

**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

Submissions in the Certificate of Urgency:

Ms. Monique Peters of Travers Thorp Alberga (BVI) for the Claimant
The Defendant has not yet been served

2020: December 31

JUDGMENT

[1] **JACK, J [Ag.]:** By an application issued on 29th December 2020 the claimant (“Navigare”) seeks an *ex parte* order that pending the hearing and determination of the claim, the defendant (“Mr. Frett”):

“1... be restrained from (a) encumbering [Navigare] from dealing with its asset, namely [the yacht *Grande Dame*] being seized and held on one of [Mr. Frett’s] docks and (b) disposing of, or dealing with, or transferring [Grande Dame]

[and]

2.... [do] immediately release [Grande Dame] to [Navigare].”

[2] The facts are set out in an affidavit of Navigare’s general manager, Phillip Winter. He deposes that Navigare (as tenant) entered a tenancy agreement with Mr. Frett

(as landlord) for the renting of various dock slips and four mooring balls in the Inner Harbour Marina, Road Town for a term of one year from 15th November 2019. The recital to the lease says that the number of docks leased is nineteen, whereas the detailed description of the area demised in the First Schedule to the lease says the number of slips leased is seventeen. This difference in number may be significant. This is because, although the rent agreed was \$15,000 per month, 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.”

- [3] Navigare’s case is that Mr. Frett did retain two slips, so that only the reduced rent of \$12,600 per month was payable. Mr. Winter says Navigare paid that rent without complaint of underpayment by Mr. Frett until October 2020, when Mr. Frett claimed he had only used one slip. Mr. Winter says:

“6. On November 15, 2020, [Navigare] attempted to remove the remaining 6 vessels from the marina and discovered that one of the boats *Grande Dame*... was chained and immovable. [Mr. Frett] had seized the... boat as compensation for the debt he believed owed. Instead of issuing... legal proceedings against [Navigare], [Mr. Frett] has resorted to the illegal remedy of ‘self-help’. [Mr. Frett’s] claim (if ever issued), would be for \$1,200 per month for 12 months, which totals \$14,400. The value of the Vessel is \$1.1 million. [Mr. Frett’s] actions are clearly wholly disproportionate to the value of the potential claim.”

- [4] It is not self-evident to me that the matters alleged do show any form of “illegal self-help” by Mr. Frett. On the contrary what Mr. Frett appears to have done is levy a distress for the rent which is said to be due. If that is right, then the appropriate procedure is for Navigare to apply to replevy *Grande Dame*. (Distress for rent has been abolished in England: **Tribunals, Courts and Enforcement Act 2007** (UK)¹ sections 62-70, but this does not affect the position here.)

- [5] In the limited time available, I have been unable fully to research the law of replevin as it applies in the British Virgin Islands. I note that under section 2 of the

¹ 2007, c 15.

Recovery of Rent Act 1890² an application for replevin has normally to be made within five days of the distress being levied (with a fifteen day extension possible under section 3). Those time-limits have expired. It may, however, be that an application can be made at any time before the goods seized are sold. A draft replevin bond would be similar to the following (normally two sureties are offered):

“Know all men by these presents that we Navigare Yachting Ltd. of [place of incorporation and address of registered office or registered agent] C.D. of [place of abode] and L.H. of [place of abode] are held and firmly bound to Betteto Frett of [address] in the sum of 2.2 million dollars of lawful money of the Territory of the Virgin Islands to be paid to the said Betteto Frett. or his certain attorney executors administrators or assigns for which payment to be made we bind ourselves and each of us our respective heirs executors and administrators jointly and severally by these presents.

Dated this day of

Whereas the above Betteto Frett upon the complaint of the above Navigare Yachting Ltd hath consented to deliver and replevy to the said Navigare Yachting Ltd the goods and chattels following to wit, the Lagoon 560 boat *Grande Dame*, which Betteto Frett of [address] hath taken and wrongfully withheld as the said Navigare Yachting Ltd alleges. Now the condition of this obligation is that if the said Navigare Yachting Ltd do within one month now next ensuing commence an action against the said Betteto Frett in the High Court of the Eastern Caribbean Supreme Court sitting in the Territory of the Virgin Islands and do prosecute such suit with effect and without delay against the said Betteto Frett for the taking and withholding of the said goods and chattels and also do make return thereof if return thereof shall be adjudged by law and so defend and save harmless the said Betteto Frett against the said Navigare Yachting Ltd and all other persons from and against all matters and things concerning the premises then this obligation shall be void otherwise it is to remain in full force.

Signed sealed and delivered in the presence of...”

- [6] Under section 4 of the Act, distress must be levied by a bailiff certified by the Registrar of the High Court. It is unclear whether a certified bailiff did levy the distress in this case. The consequences of levying a distress by a non-certified person are not clear. By section 4(4), both the landlord and the uncertified bailiff

² Chapter 66, Revised Laws of the Virgin Islands.

are taken to have committed a trespass, but whether that also has the effect of rendering the distraint a nullity is less clear. Arguably, the sub-section envisages that the distress is valid, even though the landlord and the bailiff commit a wrong. (See, however, section 22, which seems to draw a distinction between initial invalidity and subsequent invalidity.³)

- [7] I note that by section 21 of the Act “where any distress and sale shall be made by virtue or colour of this present Act for rent pretended to be in arrear and due, where in truth no rent is in arrear and due to the person or persons distraining... then the owner of such goods and chattels distrained and sold as aforesaid...shall and may... recover double the value of the goods and chattels so distrained and sold together with full costs of suit.” The right to double-damages means *Navigare* has substantial protection against a sale of *Grande Dame* by Mr. Frett, if in truth no rent is owing.
- [8] Further, special damages can be recovered in an action of replevin: **Gibbs v Cruikshank**⁴ (likewise in the analogous case of an action based on distress damage feasant: **Boden v Roscoe**⁵). *Navigare* can therefore claim in replevin for loss of hire on *Grande Dame*, whilst she was wrongly distrained (assuming of course that she was).
- [9] Given the legal uncertainties and the issue of fact as to the number of slips in fact retained by Mr. Frett, this case is wholly unsuitable for determination on an *ex parte* basis. Further there has been unexplained delay in bringing the application. Lastly what is sought is in part a mandatory injunction releasing the yacht rather than merely a restraining injunction. It is rare that such an application is suitable to be dealt with *ex parte*.⁶

³ As to invalidity *ab initio* see *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299 and historically the *Six Carpenters' Case* (1610) 8 Co Rep 146a.

⁴ (1873) LR 8 CP 454.

⁵ [1894] 1 QB 608.

⁶ *Re Foxy's Tamarind Bar Ltd; Philiciano Callwood v Teresa Callwood and others BVIHC (COM) 2020/0010* (determined 3rd February 2020) at para [8].

[10] Accordingly I shall list this matter to be heard *inter partes* on 5th January 2021.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar