

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM No: BVIHC (COM) 2020/0228

BETWEEN:

NAVIGARE YACHTING LIMITED

Claimant

and

BETTETO FRETT

Defendant

Appearances:

Ms. Monique Peters of Travers Thorp Alberga (BVI) for the Claimant
Ms. Ruthilea Maxima of Maxima & Co for the Defendant

2021 February 15 (site visit) 16 (trial)
and 18 (judgment),

JUDGMENT (No 2)

[1] **JACK, J [Ag.]:** This is my judgment following the expedited trial of this matter pursuant to an order I made on 14th January 2021. The claimant (“Navigare”) seeks an order for the release of its yacht, *Grande Dame*, and substantial damages. The defendant (“Mr. Frett”) resists the claim on the grounds that he has lawfully levied a distress on the yacht on 6th December 2020 for arrears of rent. He also seeks a money judgment for various heads of claim.

The site visit

[2] On 15th February 2021 I conducted a site visit of Inner Harbour Marina, Road Town in presence of counsel (although Ms. Peters arrived late) and Mr. Frett. The marina is orientated west-east and faces north into the harbour. At the east end,

beyond a locked gate is a small wharf with a petrol pump. At the west end, a group of mangrove trees forms the western-most boundary of the marina. As originally constructed, there were twelve fingers coming out from the walkway along the marina frontage. These comprised concrete walkways over the seawater supported by two concrete pillars. The width of the water between two fingers was sufficient to allow two monohulled yachts to moor, so long as the beam of the yachts was not too great. Alternatively, one catamaran could moor between two fingers.

- [3] It was common ground that the marina was damaged in the course of Hurricane Irma in 2017. Three fingers were damaged beyond repair. By the time of my inspection, these had been completely removed and the concrete pillars which supported the damaged fingers had also gone. The effect was that more yachts could be moored in the gaps created by the missing fingers, although the yachts could only be boarded over the transom rather than from the side.
- [4] Between the mangrove trees and the first finger on the west side, there was space for one yacht. Between the first and second fingers, there was space for two monohulled yachts. It was common ground that Mr. Frett moored a yacht on the port side of this space (in other words next to the first finger). Navigare's case is that Mr. Frett also moored a yacht on the starboard side of this space. I shall return to this issue. It was common ground that Mr. Frett had not used any other parts of the marina for his own purposes at any relevant time.
- [5] On the east side of the second finger there were two blanks where damaged fingers had been removed. There were then six fingers before the other blank. There was then a last finger before the gate which led to the wharf with the petrol pump. *Grande Dame* was moored between the fourth and fifth of the surviving fingers. She was chained to the fourth finger. *Grande Dame* is a large catamaran and filled the entire space between the two fingers.

- [6] There were seven pedestals on the walkway. These provided water and electricity for yachts (with two plugs for electricity on each). They were inconveniently spaced with two on each side of the second finger from the west, four in the middle and one by the penultimate finger from the east. Given that the marina had space for at least nineteen yachts, there was insufficient electrical supply to service all the vessels simultaneously.

The witnesses

- [7] At the trial on 16th February 2021, I heard evidence from Mr. Frett and from Mr. Phillip Winter, the general manager of Navigare. Both men were doing their best to assist the Court. Mr. Frett, however, was less impressive on matters of detail. His accounting records were poor.

The issue of slips and the reduction in rent

- [8] It is common ground between the parties that Navigare (as tenant) entered a tenancy agreement with Mr. Frett (as landlord) to rent the marina for a term of one year from 15th November 2019. Although there are infelicities in the description of the premises let, it was common ground that, subject to clause 9 of the lease, the demise was of the whole of Mr. Frett's marina as well as some mooring buoys just to the north of the fingers. The rent agreed was \$15,000 per month, but, by clause 9 of the lease, "[i]n the event two of the slips are retained by the Landlord there will be a reduction of \$2,400 from the rent."
- [9] Navigare's case is that they were only obliged to pay \$12,600 per month, because Mr. Frett retained the slips. Mr. Frett's case is that he only occupied one slip. The rent should thus only be reduced to \$13,800 per month.
- [10] I directed that Mr. Frett, although nominally the defendant, plead his case first as Points of Claim. As a result, Navigare pleaded in its Points of Defence and Counterclaim and in its column in the Scott Schedule "that two mooring slips were utilized by the defendant". The way this was put originally by Ms. Peters was that, if there were two yachts moored, that necessarily meant that two slips were in

operation. Mr. Frett's case was that a "slip" was the area between two fingers. Thus, if he moored two yachts side-by-side between two fingers that was use of only one slip.

[11] In fact, Mr. Winter's evidence was consistent with Mr. Frett's case. For example, he said that *Grande Dame* occupied one slip. He said that the two yachts which he said Mr. Frett moored side-by-side in the area between the first and second fingers from the west were in one slip.

[12] I find as a fact that the area between two fingers is one slip, whether the area is used by two vessels or one. I do not need to resolve whether Mr. Frett did moor two yachts or only one in the area between the first and second fingers. Either way, I find as a fact that Mr. Frett only used one slip.

[13] This, however, is not the end of Navigare's case on the point. Ms. Peters argues that, since Mr. Frett did retain use of part of the marina, clause 9 applied, so that the rent stood to be reduced by the full \$2,400. There was no scope, she submitted, under the lease for the rent to be reduced by only \$1,200.

[14] Mr. Frett gave evidence that the reason for the inclusion of clause 9 and the reference to two slips was because he had been in negotiation with a different charter company, who wanted to rent two slips (in the sense I have accepted of the word). The negotiations in fact came to nothing, so he decided to use one slip for himself. There is no evidence that Mr. Winter knew anything of these negotiations, so they cannot be used in construing the terms of clause 9.

[15] Mr. Winter's evidence was that he wanted to rent the whole of the marina and would have liked to use the slip occupied by Mr. Frett. Navigare, I find as a fact, did use all the rest of the marina. I accept Mr. Frett's evidence that Navigare moored yachts next to the mangrove trees by reason of its need for all the space available.

[16] In my judgment, the construction of the lease advanced by Ms. Maximae on Mr. Frett's behalf is to be preferred. It makes little sense for Mr. Frett to give Navigare a reduction of \$2,400 in its rent, when Navigare's enjoyment of the marina was only reduced by one slip. The position might have been different if Navigare did not use two slips, but I find as a fact that they used all the space available to them. On these facts, I can imply a term that the rent should only be reduced by \$1,200, either to ensure business efficacy or as a term which a bystander would consider obvious.

[17] It follows from this that there was a shortfall in rent in the period up to the expiry of the lease on 15th November 2020. I shall consider the position after 15th November separately.

Set off against rent

[18] The lease does not include a clause prohibiting set off. The only relevant covenant by Navigare is to pay the rent "without deductions", but that is not sufficient to exclude a right of set-off: **British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd**¹ and **Connaught Restaurants Ltd v Indoor Leisure Ltd**.² Indeed Ms. Maximae did not argue to the contrary.

[19] In evidence, Mr. Winter complained that there were various breaches of the terms of the terms of the lease. These included matters such as a failure to install more pedestals for water and electricity and issues surrounding the buoys. The removal of the damaged fingers took longer than was anticipated, he said. However, none of these were pleaded in the Points of Defence and Counterclaim as giving rise to a claim for damages. The matters raised there as giving rise to a damages claim related to two cancelled charters of *Grande Dame* in January and February 2021. These matters, however, post-dated the termination of the lease by effluxion of

¹ [1980] QB 137.

² [1994] 1 WLR 501.

time. They cannot, therefore, affect Mr. Frett's right to levy a distress in December 2020 for arrears of rent.

Fencing and electricity costs and Navigare's breakdown of payments

- [20] Mr. Frett claimed the sum of \$2,480. It was common ground that Navigare had made fencing materials available to Mr. Frett, so that he would fence the marina. Although Mr. Frett complains that \$2,480 was expensive for what was supplied, no issue arises as to the amount. The dispute arises because Mr. Frett says that he gave credit to Navigare for that sum twice. It is common ground that Navigare put the \$2,480 as a credit against the rent due in March 2020. This appears in the spreadsheet adduced in evidence by Navigare at trial. Mr. Frett's case is that he gave that credit to Navigare for a second time towards the end of the lease.
- [21] There is no evidence to support that assertion. Ms. Maximae in her closing speech sought to introduce an invoice which she said supported Mr. Frett's case. The invoice had not previously been put in evidence. Mr. Winter had had no opportunity to speak to it. In those circumstances, I declined to allow the evidence to be introduced.
- [22] I accept Mr. Winter's evidence that Mr. Frett's accounts were kept poorly. I find that there was no double crediting of Navigare with the \$2,480. Accordingly, there is no money owing to Mr. Frett in respect of this item.
- [23] In an invoice generated on 6th October 2020, Mr. Frett claimed \$4,500 in respect of electricity and \$300 in respect of water. He had on only 2nd October 2020 been paid \$4,300 in respect of utilities in an earlier period (and this earlier demand was supported by bills from the utility companies). No invoices from the utility providers have been adduced by Mr. Frett as to this latter demand. No doubt some electricity and water were used since the previous bills, but without sight of the invoices it is impossible to assess to what sum was owed. I disallow this sum completely. Allowing anything would be wholly arbitrary.

- [24] Navigare has, as I have said, produced a print-out from a spreadsheet showing what sums were paid. The allocation of costs is complicated, because Navigare made a number of payments in advance in order to assist with Mr. Frett's cash-flow problems. These payments were then credited against rent due up to and including June 2020. However, the figures are consistent with the Scott Schedule, once the disputed sums claimed by Mr. Frett are excluded.
- [25] The only sum due as at 15th November 2020 from Navigare to Mr. Frett was, I find, the shortfall of \$1,200 in the rent. It is common ground that rent was only due from 1st December 2019. (The explanation for the rent-free period is that the removal of the damaged fingers and other works were expected to be done in November 2019. In fact, they took longer but no claim is brought by Navigare in respect of this.) Accordingly, the arrears as at 15th November 2020 were \$13,200.

Lawfulness of the distress

- [26] It follows that Mr. Frett was entitled to distrain for that rent on 6th December 2020. The fact that the lease had expired does not prevent his levying a distress for rent due before the ending of the lease: see section 13 of the **Recovery of Rent Act 1890**.³ Ms. Peters complains that it was disproportionate to seize *Grande Dame* for such a small sum. Mr. Winters said that the yacht had been offered for sale at 985,000 Euros. Whether that is a proper measure of value, given that she did not sell at that price, can be left to one side. Having seen the yacht, I consider it obvious that she is worth vastly more than \$13,200.
- [27] That, however, does not mean that the distress was unlawful. It is true that, if a landlord has a choice of chattels to seize, he must choose that which is closer in value to the rent due. (The Court will of course bear in mind the likely discount on any sale in assessing proportionality.) In the current case, however, Navigare made no case that another yacht would have been worth less than *Grande Dame*. Where a landlord has no choice but to seize a valuable asset, because there is

³ Chapter 66, Revised Laws of the Virgin Islands.

nothing less valuable on which to levy distress, the landlord in my judgment acts lawfully.

- [28] In my first judgment, I raised the question whether the distress levied by Mr. Frett was unlawful by reason of his not having used a certified bailiff. Further research shows that a landlord levying distress himself does not fall foul of section 4 of the 1892 Act: **Franklin Dobson v Michael Burrill**.⁴ Accordingly in my judgment Mr. Frett acted lawfully in distraining on *Grande Dame*.

Navigare's counterclaim

- [29] This means in my judgment that Navigare's counterclaim fails. Navigare complain that, as a result of seizure of *Grande Dame*, it lost the benefit of two charters which had been booked, one for a fortnight in January 2021 at a cost of \$38,420, and another in February 2021 for a week at \$20,714.38. Since the seizure of *Grande Dame* was lawful, Navigare has only itself to blame for the unavailability of the yacht for these charters. It should have paid, or at least tendered, the outstanding rent.
- [30] Even if I were wrong on this, the counterclaim would fail on grounds of causation. The February cancellation was made on 29th November 2020, before the distress had been levied, so it cannot relate to that. The January cancellation postdates the seizure, but the charter industry in the BVI (as elsewhere) has been bedevilled by the restrictions introduced around the world to combat Covid. Mr. Winter was unable to give direct evidence himself as to why these customers wanted to cancel their holiday. Covid's blame for the cancellations cannot in my judgment be excluded. Even if the distress levied on *Grande Dame* was unlawful, I would still have found against Navigare.

⁴ [2006] ECSCJ No 168, BVIHCV 2005/0086 (determined 9th May 2006), at paras [46]-[48] (Joseph-Olivetti J).

Mr. Frett's post-termination claims

[31] Mr. Frett makes claims for post-termination damages. The first element is mesne profits for holding over from 15th November 2020 to 6th December 2020, when all the yachts bar *Grande Dame* were sailed to the new moorings rented by Navigare. The second is storage fees for *Grande Dame* from 6th December 2020 to the date of the trial.

[32] So far as the first element is concerned, it is trite law that if a tenant holds over at the end of its lease it must pay mesne profits to the landlord. A tenant is obliged to move his chattels from the demise at the end of a tenancy. In this case, however, Mr. Frett forbade Navigare from removing the yachts. On 12th November 2020 he emailed Mr. Winter and Mr. Wintz, Navigare's operations manager, in these terms:

“Currently you have 6 boats remaining on my dock and unless I receive payment in accordance with the outstanding balance they will not be removed from my dock as I endeavour to take whatever action necessary to secure them to my dock.

I am copying this letter to your Operation Manager informing him that he must not enter onto my property to remove the boats until payment is made and I indicate to him. If he or his staff do so they will doing so at their own risk.”

[33] If a landlord forbids his tenant from removing his belongings when the tenant is ready willing and able to do so, the landlord in my judgment forfeits his right to mesne profits.

[34] So far as mooring fees are claimed in respect of *Grande Dame* after 6th December 2020, Ms. Maximae cites no authority for their recoverability. I accept that if goods which are restrained are removed to a pound, the cost of storage might be recoverable (although I make no holding to that effect). Where goods and chattels are held on the demised premises, normally only a fee in respect of a man attending under a walking possession agreement is recoverable. (In the BVI this

is fixed at 36 cents a day: **Recovery of Rent Rules 1891.**⁵⁾ In the absence of authority, this cost is not recoverable.

[35] Accordingly, both claims for post-termination losses fail.

[36] There would in any event be an issue as to the amount. On my site visit there were few boats moored. It may of course be that some were out sailing, however, I would require convincing that Mr. Frett suffered any lost earnings from keeping *Grande Dame* chained to one of his fingers.

Conclusion

[37] It follows that Mr. Frett lawfully levied a distress on *Grande Dame* for the sum of \$13,200. He has no other money claims. Navigare's counterclaim fails. I shall hear counsel on what consequential orders I should make.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar

⁵ Promulgated in the Leeward Islands Gazette 1891, made under the 1890 Act section 27(1). The fee is in the Schedule to the Rules.