

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2023/0063 (FORMERLY GDAHCV2021/0001)

BETWEEN:

PANTAENIUS GMBH

Claimant

and

H2O LTD.

Defendant

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Mrs. Afi Ventour De Vega, Ms. Yurana Phillip, Ms. Aloytha Thomas and Ms.
Veronica Plenty for the Claimant

Mrs. Sandina Date Oseu-Gyau and Ms. Marion Suite for the Defendant

2024: November 26th; 29th

RULING

- [1] **ACTIE, J.:** This a claim in negligence against the defendant for the destruction of a catamaran vessel moored at its marina. The claim stands dismissed for the following reasons outlined in this ruling.

Background

- [2] The claimant is an insurance company, and the insurer of a sailing catamaran vessel named "Safari", which was destroyed in the defendant's mooring field "Prickly Bay Marina" (hereafter referred to as "the Marina"). Safari was owned by one Oliver Christopher Jansen who assigned his right to the claimant to bring all actions in respect to the vessel.

- [3] By claim form filed on 18th January 2021, the claimant claims among other things, general damages for negligence together with special damages comprising of pre collision value of the vessel of EC\$3,344,835.14 and costs of salvaging the vessel and removing the wreck and debris in the sum of EC\$175,725.75, together with interest and costs.
- [4] It is the evidence that the Safari arrived at the Marina on 25th February 2019, and its captain Errol Bibby moored the vessel on one of the Marina's mooring balls-number 44. The claimant states that after the captain's failed attempts to contact the Marina's dockmaster he went ashore to purchase supplies.
- [5] The claimant states that upon Captain Bibby's return to the Marina, he noted that the vessel had broken free of the mooring ball, drifted and partially sunk with both of its hulls flooded. The claimant states that Captain Bibby requested emergency rescue assistance from the marina's manager, however the marina had no boat or equipment with which to undertake rescue of the vessel.
- [6] The claimant states that all attempts to salvage the vessel proved futile. The vessel subsequently broke apart due to adverse sea and weather conditions and was a total wreck.
- [7] The claimant states that the defendant advertised the marina and offered mooring balls that could accommodate both catamaran and monohull vessels. The claimant avers that the defendant represented on its website that the said mooring balls are inspected and serviced by a professional dive company every six months.
- [8] The claimant particularized the defendant's negligence as:
- (1) Failing to take any or any adequate measures whether by way of periodic or other inspection to ensure that mooring ball 44 was safe for use;
 - (2) Failing to adequately warn patrons of the Marina by means of a clearly visible sign or at all warn that the mooring ball was defective and unsafe for use;
 - (3) Permitting the mooring ball to remain in a defective and dangerous state;

- (4) Failing to have on site emergency services for the rescue of a vessel;
- (5) Failing to have a dock master on site to direct the captain of the vessel to a safe mooring.

[9] The claimant contends that the defendant implicitly warranted that the mooring balls were in a safe condition for use by vessels and that the defendant had taken all reasonable steps to ensure that they were in safe condition for use. The claimant contends further that the defendant was under a duty to take reasonable care to ensure that the mooring balls were safe and failed to discharge its duty to give adequate or any notice of the defect of the mooring ball to Captain Bibby.

Defendant's case

[10] The defendant denies liability and states that its common law duty to take reasonable care arises when a relationship is established between itself and a patron. This relationship did not arise since Captain Bibby unlawfully entered its mooring field and attached the vessel to mooring ball 44 which is admitted was defective.

[11] The defendant contends that Captain Bibby did not follow established protocol for vessels arriving at the Marina without prior reservation. The defendant avers that the established protocol of arrival of vessels are:

- (1) The vessel must announce its arrival into the Marina's mooring field by VHF (Very High Frequency) radio to the Marina office;
- (2) The vessel is guided by the Marina office to berth temporarily at one of the Marina's docks;
- (3) The captain of the vessel is greeted by a member of staff at the dock then guided to the Marina office or the captain makes his way to the Marina office;
- (4) At the Marina office, the captain of the vessel:
 - i. Provides the Marina staff with copies of the vessel's insurance policy and particulars of the vessel's dimensions;

- ii. Completes the Marina's standard paperwork of disclaimer forms and contact information; and
- iii. Makes an initial payment for use of the Marina's premises based on the period requested and the dimensions of the vessel; then
- iv. The dock master advises the captain on available and appropriate mooring balls in the field, dependant on the size of the vessel, the weather conditions, location of other vessels or available berthing spots at the Marina's docks.

[12] The defendant contends that Captain Bibby did not comply with any of the established protocols. The defendant denies that Captain Bibby made attempts to contact the Marina's office, and states that its entire staff had access to and were within earshot of VHF radios on the day of the incident.

[13] The defendant states that all the mooring balls available for use were in good and safe condition, and that it uses an external company to perform inspections and servicing of its mooring balls every six months. The defendant avers that it also uses in-house divers to conduct continuous inspections, maintenance and servicing on its moorings.

[14] The defendant states however that mooring ball 44 was unavailable for use on the day of the incident and was so marked with an informal notation of an attached recycled drinking receptacle. The defendant states moreover that Captain Bibby would have been so advised by its staff and directed to alternate means had contact been made.

Expert Evidence

[15] The court appointed Mr. Alistair Brett Fairhead an expert in the field of mooring systems, underwater works, marine construction and oceanography. Mr. Fairhead's then company, Underwater Solutions Ltd., was engaged by the claimant in the removal of the wreckage following the extant incident.

[16] Mr Fairhead states that none of the moorings in the mooring field at Prickly Bay at that time was designed for such a large vessel as the Safari. Mr. Fairhead in his report states that:

“...the vessel Safari was way more than 20 tons which is the maximum that moorings of the type at Prickly Bay could hold. In fact, Safari was a large vessel of over Thirty-five (35) tons.”

[17] Mr. Fairhead states that the Marina had only one mooring that would have been able to accommodate a vessel as large as Safari. Other than that mooring, the vessel would have had to be accommodated on one of the docks of the Marina.

[18] Mr. Fairhead also makes reference to the prevailing weather conditions at the time of the incident. He states that wind and sea conditions experienced by a vessel berthed on a mooring system can drastically affect the amount of stress placed on mooring components. He explains that moorings are generally made up of a combination of chain, rope, shackles, thimbles and an anchoring system such as a concrete anchoring block or a helical sand screw.

[19] Further evidence is also given by court appointed expert meteorologist, Mr. Wayne Williams. Mr. Williams states that on 25th February 2019 during the hours of 10:00am and 3:00pm, the winds were blowing briskly with speeds of up to 33kmph coming from a generally easterly direction. According to Mr. Williams, the consistency of this direction and speed had the capacity to produce strong swells with waves that could reach up to 6 feet in open waters and 4 feet in sheltered waters. He states that in the time frame specified, winds were consistently from one direction and maintained almost constant speeds, producing a significant amount of wave energy.

[20] Mr. Fairhead states that a catamaran can place as much as 4 to 5 times more strain on a mooring during high wind conditions than that of an equivalent sized monohull. Accordingly, careful planning, calculations and risk assessment need to be made when dealing with large vessels that are more readily affected by wind and sea conditions.

- [21] Mr. Fairhead concludes that whether the particular mooring was faulty or not, any of the moorings available from the Marina at the time of the incident would not have been adequate to hold a vessel of the size of Safari.

Legal Analysis

Whether the defendant owed a duty of care to the claimant

- [22] The claimant alleges that the defendant's negligence caused loss and damage to the Safari. Before there can be any question of liability to the claimant, the defendant must owe a duty of care in relation to the general class within which the claimant and the type of damage that has arisen, fall¹.
- [23] The claimant contends that Captain Bibby lawfully entered on to the marina premises in pursuance of doing business and that the defendant failed to discharge its common law duty to the owner of the vessel to give adequate notice or any notice of the defective mooring ball.
- [24] The claimant avers that the relationship between the parties is that of an invitee and accordingly the defendant owed a duty of care. An invitee at common law is a person who is on premises on lawful business in the course of fulfilling a contract in which both he and the occupier of the premises have an interest, and not on a bare permission².
- [25] According to Willis J in the case of **Indermaur v Dames**³:

"The common case is that of a customer in a shop, but it is obvious that this is only one of a class, for whether the customer is actually chattering at the time or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows or ought to know, such as a trap-door left open, unfenced, and unlighted...

This protection does not depend upon the fact of a contract being entered into, but upon the fact that the customer has come into the shop in

¹ Halsbury's Laws of England Vol 78(2018) para 28

² [1861-73] All ER Rep 15

³ [1861-73] All ER Rep 15

pursuance of a tacit invitation given by the shopkeeper with a view to business which concerns him.”

[26] It is the claimant's evidence that the captain of the vessel Safari, had previously patronised the marina and was aware of the practice of permitting vessels to be moored at its premises without prior reservation. The claimant avers that having entered the mooring field of the defendant and attached the vessel to a mooring ball was all in the view to engaging the business of the defendant.

[27] The claimant argues and the court accepts that owners or operators of a marina owe a duty of care to invitees who enter to conduct business and are under a duty to exercise reasonable diligence to furnish a safe berth and avoid damage to a vessel.

[28] Counsel for the claimant relies on the case of **White v Phillips**⁴ where the condition of a camp-shed had rendered the berth alongside a wharf dangerous. The court held that a duty was cast on the operators of the wharf towards the owner of vessels using their berth either to give notice of the danger arising from the camp-shed in that state, or to have it properly repaired and properly constructed. Erle CJ at paragraph 254 of the judgment stated:

"it was the plaintiffs' duty to keep the campshed in a proper condition, and to give due notice if it were out of repair."

[29] Counsel for the claimant also relies on the case of **Darby v National Trust**⁵ where it was held that an occupier's duty to warn a visitor would only arise where, if without such a warning, a visitor would be unaware of the nature of a risk.

[30] Additional cases relied on by counsel for the claimant include **The Moorcock**⁶, and **The Bearn**⁷, however in the case of **The Moorcock** a contract existed between the parties, while **The Bearn** was decided by operation of a statutory instrument. The court is of the view that these mentioned cases are not applicable to the extant matter.

⁴ (1863) 15 C.B. (N.S.) 245

⁵ [2001] EWCA Civ 189

⁶ (1889) 14 PD 64

⁷ [1904-07] All ER Rep 315

- [31] Counsel for the defendant in submissions argues that the defendant did not owe a duty of care to the claimant but failed to provide the court with any authority to support the absence of a duty.
- [32] It is the evidence that the defendant acknowledged that mooring ball 44 was faulty and in need of repair. In such an instance, the authorities demonstrate that a duty arose for the defendant to give notice to its customers of the need for repair of the mooring ball, given that it presented a risk which customers would be unaware of without such notice.
- [33] The claimant, as an invitee and customer in the circumstances, was owed this duty by the defendant. However, it is the defendant's evidence that there a recycled drinking receptacle was attached to ball 44 to put patrons on notice of the defect.
- [34] Evidence is given by Captain Bibby that he did not observe any warning signs that indicated that mooring ball 44 was out of service or damaged in any way. Nevertheless, it is admitted by the claimant, and is the evidence, that Captain Bibby moored the vessel without contact with the Marina office. In addition, no prior reservation was made on behalf of the vessel.
- [35] The court accepts the defendant's argument that had the captain made communication with the defendant he would have been put on notice of the defective ball 44. Whether the attached receptacle was sufficient notice or the practice to inform of a defective ball was not canvassed at the trial and the court makes no ruling on the suitability of the purported notice of defect of ball 44.

Whether the defendant breached the duty of care owed to the claimant

- [36] The claimant argues that the defendant's failure to warn of the potential danger, or to repair mooring ball 44 is in direct breach of the duty of care owed by the defendant to the claimant as invitee.
- [37] The claimant further states that the defendant website instructs visitors of the marina to follow a buoyed channel straight to the docks and mooring field,

however evidence of the existence of said advertisement was not provided to the court.

[38] The defendant states that the following is included on its website:

(1) "...we have 3 docks where we can offer a total of 24 'stern' to berths for both monohull and catamaran vessels... in front of the docks we have a mooring field with 20 mooring balls available for both catamaran and monohulls"

(2) "Please inform the Marina office of your vessel requirements at the time of your reservations so that we can ensure that your berth position meets the needs of your vessel..."

[39] Evidence of the defendant is also that customers of the Marina have the option to schedule bookings online, via VHF radios, via telephone, or in person. It is the evidence of Mr. Darren Turner, manager of the defendant, and the court accepts, that during the opening hours of the Marina (7:30 a.m. to 4:00 p.m.), there are two fixed VHF radios and four handheld VHF radios carried by Marina staff.

[40] Captain Bibby states that when he called the defendant's main office via VHF radio to announce the vessel's arrival, no one answered. It is the defendant's case however that there were six persons on duty at the Marina on the day of the incident, and that neither of them was contacted by Captain Bibby for the mooring of the vessel.

[41] Mr Bibby in his witness statement stated that "around 12.15 p.m, after clearing Immigration and Customs, I returned to the Vessel. I passed by the marina office and observed that no one was there. I made several unsuccessful attempts to contact the Marina's Dockmaster, Simon Pascal. When I returned to the Vessel, I secured the documents on board. I returned to shore using the dinghy and went to Budget Marine for organizing services for the Vessel. At around 1:15 pm, I returned and had lunch on board. I left the Vessel again at 2 pm and returned to Budget Marine.... "

[42] The court does not accept Mr Bibby's evidence of his repeated attempts to make contact with the defendant to utilize its marina services. It is Mr Bibby's evidence

that he had patronized the defendant's marina on two previous occasions and was permitted to moor the Safari on Mooring Ball 44 without prior reservation. However, there is no evidence to substantiate his averment.

- [43] Mr Bibby states that "when I began to approach the Marina, I called the main office via VHF radio to announce the Vessel's arrival and to arrange payment for use of one of the Marina's Mooring Balls". Captain Bibby by his own admission stated that he did not make contact with the defendant and could not have received permission to moor on mooring ball 44 on the day of incident neither did he return on the vessel many times after mooring the vessel on the date of the incident.
- [44] The court accepts the defendant's evidence that there are several methods of communication and there is no evidence that captain Bibby attempted any communication prior or upon arrival.
- [45] It is the evidence of both Ms. Grace Alexis and Ms. Kurline Baptiste that they were notified of the vessel drifting sometime around lunch time which goes against Captain Bibby's evidence that he made several trips to the vessel after he moored the Safari. If this was the case Captain Bibby would either have seen the vessel drifting or would have been on board the Safari and adrift at the time of the incident.
- [46] Ms Alexis and Ms Baptiste gave evidence of the all the attempts made to find out the identity of the vessel through the customs department. Their search on Facebook led them to obtain the name and phone contact details for Captain Bibby through his daughter. It is Ms Alexis evidence that she called Mr. Bibby who said he was in town buying supplies and returned at the marina between 4:30 p.m. and 5:00 p.m.
- [47] Counsel Ms Sandina Date for the defendant during cross examination, put to Mr Bibby that he did not go to marina to register neither did he make attempts to contact the Dock Master, Mr Simon Pascal. Mr Bibby in response states that he did not know and never met Simon Pascal. He states further that he went to the marine office, and no one was present.

- [48] However, Mr Bibby in his witness statement filed on 30th September 2022, stated that he returned to the marina, "I saw Mr. Simon Pascal, the Dock Master, whom I know. I asked him what happened, he said that he saw the Vessel drifting but he was busy fuelling another boat".
- [49] Mr Bibby also states that on his return" he was accosted by the lady who called me on the phone, Ms. Grace Alexis who shouted at me, Don't blame us because you didn't come register."
- [50] The court is of the view that Mr Bibby is a misleading witness. The court does not accept any of his evidence other than that he moored the vessel to ball 44. He did so without the permission of the defendant. Mr Bibby's evidence corroborates the defendant's evidence that he did not make contact neither was he authorized to moor his vessel at the defendant's marina or Ball 44. It was not foreseeable on the part of the defendant that a captain with over 45 years' experience would have taken such a risk to moor a vessel of the capacity as described by the expert without first making contact with the defendant to determine its ability of accommodate the vessel. The court also accepts the expert's opinion that the facilities offer by the defendant did not have the capacity to accommodate a vessel the size of the Safari.
- [51] The court accepts the defendant's case that had it been contacted, arrangements would have been made to secure the Safari appropriately in accordance with its dimensions or would have informed that Ball 44 was defective.
- [52] The court agrees with the defendant that the claimant has failed to establish that there existed any relationship with the Safari or there was a breach of any duty of care.
- [53] Given the evidence before the court, including the expert evidence of Mr. Fairhead and Mr. Wayne Williams, the circumstances of the damage caused to the vessel Safari is not a question of negligence on the part of the defendant but was through the negligence of Captain Bibby in utilizing the premises of the defendant without prior notice or after the unscheduled visit without the permission of the defendant.

[54] The court accordingly finds that the claimant has failed to establish that the careless conduct of the defendant caused the damage to the vessel Safari which is a necessary ingredient to establish a case in negligence against the defendant and accordingly the claim is dismissed.

ORDER

[55] For the foregoing reasons, it is ordered and directed as follows:

- (i) The claimant's claim is dismissed.
- (ii) The claimant shall pay the defendant prescribed costs calculated in the sum of \$188,852.80 with sixty (60) days of today's date.

Agnes Actie
High Court Judge

By the Court

Registrar