THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

VIRGIN ISLANDS

Admiralty

Consolidated Claims No
BVIHAD2009/0008 Betteto Frett v Buckpasser Jeanneau 36
BVIHAD2009/0009 Betteto Frett v Keliste II Hershine 42
BVIHAD2009/0010 Betteto Frett v Emily J
BVIHAD2009/0011 Betteto Frett v Sea Lord Novatec
BVIHAD2009/0012 Betteto Frett v Fantastic Lady
BVIHAD2009/0015 Betteto Frett v Sea Smoke Beneteau 38
BVIHAD2009/0017 Betteto Frett v Hopeful 1
BVIHAD2009/0019 Betteto Frett v Cassidy
BVIHAD2009/0023 Betteto Frett v Gotcha Finally
BVIHAD2009/0024 Betteto Frett v Lady Ashleigh
BVIHAD2009/0025 Betteto Frett v Poco Loco

BETWEEN:

BETTETO FRETT

Claimant

and

THE OWNERS AND OTHER PERSONS INTERESTED IN THE SHIP "BUCKPASSER JEANNEAU 36" ET AL

Defendants

Appearances:

Lewis Hunte QC, Richard Arthur with him, instructed by Hunte & Co Law Chambers, for the Claimant
John Carrington, Mishka Jacobs with him, instructed by Mc W Todman & Co, for the Defendants

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2011: March 25

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JUDGMENT

[1] MITCHELL, J: In this action Mr Betteto Frett, a real estate agent and businessman of Tortola in the Territory of the British Virgin Islands (Mr Frett), claims against eleven vessels for dockage, water and electricity that he says he supplied to them during the period March 2006 to September 2009. He owns the Inner Harbour Marina (the Marina) situated at Road Town in Tortola. His claim arises out of the use by the eleven vessels of his Marina facilities.

The Issue of Jurisdiction

[2] At the commencement of the hearing it became necessary to get through a number of interlocutory applications. The first was a preliminary submission by Mr Carrington for the Defendants that went to jurisdiction. Mr Carrington submitted that the claims were not capable of being brought under CPR 2000 as admiralty claims in rem. He urged that CPR Part 70.2 sets out the various claims which may be made as admiralty claims. He urged that Mr Frett could only come within paragraphs (m) or (n) of this Rule. If he did so, then he could only make a claim in rem if he could fit it within Part 70.3 which sets out the admiralty claims which may be made as claims in rem. The relevant part of Rule 70.2 reads as follows:

> "70.2 The following claims, questions and proceedings, namely - ...
>
> (m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;
>
> (n) any claim in respect of the construction, repair or equipment of a ship or dock charges or dues;
>
> … are to be dealt with as Admiralty claims."

And, the relevant part of Rule 70.3 reads:

> "70.3(3) In the case of any such claim as is mentioned in rule 70.2(c) to (g), (i) to (k), (m) to (p), (r) and (u), where -
>
> (a) the claim arises in connection with a ship; and
>
> (b) the person who would be liable in a claim in personam was, when the cause of action arose, the owner or charterer, or in possession or in control, of the ship;
>
> a claim in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought against -

(i) that ship, if at the time when the claim is made the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or

(ii) any other ship of which, at the time when the claim is made, the relevant person is the beneficial owner as respects all the shares in it."

[3] Mr Carrington urged that, pursuant to Part 70.3(3), Mr Frett could only make a claim in rem against the eleven vessels if, at the relevant time, the relevant person was either the beneficial owner or charterer of the vessels. There was no evidence, he submitted, that North South Yacht Vacations Ltd (North South), the yacht chartering company represented by Mr Chandi Singh and Mr Brian Rose, and which had been Mr Frett's tenant of the Marina under a Tenancy Agreement, had owned or chartered the vessels, or had negotiated as owners of the vessels, and the claim must fail. Mr Hunte QC on behalf of Mr Frett responded that the claim in rem arose under paragraphs (m) and (n) of Part 70.2. The vessels had been brought to the Marina by their "ostensible owner" Mr Rose. Mr Rose was the Director of North Sound and Mr Frett had negotiated with him. Mr Frett could hardly be expected to examine the ownership papers of each vessel arriving at his Marina to ensure he was dealing with the legal owner. No one else had ever claimed that the vessels had wrongfully been brought to the Marina. North South, he urged, was clearly acting as agent for the owners, and the acts of a duly authorised agent is the act of the owner. The requirements of Part 70.3 had been satisfied.

[4] After hearing argument, I ruled that I was satisfied that a claim for dockage, water and electricity supplied to a boat would found an admiralty action intended to be covered by Part 70.2(m) and (n). Such a claim, I ruled, was an admiralty claim in rem under the provisions of Part 70.3(3) if the relevant person was the beneficial owner of the ship. I was satisfied that for the purposes of Part 70.3(3) the management of North South, who had brought the vessels in question to Mr Frett's Marina, represented the owners as agent of the owners for the purpose of satisfying the requirements of Part 70.3(3). I was fortified in that finding in that no other person had stepped forward to allege that the management of

North South had no authority to dock the vessels at the Marina or to contract for services and materials for the vessels.

The Issue of the Admissible Evidence

[5] There was another interlocutory application. On 17 February 2011 Mr Carrington had filed an application to extend time for the Defendants to file and serve affidavit evidence to be used at the trial. Mr Hunte QC on behalf of Mr Frett submitted that the court had no jurisdiction to admit the affidavits late. The Hon Chief Justice had issued the case management directions in the matter by an Order made in Saint Lucia on 17 December 2010, and the Order had been filed in Tortola on 29 December 2010. Pursuant to the case management directions Mr Frett had filed his affidavit in time on 7 January 2011. The Defendants then had 14 clear days, ie, by 24 January if we ignore the intervening weekend, to file their affidavits. However, Mr Rose's affidavits had not been filed until 31 January and 14 February. There had been no application by the Defendants for an extension of time. There had been no application by the Defendants for relief from sanctions. Relying on the judgment of Barrow J in the St Bernard case[1], he urged that the court had no jurisdiction to extend time or to grant relief from sanctions. It would be wrong for Mr Carrington, he urged, to disobey the case management Order with impunity.

[6] However, I accepted Mr Carrington's submissions, and ruled that the restriction in CPR 2000 Part 29 on the late filing of Witness Statements and without an early application for relief from sanctions and for permission to file late did not apply to Affidavits filed under Part 30. There was no similar restriction in Part 30. I was satisfied that in the absence of an unless order having been made by the case manager, in this case the Hon Chief Justice, and there being no sanctions provided for in Part 30, the court had power to permit Mr Rose's affidavits to be used. Mr Frett was not prejudiced. He had had the affidavits for some weeks and had referred to them in his own affidavits. The late filing of them was, in any event, done initially by consent.

1 Kenton Collinson St Bernard v Attorney General of Grenada and others (Unreported High Court decision in suit 84/1999, Grenada)

The Facts and the Law

[7] Mr Frett gave evidence on his own behalf. Giving evidence for the Defendants were Mr Chandi Singh, Managing Director of North South, and Mr Brian Rose a director of North South. The evidence consisted of their Affidavits and bundles of documents submitted by both Mr Frett and the Defendants.

[8] From this evidence I find that the eleven vessels involved in this claim were brought to the Marina and docked there under a Tenancy Agreement negotiated between Mr Frett and Mr Rose. The parties to the Agreement are Mr Frett and North South. The Agreement is in writing and is dated 31 March 2006. It provides for a year to year tenancy commencing on 1 May 2006. By this Agreement, Mr Frett rented the Marina to North South. The area rented included 19 docks and attached bulkheads and common area of the docks along with the building land to be used for office, maintenance and other company facilities. The rent was to be US$15,000 per month payable monthly in advance. The rent was to be increased by 12% at the end of the third year and, according to the Schedule, was to remain fixed for "the balance of the 5 year lease". This last phrase is surprising as the Agreement clearly states in clause 1 that it is a "tenancy from year to year". It is not a five year lease. The likelihood is that the error arose from Mr Frett having used a template of a 5-year lease to prepare this year to year lease, and having forgotten to alter the Schedule. The Agreement also provides at clause 2.f that North South will pay Mr Frett for all charges for electricity, water, gas, telephone and other services consumed or used at the premises. There is no provision in the Agreement for any additional dockage fees to be paid by the vessels. The only provision for payment is the monthly rent to be paid by North South to Mr Frett and the share of utilities to be paid by North South.

[9] The arrangement was disturbed in about March 2008 when a number of third parties advised the management of North South that the area of land on which the Marina office, maintenance shed and other buildings were built did not belong to Mr Frett and that North South was trespassing on it. North South wrote Mr Frett bringing the dispute with the third parties to his attention and asking him to sort it out. Mr Frett not succeeding in sorting out the dispute with the third parties, North South next wrote Mr Frett indicating they would

cease paying him rent and that they would hold the rent in escrow until the dispute had been determined. North South ceased paying rent to Mr Frett. A dispute arose between Mr Frett and North South. Mr Frett had his attorneys demand payment of the outstanding rent and threatened legal proceedings and eviction. More correspondence ensued. The third parties eventually instituted legal proceedings against North South.

[10] North South ceasing to pay rent, Mr Frett served a notice to quit on it. North South left the premises at the end of January 2009. On 7 April 2009 Mr Frett issued a claim based on the Tenancy Agreement against North South for arrears of rent and the cost of utilities including electricity and water. He subsequently in about August 2009 obtained a default judgment against North South. North South subsequently went into liquidation and Mr Frett has not been able to collect on his judgment against it.

[11] On 16 October 2009 Mr Frett issued these eleven proceedings against the eleven boats that North South had docked at the Marina. He did so in a series of eleven admiralty claims in rem. I find that what he did was to claim from each of the eleven vessels a proportionate share of the amounts of rent and utilities that he had previously claimed had been owed to him by North South. The basis of his claims is a notional "agreement" made with him by the officers of North South and intended to bind each vessel. I find that he never had any conversation, far less any agreement, with any officer of North South or owner or owner's representative of any of the eleven vessels for each vessel to pay a dockage or for electricity or for water. His only agreement was with North South, and it was in writing in the form of the Tenancy Agreement, and it obliged North South to make the payments.

[12] Mr Frett was of the opinion that the Tenancy Agreement was invalid on two grounds. One was that Mr Rose, he claimed, had refused to have his signature notarized, and the other was that the Agreement had never been registered in the Land Registry. Now, it is notorious that a rental agreement of property in Tortola on a year to year basis is not a registerable document, nor is any signature on it required to be notarized. Such an agreement may in law even have been oral and if so would have been as binding as one in

writing. Nothing therefore turns on whether the signature had been notarized or the Agreement registered. The Agreement effectively created a year to year tenancy of the Marina and put North South into exclusive possession of the Marina and all the docking facilities. While the Agreement subsisted, only North South, not Mr Frett, could have charged any vessel with docking fees. While North South remained in occupation, only North South owned Mr Frett for electricity and water, not the boats. Even if the owners of the docked boats had negotiated to pay a proportionate part of the electricity and water, which I am satisfied they did not, the payments would have had to have been made to North South, not to Mr Frett. North South, not the boats, was obliged under the Tenancy Agreement to pay for water and electricity. Mr Frett as a real estate agent should have known this.

[13] I accept Mr Hunte's submission that a Marina debt can give rise to two separate causes of action, namely, an action in rem against the vessels and an action in personam against the debtor. I accept that the rules prohibit the joining of the several parties in the same action where the claim against one party is in rem and the claim against the other party in personam. I am satisfied that the reason for this suit is that Mr Frett feels hurt that North South has left his premises owing him money, though clearly not the amount of money he sues for. The amount of money he sues for includes as “docking charges” amounts of rent that he had in fact previously been paid. That he was owed just over one month's rent is evidenced by the letter from his original solicitors claiming only this smaller amount.

[14] Mr Frett’s claim must flounder on the reef of lack of privity of contract between himself and the vessels or their owners There is also the little matter of his previously having obtained a judgment, unsatisfied though it is, against North South for all arrears of rent and charges for electricity and water. Any amounts previously owed to him for rent and utilities have merged into the judgment. He cannot now sue for what is in effect the same debt in a new and separate claim.

Conclusion

[15] Mr Frett's claim is dismissed, with prescribed costs to the Defendants which I assess at $38,525.28. The Defendants are released from their bail.

Costs on Application by a Defendant to Release a Vessel

[16] There is a number of outstanding applications that remain to be disposed of. Mr Carrington advises that the costs of the Claimant on the earlier Application for an Order for Release of a Ship filed by Mr Singh on 17 November 2009, and which had been dealt with by the Hon Mr Justice Henry Moe on 22 February 2010, remain outstanding to be assessed. Moe J had dismissed the defendant's application with costs to Mr Frett to be assessed. These costs must be quantified under CPR Part 65.11 as they arise from an application other than at case management, pre-trial review or at the trial. Under CPR Part 65.11(7) the costs of an application may not exceed 10% of the prescribed costs unless there are special circumstances justifying a higher amount. I accept Mr Carrington's assurance that the consolidated claim is for eleven times $17,894.11 which totals $196,835.21. I have accepted his submission that the prescribed costs to trial that are appropriate to the consolidated claims are therefore $38,525.28. The amount of 10% should not exceed $3,852.52. I assess Mr Frett's costs in that amount.

Costs on Applications by Mr Frett for Judgments in Default

[17] These were applications by Mr Frett for default judgments against the Defendants on the basis that they had not filed acknowledgments of service within the allotted time under the Rules. They had in fact filed their defences. Mr Frett had conceded early in the hearing before Moe J that he had no case on the applications and he had withdrawn them. Moe J had then dismissed the applications for judgment in default on 26 April 2010 with costs to the Defendants to be assessed. These costs also fall to be assessed under Part 65.11. Mr Carrington applies for costs of $24,002.40. Applying the rule on costs referred to above it would seem that the maximum amount that may be awarded is $3,852.52. I take into account the withdrawal of the application by Mr Hunte QC at the hearing before Moe J. I award the sum of $2,000 to the Defendants.

Costs on the Application by Mr Frett for the Court not to Admit the Affidavits of the Defendants at the Hearing

[18] This application was heard at the commencement of the hearing, and dismissed as described above in favour of the Defendants. The award of costs in the case is sufficient to cover this application.

Costs of the Defendants on the Application of Mr Frett for Forfeiture of Bail

[19] This application filed on 26 January 2011 was dealt with at the commencement of the hearing. The basis of the application was that three of the seven bailed vessels had either been sold by the owners or had disappeared. The application was that either the vessels be produced or the bail should be forfeited. I accept Mr Carrington's submission that the application was misconceived. In admiralty law the bail stands in the place of the vessel in question and the vessel itself, unlike with bail in a criminal case, need not be produced: see Halsbury's Laws of England, 4th Edition, Vol 1(1), para 389. The application is dismissed with costs to the Defendants. I consider that the award of costs in the case is sufficient to cover the costs of this application.

Don Mitchell, CBE QC
High Court Judge [Ag]