2004. It seems clear to me that Matthew had to comply with that undertaking by the end of September 2004 latest. I do not accept the contention that it was because of the constant changes demanded by Mr. Halbich that the boat was not completed. I believe Mr. Halbich helped to bring the boat to a stage of completion.

[148] It is clear that the Second Defendant did not comply and is in breach of contract. It took an injunctive order of the High Court of Justice made on February 9, 2005 to get him to launch the boat and thereafter to deliver it to the Claimant. Before I consider the consequences of the breach I should advert to a claim in negligence which was made when these proceedings were first filed.

[149] It seems that claim is no longer before me as in his final amended submissions learned Counsel for the Claimant has deliberately not claimed the amounts in the particulars for negligence stated at paragraph 65, 66 and 67 of the statement of case. Learned Counsel for the Defendants is to the same effect when in his final submission he said the issue of payment for defects is no longer applicable.

[150] I am now left to consider the quantum of damages for the delay of the Defendants in delivering the boat. Learned Counsel for the Defendant submitted that the Claimant attached a set of letters to his witness statement but that is not evidence. There must be direct evidence from the Claimant showing how the Defendants' late delivery caused him to lose profits and the nature and extent of these profits with details and specifics. I agree.

[151] It is trite law that special damages must not only be specifically pleaded but must be proved. Evidence must be tendered which is subject to cross-examination. I had already held most of these letters inadmissible for another reason. I refer to:

1. McGregor on Damages, 16th edition, paragraphs 23 and 2030;
2. Chitty on Contracts 28th Edition Volume 1, paragraph 27-005.

[152] But it must have been in the contemplation of the Defendants that time was of the essence of the contract and by delaying delivery the Claimant would lose money. The catamaran was delivered four months late and so I awarded the Claimant general damages of \$40,000 which should be deducted from the amount of the judgment in default which is no longer stayed.

[153] There will be no order as to costs.

.....
Albert N.J. Matthew
HIGH COURT JUDGE (Ag.)
(August 10, 2008)