

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)

CLAIM NO. ANUHCV2021/0086

BETWEEN:

ANTIGUA INVESTMENT GROUP LIMITED

Claimant

and

NATIONAL PARKS AUTHORITY

Defendant

Appearances:

Dr. David Dorsett with him, Mr. Jarid Hewlett, Counsel for the Claimant

Mr. Anthony Astaphan SC with him, Mr. Loy Weste, Counsel for the Defendant

2024: June 5th, 6th
2025: August 29

JUDGMENT

- [1] **WILLIAMS, J.:** The claimant, the Antigua Investment Group Limited operates a marina at Falmouth Harbour, whilst the defendant, National Parks Authority manages the Nelson's Dockyard National Park within which the marina is located. For over twenty years, the Claimant paid the Defendant 5% of berthing fees charged to vessels using its marina. The Claimant now disputes the Defendant's legal authority to collect these fees and requests reimbursement, arguing they were paid by mistake. The Defendant disputes this.

The Parties

The Claimant

- [2] The Claimant is owner and operator of the Falmouth Harbour Marina which is located within the area delineated as the Nelson's Dockyard National Park.¹ It is not disputed that the Claimant at first consisted of a group of local investors who in the 1990's was interested in constructing and operating a Marina at Falmouth Harbour, St. Paul's, Antigua. The group later incorporated the company known as Antigua Investment Group Limited. In or about 1996 the Claimant entered into possession of an area of reclaimed land and commenced

¹ Statutory Instrument No. 14 of 1990

operating the marina. In 2009 the Claimant purchased the said area where the marina operates to this day.

The Defendant

- [3] The defendant, National Parks Authority is a statutory body established in 1984 pursuant to the **National Parks Act**.² Section 3 of that **Act** establishes the Defendant as a body corporate and provides for it to be managed by a board. The day to day running of the organization is the responsibility of the Parks Commissioner appointed pursuant to section 7 of the **Act**. The Defendant is allocated extensive functions in relation to the operation of national parks in Antigua and Barbuda by virtue of section 4 of the **Act**. Finally, the second schedule to the **Act** and the National Parks (Nelson's Dockyard) Order³ describes the Nelson's Dockyard National Park and places this area under the management of the Defendant.

The Claim

- [4] The claim commenced by Claim Form and Statement of Claim filed on 19th February, 2021. The claim seeks the following relief:-
1. A declaration that the sum of EC \$1,684,759.68 with respect to leasehold rental, paid to the Defendant from 2009 until 2019, was paid by mistake;
 2. Repayment and Restitution of the sum of EC \$1,011,671.87 paid by the Claimant to the Defendant by mistake between February 2015 - February 2021 and on a total failure of consideration from the Defendant to the Claimant;
 3. Interest pursuant to section 7 of the Judgments Act CAP 227 of the Laws of Antigua & Barbuda 1992;
 4. Interest on the sum of EC \$1,011,671.87 at 5% per annum from February 2015 to February 2021 as provided by section 27 of the Eastern Caribbean Supreme Court Act, in the sum of EC \$301,284.20;
 5. Costs;
 6. Further or other relief as the court may consider just pursuant to section 20 of the Eastern Caribbean Supreme Court Act.

Statement of Claim

- [5] In the Statement of Claim the Claimant alleges that in 1994 it was registered to explore building and operating a yacht marina at Falmouth Harbour. Negotiations for a lease began in 1995 between the Claimant's shareholders and the Defendant. A draft lease was sent to the claimant for discussion, which

² Cap. 290

³ Statutory Instrument No. 14 of 1990

provided for a term of fifteen (15) years with a possibility of a further thirty (30) year term. The draft lease also stipulated rent of 5% of the gross revenue from marine facilities.

- [6] The Claimant took possession of the property and began operations between 1996 and 1997, paying a monthly sum equivalent to 5% of its monthly income for dockage and buildings, even though no lease agreement was ever executed. A second draft lease was prepared in 2003 for a term of 99 years, but this was also never executed. The claimant became the registered proprietor of the land it occupied on 10th March, 2009.

- [7] In December 2018, the newly elected Chairman of the Claimant's board, Sir Gerald Watt, and the General Manager, Mr. Robert Reis, observed that the company had been paying 5% of its gross monthly income to the Defendant for which there was no documentation to justify this expenditure. By letter dated 1st April, 2020 the Claimant requested clarification from the Defendant regarding the basis for these payments.

- [8] The Defendant responded on 1st September, 2020 stating that the fee was a negotiated "user fee" for the use of the seabed, over which the National Parks Authority claimed to act as an agent for the Crown. The Defendant contended that a contract was established through the twenty-three (23) year course of dealings between the Parties. The Claimant for its part denies that any such agreement for a user fee exists and argues that the Defendant has no jurisdiction over the seabed in Falmouth Harbour, which falls under the sole jurisdiction of the Port Authority.

- [9] The Claimant alleges that a diligent investigation of its records by the company secretary, acting on the board's instructions, revealed the two unsigned draft leases. These drafts indicated that the "5 percent of the monthly income earned by the lessee for dockage and buildings" was intended to be leasehold rental for the land.

- [10] Due to the Statute of Limitations, the Claimant is limiting its claim to the sums paid between February 2015 and February 2021. The total amount claimed is EC \$1,011,671.87

Defence and Counterclaim

- [11] The Defendant filed a Defence and Counterclaim on 22nd March, 2021. The Defendant firstly disputed the claim on the basis that the action was statute-barred pursuant to section 2 of the **Public Authorities Protection Act**,⁴ as the

⁴ Cap. 232

last payment was received in 2019, more than six months before the alleged cause of action arose. The Defendant subsequently withdrew this aspect of the defence.⁵

- [12] The Defendant claims that payments made by the claimant represent a 5% "user fee" of gross berthing fees, charged under the **National Parks Act**.⁶ The Defendant therefore denies that the payments were for leased premises or solely for leased premises. The Defendant further alleges that an oral agreement was entered into for the Claimant to pay a user fee for the use of the seabed, docking, and operations in and around the National Parks area. The Defendant avers that no lease agreement was ever executed thus any monies paid were user fees and not rent.
- [13] The Defendant further avers that the claimant continued to pay the user fee for 10 years (from 2009 to 2019) even after becoming the registered proprietor of the lands, indicating they were not operating under a mistake. The Defendant asserts its authority under its enacting provisions and as an agent of the Government of Antigua and Barbuda to charge such user fees. The Defendant therefore denies that the Claimant has suffered loss or damage as alleged.

Counterclaim

- [14] The Defendant claims it is empowered to enter into agreements for the payment of fees. Around 1997, an oral agreement was made between the two parties for the Claimant to pay a fee of 5% of its annual gross berthing fees. The Claimant made these payments from 1997 to 2019.
- [15] The Defendant alleges that the Claimant breached this oral agreement by failing to pay 5% of its annual gross berthing fees for the year 2020. The Defendant also states that it has never been given a proper accounting from the Claimant to verify that the paid fees accurately represent 5% of the gross berthing fees. The Defendant therefore seeks:-
1. An order that the claimant provide a true and proper accounting of gross berthing fees for the year 2012 to 2020 and continuing;
 2. A Declaration that the claimant is in breach of contract to pay the defendant 5% of its gross berthing fees for the year 2020;
 3. Damages for Breach of Contract by the claimant representing 5% of all gross berthing fees from February 2025 to the date of judgment;

⁵ Reply to Request for Information 4th May 2022

⁶ Cap. 290

4. Interest pursuant to section 27 of the Eastern Caribbean Supreme Court Cap. 143 from the date of this claim until payment;
5. Further or other relief as this Honourable Court deems fit; and
6. Costs

Claimant's Request for Information

[16] On 4th June, 2021 the Claimant made an application for further information relating to:-

1. Specifics of the negotiations which culminated in the alleged agreement between the Parties.
2. Whether the alleged agreement was ratified by a resolution of the Defendant and recorded in the minutes?
3. In what legal capacity did the claimant occupy the defendant's lands prior to purchase?
4. Whether or not the Claimant was the only marina paying the alleged 5% user fee?
5. What statutory or legal authority empowered the defendant to charge the Claimant a user fee?

Defendant's Reply to Request for Information

[17] This request for information led to various applications none of which are necessary to examine in any detail. For present purposes it is only necessary to outline the Defendant's replies to said request. The Defendant filed a reply to the request for information on 29th November, 2021. In summary the Reply states:-

1. The Defendant cannot locate records of the dates and persons of the negotiations for the alleged agreement between the Parties.
2. The Defendant cannot locate the minutes of the meeting in which the alleged agreement was made.
3. The Claimant's occupation of the defendant's lands was pursuant to an oral agreement.
4. The Claimant is not the only marina which pays a 5% user fee.
5. The Claimant was put into possession of the Defendant's property pursuant to the powers given to it under the National Parks Act.
6. The Defendant had power to charge a user fee by authority given to it by Cabinet.

Defendant's Second Reply

[18] Subsequent to an application for summary judgment filed by the Defendant, Master Charon Gardiner-Hippolyte made an unless order requiring the Defendant to file a further Reply to the Request for Information. This was filed on 4th May, 2022 and provided as follows:-

1. The negotiations and alleged oral agreement between the parties took place in or about the year 1991 to 1994. Mr. Hugh Bailey and Mr. Kenneth Malone represented the Claimant whilst Mr. James Fuller and Mrs. Ann Marie Martin represented the defendant.
2. The Claimant began paying the 5% berthing fees pursuant to the oral agreement arrived at in 1996.
3. Minutes of a directors meeting held on February 15, 2007 show that the Defendant noted that the Claimant will continue to pay the 5% berthing fee after the purchase of the land.
4. Subsequent to the purchase of the land in 2007, the Claimant continued to pay the 5% berthing fee.
5. The monies paid were always referred to as berthing fees and was never building rent.
6. The Claimant applied for planning approval in February 2020 to expand its facilities, and that approval was granted on May 20th 2020. This shows the claimant recognized and accepted the jurisdiction and authority of the defendant over the land and seabed.
7. At no time prior to 2020 did the claimant raise any objection to the payment of berthing fees.
8. The claimant's only reason for its present objection was an exponential increase in the growth of its berthing business and therefore the fees payable to the defendant.
9. The claimant by its conduct and payment of 5% of its monthly income recognized and accepted the existence of the oral agreement to pay berthing fees.
10. Whether or not the agreement is supported by a resolution or minutes, is irrelevant in light of the fact that there was a delay of some 20 years in raising an objection.
11. The lands occupied by the claimant were done so with the defendant's permission, and the draft leases were not signed.
12. No 5% could have been paid on building rent as no building was constructed by the Claimant for rent until 2011.
13. The claimant is not the only marina paying 5% berthing fee. Southwest Trading Co. Ltd. pays berthing fees and building rent, although that is irrelevant because the claimant agreed to pay and did pay 5% berthing fees to the defendant for 20 plus years.

14. The claimant was let into possession of the defendant's property by cabinet decision.
15. In 2006 the claimant received permission to purchase and did purchase Crown Land and sought the defendant's approval because it knew the lands it occupied were subject to the defendant's jurisdiction.
16. There was no imposition of a 5% "levy" or "tax". The 5% was paid pursuant to an agreement, which the claimant was not obligated or compelled to agree to.

Defendant's Third Reply

[19] The Claimant made a further application for declarations that the Defendant had not complied with the learned Master's unless order. Master Michel by order made on 11th November, 2022 ordered the Defendant to answer questions related to specific paragraphs of its defence failing which these paragraphs would be struck out.

[20] The Defendant therefore filed its Third Reply on 28th November, 2022 which stated as follows:-

1. The defendant has not been able to locate a resolution authorizing the alleged oral agreement to pay a user fee as recorded in the Minutes.
2. Southwest Trading Co. Ltd. trading as Antigua Yacht Club Marina pays 5% on berthing fees and building rent and has paid this since 1997.
3. Nelson's Dockyard Marina is owned by the defendant and does not pay berthing fees.
4. Catamaran Marina does not pay berthing fees.
5. The claimant was put into possession of and occupied the defendant's lands prior to its purchase "with the consent of the Minister and Cabinet pursuant to section 9(d) of the National Parks Act in order to construct and occupy a marina at Falmouth Harbour"
6. The defendant did not levy a user fee against the claimant. The parties negotiated and entered into an agreement for the payment of 5% of the berthing income.
7. The defendant does not have the authority to levy a tax.
8. The defendant was given express or implied power or authority by the Act and/or Cabinet to negotiate and charge user fees.

Claimant's Reply and Defence to Counterclaim

- [21] The final pleading filed was the Claimant's Reply and Defence to Counterclaim filed on 22nd February, 2023. The Claimant denied that the payment of 5% of its monthly income represented berthing fees and reiterates that they were paid pursuant to a lease agreement. Further, pursuant to section 15(1) of the **National Parks Act**, in order for the Defendant to enter into any oral agreement with the Claimant, the Defendant would need to pass a resolution authorizing it. Without such resolution, any agreement purported to be entered into between the Defendant and any other party would be ultra vires the statute and therefore be null and void. The Defendant has no such resolution.
- [22] The Claimant admits that it paid the Defendant 5% of its monthly income, but that payment was rent for the leased premises which payment continued even after the Claimant became owner of the area. The Claimant denies that it is required to provide a true and proper accounting pursuant to any agreement with the Defendant. The only mention of a need for a true and proper accounting is contained in the draft leases.

Trial

- [23] Trial of this claim took place on 5th and 6th June, 2024. Sir Gerald Watt and Mr. Robert Reis gave evidence on behalf of the Claimant. Sir Hugh Bailey, Mr. John Fuller, Ms. J. Valerie Hodge and Mrs. Ann Marie Martin gave evidence on the Defendant's behalf. The Parties filed written closing submissions on 5th July, 2024.

Claimant's Evidence **Sir Gerald Watt KC**

- [24] Sir Gerald Watt gave evidence by witness statement filed on 15th September, 2023. According to Sir Gerald in 1994, a group of Antiguan, including Mr. Kenneth Malone explored the idea of building and operating a yacht marina at Falmouth Harbour. AIG was registered on 20th July, 1994. The company, through its shareholders, began negotiating with the NPA to lease land for the marina.
- [25] A draft lease dated 31st July, 1995 proposed a fifteen (15) year term with a thirty (30) year extension. The rent was to be 5% of the gross revenue from the marine facilities. Despite no lease being executed, AIG entered into possession of the land in 1996-1997 and began paying a monthly rent of 5% of its income from "dockage and buildings" From 1997-1998 to 2018-2019, AIG paid the NPA a total of \$2,358,071.46. A second draft lease was prepared in 2003, but it also went unsigned and unregistered. This draft stated that the lease was to be for

99 years and that the rent would be 5% of the monthly income from "dockage and buildings".

- [26] Sir Gerald states that he was elected Chairman of the Claimant's Board of Directors in December 2018. Shortly afterwards the General Manager, Robert Reis, brought to his attention that AIG had been paying 5% of its gross monthly income to the Defendant without any "rational explanation or supporting documentation." He then wrote to the Defendant's chairman, Ambassador Arthur Thomas, to seek clarification on the basis for these payments. After five months, Ambassador Thomas responded, claiming the fee was a "user fee for the benefit to AIG (the claimant) derived from the use of the seabed over which the Crown has control." He also stated that a contract was "well established by the course of dealings" over twenty-three (23) years.
- [27] Sir Gerald asserts that there was never an agreement for a seabed user fee. He also states that the Defendant has no jurisdiction over the seabed, as that falls under the sole authority of the Port Authority. The Claimant applied to the Court for information from the Defendant to support its claim of a user fee agreement. The Defendant has failed to provide any evidence, even after two court orders, including an "unless order." Based on its own records, the Claimant discovered only the two unsigned draft leases which indicated the payments were intended as a percentage rent for the land lease. Sir Gerald believes the user fee claim is a "manufactured story" to counter the Claimant's evidence that the payments were for rent under a lease.
- [28] Due to the statute of limitations, he stated that the Claimant is seeking to recover the payments made between February 2015 and February 2021. The total amount claimed is \$1,011,671.8728. This is the sum of payments made during the financial years 2014-2015 (after February 2015), 2015-2016, 2016-2017, 2017-2018 and 2018-2019. He asks the Court to find that these sums were paid by mistake and that the Defendant must repay them with interest from February 2015 until judgment.
- [29] In cross-examination Sir Gerald admitted that he did not seek clarification from the former Managing Director Sir Hugh Bailey or former chairman of the Defendant Mr. James Fuller as to why these payments were being made.

Mr. Robert Reis

- [30] Robert Reis gave his evidence-in-chief by witness statement filed on 15th September, 2023. Mr. Reis the General Manager of Falmouth Harbour Marina and Secretary to the Board of the Claimant. He states that upon starting his employment as General Manager on 1st May, 2011 he reviewed the company's financial statements and discovered a monthly "lease payment" of 5% being

paid to the defendant. He found this strange because the company's land certificate, dated 10th March, 2009 showed that it owned the property. He also found unsigned draft leases during his review of the available documentation.

- [31] Mr. Reis states that he questioned the Claimant's founder, Mr. Kenneth Malone, and former chairman, Mr. Leroy Warren, both of whom had no recollection of an agreement for these payments. An earlier conversation with the former company secretary, the late Mr. Ivor Jackson, revealed that the payment was being made because "Ann Marie (NPA Parks Commissioner) said we have to pay it".
- [32] In December 2018, Sir Gerald Watt was elected Chairman. Mr. Reis brought the issue of the 5% payment to his attention, noting there was no "rational explanation or supporting document" for it. Sir Gerald Watt wrote to the NPA Chairman, Ambassador Arthur Thomas, on 1st April, 2020 seeking clarification, as the company's records had no basis for the levy.
- [33] A meeting was held on 20th July, 2020 attended by the Parks Commissioner, Mrs. Ann Marie Martin, and AIG's board members, including Sir Gerald Watt and Mr. Reis. At this meeting, Mrs. Martin insisted AIG had a "moral right to pay" the levy because it was making money and had to contribute. Sir Gerald Watt pointed out that AIG had been paying 25% corporate tax and that no one pays a lease on land they own. He also presented a letter from 2007 showing that the NPA Board had given its "overwhelming support" for AIG to purchase the reclaimed lands.
- [34] Five months after Sir Gerald 's letter, the defendant responded, claiming the payment was a "user fee for the benefit to AIG derived from the use of the seabed" and that the Defendant acted as an agent for the Crown. Mr. Reis searched the files again and found no such agreement. Mr. Reis attests that the Claimant has requested documentation from the Defendant to substantiate their claim. However, the Defendant has failed to provide this documentation, even after an "unless order" was made by Master Charon Gardner-Hippolyte.
- [35] In cross-examination Mr. Reis admitted that he had not sought confirmation from the former Managing Director Sir Hugh Bailey as to the basis for the payments. He also confirmed that he had not sought clarification from the company's auditors as to why these payments were being made although they were mentioned in the financial statements.

Defendant's Evidence

J. Valerie Hodge

- [36] J. Valerie Hodge provided her evidence-in-chief by witness statement filed on 18th September, 2023. Ms. Hodge sought to rely on unsigned minutes of the meeting of the Defendant's board of directors. However, this document was excluded as inadmissible hearsay.
- [37] Ms. Hodge states that she was the former chairman of the Defendant. She confirms that during her time as Chairman, the Claimant consistently paid the Defendant 5% of its berthing or dockage fees. She states that these payments were considered a user fee for operations of the marina. She recalls a meeting of the Defendant Board of Directors on 15th February, 2007 where Sir Hugh Bailey, who was a shareholder and director of AIG at the time, was present. Ms. Hodge asserts that AIG continued to make these 5% payments after it purchased the land in 2009 for the remainder of her time as Chairman, because it had agreed to do so.

Sir Hugh Bailey

- [38] Sir Hugh Bailey, a major shareholder and former Managing Director of the Claimant gave evidence by witness statement filed on 18th September, 2023. He states that he was a founder of the local investment group that later became the Claimant. He states that it was "always agreed and understood" that the claimant would pay 5% of its monthly income from berthing fees to the Claimant as part of the commercial development of the marina.
- [39] The negotiations for this agreement took place between 1991 and 1996. Sir Hugh Bailey, along with Mr. George Looby and Mr. Ken Malone, negotiated on behalf of the Claimant, while Mr. James Fuller and Mrs. Ann Marie Martin represented the Defendant. The claimant, AIG acted on this oral agreement, paying 5% of berthing or dockage fees to the NPA from 1996 to 2019. The 5% payment continued even after the Claimant purchased the reclaimed land in 2009, as it was considered a payment for the "use of the seabed for the Marina Docks." He recalls that at a meeting held on 15th December, 2007 it was discussed that the Claimant would continue to pay the 5% berthing fees despite becoming the registered owner of the property.
- [40] In cross-examination it was put to Sir Hugh that he had provided no evidence to substantiate that the alleged agreement had been approved by the Claimant's board. Sir conceded that he had no evidence of such.

Ann Marie Martin

- [41] Ann Marie Martin, the Parks Commissioner for the National Parks Authority gave her evidence in chief by witness statement filed on 18th September, 2023. Ann Marie Martin, a resident of Piccadilly, Antigua, has been employed with the NPA for over thirty-eight (38) years. She has first-hand knowledge of how the Claimant constructed and operates its marina in the National Parks area.
- [42] According to her, before the Defendant was established, Friends of English Harbour, a friendly society, was responsible for managing the day-to-day operations and setting regulations for commercial activity in the Falmouth Harbour and English Harbour area. This group generated revenue for the upkeep of the area by charging building and/or berthing fees for docking, operations, and seabed use since around 1979.
- [43] She states that the **National Parks Act** later transferred all assets, rights, obligations, and liabilities of the Friends of English Harbour to the National Parks Authority, including the right to charge user fees. Following a Cabinet policy decision in 1985, the Defendant called for proposals to construct a marina at Falmouth Harbour. The Cabinet's decision aimed to meet the growing demands of the yachting sector.
- [44] In late March 1994, a local investment group, which was later incorporated as the claimant, submitted a proposal to build a marina. The proposal stipulated that after obtaining outline planning approval, the Parties would negotiate the terms for land use with the Defendant. The Claimant (or its predecessor) was the successful party and received approval from the Defendant on 5th July, 1994 to construct a marina in Falmouth Harbour.
- [45] The Claimant was granted possession of the land and seabed by the defendant around 1994 to construct the marina. The negotiations for the marina's operations took place between 1994 and 1996. The Defendant was represented by Ann Marie Martin and Mr. James Fuller. The local investment group (the Claimant's predecessor) was represented by Mr. George Looby (deceased), Mr. Hugh Bailey, and Mr. Ken Malone. Mr. Bailey and Mr. Malone later became shareholders and/or directors of the Claimant.
- [46] A meeting was held in 1996 to finalize the terms and payment structure. At that meeting, it was orally agreed that the claimant would pay the Defendant 5% of its berthing or dockage fees as a user fee for operating the marina. Although the Authority's minutes from January 15, 1997, indicated a decision to require the Claimant to pay 10% of gross berthing fees for two years, this was not implemented. The Claimant paid and continued to pay 5% on berthing fees, acting on the 1996 oral agreement.

- [47] The Claimant's attorney, Miss E. Ann Henry, confirmed in a 19th June, 2003 letter that the Claimant would "continue to pay, 5% of their monthly income earned for Dockage and Buildings under a proposed lease. However, this lease was not signed as the Claimant sought a ninety-nine (99) year term, among other things. The Claimant paid the 5% fee on berthing income from the start of its operations until 2019. This included payments made after the Claimant purchased the land in 2009. A letter from the Claimant dated 13th June, 2007 showed it had paid a total of \$471,553.35 for berthing fees from 1996 to 2007.
- [48] She also states that the Claimant did not raise any objections to the 5% berthing fees before July 2019. In the letter dated 1st April, 2020 the Claimant's chairman, Sir Gerald Watt, wrote that the company had discovered the 5% payment, which "did not initially attract attention" because the payments were small but had "exponentially increased with the growth of the company's business." The letter stated the company would no longer pay the "illegal levy."
- [49] The Defendant responded on 1st September, 2020 arguing that the fee was a negotiated "user fee" and not a tax. The Defendant maintained that a contract was established through the twenty-three (23) year course of dealings between the Parties and that the Claimant was now in breach.
- [50] She states that in a further letter dated 14th September, 2020 Sir Gerald Watt claimed the payments were made because the early directors were "bullied" and "intimidated" by Mr. James Fuller, the defendant's Chairman at the time. On 22nd January, 2021 the Claimant's attorney, Dr. David Dorsett, alleged that the payments were made by mistake and were recoverable. He argued the payments were a "percentage rent in respect of lands leased" and that the obligation to pay the same ceased when the claimant purchased the land in 2009.
- [51] The Defendant's attorneys responded on 9th February, 2021 stating that the agreement was for a fee for the use of the seabed and was not contingent on land ownership. They argued that the Claimant's continued payments for ten (10) years after purchasing the land contradicted the claim of a mistaken payment. The Defendant's position is that the agreement was a commercial one, freely entered into, and the Claimant is obligated to continue the payments.
- [52] Ms. Martin confirms that another marina, Antigua Yacht Club Marina, also pays 5% on berthing fees and building rent to the Defendant. The Nelson's Dockyard Marina, which is 100% owned by the defendant also does not pay berthing fees. The Catamaran Marina, owned by Mr. Hugh Bailey, a shareholder and director of the Claimant, does not pay berthing fees because it was in operation for over forty (40) years before the defendant was established.

[53] During cross-examination Ms. Martin was questioned as to a meeting she attended with the board of the Claimant in July 2020. Ms. Martin admitted that this meeting took place but was insistent that it was “not a real meeting.” Finally in response to a question from the Court, she confirmed that the Claimant paid a licence fee of \$500.00 annually.

James Fuller

[54] Mr. James Fuller a former Chairman of the defendant gave evidence by witness statement filed on 18th September, 2023. He states that he served as Chairman of the Defendant from 1994 to 2004. According to him, the Defendant issued a call for proposals to develop a major marina at Falmouth Harbour. Around late February or early March 1994, the Claimant's predecessor, a local investment group, submitted a proposal to construct the said marina. This proposal stated that after obtaining outline planning approval, the Parties would negotiate the terms for the use of the land.

[55] On 5th July, 1994 the Defendant's board approved the construction of the marina by the group. Negotiations between the Claimant and the Defendant to determine the terms of operation and payment structure began in 1996, after the marina's construction had started. A meeting was held at the Copper and Lumber Hotel and Restaurant where the terms were agreed upon. James Fuller and Ann Marie Martin represented the Defendant at this meeting, while Sir Hugh Bailey and Mr. Ken Malone negotiated on behalf of the Claimant.

[56] At the meeting, he alleges that it was agreed that the Claimant would pay the Defendant 5% of its berthing or dockage fees. The payments were considered a "user fee" for operating the marina and were not based on a lease arrangement. The Claimant began making these 5% berthing fee payments and continued to do so throughout his time as Chairman.

Findings

[57] Although extensive oral testimony and oral evidence has been provided, the following facts are largely undisputed. These are as follows: -

1. In 1994 a group of local investors later incorporated as the Claimant submitted a proposal to operate a marina at Falmouth. This proposal was accepted by the defendant after the Claimant had obtained outline planning approval.
2. The Claimant entered into possession of the marina site and began operations in about 1996.
3. No lease agreement was ever executed between the Claimant and the Defendant although two draft leases were prepared.

4. From 1997 onwards the Claimant paid the defendant 5% of berthing fees collected at the marina.
5. The Claimant became the registered owner of the marina site in 2009 and continued to pay the Defendant 5% of the berthing fees collected until sometime in 2019 or early 2020 when this dispute arose.
6. There is no resolution or minutes of the defendant evidencing that the Claimant agreed to pay 5% of berthing fees collected.
7. Mr. Robert Reis became the Managing Director of the claimant in 2011 and Sir Gerald Watt became chairman of the Claimant in December 2018.
8. The Claimant first formally disputed the continued payment of 5% of berthing fees by letter dated 1st April, 2020.
9. The Defendant responded by letter dated 1st September, 2020.
10. Counsel for the Claimant, Dr. Dorsett also issued a letter dated 22nd January, 2021 to Thomas, John and Weste disputing the continued payments. Thomas, John and Weste responded by letter dated 9th February, 2021.
11. The Claimant commenced these proceedings on 19th February, 2021.

Issues

[58] The issues to be determined may be identified as follows:-

1. Whether the defendant (the National Parks Authority) is authorized by virtue of the National Parks Act to charge fees for the use of the seabed?
2. Whether there was an agreement between the parties for the claimant to pay 5% of berthing fees collected to the defendant?
3. Whether the berthing fees paid by the claimant between 2015 and 2020 were made by mistake?
4. Whether the claimant is estopped from alleging that the fees are not authorised by statute or agreement?
5. If the payments were in fact made by mistake, what are the appropriate remedies?

Discussion

Whether the Defendant is Authorized by National Parks Act to Charge User Fees?

[59] It is undisputed that since 2009 the Claimant has been the owner of the land where the marina is located. Thus, any fees paid to the defendant after 2009 cannot be categorized as rent. The Defendant has argued that it is entitled to charge user fees on the following bases:-

1. **Statutory Instrument No. 14 of 1990** vests jurisdiction over the seabed within the area designated as the national park in the claimant.
2. **Section 11(c)** of the Act which enables the Authority to charge fees.
3. **Section 4(1)(d)(ii)** of the **National Parks Act** which permits the defendant to carry out or permit to be carried out such works as may be necessary to facilitate the use of the sea adjoining parks for sailing and boating.
4. **Section 4(h)** of the Act which confers all such incidental powers on the claimant to enable it to carry out its functions under the Act which would include the right to charge fees for matters agreed to pursuant to **Section 4(1)(d)(ii)**.
5. **Section 28** of the Act which vested all rights previously in the limited liability company known as Friends of English Harbour in the claimant including the right to charge user fees.
6. Finally, **section 7** of the **Law Revision (Amendment) Act No. 2** also confers the power on the claimant to charge user fees.

[60] Section 3(1) of the **National Parks Act** establishes the Claimant as a body corporate and its functions are outlined at section 4(2) of the **Act**. In **Commissioner of Independent Commission of Investigations v. Police Federation**⁷ the Privy Council stated:

“a statutory corporation has only the powers conferred directly or indirectly upon it by statute.”

[61] In the context of this matter the **National Parks Act** must expressly or impliedly permit the Defendant to charge fees for the use of the seabed. Should the statute be determined not to confer such authority, these charges shall be considered ultra vires with respect to the Defendant's powers.

The Seabed

[62] In its Defence and Counterclaim the Defendant alleges that the 5% of berthing fees paid to the Claimant was in respect of the use of the seabed. In this regard, the Defendant relies on the National Parks (Nelson's Dockyard) Order.⁸ This Statutory Instrument delineates the area of the Nelson's Dockyard National Park by providing the coordinates and measurements of an area which measures 15.94 square miles. The Statutory Instrument was made pursuant to paragraph 1 of the Second Schedule to the **National Parks Act**. The second schedule

⁷ [2020] 4 LRC 498 at paragraph 15

⁸ Statutory Instrument No. 14 of 1990

makes it clear that all lands adjacent to English Harbour and Falmouth Harbour fall within the Nelson's Dockyard National Park.

[63] However, neither the National Parks (Nelson's Dockyard) Order nor the **National Parks Act** appear to expressly vest control of the seabed in the area in the Defendant. Section 20 of the **National Parks Act** permits the Minister "to declare any area of land or water or both land or water" to be a national park. The term seabed is not mentioned at all.

[64] Section 162(1) of the **Registered Land Act**⁹ states that ownership of the seabed is vested in the Crown. As there is no provision in the **National Parks Act** or its regulations that designates the seabed as part of the National Park, the basis for the Defendant's purported authority over the seabed in this area is therefore unclear. By itself this is sufficient to dispose of the Defendant's argument that it is entitled to charge for use of the seabed. Nevertheless, should my interpretation of the statutory provisions prove to be incorrect, I will proceed to consider the additional grounds advanced by the Defendant.

Section 11(c) of the National Parks Act

[65] Section 11 of the **National Parks Act** dictates how the National Parks Authority is to be funded. In particular section 11(c) of the **Act** provides for:-

"all monies paid to the Authority by way of subsidies, gifts, fees, subscriptions, rent, interest and royalties as well as any other sum or any property which may in any manner become payable to or vested in the Authority in respect of the performance of its functions.." (my emphasis)

[66] The Defendant relies on section 11(c) of the **Act** quoted above, however this subsection does not mention user fees as a funding source. The phrase "any other sum or any property..." is interpreted by the *ejusdem generis* principle to refer only to items similar to those listed earlier. The alleged user fees cannot be regarded as being similar to "subsidies, gifts, fees, subscriptions, rent, interest and royalties" mentioned earlier in the subsection. Thus, section 11(c) of the **National Parks Act** cannot be read as granting the Defendant power to charge user fees.

Section 4(1)(d)(ii) and 4(h) of the National Parks Act

[67] Sections 4(1)(d)(ii) of the **National Parks Act** provides as follows:-

"The functions of the Authority are-

⁹ Cap. 374 (Revised Laws of Antigua and Barbuda)

- (d) in so far as it may appear desirable to the Authority so to do, to carry out or permit to be out-
- (ii) such works as may be necessary to facilitate the use of the sea adjoining the Parks for sailing, boating, diving, bathing or fishing.”

[68] Section 4(h) of the **Act** states as follows:-

“for the purpose of carrying out its functions under this Act, to do all such acts as may appear to it be requisite, advantageous or convenient for or in connection with the carrying out of those functions or to be incidental to their proper discharge and to carry on any activities in that behalf either alone or in association with any other person or body.”

[69] It should be noted section 4(2) states that **section 4(h)** “does not authorize the disregard by the Authority of any law or rule of law.”

[70] In **Attorney-General v. Great Eastern Railway Co.**¹⁰ Lord Blackburn stated:

"where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorise is to be taken to be prohibited; . . ."

[71] However, in the same case Lord Selborne LC stated that an express statutory power carries implied ancillary powers where needed. He stated:-

"whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

[72] Finally, Lord Blackburn added:-

"...those things which are incident to and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited."

[73] In **Hazell v. Hammersmith LBC**¹¹ Lord Templeman giving the main judgment of the House of Lords outlined as follows:-

"The authorities deal with widely different statutory functions but establish the general proposition that when a power is claimed to be incidental, the provisions of the statute which confer and limit functions must be considered and construed."

¹⁰ (1880) 5 App.Cas. 473

¹¹ [1992] AC 1 at pg. 31

[74] Lord Templeman further added that:-

“The authorities also show that a power is not incidental merely because it is convenient or desirable or profitable.”¹²

[75] Section 4(1)(d)(ii) of the **Act**, which is cited by the Defendant, provides the National Parks Authority to carry out works or permit such works to be conducted. Several associated powers, such as entering into construction contracts, obtaining financing, and purchasing materials, may be considered reasonably incidental to this provision, since these powers facilitate the implementation of the relevant works. However, **section 4(1)(d)(ii)** does not imply a power to levy charges for use of the seabed, as works can be performed without imposing such charges. Therefore, the defendant cannot rely on **section 4(1)(d)(ii)** as the basis for any alleged implied power to charge for use of the seabed.

Section 26(c) of the National Parks Act

[76] At trial of this matter the Court directed the Parties to section 7 of the **Law Revision (Miscellaneous) (Amendments) (No. 2) Act**.¹³ This amended section 26(c) of the **National Parks Act**¹⁴ which now reads as follows:-

“The Minister may make regulations generally for the carrying out of the purposes of this Act and for the preservation, management and development of Parks and without derogating from the generality of the foregoing provision such Regulations may-

(c) provide for the fees and charges to be levied for entry into Crown Land in a Park or any buildings therein or for any services or amenities provided or for licences issued for carrying on any business in a park;”

[77] At first glance section 26(c) of the **National Parks Act** seems to permit the Claimant to levy fees and charges. However, in order for this sub-section to be operative, the relevant Minister is required to make regulations to provide for the authority to levy fees for use of the seabed. No such regulations have been made. The National Parks (Trading) Regulations¹⁵ made pursuant to section 26 provides for Marinas to pay an annual licence of US\$500.00 annually. Ms. Martin in response to a question from the Court confirmed that the Claimant pays this fee. Accordingly in the absence of a Regulation, the Defendant cannot rely on section 26(c) of the **Act** to justify the Claimant paying any fees for use of the seabed.

¹² Ibid pg. 31

¹³ Act No. 9 of 2000

¹⁴ Cap. 290 (Revised Laws of Antigua and Barbuda)

¹⁵ Statutory Instrument No. 9 of 2014-Schedule II

Section 28 of the National Parks Act/Friends of English Harbour

[78] Section 28 of the **National Parks Act** contains extensive savings provisions concerning a body corporate known as The Friends of English Harbour which was incorporated by virtue of the **Companies Act**. It appears that that body performed many of the functions now carried out by the Defendant in the area now declared to be the Nelson's Dockyard National Park. Section 28(1) of the **Act** dissolved this body corporate whilst the other sub-sections transferred its assets, liabilities and functions to the Defendant.

[79] In particular section 28(4) of the **Act** provides as follows:-

“Subject to the provisions of this Act, all assets, rights, obligations and liabilities which immediately before the date upon which this Act comes into operation were vested in, imposed upon or incurred by the Friends of English Harbour are deemed to be the assets, rights, obligations and liabilities of the Authority.”

[80] Ms. Ann Marie Martin in her evidence states that the Friends of English Harbour had the right to charge and charged building and/ or berthing fees for docking, operations and seabed use since in or around 1979. She further elaborates that these funds were used for the upkeep of English Harbour and Falmouth.

[81] Ms. Martin's statement is not supported by any documentary evidence. Her evidence provides no detail as to purported exercise of this power the Friends of English Harbour. In particular, it is unknown whether the collection of these fees was authorized by statute or agreement. In addition, the rate at which these fees were levied is unknown. Finally, her evidence is not corroborated by that of any other witnesses. Thus, it is not possible to state on a balance of probabilities that the Friends of English Harbour collected such fees as alleged by the Defendant prior to the coming into force of the **National Parks Act**.

[82] In summary, therefore there are no provisions in the **National Parks Act** or Regulations made thereunder which authorizes the Defendant to charge fees for use of the seabed. The levy of any such fee by the Defendant would therefore be ultra vires its powers and illegal.

Oral Agreement

[83] In the alternative the Defendant argues that there was an oral agreement between Parties whereby the Claimant would continue to pay 5% of berthing fees even after purchase of the reclaimed land where the Marina is located. Ms. J. Valerie Hodge, Sir Hugh Bailey and Mr. James Fuller all gave evidence of this. It should be noted that Sir Hugh Bailey was Managing Director of the Claimant up to 2011. This of course included the period when the Parties negotiated the Claimant's purchase of the marina site.

- [84] According to Sir Hugh, the claimant agreed to pay the Defendant 5% of its monthly income from berthing fees for the development of a marina. This oral agreement, negotiated between 1991 and 1996, led to the Claimant making these payments from 1996 to 2019. The payments continued even after the Claimant purchased the reclaimed land in 2007, as they were considered payment for the use of the seabed. A meeting on 15th December, 2007 confirmed that the Claimant would continue the payments despite becoming the registered owner of the property. According to him, the payments were made with the full knowledge of the Claimant's Board and shareholders and were not a mistake.
- [85] Mr. James Fuller described a meeting was held at the Copper and Lumber Hotel and Restaurant where these terms were finally agreed upon. He stated that he attended the meeting along with Ann Marie Martin on behalf of the Defendant. Sir Hugh Bailey and Mr. Ken Malone attended the meeting on behalf of the Claimant. It was at that meeting that it was agreed that the Claimant would pay the Defendant 5% of berthing or dockage fees as a user fee.
- [86] The Claimant strongly objects to this evidence. In the case of Sir Hugh Bailey, the Claimant notes that there is no evidence of how the members of the Claimant's Board and the shareholders would have known about this oral agreement. In this regard the Claimant also points out that there is no documentary evidence which alludes to the existence of this purported oral agreement.
- [87] It is possible that there was an oral agreement between the Parties for the payment of 5% of berthing fees as alleged by the Defendant. Sir Gerald and Mr. Reis by their own testimony were not actively involved in the company during the period when the agreement was purportedly negotiated. Accordingly, they cannot contradict the testimony of the Defendant's witnesses in this regard. I therefore find that an oral agreement existed between the Parties to pay 5% of the berthing fees.

Section 15(1) of the National Parks Act

- [88] However, even if such an oral agreement existed, the Defendant has argued that such an agreement would be contrary section 15(1) of the **National Parks Act**. Section 15(1) of the **National Parks Act** provides as follows:

“All decisions, orders, rules and regulations relating to the financial operations of the Authority and authorised by this Act shall be made by resolution of the Authority at a meeting thereof and shall be recorded in the minutes of the Authority.”

- [89] It is clear from the repeated requests for information which engaged the Court during the early stages of this litigation that no resolution as required by section 15(1) of the **National Parks Act** exists. Therefore, the only evidence of an agreement for the Claimant to pay 5% of the berthing fees is the testimony of Sir Hugh Bailey and Mr. Fuller outlined earlier. The Defendant argues that it would be “manifestly unfair if not oppressive”¹⁶ for the Claimant to avoid paying 5% of the berthing fees on the basis of the defendant’s inability to locate a specific resolution.
- [90] The absence of a resolution evidencing the purported oral agreement between the Parties means that there has been non-compliance with section 15(1) of the **Act**. However, the provision itself does not specify any consequence for failure to comply. Thus, the issue is what is the effect of non-compliance? Further, would any agreement that is not evidenced by such a resolution be void?
- [91] The Courts previously categorized statutory provisions as being mandatory or directory. Where the requirement is mandatory, a failure to comply with it invalidates the **Act** or decision in question. Whilst if the provision were merely directory, a failure to comply did not invalidate what follows. However, the modern approach is outlined in the House of Lords decision in **R v. Soneji** where Lord Steyn stated:-
- “Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in *Attorney General’s Reference (No 3 of 1999)*, the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction.”¹⁷
- [92] The issue of whether Parliament intended total invalidity in event of failure to execute a resolution in accordance with section 15(1) of the **National Parks Act** must be approached by examining the Act as a whole. In this regard section 15(1) is contained at Part III of the **Act** which is entitled “**Financial Provisions.**” Section 11 of the **Act** has already been examined briefly and specifies the sources of the authority’s revenue. Section 15(2) requires the authority to keep detailed accounts whilst section 15(3) provides for these accounts to be audited annually. Section 15(5) of the **Act** further mandates that the audited financial statements are to be laid in Parliament. Pursuant to section 18 of the **Act** the authority’s annual report must also be laid in Parliament.

¹⁶ Defendant’s closing submissions paragraph 30

¹⁷ [2006] 1 AC 340, 353

- [93] In short, the **National Parks Act** provides for stringent Ministerial and Parliamentary oversight of the Defendant's finances. This is to be expected as the National Parks Authority manages an area which is ecologically sensitive and also contains the nation's most well-known historic sites such as Nelson's Dockyard and Shirley Heights on behalf of the nation of Antigua and Barbuda.
- [94] Section 15(1) of the **Act** clearly mandates the Claimant to keep proper records of its transactions to promote effective oversight and transparency. In the absence of a written record, the Minister or Parliament would not be able to review the terms of an alleged oral agreement made by the Defendant. Further it would be impossible to ensure that the decision-making processes outlined in the **Act** were followed.
- [95] Thus, the legislation taken as whole indicates that Parliament intended that any transaction entered into by the National Parks Authority which is not evidenced by a written resolution is void. Accordingly, the defendant cannot rely on any purported oral arrangement with the claimant to enable it to collect 5% of berthing fees.

Estoppel

- [96] It is only necessary to make a brief mention of estoppel which was raised by the Defendant at paragraphs 16 and 23 of the Defence. The Defendant did not seem to pursue this aspect of the case with any enthusiasm with only a very brief mention of it being made in closing submissions.
- [97] The Claimant submits that it has no responsibility to pay in accordance with an ultra vires demand. I agree and further find the principles of estoppel do not assist in these circumstances. In **Attorney General v. Grenada Bar Association**¹⁸ Byron CJ stated as follows:-

“Wade on Administrative Law (6th Ed.) at p. 262 makes the point that in public law the most obvious limitation on the doctrine of estoppel is that it cannot be invoked to give an authority powers which it does not in law possess. In other words, no estoppel can legitimate action, which is ultra vires, and p. 264 it adds that the primary rule is that no waiver of and no consent or private bargain can give a public authority more power than it legitimately possesses.

- [98] The above applies with full force to the Defendant as a public authority which is established by statute. Having found that the purported power to levy a user charge is ultra vires the principle of estoppel is not applicable. Further, the

¹⁸ Civil Appeal No. 8 of 1999 (delivered 21st February 2000) (unreported)

Defendant has not provided sufficient evidence to prove that estoppel has arisen. The Claimant relies on the following passage in Halsbury's Laws of England.¹⁹

“Where a person has by words or conduct made to another a clear and unequivocal representation of fact either with knowledge of its falsehood, or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.”

[99] In this case I have not been pointed to a clear and unequivocal representation on the part of the Claimant. The Defendant can only point to the fact that the Claimant paid 5% of the berthing fees collected without protest for over twenty years. Secondly the Defendant does not disclose how it has altered its position to its detriment. Accordingly, the Defendant's defence of estoppel cannot succeed.

Mistake of Law

[100] The Court has found that the payment of 5% of the berthing fees collected by the Claimant to the Defendant was not authorized by statute or by any enforceable agreement. In addition, the defendant cannot rely on the principles of estoppel. The Claimant argues that the payments made from the year 2009 onwards were by mistake. In this regard the Claimant argues that “payment made by mistake is recoverable and an action in restitution will lie to recover it.”²⁰

[101] The Claimant relies on the authority of **Kelly v Solari**:

“I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it...”²¹

[102] The Claimant also relies on the **Kleinwort Benson Ltd v. Lincoln City Council**²² where the House of Lords held that monies paid by virtue of either a mistake of fact or law is recoverable. The claimant also relies on the case of **Norwich Union**

¹⁹ Halsbury's Laws of England 4th Ed. (Vol. 16) para 955

²⁰ Defendant's Closing Submissions paragraph 70

²¹ (1841) 9 M & W 54 at 58-59, 152 ER 24 at 26

²² [1992] 2 AC 349

Fire Insurance Society Ltd v William H Price Ltd.²³ where the Privy Council held that the mistake relied upon must be fundamental or basic.

- [103] Finally, it must be noted that a claim for mistake will not succeed if the Claimant intended the Defendant to have the monies in any event. The Claimant did not highlight this aspect of the law of mistake, but this has been established long ago in the case of **Kelly v. Solari**²⁴ relied upon by the claimant. Halsbury's Laws of England outlines this principle as follows:-

“A claim to recover a benefit which has been conferred under a mistake, whether of fact or of law, may fail where the payer 'intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend. Rather than being a true defence, this is another way of saying the mistake must be causative.”²⁵

- [104] In this regard the evidence of Sir Hugh Bailey on behalf of the Defendant and Mr. Robert Reis on behalf of the Claimant is instructive. Mr. Reis indicates that upon assuming the position of Managing Director of the Claimant in 2011, he made inquiries as to the basis for the payment of the berthing fees. Thus, he questioned Mr. Kenneth Malone and Mr. Leroy Warren directors of the Claimant. According to him both men denied any knowledge of any agreement to pay such fees. He also recounts speaking to the then company secretary the late Mr. Ivor Jackson who indicated that the Parks Commissioner said that the fees were payable and therefore the company was obliged to pay them.
- [105] Mr. Reis comments in his witness statement that “At the time, it seemed that the Board was not prepared to question the authority of the defendant.” This state of affairs remained until Sir Gerald Watt became chairman of the Claimant in December 2019. Sir Hugh's evidence has already been summarized. As previously indicated, he states that the decision to pay 5% of the berthing fees was done with the full knowledge and approval of the Claimant's board of directors.
- [106] At trial, Mr. Reis came across as a prudent manager who was reluctant to make significant payments to the Defendant without supporting documentation to justify them. I fully accept his testimony that he brought this situation to the attention of the board as then constituted. However, the board apparently declined to take any action. None of the former members of the board such as Mr. Kenneth Malone or Mr. Leroy Warren have given evidence on behalf of the Claimant to explain this.

²³ [1934] AC 455 at pg. 461

²⁴ Supra note 20

²⁵ Halsbury's Laws of England (2024 Ed.) Vol. 100 paragraph 41

- [107] It is evident that Mr. Reis for his part had serious doubts about whether the Claimant was required to pay a portion of the berthing fees to the Defendant. However, the ultimate decision-maker in any body corporate is the board of directors and not the Managing Director. Despite the lack of supporting documentation to justify these payments, it seems that the board was unwilling to either make further inquiries or cease payments altogether. Thus, it cannot be said with any degree of certainty that the board (as then constituted) did not intend for the defendant to receive these payments in any event.
- [108] The situation was different from December 2019 onwards when Sir Gerald Watt took over chairmanship of the board. Mr. Reis indicates that he briefed Sir Gerald on the matter in January 2019. This prompted Sir Gerald in April 2020 to write the Defendant pointing out that there was no legal basis to justify the payment of 5% of all berthing fees to the claimant. The Defendant's chairman Ambassador Arthur Thomas responded by letter dated 1st September, 2020 indicating that the Claimant was required to pay for use of the seabed.
- [109] Letters disclosed by the Defendant signed by Mr. Reis indicate that payments seem to have been made until at least July 2019. However, it is not exactly clear when payments actually ceased, although Ambassador Thomas implies that the Claimant had already ceased making payments in his letter of 1st September, 2020.

Counterclaim

- [110] The Defendant filed a Counterclaim on 22nd March, 2021 seeking among other things damages for breach of contract due to the Claimant's failure to pay the agreed fees. Considering the previous finding that the Claimant was not obliged to pay either by statute or an enforceable agreement, the Counterclaim must be dismissed.
- [111] The Claimant is entitled to costs on the Counterclaim pursuant to CPR Rule 65.4 and Appendix B. The Counterclaim having no stated value, the default value of \$50,000.00 will be used as the value of the claim leading to costs of \$10,000.00.

Remedy

- [112] The Court has found that there was no statutory or enforceable contractual basis which required the Claimant to pay 5% of berthing fees to the Defendant. After this was brought to Sir Gerald's attention in January 2019, subsequent payments appear to have been made by the Claimant's board of directors without certainty regarding the legal basis for the remittances. Based on the available evidence from then onwards the Claimant would not have made these payments had it

been sure of the true legal position. This satisfies the legal definition of a payment made on the basis of a mistake of law.

- [113] In the circumstances, the appropriate remedy is an order for the defendant to refund all payments of berthing fees paid by the claimant after 1st January, 2019. Since it is unclear exactly how much money was paid, these sums should be assessed by a Master if not agreed to by the Parties.

Interest

- [114] It should have been apparent to the Defendant from at least April 2020 (when Sir Gerald wrote the Defendant's board that it had no right to demand payment of 5% of berthing fees from the Claimant). Further, the responses to the numerous requests for information files during these proceedings clearly revealed that there was no resolution evidencing an agreement between the Parties in this regard.
- [115] Accordingly, this is an appropriate case to award pre-judgment interest pursuant to section 27 of the **Eastern Caribbean Supreme Court Act**.²⁶ Therefore, interest will be awarded at the rate of 3% per annum from the date of service of the Claim Form until judgment. Interest will be calculated on either on the sums agreed between the Parties to be refunded or assessed by a Master in default.

Costs

- [116] The Claimant has been successful overall and is therefore entitled to costs. In accordance with Rule 65.5(2)(a) of the Revised Civil Procedure Rules the Claimant is entitled to prescribed costs in the "amount agreed or ordered to be paid." The Court will order that the Claimant is entitled to prescribed costs calculated on any sums agreed to be refunded or assessed by a Master in default of agreement.

Order

- [117] Accordingly, the Court hereby orders as follows:-
1. The Defendant is only entitled to retain all berthing fees paid by the Claimant prior to 1st January, 2019.
 2. The Defendant shall refund all berthing fees which were paid by the Claimant after 1st January, 2019 the quantum of which shall be assessed by a Master in default of agreement between the Parties.

²⁶ Cap. 143 (Revised Laws of Antigua and Barbuda)

3. The Defendant's counterclaim filed on 22nd March, 2021 is dismissed with prescribed costs of \$10,000.00.
4. The Claimant is entitled to interest on the sums agreed to be refunded or assessed by a Master in default of agreement at the rate of 3% per annum from the date of service of the Claim Form until judgment.
5. The Claimant is awarded prescribed costs on the claim to be calculated on the sum assessed by the Master to be refunded or agreed to by the Parties.

[118] The Court takes this opportunity to thank all Counsel for their helpful submissions.

Rene Williams
High Court Judge



By the Court

Registrar