

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHAD2023/0001

BETWEEN:

**[1] NAUTILUS INTERNATIONAL
[2] CHRISTOPHER MALCOLM LEWIS**

Claimants

and

[1] THE OWNER OF THE SHIP MY ALFA NERO

Defendant

[2] ATTORNEY GENERAL

Intervenor

CONSOLIDATED WITH

CLAIM NO. ANUHAD2003/0002

BETWEEN:

**[1] CARMEN MILLER
[2] BENJAMIN CLOGG
[3] HARI GURUNG
[4] RAJ GURUNG
[5] LUKE MCNAB
[6] RICK WILLACY
[7] HENRIK JENSEN
[8] JERKO MARCELIC
[9] JURE VULIC
[10] GEORGIA KEIR
[11] SOFIA MARQUES
[12] KIMBERLY PROPER
[13] CARMIE STANDER
[14] DAVID WHITEFIELD
[15] RODRYC HOFMEYR
[16] SIMON SVENSSON
[17] SHANNON SANDERSON
[18] EDWARD DUDSON**

Claimants

and

[1] THE OWNER OF THE SHIP MY ALFANERO

Defendant

Appearances:

Mr. Craig L. Jacas with him Ms. Talia N. Dacosta for the Claimants in 2023/0001
Mr. Sylvester Carrott with him Mr. Anthony Greer for the Claimants in 2023/0002
Mrs. Carla Brookes-Harris with her Ms. Alicia Aska and Ms. Joy Dublin for the
Intervenor

2023: October 25th
December 12th

JUDGMENT

- [1] **Byer J.:** This was a case that dealt with the cause célèbre yacht known as the “MV Alfa Nero” (“the super yacht”).
- [2] After a much-publicized arrival and subsequent abandonment by the owner of the yacht under international sanctions, the super yacht was left in the waters off Antigua and Barbuda. Its crew had been terminated in large part and the yacht was manned by a skeleton crew until the same was officially acquired by the Antigua and Barbuda Port Authority.
- [3] This case solely concerns the monies due and owing to those crew members who were originally employed on the super yacht before its abandonment and those who remained on board and/or hired as part of the skeleton crew from March 2022 to April 2023.

Background

- [4] On the 11th March, 2022 the superyacht was docked at the Antigua Yacht Club Marina, Falmouth Antigua. This vessel was registered to Flying Dutchman Overseas Ltd, a company incorporated in the Territory of the Virgin Islands (“the Flying Dutchman”). Via notification dated August 2nd 2022, the Office of Foreign Assets Control (“OFAC”) of the US Department of the Treasury declared the vessel a sanctioned vessel.
- [5] By correspondence dated 10th March, 2022 the services of the crew members, inclusive of the Claimants in ANUHAD2023/0001, were terminated by Burgess Crew Services, (“Burgess”) a management company whose services had been engaged by Flying Dutchman to staff the vessel.

[6] By a declaration dated 21st day of March 2023 pursuant to the Port Authority (Amendment) Act 2023, the superyacht was declared abandoned and was subsequently seized on the 11th day of April 2023. Following the seizure and registration of the vessel, the Government of Antigua and Barbuda (“the Government”) was able to successfully de-list the vessel as a sanctioned vessel for the sole purpose of facilitating the sale of same by the Government. Since the Government’s seizure of the vessel, the services of a new management company were engaged to staff the vessel.

[7] However between the period 17th March 2022 to 11th April 2023, that is to say, after the termination of the crew by Burgess but prior to the Government’s seizure of the vessel, the previous owners, Flying Dutchman had made no arrangements or given any instructions for the maintenance and or staffing of the vessel.

[8] On 17th March, 2023 Claim No. ANUHAD2023/0001 (“the Nautilus Claim”) was filed seeking *inter alia* an order of arrest in rem against the superyacht and the enforcement of a Maritime Lien held by the crew members pursuant to section 49(1) of the Merchant Shipping Act No. 1 of 2006 and sought an order to facilitate the seizure and sale of the vessel to facilitate the payment of outstanding wages payable to the former crew members of the superyacht. This claim was filed by Nautilus International, a Trade Union and professional organization registered in the United Kingdom and Christopher Malcom Lewis on behalf of crew members identified in Annex 1, Annex 2 and Annex 3 to the Amended Statement of Claim.¹ The Claimants in this claim were seeking payment of the sum of €2,242,991.62 and interest at the rate of 4%.

[9] On the 26th day of April 2023 the application by the Attorney General of Antigua and Barbuda as an Intervenor was granted.

[10] On 14th October, 2023 a second Admiralty Claim No. ANUHAD2023/0002 (“Non-union claim”) was filed wherein the Claimants who were the non-unionized crew members *inter alia*, also sought payment for the amount of €439,494.40.00 plus costs and interest.²

[11] By Order of the Court dated 27th June, 2023 both claims were consolidated.

¹ At pages 14-30 TB #1 filed on the 24/10/2023

² At pages 69-74 TB#1 filed on the 24/10/2023

[12] On 27th July, 2023 judgment was entered on admission on the issue of liability to pay salaries and the trial on the sole issue of quantum was set for 25th October, 2023.

[13] The Claimant's Joint Affidavit for the said trial of the matter was filed on the 18th of September 2023 and the Intervenor's/Defendant's Affidavit in Reply was filed on the 16th of October, 2023.

[14] Before this court considers the issues that arose in this case, there are several preliminary issues which this court is mandated to consider and determine.

[15] This suit being a consolidation of two suits, namely Claim No. ANUHAD2023/0001 and Claim No. ANUHAD2023/0002 clearly dealt with monies dues and owing by way of an action in rem by the superyacht to its crew members, hence the order for consolidation having been made. However, both suits dealt with different considerations as to the manner in which the monies due and owing were to be calculated and at some point during this judgment the differences will be addressed.

[16] On the claims as filed, the Claimants sought a declaration that the claim must amount to a maritime lien pursuant to the provisions of the Merchant Act 2006.³ However in light of the admissions made by the Intervenor and the order that this court made on the issue of liability, the court will no longer be considering this prayer for the declaration although the Claimants did not expressly resile from this relief in their submissions or at trial of the matter.

[18] In this court's view having determined that the Claimants are owed sums and that the Intervenor who is responsible for the sale of the superyacht and the payment of its outgoings for which it is liable, must mean by necessity that the claim is in fact a lien to be met. Making the declaration in this court's mind would at this point be superfluous and unnecessary.

[19] The final preliminary issue that this court must consider was the issue that arose at trial where both counsels for the Claimants made it clear that they objected to the Intervenor by way of evidence as through their sole witness Darwin Telemaque, as opposed through their pleadings purportedly seeking to raise as a ground of defence on quantum, the issue of the authority of the Claimant in the Nautilus claim, Captain Lewis to hire personnel to man the superyacht.

³ Section 49(1)

The contention of the Intervenor was that since the Claimant in the Nautilus claim had his employment terminated and there was no entity to re-employ him or who did in fact re-employ him, any acts that he purported to do thereafter were null and void and could not attract liability on the part of the superyacht in the sums claimed.

[20] It was the contention by the Claimants that the Intervenor must be bound by the pleadings they filed and in particular the Defence on Quantum filed on the 21st July 2023. The Claimants further submitted that the Intervenor not having raised this issue in the pleadings could not now do so on evidence and effectively change their defence to the claim. By doing this, it meant that the Claimants were not able to respond to the same having seen that contention for the first time in the affidavit of the Intervenor's witness at trial.

[21] In response the Intervenor's position was two-fold as contained in their closing submissions. Firstly, that pleadings, since the advent of the Civil Procedure Rules, were no longer required to be extensive but merely were to define the parameters of the case that the other party had to meet. Secondly that in any event the fact that they had pleaded that they questioned the validity of the Claimant's claim for double pay in both the Nautilus and the Non-union claims, was sufficient to put the Claimants on notice that not only did the Claimants have to prove their claim but that they could not accept the contention of the Claimants that the Captain was authorized to re-hire persons as crew.

[22] In order for this court to decide this point it is therefore critical to assess not only the pleading referred to but also the statements contained in the affidavit of Darwin Telemaque.

[23] The Defence on Quantum filed on the 21st July 2023 at paragraphs 5, 7 and 9 stated the following:

“(5) Further by letters dated the 12th of July 2023, counsel for the Defendants wrote requesting documentation and/or information in relation to the following among other concerns and issues:

- (a) The validity of double-pay claims
- (b) The inclusion of travel expenses
- (c) The effect of funds held by the Burgess Company for crew services;
- (d) The need for the provision of a breakdown of the expenses claimed

- (e) The claiming tips
- (f) Account of petty cash on board
- (g) The change in designation of the ship and how that would affect salaries
- (h) Clarity on the details of the timesheets
- (i) Accurate explanation of the Flying Dutchman Overseas Limited

... (7) The information in this matter concerning the amounts claimed for salaries and entitlements of the crew, are matters peculiarly within their knowledge, therefore, there is an obligation on them to provide the information requested by the Defendants/Intervener as section 38A (8) places the burden on them to prove that salaries and entitlements are in fact payable by the Defendant. No obligation is placed on the Defendants unless and until it is proved that the salaries and entitlements are due and owing.

... (9) For the reasons mentioned above, it is imperative that the Claimants be obliged to provide all of the relevant information and documentation as requested or as necessary in order to prove that the salaries and other benefits that they are claiming are in fact and in law outstanding and to give effect to the Consent Order and or to enable a fair and proper assessment to be done.”

[24] The essence of the Defence as filed therefore, was that the burden of proof lay on the Claimants to prove their case while mentioning the matters upon which they required specific proof which included the validity of the claim for what they called double pay.

[25] In the affidavit of Darwin Telemaque, he had this to say based on the contention that the Defence had foreshadowed the same:

“(7) Paragraph 5 of the Affidavit is denied. All members of the crew were terminated in March of 2022. To the best of my information, knowledge and belief, the Captain does not have the authority to hire crew to work on a vessel from which his services have been terminated.

... (17) As it relates to paragraph 17 it is admitted that all crew members were terminated on 17th March, 2022. As it relates to those crew members who remained or returned

at the request of Captain Lewis, the Claimants are put to strict proof of the Captain's authority, after his termination, to keep on/retain on board or ask crew members to return on the Alfa Nero without the authority of the owners of the vessel.

... (21) As it relates to paragraph 21, prior to these proceedings, I was unaware of Mr. Andreas Koster's role or his abilities. I note the actions taken by Captain Lewis and the rationale given for the same. However, as stated in paragraph 7 above, I am not aware of Captain's Lewis's authorization to employ and or promote Mr. Koster to the post Relief Captain or to increase his salary. To the best of my knowledge information and belief, Captain Lewis made the decisions outlined in paragraph 21 without the authority of the owners of the vessel. The Claimants are put to strict proof of the authorization and/ or permission which directed for Mr. Koster's promotion and increase in salary.

... (22) As it relates to paragraph 22 of the Affidavit I maintain that as with Mr. Koster, the promotion of Todd Rankin Hurst in November, 2022 and the increase of his salary was done without the permission and/ or authorization of the owner of the vessel. The Claimants are put to strict proof of the authorization and/ or permission which directed for Mr. Hurst's promotion and increase in salary.

... (24) I am unable to comment on the contents of paragraph 24 of the Affidavit as it relates to the return of Michael Eves to the vessel. Based on the correspondence received from Burgess in March, 2022, the services of all crew members, inclusive of Mr. Eves were terminated. As stated previously, Captain Lewis, after his termination as the Captain of Alfa Nero, did not have the requisite authority to employ the services of any crew members nor to determine their remuneration, the Claimants are put to strict proof of the authorization and/ or permission which directed for Mr. Eves to be rehired at a higher level and receive a pay increase.

... (25) I note that paragraphs 25 to 29 outline the circumstances under which various crew members returned to work on the vessel, These crew members included Yam Thapa as a deckhand, Carmen Miller as a stewardess, Oliver Street as a Second Engineer, Shannon Sanderson as a cook, and Benjamin Clogg as Relief Chief Officer. The services of all these crew members were reengaged by Captain Lewis after he

was terminated. As stated before, at the relevant time Caption Lewis did not have the requisite authority to rehire any crew members. The Claimants are put to strict proof of the authorization and/ or permission which directed that Captain Lewis was authorized to make these decisions about rehiring crew members and determining their salaries.”

[26] In this court’s mind the particularity of the issue raised in the affidavit could not be encapsulated by a blanket statement, that the Claimants have to prove their case (an obvious statement in any event) nor by itemization without particularity as to what was the essence of the complaint being made.

[27] That being said, this court finds that the interpretation of the authorities relied on by the Intervenor⁴ to buttress their argument is too simplistic a view of what is in fact required in pleadings under the CPR regime. This analysis was accepted by Her Ladyship George – Creque JA (as she then was) when she put it this way in **Saint Lucia Motor and General Insurance Co. Ltd v Peterson Modeste**⁵ “I do not consider that the statement of Lord Woolf in *McPhilemy* and referred to by Lord Hope in *Three Rivers* and adopted in *East Caribbean Flour Mills* to be understood in any other way than to make clear that the factual basis underpinning [the claim] must be set out in in the pleading; even if the details of those averments may properly be left to be **fleshed out** in the witness statements.” (my emphasis)

[28] Indeed it cannot be disputed that extensive pleadings are no longer required as they once were under the Rules of the Supreme Court 1970, but in this court’s mind the advent of the CPR did not dispense with the need to have ones statement of case “...contain a concise but complete statement of the facts and matters on which a party relies.”⁶ In fact in the Court of Appeal decision of **The National Lotteries Authority v Jerome De Roche**⁷ the court accepted that the authorities relied on by counsel in that matter reflected the stance that this court has taken to the position with regard to pleadings and further stated at paragraph [39] thereof “...CPR 10.5 and 10.7 place similar strictures on the defendant by providing

⁴ **McPhilemy v Times Newspaper Ltd and ors** [1999] 3 ALL ER 775; **East Caribbean Flour Mills Ltd v Ormiston Ken Boyea** Civil Appeal No. 12 of 2006

⁵ HCVAP2009/008 at para [20]

⁶ Atkins Court Forms: Court System and Claims Procedure Vol 14(1) para 261

⁷ GDAHCVAP2021/0025

respectively that the defence must set out all the facts on which the defendant relies to dispute the claim and that a defendant **may not rely on any allegation or factual argument which is not set out in the defence** but which could have been set out there unless the court gives permission or the parties agree.” (my emphasis)

[29] It is therefore the purpose of witness statements (or affidavits relied on at trial) to flesh out fuller details of a matter that has been sufficiently pleaded, not produce new allegations or facts as in the case at bar.

[30] In the case of **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack**⁸ the Privy Council in this court’s mind has settled the issue on the manner in which witness statements are to be used when Sir John Dyson SCJ stated at paragraph 16 speaking of the failure to plead certain information that “...a detailed witness statement or a list of documents cannot be used as a substitute for a short statement of all the facts relied on by the claimant.” Further Bennet JA in **Carl Webster v Historic Beacon Point Anguilla Ltd and anr**⁹ having cited that statement from **Bernard and Seebalack**, agreed with the Board by clearly stating that “a witness statement is not a substitute for a statement of case; rather it serves to amplify or provide particulars or further particulars of the allegations set out in the statement of case.”

[31] This court therefore finds that when the Defence of Quantum and the affidavit of the witness for the Intervenor are compared that the affidavit went beyond the parameters as set out in the pleading to which the Non-union Claimants filed a Reply. That Reply could not and did not address any issues as to the authority of the Claimant in the Nautilus claim to hire/rehire persons which then later became a central theme in the evidence of the intervenor. In this court’s mind, if that had been raised with sufficient detail in the Defence as filed as an issue that needed to be settled, it would and could have been addressed in the Reply or the Consent order of the 30th June 2023 or even the Judgment entered on admissions by this Court.

[32] The first time that this arose however was after the filing of the affidavit of Mr. Telemaque and in the pretrial submissions of the party.

⁸ [2010] UKPC 15

⁹ AXAHCVP2020/0020

[33] In these circumstances, this court finds that the Intervenor is therefore not entitled to rely on that averment of fact in this matter. In making that finding, the concession of the Intervenor in their closing submissions and their witness at trial is entirely appropriate. The Intervenor's position is therefore now that "notwithstanding that the re-engagement of the crew members is unauthorized, it is submitted that in the circumstances and given the benefit derived from their actions that it would be just and equitable for the returning crew members to be remunerated for their services during the period 18th March 2022 to 11th April 2023."

[35] Having made this concession, and the court determining that the Intervenor could not in any event rely on any purported lack of authority of the Claimant in the Nautilus claim, it is now open to the court to deal with sole issue in this matter, the quantum of the remuneration to be paid to the Claimants.

[36] In considering this the court intends to deal with this issue in the following manner:

- (1) Was the Captain entitled to hire crew and, in some cases, promote them?
- (2) At what rate of pay are the crew who returned to the yacht, entitled to be paid?
- (3) Are the crew entitled to be paid: gratuity, notice pay and leave pay, travel expenses, expenses for crew training, attorney's fees and costs?

Was the Captain entitled to hire crew and, in some cases, promote them?

[37] Even though the Intervenor has conceded that the crew was in fact engaged and have been so engaged to keep the superyacht functional, for which they are entitled to be remunerated this court must still consider for itself, whether the Captain was placed to hire crew and of more importance, whether of those crew that he hired, promote them affording them a higher salary scale.

[38] I am satisfied that on a ship, a master or a captain stands in the stead of an owner. He has the capacity to bind the owner to decisions that would need to be made as if the owner themselves would have considered such decisions necessary in all the circumstances.¹⁰

¹⁰ Halsbury Laws of England Vol 93 (2022) para 412

[39] Thus in **Webster v Seekamp**¹¹ Abbott CJ stated it thus, “I am of the opinion that whatever is proper and fit for the service on which the vessel is engaged whatever the owner of that vessel as a prudent man would have ordered if present at the time, comes within the meaning of the word “necessary”” Best J also stated in that case what a prudent owner himself would do if present is necessary.

[40] However this ability is also linked to the fact that the captain is employed by the owner and acts as his agent. Jervis CJ in **Grant v Norway**¹² put it thusly “the authority of a master of a ship is very large and extends to all acts that are usual and necessary for the use and enjoyment of the ship. The master is a general agent to perform all things in relation to the **usual employment of his ship** and the authority of such an agent to perform all things usual in the line of business.” (my emphasis)

[41] In this regard therefore when this court considers the evidence of the sole witness for the Claimants that he remained with the yacht after termination in March 2022, there is no documentation which shows that any person or entity with the authority to hire crew members re-hired Captain Lewis. Indeed, although at trial Captain Lewis denied that he was acting without authority he also admitted on cross examination that he could not identify with any certainty who was in fact in charge of the superyacht at the time that he remained on board, and he certainly did not identify in evidence who was his employer. However as noted earlier, based on the concession by the Intervenor’s witness that the personnel who remained on the superyacht was in fact a reasonable course of action manifesting prudent action on the part of the Captain¹³ in this court’s mind the sole importance now of the authority of the Captain does not lie so much in the re-hires/hires he made but rather in taking that action, which this court finds could be grounded in the legal terminology of “necessary” as defined by the case law, he then purported to promote individuals and agree to salary payments to those individuals on that higher scale.

[42] In particular, these persons were Andreas Koster as Relief Captain, Todd Rankin- Hurst to Chief Officer and Michael Eves to Chief Officer. When this court considers the evidence

¹¹ (1821) 106 ER 966

¹² (1851)138 ER 263

¹³ Darwin Telemaque on cross examination at trial of the matter on the 25th October 2023

surrounding the reasons preferred for these promotions, two things are of importance to this court. Firstly, none of these people who were promoted held their positions substantially. In other words, they all were promoted for a period of time to facilitate a senior officer taking leave. So, for instance Andreas Koster was Relief Captain when Captain Lewis was on leave, as a result Todd Rankin Hurst was promoted to take up the position when Koster was Relief Captain. If this was not how in reality it worked, no other interpretation was presented to the court to suggest otherwise. The court must infer therefore that these were only temporary appointments. Secondly, these being temporary appointments, which Captain Lewis clearly stated were for set periods, logically would stretch the reliance on the “necessity” theory beyond its scope. In this court’s mind this case is therefore clearly distinguishable to the case of **Hanson v Royden**¹⁴ in which while at sea, the captain died, and the first mate assumed the duties of the captain and promoted other sailors on board to man the ship until it returned to port including the promotion of a deckhand to second mate. The court in that case found that the promoted second mate was entitled to be paid wages as second mate. In that instance the necessity to do so was clearly required and the new captain rightfully had the power to do so, having taken over as captain of the vessel.

[43] I therefore find that the promotions undertaken by Captain Lewis cannot stand and Koster, Hurst, Eves and Benjamin Clogg (who was also allegedly promoted to relieve Hurst as needed) are to be paid according to the rate for which they were paid at the time of termination by Burgess that is the period 17th March 2022 to 1st October 2022. The period 1st October 2022 to 10th April 2023 must now be considered under the following issues.

At what rate of pay are the crew who returned to the yacht, entitled to be paid?

[44] In considering this, the court must address its mind to the claim by those crew members that returned to the yacht and were allegedly offered double pay. The period covered by this claim as is contended is from 1st October 2022 to 10th April 2023.

[45] In order to understand how this claim has come about some background is required.

[46] After Captain Lewis hired several personnel, including persons who had not previously been members of the crew, there appears that several entities commenced making overtures to

¹⁴ (1867) LR 3 C.P. 47

the crew for various reasons and agendas including what purported to be the confirmation of employment.

[47] One of those entities was Opus Private who claimed (as there was no evidence shown to the court to substantiate this) to be a trustee of a trust called Tyne Trust which again allegedly owned all the shares in the Flying Dutchman the one-time owner of the yacht. No company documents or any other information was produced to this court to this effect, but the court was referred by the Claimants to a decision of my learned brother Williams J in **Flying Dutchman Overseas Ltd et al v The Port Authority et al**¹⁵ in which he relied on the following facts at paragraph 2 thereof,

“4[t]he first applicant Flying Dutchman Ltd (a BVI registered company) was registered as the owner of the yacht on the Cayman Islands registry. The second applicant¹⁶ (also a BVI registered company) alleges that it is the owner of several works of art on board the vessel.

5 It seems that the applicants are managed through a fiduciary company Opus Private Ltd. It appears that the vessel and the works of art are ultimately owned by a discretionary trust known as the Tyne Trust which is governed by Guernsey law. Mr. Andrey Guryev although alleged not to be a beneficiary of the trust appears to be considered to “control” the trusts within the meaning of the relevant Guernsey legislation. Thus, Opus regards itself as prohibited from dealing with the trust assets except in accordance with an exception or a licence.”

[48] It is therefore against this backdrop that Captain Lewis and Andreas Koster to some degree, entered, into, what can loosely be called ‘negotiations’ with Opus Private. It is these negotiations that the Claimants say they relied on to return to/remain on the yacht. It is therefore imperative to consider exactly what was the extent of these discussions and the outcome on the same.

[49] In order for the Claimants to succeed on this issue and for the court to accept that there was in fact reliance, the Claimants have to establish the following under the tenets of promissory

¹⁵ ANUHCv2023/0185

¹⁶ Vita Felice Limited

estoppel, i) that there was a clear and unequivocal promise or assurance ii) that was intended to affect the legal relations between the parties, iii) that there must have been some action taken by the person to whom the representation was made upon the basis of the promise and iv) it would be inequitable for the person who made the promise to renege on their promise.

[50] To determine whether the Claimants can rely on this principle, it therefore becomes clear that the alleged promise needs to be carefully analyzed and considered, as it is the promise that lays the foundation for the claim for double pay.

[51] When this court considers the documents provided and referred to by Captain Lewis as supporting their contention of this 'promise', the most glaring issue for the court that has yet to be resolved is that the "promise" of double pay came from the entity Opus Private. Their connection to the yacht, as has already been noted by this court, and more importantly their authority to make any such promise is far from settled.

[52] However even more disconcerting must be the words used by representatives of this entity upon which the Claimants say they relied and acted to their detriment.

[53] The first communication referred to is an email dated 8th June 2022 which is from Opus Private to Captain Lewis in which the first mention is made of making payments to crew and the indication was that Opus Private was in the process of making an application to obtain the required licences to make payments to all persons including the crew but it was made clear that that could not be done without the licence being granted.¹⁷

[54] By December 2022, talks became constant between Captain Lewis and Opus Private about trying to keep the staff on board of the superyacht. On the 19th December 2022, Wayne Mollett of Opus Private in giving Captain Lewis an update on the licence application process had this to say "The Opus Board are discussing this matter first thing tomorrow morning and one of the topics will be the financial incentives. **This cannot be formalized until the opinion is finalized** but the proposal can be fleshed out now and if all is in order letters can be issued to the crew once we are in a position to do so."¹⁸ (my emphasis)

¹⁷ Page 503 TB 3

¹⁸ Page 510 TB 3

[55] So as early as 19th December 2022, it was clear that if any incentives were forthcoming they would not be binding until certain matters were finalized.

[56] On the 21st December 2022, Opus Private through Wayne Mollett then in an update stated “incentive letters have been discussed by the Board and the intention will be to issue these as soon as possible...The terms, **subject to legal input** will be the **promise** of double pay, effective from 1st December for all crew that remain employed, until such time as salaries are paid. We will ensure that it is suitably worded by Peters & Peters so the crew have comfort it is binding.”¹⁹(my emphasis added)

[57] On the 22nd December 2022, Wayne Mollett of Opus Private then stated further on the idea of “incentives” that “Just to stress this isn’t the final answer on any form of “bonus” it’s a stop gap to retain crew while we get payments sorted.”

[58] The next item of correspondence between these parties then came in the form of a letter from Solicitors Peter & Peter dated 22nd December 2022. In giving an update on the licence being sought to enable Opus Private to make payments to the crew and “in recognition of the peril you are in”, they then went on further to state “4. We have...prepared parallel applications for a further Treasury licence to permit subsequent payments of the remainder of outstanding amounts owed as well as amounts to cover future payments. We are informed that this licence **will be sought** on the basis that the standard monthly rates of all skeleton crew members are doubled with effect from 1 October 2022 until further notice. This temporary increase to the standard salary is considered reasonable and appropriate in recognition of the additional and significant hardship that would be suffered by those crew members who remain in employment without being put in funds until a Treasury licence is granted and transfers can be made with that licence. 5. As we have explained a Treasury licence is required to make payments from frozen trust property. A Treasury licence is also required to arrange for payments from an unfrozen source in discharge of obligations owed by the trust. Finally **a Treasury licence is also required for Anisette Consultancy Ltd to**

¹⁹ Page 507 TB 3

be able to agree to the temporary increase to salary rates from 1 October 2022 onwards.²⁰(my emphasis added)

[59] Thereafter, and certainly up to March 2023 when notice of the impending sale by the Government of Antigua and Barbuda had been given, the Claimants through their Captain were fully aware that the licence had not yet been granted.²¹

[60] So when this court considers the contention that the skeleton crew who remained on board the yacht are in fact entitled to double pay, this court finds that they have not been able to surmount the hurdle of identifying a clear, unambiguous promise to do so by Opus Private (despite the clear challenges to show that they could do so). The unequivocal nature of the promise is central to the reliance to be placed on a statement and it is clear in this court's mind that at no point can any one of the statements identified be capable of having the meaning ascribed to it as a "promise".²² Indeed this court accepts that there were discussions and indeed there was an intention, and that intention however well meaning, did not translate into a promise. Any such promise was in fact outside of the power of Opus Private to make, a fact which they themselves accepted by their own constant referral to the existence of conditions being attached to the same.

[61] Ultimately, no such promise was reduced into writing and no credible evidence was produced to the court to show that in fact the crew had stayed or returned to the yacht because of this well-meaning intention of Opus Private.

[62] I therefore find that the members of the crew who remained on board after 1st October 2022 to 10th April 2023 did so at their own risk and are entitled to be paid pursuant to the rate of pay earned before termination by Burgess and those who were not so employed by Burgess at the standard monthly rate of pay as set out in the attachment to the Non-union claim.

²⁰ Pages 511- 512 TB 3

²¹ Page 515 TB 3 - Email from Captain Lewis to Nautilus International dated 3rd March 2023

²² Union of Shop, Distributive and Allied Workers v Tesco Stores Ltd 2023 1 ALL ER 326 at paras [53] and [54]

Are the crew entitled to be paid: gratuity, notice pay and leave pay, travel expenses, expenses for crew training, attorney's fees and costs?

Gratuity

[63] The basis and the particularization of this claim was sorely lacking on the part of the Claimants, without that, this court is severely hamstrung in making any determination. Indeed, Captain Lewis on cross examination admitted, quite candidly that this claim had no particulars before the court as to its substance or even how it was calculated.

[64] Additionally, although the Claimants have throughout these proceedings sought to rely on the terms of the Seafarer's Employment Agreement²³ which governed employment to infer clauses and terms into employment, Captain Lewis also agreed that that very agreement did not in fact relate to gratuity payments.

[65] This court therefore dismisses this claim for the sums representing gratuity in the calculations of the Claimants.

Notice pay/Leave pay

[66] This issue arose by virtue of the letters of termination sent by Burgess to the crew, in which they indicated that for those members of the crew that had accumulated leave/vacation, they purported to invoke a term of the Seafarer's Agreement where leave could run concurrently with notice. Therefore, upon termination, Burgess did not include the payment for leave days accrued but not taken but included the notice pay as one sum to represent both.

[67] The Claimants have taken exception to this and have submitted that although they do not deny that either party can invoke that provision, it could only in fact work in practice where the employee was in fact still working up to the effective date of termination. However, they contended that this provision could not be relied upon where payment has been made in lieu of notice and effectively there is no notice period at all.

[68] When this court considers this argument it finds that it has great merit and agrees with the contention so made.

²³ Pages 4- 291 of TB 3

[69] The starting point must be the provisions relied upon from the Seafarer's Employment Agreement. At paragraph 2 under the heading **Notice of Termination of Employment** the following provision is stated "Either party may run remaining accrued but untaken leave concurrently with the notice period."

[70] There was however no provision made for where payment is given in lieu of notice. It is of course understood that that payment is what brings employment to an immediate end.²⁴ With that end comes all entitlement to leave that had been accrued. In fact, this was not a case where either the employee or the employer knew of the impending termination, to allow them to make arrangements to take all leave to which they were entitled. Thus, in the case of **Ministry of the Public Service, Information and Broadcasting v Vincent Marcel**²⁵ the Court of Appeal per Webster JA at paragraph [29] relying on the dicta of Saunders J as he then was in **Ormond Shotte v The Attorney General**²⁶ made it clear that "accumulated leave is an eligibility to the enjoyment of a future benefit from your employer provided of course you are still employed at that future date. Upon his resignation, the applicant severed his links with his employers. Barring any statutory or contractual provision to the contrary, the applicant's act of resignation with no prior arrangement or agreement as to how his accumulated leave should be disposed of, put an end to the possibility of the taking of leave."

[71] In this court's mind even though the case cited above may have been concerned with the actions of the employee it must also apply *pari passu* to actions taken by employers. As stated by the learned authors of **Commonwealth Caribbean Employment and Labour Law**²⁷ one must consider that when this failure to utilize the leave is at the action of the employer, such employer should not and cannot be allowed to benefit by the non-payment of the sums of money "equal to the holiday remuneration earned but not granted as if the holiday were then being granted."²⁸

²⁴ Encyclopedia of Forms and Precedents: Employment Vol 14 (1) (C) para 106 ; British Building & Engineering Appliances Ltd v Dedman 1973 ICR 82

²⁵ SLUHCVP2017/0006

²⁶ MNIHCV2000/0005

²⁷ Nathalie Corthesy and Carla-Anne Harris-Roper at pages 117-118

²⁸ Panton J in Cecil July v Kirk Hall CA Jamaica [2011] JMCA Civ 3

[72] I therefore find that those members of the crew who were terminated by Burgess with vacation having accrued are entitled to be paid their holiday rate as provided for by their terms of employment.²⁹

Travel expenses

[73] Like the claim for gratuity this claim was not particularized by the parties before the court although the Seafarer's Employment Agreement spoke to the same. However, the Non-union claim made no mention of the same or how they were calculated for the court to be satisfied that they would be entitled to any such payment representing this head of claim.

[74] The claim for travel expenses is dismissed.

Expenses for crew training

[75] This item was claimed on behalf of three members of the crew in the Nautilus claim based on the Training and Career Advancement document produced by Burgess.³⁰

[76] Indeed this court accepts that provision was made at paragraph a (vii) of the said document for there to be reimbursement on two conditions being met. The first half of such payment being six months after the "successful completion" of the course and the relevant exams and the balance of such payment being due twelve months after completion upon "production of receipts and the certificate of attendance and/or the examination pass certificate from the training establishment".

[77] When Captain Lewis was questioned on this aspect of the claim, he had this to say, *"I do not think that that has been specifically presented with regard to that. I would have had sight of the successful completion documents but they would not have been presented to the court."*³¹

[78] This court therefore cannot accept this claim. The Claimants have not proven their case in this regard.

²⁹ Nikita Cloete (294 TB3) Davidson Villamayor (298 TB 3) Eleanor Cox (300 TB 3) Emma Bean (302 TB3) David Fox (304 TB 3) Isabelle Griffiths (306 TB 3) Liam Williams Garcia (312 TB 3) Natasha Cook (316 TB3) Paula Bosman (322 TB3) Renier Vinter (328 TB3) Sommer Bailey (332 TB3) Yam Thapa (338 TB3)

³⁰ Page 484 TB3

³¹ Evidence on cross examination at trial on 25/10/2023

[79] This portion of the claim is dismissed.

Attorney Fees and costs

[80] There is no basis presented to the court seeking attorney's fees. That claim is dismissed.

The court will deal with the matter of costs on the final order of the court.

The court therefore orders as follows on the Nautilus claim:

- (1) The crew terminated by Burgess on the 17th March 2022 are to be paid the sums as set out in Annex 1 of the Amended Statement of Claim filed on the 15th June 2023 save and except the sums representing Crew Training Fees and Cunningham Gratuity.
- (2) The sums due for the period of 18th March to 10th April 2023 to those persons identified in Annex 2 of the Amended Statement of Claim filed on the 15th June 2023 are to be paid for that period at the monthly/daily rate as set out in Annex 1.

The court therefore orders in relation to the Non-union claim:

- (1) The persons who worked with Burgess up to the 17th March 2022 are to be paid at the rate as paid by Burgess.
- (2) The persons who worked during the period 17th March 2022 to 10th April 2023 including Carmen Miller and Shannon Sanderson are to be paid at the rate identified as the standard monthly or daily salary as on the excel spreadsheet attached to the Statement of claim filed 15th June 2023.
- (3) All Claimants are entitled to prescribed costs on the final sums due and owing.
- (4) All Claimants are entitled to statutory interest on the said sums due and owing from the date of this judgment until payment.

**P. Nicola Byer
High Court Judge**

By the Court

Registrar