

IN THE EASTERN CARIBBEN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2010/0640

BETWEEN:

SEA SPORTS LIMITED

Claimant

and

XTREME MARINE LIMITED

Defendant

Appearances:

Mrs. Leslie - Ann Brissett George of Rika Bird & Associates, for the Claimant
Mrs. Cherissa Roberts Thomas instructed by Hill & Hill, for the Defendant

2013: July 10

August 26

JUDGMENT

[1] **Remy J:** This is a claim for damages for negligence.

[2] The Claimant company SEA SPORTS LIMITED and the Defendant company XTREME MARINE LIMITED are both registered in Antigua and Barbuda. The Claimant company is the owner of a vessel known as "Tashi II". The Defendant company carries on business primarily as Marine Technicians.

[3] The Claimant contends, and the Defendant disputes, that, in or around January 2008, the Claimant entered into an oral agreement with the Defendant, to carry out total repairs to the Tashi II (the boat.) It is the Claimant's further contention, which is categorically denied by the Defendant, that the Defendant assumed total management, responsibility and control of the project which included managing the repairs to the boat exclusively, and making recommendations for and retaining sub-contractors to assist with the repairs to the boat. The Claimant contends that as a

consequence, the Defendant's Director Ivan De Souza (Mr. De Souza) recommended to the Claimant that a sub-contractor was needed to commission repairs to the tubing of the boat and thereafter recommended the services of a sub-contractor Edward Carter (Mr. Carter) from the U.K., to repair the tubing of the boat.

[4] The Defendant admits that the Claimant is a customer of the Defendant and would engage the services of the Defendant from time to time to carry out various mechanical and electrical repairs and installations to the boat. The Defendant states, however, that for such a major project as alleged by the Claimant, the Defendant's policy would have required a written agreement outlining the scope of the work to be done and the terms and conditions of the agreement be prepared and presented for signature by the duly authorized representatives of the Claimant and the Defendant. The Defendant denied ever recommending to the Claimant that a sub-contractor was needed to commission repairs to the tubing of the boat.

[5] The Claimant's claim is for General Damages, Special Damages, interest and costs.

EVIDENCE

[6] Mr. Peter Kelsick gave evidence on behalf of the Claimant company and was its sole witness. Mr. Ivan DeSouza gave evidence on behalf of the Defendant company and was its sole witness.

[7] In his Witness Statement filed on the 18th day of May, 2012, Mr. Peter Kelsick contends that he is the sole director of Sea Sports Limited, the Claimant company. The company owns the boat Tashi II, a high speed charter vessel. Mr. Ivan De Souza is the Director of the Defendant company, and is a certified marine technician whom the Claimant had known for some years. Mr. Kelsick stated that in or around January 2008, on behalf of the Claimant, he entered into an oral agreement with Mr. DeSouza, the Defendant's representative, "to carry out total repairs to the Claimant's boat." His plan at the time was "to try to resuscitate the boat by repairing the engine and/or purchasing new engines." Since he knew Mr. DeSouza for a number of years, he approached Mr. De Souza to do the job. Mr. DeSouza readily accepted. Mr. Kelsick stated that for "this project", it was agreed that he would pay Mr. De Souza each time he completed a task and submitted his invoice. He states that the cheque payment dated 12th December, 2008 is one of those payments which he made to Mr. De Souza "over the period he was contracted to repair the boat." He adds that he is

unable to locate evidence of “various other payments” which he made as he believes they are amongst the documents destroyed when he had a flood in his office “sometime ago.”

[8] Mr. Kelsick stated that, since the boat was a “ribbed vessel” , its tubing needed to be in proper working order to facilitate the launch of the boat. He added that, during the repairs to the boat, in or around February 2008, Mr. De Souza advised that he would sub contract the tubing of the boat, and “highly recommended” a Mr. Edward Carter of Dartmouth, UK, to repair the tubing of the boat. Mr. Kelsick stated that he trusted Mr. DeSouza’s recommendation, since he “was in the business and would be better able to recommend a skilled person to repair the tubes than he could.” Mr. Kelsick stated that the repair included templating and retubing, and Mr. DeSouza thereafter hired Mr. Carter to work on the tubes of the Claimant’s boat. Mr. Kelsick stated that Mr. De Souza was in charge of the entire project. Mr. DeSouza made all the arrangements with Mr. Carter regarding the shipment, templating and repairing of the tube; his (Mr. Kelsick’s) involvement was “only to the extent that he would pay the fees with respect to the tubing and incidental charges.” Mr. Kelsick added that the invoice to commence the tubing job was sent to Mr. De Souza who advised him that fees were to be paid in two installments, the first installment immediately, and the second installment to be paid upon completion of the job prior to the sub-contractor’s (Mr. Carter) departure from Antigua. He (Mr. Kelsick) subsequently provided the relevant payment.

[9] Mr. Carter arrived in Antigua on 6th December, 2008 to begin repairing the tubing. Mr. Kelsick stated that, in the latter part of December 2008, Mr. Carter contacted him and “indicated that the tubes were completed as Mr. De Souza was in the area but not on site and he needed to be paid immediately since he was scheduled to catch his flight in short order.” Mr. Kelsick stated that he paid Mr. Carter the 2nd invoice in the amount of EC\$11,200, on 17th December 2008. He stated that he “assumed that Mr. DeSouza would have made arrangements to have the job certified in his absence.”

[10] Mr. Kelsick added that, in or around 6th January 2009, he was advised by a friend that the tubes were flat presumably due to a leak. He says that he told Mr. DeSouza about this and also contacted Mr. Carter who advised that he would return to Antigua to do the repairs by placing more stripping on the inside of the tube and in any event, he had contacted Sea Gull Inflatable to complete this stripping. In or around the middle of March, he became aware that Mr. Carter never

contacted Sea Gull Inflatable. Mr. Carter never returned to Antigua to complete the job and stopped responding to his telephone calls or emails.

- [11] Mr. Kelsick stated that, based on the relationship with Mr. DeSouza and the fact that he had accepted the job to repair the boat and assumed responsibility to manage the project and recommended and hired Mr. Carter as his sub-contractor, he felt that Mr. De Souza had “dropped the ball “ as the “project manager” and/ or “main contractor” . He stated that Mr. DeSouza, as the Defendant’s representative, owed a responsibility to the Claimant to ensure that the sub-contractor was reputable and that the job was completed with reasonable skill, care and diligence. He added that the present cost to repair the boat is EC\$64,652.48. He further stated that Mr. Carter was employed by Mr. DeSouza and the job was not completed in a good and workmanlike manner and as a result the Claimant has suffered loss and damage.
- [12] Under cross-examination, Mr. Kelsick testified that he has known the Defendant for a number of years and has known him to be in the business of mechanical repairs. He has previously worked well with the Defendant. . He engaged the Defendant to carry out the mechanical works on his boat Tashi II; that included repairing the engine and / or purchasing new engines. He stated that, to date, the engines have neither been repaired nor replaced.
- [13] Mr. Kelsick testified that he eventually agreed, after Mr. DeSouza made inquiries, to using Mr. Carter. He stated that after discussing the matter with Mr. DeSouza, the latter indicated to him that he was aware of work actually done here in Antigua by Mr. Carter and Mr. DeSouza convinced him that it was “o.k.” Mr. Kelsick agreed that, following Mr. DeSouza’s email, he (Mr. Kelsick) contacted Mr. Carter and made arrangements for him to come to Antigua in December. He was paying the bills, and he was responsible for making the flight arrangements and he made arrangements for hotel accommodation for Mr. Carter. He stated that after Mr. Carter completed the work, he was responsible for paying the balance due, but not necessarily responsible for inspecting the vessel. According to Mr. Kelsick, Mr. DeSouza was “an integral part” of the job. He testified that it was Mr. DeSouza’s suggestion that they use Mr. Carter, and he agreed. Mr. Carter was selected to do the work on Mr. DeSouza’s recommendation.
- [14] Mr. Kelsick stated that when the job was complete, Mr. Carter called him and said he was finished and wanted to be paid. He could not contact Mr. DeSouza and attended the job site, paid Mr.

Carter but didn't have the expertise to inspect the work to be able to say with certainty that it was a complete job. He added "that is not my expertise and that is why I had asked Mr. DeSouza to be involved with me from the beginning." In response to the suggestion of Learned Counsel for the Defendant, Mrs. Roberts-Thomas that Mr. DeSouza was not present throughout the period that Mr. Carter was working on the vessel, Mr. Kelsick stated, "I will have to disagree with that. Carter used some tools that Mr. DeSouza gave to him; so he must have been involved."

- [15] Mr. Kelsick testified that Mr. DeSouza and Mr. Carter were responsible for the resuscitation of the tubes. He disagreed with the suggestion of Mrs. Roberts Thomas that he brought Mr. DeSouza to court "out of the convenience of him being in Antigua," and also because he had little success locating Mr. Carter in the U.K. and getting him to remedy the boat.
- [16] Under re-examination, Mr. Kelsick re-iterated that Mr. DeSouza was "an integral part" in the resuscitation of the boat from the very beginning and that he was the one who contacted Mr. Carter on his behalf. He stated that the engines on the boat had not been replaced because he could not afford to do so.
- [17] Mr. DeSouza in his Witness Statement filed on the 18th May 2008, contends that he is a director of Xtreme Marine, the Defendant company. In 2008 Mr. Kelsick asked him to give him an estimate to replace both engines on his boat, Tashi II with two new Yanmar marine engine packages. A few weeks later he asked for information on someone who could replace the tubing on his boat. Mr. DeSouza made inquires, got a recommendation and contacted Mr. Carter on Mr. Kelsick's behalf.
- [18] Mr. DeSouza stated that he got the costing from Mr. Carter. Mr. Kelsick then dealt directly with Mr. Carter about the tubing on the boat. A few months later, Mr. Carter called him, because he was unable to contact Mr. Kelsick directly and he was ready to come to Antigua. He relayed the message to Mr. Kelsick. A few weeks later, Mr. Carter called him and informed him that he was in Antigua, was waiting in the boatyard for Mr. Kelsick, and could he borrow a compressor and some tools. He did not have the tools, but lent him the compressor. A few days afterwards, Mr. Carter returned the compressor, thanked him for his assistance, told him the job was complete and he had been paid.

- [19] Mr. DeSouza stated that, two days later, Mr. Kelsick called him and told him that he had overpaid Mr. Carter, and could not contact him. He relayed the message and was later informed that Mr. Carter had repaid Mr. Kelsick. Mr. DeSouza stated that there was no oral agreement between himself and Mr. Carter to supervise the re-tubing of the boat. He added that he assisted Mr. Kelsick in light of the fact that the latter had been a customer of Xtreme Watersports, and was giving him the job to repower his boat.
- [20] Mr. DeSouza states that, after the incident with Mr. Carter, Mr. Kelsick continued to call him and ask for his services on other projects. In 2010 Mr. Kelsick asked him to be a witness in a matter against Antigua Marine Services. He agreed, but when the matter was called, he was out of state. Antigua Marine Services won the case and subsequently Mr. Kelsick stopped speaking to him and told him that "his day would come before year end."
- [21] Under cross-examination, Mr. DeSouza testified that he is a Marine Technician and that he "just works" for the Defendant company. He denied that Mr. Kelsick and himself agreed that the Defendant company would resuscitate or bring around the Claimant's boat Tashi II. He was insistent that the agreement with the Claimant to manage the repairs to the Tashi II was solely for "mechanical repairs." He stated that it was "incorrect" to suggest that the replacement of the tubes was a part of the "overall project to repair the boat Tashi" that he had undertaken. It was also incorrect that he advised Mr. Kelsick that Seagull was not qualified to do the job at hand and proposed to speak to Pickle to obtain a quote for tube replacement. He stated that he did not go to see the work that was done on Pickle's boat.
- [22] Mr. DeSouza was also insistent under cross examination that he did not sub-contract the services of Mr. Carter to work on the boat tubes for Mr. Kelsick. He stated that it was "not correct" to suggest that he was responsible for managing this tubing project "from start to finish." He stated that it was "incorrect" to suggest that he was only denying responsibility because Mr. Carter "botched the job."
- [23] Based on the evidence before the Court, the undisputed facts are as follows:-
- (a) The Claimant was a customer of the Defendant and had previously engaged the latter's services from time to time to provide mechanical services for the Claimant's boats.

- (b) There was no written agreement or contract between the parties for the repairs to the Tashi II.
- (c) The Claimant's claim is based on an alleged oral agreement between Mr. Kelsick and the Defendant's representative Mr. DeSouza which took place sometime in January 2008.
- (d) Mr. DeSouza was not skilled in the area of tubing of boats. No evidence was adduced by either the Claimant or the Defendant that either Mr. DeSouza or the Defendant company purported to possess expertise in that area.
- (e) Mr. Kelsick indicated to Mr. De Souza that the engines of the Tashi II needed to be replaced and there was an oral agreement for the replacement of the said engines.
- (f) To date, no replacement of the engines of Tashi II has taken place. In fact, the evidence before the Court is that the engines have been sold.
- (g) On completion of the tubing works by Mr. Carter, Mr. Kelsick attended on site and paid him the balance of the money owed.
- (h) Mr. DeSouza was not present and did not inspect the completed job prior to the payment of the final installment by Mr. Kelsick.
- (i) Mr. Kelsick contacted Mr. Carter directly on discovering that the tubing job was defective.

ISSUES

[24] The issues which fall to be determined by the Court are as follows:-

- 1) Whether or not an agreement to manage "total repairs" to the Claimant's boat existed between the Claimant and the Defendant.
- 2) Whether or not the Defendant held himself out to the Claimant as the Project Manager/ Main Contractor and assumed the responsibility of supervising the repairs to the Claimant's boat.
- 3) Whether or not the Defendant breached the duty of care which was brought about by his alleged assumption of responsibility and was negligent.
- 4) What if any is the extent of the damage owed to the Claimant as a result.

THE RELEVANT LEGAL PRINCIPLES

[25] The learned authors of Halsbury's Laws of England at page 3 parag. 1¹ state:-

"Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all."

[26] Charlesworth & Percy on Negligence (page 11, paragraph 1-19)² define negligence in these terms:-

"Negligence as a breach of duty is a "specific tort in itself and notsimply.....an element in some more complex relationship or in some specialized breach of duty" - per Lord Wright in **Grant v Australian Knitting Mills** [1936] A.C. 85."

[27] It is the contention of the Claimant that the Defendant owed a duty of care to it because it assumed responsibility of carrying out repairs to the Tashi II, and for undertaking the task of supervising the tubing work.

SUBMISSIONS OF COUNSEL

[28] Learned Counsel for the Claimant, Mrs. Brissett – George , in her Closing Submissions contends that Mr. DeSouza expressly assumed responsibility to resuscitate the Tashi II and for supervising the tubing. She further contends that Mr. DeSouza was an integral part of the work of resuscitating the boat and of supervising the tubing. Learned Counsel grounds her submissions on the assumption of responsibility by the Defendant on the following:-

¹ Halsbury's Laws of England
Volume 78 - 5th Edition
Butterworths
LexisNexis
2010

² Charlesworth & Percy on Negligence
Edited by Christopher Walton
12th Edition

- 1) It is the Defendant who acted through its representative Mr. DeSouza, and can by his actions be considered to have in fact assumed responsibility to manage the project to totally resuscitate the Claimant's boat which included dealing with repairs for the tubes. Learned Counsel invites the Court to make this finding of fact "based on the Defendant's actions and course of conduct throughout the relevant period. "
- 2) The evidence before the Court illustrates that Mr. DeSouza was the person managing the aspect of the project pertaining to the tubing job by Mr. Carter. He undertook all the arrangements and managed the relationship with Mr. Carter, and the Claimant only got involved to the extent where he paid for all the relevant charges directly.

[29] Learned Counsel for the Claimant also contends as follows:-

" At paragraph 1 - " The documentary evidence in the case at bar illustrates that the Defendant assumed total management, responsibility and control of the project which included retaining a subcontractor from England called Ed Carter which was acceded to by the Claimant. At all material times the Claimant was far removed from the project save for his involvement at instances when payments for flight, accommodation and work had to be made. The evidence illustrates that the Defendant and not the Claimant had total contact with the sub-contractor to make arrangements regarding the preparation and later remodeling of the tube. Moreover, too, the Claimant conducted himself in acceptance that the Defendant was jointly responsible with the subcontractor to repair the tubes and his involvement at all material time was to the extent where he paid for all costs involved."

[30] Learned Counsel for the Defendant Mrs. Roberts –Thomas contends that the Claim as framed or pleaded "falls squarely within one of the four special circumstances within which a third party may owe a duty to prevent damage to another, that is "where there is a special relationship between the defendant and the claimant based on an assumption of responsibility by the defendant".

[31] The rival submissions of Mrs. Roberts-Thomas on the Claimant's allegations of assumption of responsibility by the Defendant are as follows:-

- (a) There did not exist a contractual arrangement/agreement whereby the Defendant is purported to have assumed responsibility for the management of the repairs to the Claimant's boat.
- (b) The Claimant did not rely on any assumption of responsibility by the Defendant, but remained involved throughout his project. The evidence reveals that Mr. Kelsick, as representative of

the Claimant, himself assumed the responsibility beyond the initial preparatory stage of identifying a service provider.

- (c) The decision to proceed with Mr. Carter would have been based upon references made available to the Claimant for consideration.
- (d) From the evidence it is clear that the Defendant, at the request of the Claimant, made enquiries of and contacted a service provider to carry out the re-tubing in Antigua. The Defendant obtained references and quotations for the job and all of this information was forwarded to the Claimant for consideration.
- (e) The Defendant facilitated the initial process but this was done on the basis of the relationship of the Claimant being a past and potential future customer of the Defendant with the Claimant having full knowledge at all times that the Defendant's skills and experience were limited to mechanics and did not extend to tubing.
- (f) Objectively speaking, there was no reliance on the part of the Claimant.

[32] I will now consider the issues in light of the law and the submissions of Counsel.

ANALYSIS AND FINDINGS

ISSUE # 1 - WHETHER OR NOT AN AGREEMENT TO MANAGE "TOTAL REPAIRS" TO THE CLAIMANT'S BOAT EXISTED BETWEEN THE CLAIMANT AND THE DEFENDANT.

[33] The Claimant alleges not only that the Defendant undertook to carry out total repairs to the Tashi II; according to Mr. Kelsick, the agreement which he had with Mr. DeSouza included being a Project Manager / Main Contractor for the "project." It is trite law that he who alleges must prove. The onus is therefore on the Claimant to prove that which it alleges. As stated above, it is not disputed that the Claimant was a customer of the Defendant whereby the Defendant provided mechanical services to the Claimant for his boats. It is also not disputed that there is no written agreement or contract between the Claimant and the Defendant. However, the law is settled that a contract can be oral as well as written. The Claimant has to satisfy the Court that an oral agreement existed between itself and the Defendant, such as would impose on the Defendant a duty of care. Based on the evidence before it, the Court finds that no contractual arrangement or agreement existed between the Claimant and the Defendant for carrying out total repairs to, or for "total resuscitation" of the Tashi II, as alleged by the Claimant. There is no evidence of any terms

and conditions of this alleged agreement, such as the total cost of the contract, the length of time involved in carrying out the repairs. In any event, the Defendant's representative Mr. De Souza was, to the knowledge of the Claimant's representative Mr. Kelsick, skilled in mechanical repairs only.

[34] I am of the view that Issues 2 and 3 can be conveniently dealt with together.

Issue # 2 - Whether or not the Defendant held himself out to the Claimant as the Project Manager/Main Contractor and assumed the responsibility of supervising the repairs to the Claimant's boat.

Issue # 3 - Whether or not the Defendant breached the duty of care which was brought about by his alleged assumption of responsibility and was negligent.

[35] Learned Counsel for the Defendant submits "...as the claim pleads negligence, consideration must be given to whether, outside of a contractual arrangement, the Defendant has assumed the responsibility to manage repairs on behalf of the Claimant and more particularly 'whether the claimant could reasonably rely on an assumption of personal responsibility by the defendant who performed services on his behalf.'"

[36] With respect to the law dealing with the duty of care based on the assumption of responsibility, the learned authors of Halsbury's Laws of England (5th edition at page parag.) supra n.1 state:-

"There is no general duty to prevent a third party from causing damage to another, but there are four special circumstances in which a duty may arise:-

- (1) Where there is a special relationship between the defendant and the claimant based on an assumption of responsibility by the defendant;
- (2) Where there is a special relationship between the defendant and the third party based on control by the defendant over certain classes of persons
- (3) Where the defendant is negligently responsible for a state of danger and it is reasonably foreseeable that a third party may interfere with it and cause damage by 'sparking off' the danger, and
- (4) Where the defendant knows, or has the means of knowing, that the conduct of a third party on his property is endangering neighbouring property."

[37] Charlesworth & Percy (at page 52, paragraph 2-93) supra n.2, under the Rubric "Assuming responsibility by taking on a task") state:-

"In the decision of the House of Lords in **Henderson v Merrett Syndicates Ltd** [1995] 2 A.C. 145, their Lordships held that where a person assumes responsibility to perform professional or quasi-professional services for another who relied on those services, then the relationship was sufficient to give rise to a duty on the part of the person providing the services to exercise skill and care in doing so."

[38] The authorities are clear that the test of whether a Claimant can state that the Defendant has assumed responsibility is an objective one; namely, whether a reasonable person in the position of the claimant would believe that, in all the circumstances, the defendant had assumed responsibility.

[39] Several relevant factors have to be considered before the Court can conclude that a defendant has assumed responsibility and therefore owe a duty of care to the Claimant. In the case at bar, the Court takes into account the following factors:-

(a) The nature of the relationship between the parties; in the instant case, the Claimant was a customer of the Defendant company. The Claimant had engaged the services of the Defendant company in the past. Mr. Kelsick and Mr. De Souza were not strangers to each other; they had a prior business relationship and Mr. Kelsick had approached Mr. De Souza about replacing the engines of the Tashi II.

(b) Based on the totality of the evidence and on the whole course of conduct of the parties, the Court finds that there is no evidence that the Defendant through Mr. De Souza, did any more than facilitate the Claimant's representative Mr. Kelsick. Because of their business relationship, Mr. De Souza provided information to Mr. Kelsick as to who was available to do the tubing work on the Tashi II, after having made enquiries in that regard, at Mr. Kelsick's request. He informed Mr. Kelsick that Mr. Carter had done work for one Pickle on the latter's boat. There is no cogent evidence, except Mr. Kelsick's "say so", that Mr. De Souza "highly recommended" Mr. Carter. In any event, Mr. Kelsick was free to reject this "recommendation", and to conduct his own enquiries. He could and should have ensured for himself whether Mr. Carter was "a reputable individual" by making enquiries for himself of Pickle. After all, Pickle was available in Antigua and Barbuda.

- (c) The Court is therefore of the view that, in the circumstances, the fact that Mr. De Souza facilitated Mr. Kelsick by making enquiries at the latter's request with respect to who was available to do the tubing work was no more than good business practice .
- (d) Mr. Kelsick may not be a marine mechanic or an expert in boat repairs, but he is a businessman. Indeed, in his Witness Statement, Mr. Kelsick stated that he is a "businessman by profession." It is the evidence of Mr. Kelsick that he trusted Mr. De Souza's recommendation, since he (Mr. De Souza) "was in the business" and would be better able to recommend a skilled person to repair the tubes than he could. The Court finds little merit in this contention. Mr. Kelsick himself was in the boat business.
- (e) The evidence before the Court is that the Tashi II is a charter vessel and is therefore used for business. In his Witness Statement, Mr. Kelsick states that "the Tashi II was manufactured to provide a high speed charter vessel for use in the Tourist Industry by Crompton Marine of the U.K. in 1998." The Tashi II is therefore not a boat which Mr. Kelsick used for his private pleasure on a week- end or whenever he fancied. In the view of the Court, a reasonable person in the position of Mr. Kelsick would be expected to obtain information and/or make further inquiries about Mr. Carter. A reasonable person in the position of Mr. Kelsick would be expected to have visited Pickle and found out for himself whether he (Pickle) was satisfied with the work done by Mr. Carter. At the very least, Mr. Kelsick could have made a telephone call to Pickle to satisfy himself of the level of expertise of Mr. Carter. There is no evidence that Mr. Kelsick did any of the above.

[40] At paragraph 22 of his Witness Statement, Mr. Kelsick states: - "I am of the view that Mr. De Souza as the Defendant's representative owed the Claimant a responsibility to ensure that the sub-contractor was a reputable individual in the first instance."

[41] Learned Counsel for the Claimant contends that the Defendant assumed "total management, responsibility and control of the project which included retaining a subcontractor from England called Mr. Ed Carter which was acceded to by the Claimant." She contends further that "at all material times the Claimant was far removed from the project save for his involvement at instances when payments for flight, accommodation and work had to be made." The Court respectfully disagrees with this submission. The evidence of Mr. De Souza is that, after he got the costing from Mr. Carter, Mr. Kelsick dealt directly with Mr. Carter about the tubing on the boat. The evidence

of Mr. Kelsick confirms this. Mr. Kelsick in his evidence agreed that, following Mr. De Souza's email, he is the one who contacted Mr. Carter and made arrangements for him to come to Antigua in December.

[42] The Court finds further that it cannot be said that the Claimant "was far removed from the project" if Mr. Kelsick was responsible for making the arrangements for the flights, hotel accommodation and for paying the money for the job. If the Defendant had retained Mr. Carter as its sub-contractor, as contended by the Claimant, it would have been the responsibility of the Defendant, as the General Contractor, to have made all these arrangements; not Mr. Kelsick. In that regard, the Court is of the view that paragraph 12 of the Witness Statement of Mr. Kelsick is very instructive. Mr. Kelsick states:-

"In or around 6th December, 2008 Mr. Carter arrived in Antigua to begin repairing the tubing of the boat. I was not entirely pleased by this as I preferred if he came during the summer period as opposed to the winter period so if I was needed for anything I could readily make myself available."

[43] The Court finds that the above illustrates that the Claimant's involvement extended beyond merely paying for the job and that Mr. Kelsick was intimately involved not only in contacting Mr. Carter to come to Antigua to do the tubing work, but in supervising the actual work. The Court finds further that if Mr. De Souza had assumed responsibility for the tubing project, there would have been no necessity for Mr. Kelsick to "readily make himself available" if he was needed.

[44] Learned Counsel for the Claimant relies on the following email dated 21st November, 2008 as illustrating the nature and extent of the relationship between the Claimant and the Defendant "such that it is reasonable for the law to impose a duty of care." The email reads as follows:-

"Peter....You promise to call Ed, please call him. This is becoming a problem to me for if I have a tube to be made in the future I cannot use Ed, who is cheaper, because of a situation not my fault. Between yesterday and this morning I received four calls, which I did not answer, and two emails saying that you did not call him as I promise him you will do and he tried calling you but no answer. I do not believe in burning bridges with my suppliers or sub-contractors because a negative report on Xtreme Marine does not speak well to the standards I try to upkeep.

As a rule when I undertake projects I collect all monies for parts and sub contract work and 75% labour from the customer upfront. I never applied this rule to you because of our good relationship since I left Tom. I understand your position, but, on the other hand, I am facing one of my subcontractors, who because of past experience with customer in Antigua, is becoming suspicious of Xtreme Marine.

I don't want you to get me wrong I know it's difficult for you now, but here I am not able to do anything to resolve Ed's legitimate concerns. I am looking forward to the completion of retubing of boat which has put me in an embarrassing position."

[45] Learned Counsel for the Claimant makes the following submissions with respect to the above email:-

(a) In cross examination, Mr. De Souza admitted that the project he undertook as referred to in the above email was "to change the engine for the boat and assist Mr. Kelsick in the process of retubing the boat." Mr. De Souza has further acknowledged in cross examination that Mr. Kelsick was his client and Mr. Carter was his sub-contractor.

(b) The evidence further illustrates that Mr. De Souza was the person managing the aspect of the project pertaining to the tubing job by Mr. Carter. He undertook all the arrangements and managed the relationship with Mr. Carter, and the Claimant only getting involved to the extent where he paid for all the relevant charges directly.

[46] Learned Counsel for the Defendant states that the Claimant places much reliance on the above email of 21st November, 2008 as evidence that Mr. De Souza accepted the job. She states that in cross-examination, Mr. De Souza was asked to explain what he meant in the said email by "...looking forward to completion of re-tubing." Learned Counsel contends that "the explanation provided pictured Mr. Carter as being disgruntled over funds he had injected into the project and not being able to reach Mr. Kelsick to finalise arrangements for completion. Mr. De Souza indicated he was frustrated that Mr. Carter was continually contacting him (Mr. De Souza) as he (Mr. Carter) could not reach Mr. Kelsick to finalise arrangements." Learned Counsel submits that "this in itself suggests that the Defendant was not given nor did it assume the responsibility over the project as the Claimant contends and that the said email was by no means acceptance of such an oral agreement or assumption of that responsibility." Learned Counsel invites the Court to find that the Claimant "created the basis of a claim against the Defendant upon this email in hindsight."

- [47] Learned Counsel for the Claimant also relies on the email dated 29th February, 2008 from Mr. Carter to Mr. De Souza, where Mr. Carter instructed Mr. De Souza to “strip off all the cladding of the boat.” She also relies on the email dated 11th April, 2008, where Mr. De Souza advised Mr. Carter that he had shipped out the tubes, and on the email dated 21st April, 2008 where Mr. De Souza “confirmed to Mr. Carter of the shipment of the tubes and tracking number.”
- [48] The Court is of the view that the above correspondence does not provide proof of the assumption of responsibility for the tubing project on the part of Mr. DeSouza as alleged by Mr. Kelsick. It bears repeating that, following the email of 21st November 2008, Mr. Kelsick contacted Mr. Carter directly and made all the arrangements himself for Mr. Carter to travel to Antigua. Further, that although De Souza had shipped out the tubes to Mr. Carter, it was Mr. Kelsick who paid for everything. The evidence also discloses that it is Mr. Kelsick who cleared the tubes at Customs when they arrived in Antigua and it was Mr. Kelsick who stored the said tubes, pending the arrival of Mr. Carter in or around December 2008.
- [49] If, as alleged by the Claimant, Mr. De Souza had sub-contracted Mr. Carter for the tubing job, the email between Mr. Kelsick and Mr. De Souza dated the 21st November 2008 would not have been necessary. The gist of this email is Mr. De Souza, again, acting as a facilitator for the relationship between Mr. Carter and Mr. Kelsick. Mr. De Souza is expressing his concerns about the breakdown of the contact between Mr. Kelsick and Mr. Carter. If Mr. De Souza had sub-contracted Mr. Carter, all negotiations and payments would have been between Mr. De Souza and Mr. Carter.
- [50] The law is settled that in contracts of employment, the label given to the relationship by the parties is not determinative; it is the reality of the relationship between the parties which is important. The Court is therefore of the view that, notwithstanding Mr. De Souza’s response during cross examination that “the sub-contractor” referred to in the email of 21st November 2008 was Mr. Carter, the reality of the relationship between Mr. De Souza and Mr. Carter was not that of Main Contractor and Sub-contractor. In any event, Mr. De Souza had testified earlier that he did not sub-contract Mr. Carter to work on the boat tubes. The Court is of the further view that, looking at the conduct of Mr. De Souza and Mr. Carter in its entirety, that not only was there no express contract between them in respect of the tubing project, but that there is no conduct on their part from which such a contract can be implied.

[51] The Court is of the view that the following exchange between Mr. Kelsick and Learned Counsel for the Claimant Mrs. Brissett - George, during re-examination , is telling:-

Mrs. Brissett – George:- “Mr. Kelsick, in cross-examination , Counsel asked ‘in fact you brought Mr. De Souza to Court out of the convenience of him being in Antigua.’ My question to you is why did you bring Mr. De Souza to Court?”

Mr. Kelsick:- “Mr. De Souza was an integral part in the resuscitation of my boat from the very beginning. He was the one who contacted Ed Carter on my behalf.”

[52] The Court is of the view that Mr. Kelsick’s above response encapsulates the Claimant’s entire case. The Claimant’s case is based on the fact that because Mr. De Souza contacted Mr. Carter on Mr. Kelsick’s behalf, Mr. De Souza thereby assumed the role of Project Manager/ Main Contractor and that he assumed responsibility for the “ entire project” including the tubing project.

[53] The Court also notes the following exchange which took place between Mr. Kelsick and Learned Counsel for the Defendant Mrs. Roberts-Thomas during cross-examination:-

Mrs. Roberts-Thomas:- “And so you want the court to believe that you attended the job site, paid Mr. Carter and didn’t verify that the job was complete?”

Mr. Kelsick:- “I was at the job site; I did pay Carter. I didn’t have the expertise to inspect the work to be able to say with certainty that it was a complete job. That is not my expertise and that is why I had asked Mr. De Souza to be involved with me from the beginning.”

[54] The Court finds the exchange that follows soon thereafter very significant:-

Mrs. Roberts- Thomas:- “But Mr. Kelsick, earlier you indicated to the Court that Mr. De Souza’s expertise was in mechanics, not so?”

Mr. Kelsick:- “Yes.”

Mrs. Roberts- Thomas:- “And so he was not in fact skilled to carry out the tubing repairs, is that not so? Did you not indicate that to the Court?”

Mr. Kelsick:- “Yes.”

Mrs. Roberts-Thomas:- "So, Mr. Kelsick, you were not skilled; Mr. DeSouza was not skilled; who certified this job complete?"

Mr. Kelsick:- "As much as we are not skilled in the actual work itself, I am sure we have enough common sense to look at something like so and be able to ascertain whether it was reasonably well done or not.....In doing the actual work itself, the physical labour of actually mounting the tubes, a reasonable oversight would be able to indicate whether the job was complete or not."

[55] The Court is of the view that the above provides further evidence that Mr. De Souza had not accepted or assumed responsibility and control of the tubing project as alleged by the Claimant. Mr. De Souza never held himself out as being skilled in carrying out tubing repairs. The Court finds further that Mr. Kelsick had himself assumed responsibility for inspecting the job after it was completed by Mr. Carter. He relied on his "common sense" to ascertain whether the job was reasonably well done.

[56] Based on the foregoing, the Court finds that the Claimant has not proved, on a balance of probabilities, that Mr. De Souza assumed responsibility for the "entire project" including the tubing project, nor did he assume the role of Project Manager / Main Contractor.

[57] In its Amended Statement of Claim, the Claimant pleads (at paragraph 10) thereof:-

"Whilst the sub-contractor was in Antigua the Defendant worked closely with him to ensure the repair to the tube was completed."

[58] It bears repeating that the onus of proving that which is alleged lies on the Claimant. The Court is of the view that the following exchange between Counsel for the Defendant Mrs. Roberts-Thomas and Mr. Kelsick during cross examination is very instructive in determining whether or not the Claimant has discharged its burden of proof:-

Mrs. Roberts-Thomas:- "In fact, I put it to you that Mr. DeSouza was not present throughout the period Mr. Carter was working on the vessel."

Mr. Kelsick:- "I will have to disagree with that. Carter used some tools that Mr. DeSouza gave to him so he must have been involved."

[59] The exchange continued:-

"Mrs. Roberts-Thomas: "So by process of elimination, if Mr. Carter uses Mr. DeSouza's tools, Mr. DeSouza was involved? Do I understand you correctly?"

Mr. Kelsick: "Yes; I would say that he must have had some knowledge. If you are going to lend somebody equipment to do a particular job you must know where the job is at some point. I think that is only reasonable."

[60] The Court is of the view that the above exchange does not prove, on a balance of probabilities, that Mr. DeSouza was involved in the tubing project, or that he worked closely with Mr. Carter on the said tubing job while the latter was in Antigua. The Court is of the view that no reasonable person would assume or infer that the mere act of lending someone tools or equipment would constitute "working closely" with that person, or being involved in that person's work. Further, there is no evidence before the Court from which a "close" or any other kind of working relationship can be inferred. There is no evidence that even suggests, let alone proves, that Mr. DeSouza participated in the tubing work with Mr. Carter. There is no evidence to suggest, let alone prove, that Mr. De Souza assisted Mr. Carter in the tubing work.

[61] At paragraph 13 of its Amended Statement of Claim, the Claimant pleads that "prior to the period of survey, it was made known to the Claimant on or around January 6th 2010 that the tubes were deflated. As a consequence the Claimant immediately contacted the sub-contractor to request that he make repairs and was advised by the sub-contractor that the repairs would be made shortly."

[62] Further, in his Witness Statement, Mr. Kelsick stated that on being advised by a friend that the tubes were flat, he "told Mr. DeSouza about this and also contacted Mr. Carter who advised that he will come to Antigua to do the repairs..."

[63] The Claimant pleads that "notwithstanding and despite this assurance and several demands made by the Claimant, the sub-contractor never in fact returned to Antigua to make the repairs."

[64] The Court is of the view that Mr. Kelsick's conduct in "immediately contacting " Mr. Carter on discovering that the tubes were deflated is significant and is indicative of a tacit acknowledgment on the part of Mr. Kelsick that Mr. Carter and not the Defendant had total responsibility for the tubing work. If Mr. Carter had been sub-contracted by Mr. DeSouza, as contended by Mr.

Kelsick, the responsibility for contacting Mr. Carter to advise of the leaks and to request the repairs would have been that of Mr. DeSouza as the "Main Contractor." As noted above, it is Mr. Kelsick who not only contacted Mr. Carter to request that he make the repairs, but made "several demands" of Mr. Carter to return to Antigua to remedy the defect in his work.

CONCLUSION

[65] In my judgment, based on the totality of the evidence, the Claimant has failed to prove its case on a balance of probabilities. I find that while there may have been an oral agreement between the parties that the Defendant replace the engines of the Tashi II, there is no cogent evidence that there was an agreement or contract for the Defendant to carry out "total repairs" to , or "totally resuscitate the Tashi II , inclusive of the tubing repairs." In particular, there is no evidence from which the Court can reasonably conclude that an agreement existed for Mr. DeSouza to sub-contract the tubing job or for him to manage and / or supervise the said job. I find further that there is no evidence that the Defendant either through Mr. DeSouza or in any other way was engaged as Project Manager or Main Contractor to manage or supervise the tubing project with respect to the Tashi II. In my judgment, Mr. DeSouza assisted and facilitated Mr. Kelsick in obtaining the services of Mr. DeSouza based on the fact that the Claimant was a customer of the Defendant. I do not accept the evidence of Mr. Kelsick that in or around February 2008, Mr. De Souza advised that he would sub-contract the tubing of the boat. I find that there was never a sub-contracting of Mr. Carter by the Defendant. The responsibility for the tubing work fell squarely on the shoulders of Mr. Carter; it was his duty to ensure that the job was completed with due care and attention. There is also no evidence that Mr. DeSouza undertook to be responsible for the tubing job jointly with Mr. Carter or to supervise the work of Mr. Carter. There is no evidence that Mr. De Souza held himself out as having expertise in tubing repair.

[66] I find further that there was no express or implied assumption or undertaking of responsibility by the Defendant towards the Claimant for the tubing project on the Tashi II as alleged by the Claimant. Mr. Kelsick could not have relied on the exercise by Mr. DeSouza of due care and skill as Mr. Kelsick was well aware that Mr. DeSouza did not possess that expertise. In any event , as stated above, I find that Mr. DeSouza's role was never that of Project Manager and/or Main Contractor and therefore that he did not sub-contract Mr. Carter to do the work for the

Claimant. Mr. DeSouza only assisted Mr. Kelsick based on the fact that the latter was a customer of the Defendant company. He assisted him by making the initial contact and arrangements with Mr. Carter with respect to the tubing job. Thereafter, the rest of the responsibility, including that of payment, fell on the shoulders of Mr. Kelsick. Accordingly, the Defendant owed no duty of care to the Claimant and could therefore not be in breach of any such duty. It was Mr. Carter who owed the duty to the Claimant to ensure that the tubing was done with due care and skill. He, therefore, and not the Defendant, owed the duty of care to the Claimant and was in breach of that duty of care. I endorse the view of Learned Counsel for the Defendant that the Claimant filed the claim against the Defendant solely on the basis that Mr. Carter could not be located and it was more "convenient" to claim against the Defendant.

[67] I am of the view that the above is dispositive of the Claimant's claim. Accordingly, that it is not necessary to deal with Issue # 4 in paragraph 24 above.

MY ORDER IS AS FOLLOWS:-

1. The Claimant's claim against the Defendant is dismissed.
2. The Claimant is to pay to the Defendant prescribed costs in accordance with rule 65, Civil Procedure Rules 2000 (CPR).

Jennifer A. Remy
High Court Judge