

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **NEVHCV2019/0034**

Between **TAMARIND COVE MARINA DEVELOPMENT LIMITED**

Claimant

-and-

SEA BRIDGE (ST KITTS-NEVIS) INC.

Defendant

Before: His Lordship Justice Ermin Moise

Appearances:

Ms. Barbara Hardtman with Mr. Sylvester Carrott of counsel for the claimant
Mr. Glenford Hamilton with Mr. Jeffery Nisbett of counsel for the defendant

2019: October, 28th
November, 8th (Written Submissions)
2020: February, 14th

JUDGMENT

[1] **Moise, J:** This is a claim for breach of contract. The claimant filed this action for damages in the sum of \$1,527,214.76 representing an amount owed by the defendant for pass-through fees pursuant to the terms of a continuance of business agreement entered into by the parties. The defendant, on the other hand, counterclaims for the repayment of the sum of \$1,806,388.24, which it states represents an overpayment of pass-through fees paid to the claimant, pursuant to the agreement. The case hinges primarily on the interpretation of the terms of covenant 22 of the continuance of business agreement. However, before addressing my mind to that issue I will examine the facts upon which the parties rely, as these facts are generally agreed, save and except the circumstances surrounding the inclusion of covenant 22 into the agreement.

The Facts

- [2] The defendant operates a ferry service between the islands of Saint Christopher and Nevis and was also the owner of real property situated at Cade's Bay registered in Book 53 Folio 165 and 167. This land was important to the defendant's business operations as it contained a docking facility which was used to berth its vessels for the transportation of persons, vehicles, heavy equipment and containers across the channel. In March, 2015 the parties entered into a memorandum of understanding with a view to the claimant acquiring title to the defendant's property. A sale and purchase agreement was signed on 14th April, 2015. As a result of this, the parties agreed that a disruption and relocation fee of \$2,700,000.00US would be paid to the defendant. A certificate of title was issued to the claimant on 6th July, 2015; at which point a balance of \$1,100,000.00US remained payable to the defendant in keeping with the terms of the agreement.
- [3] It was the clear intention of the parties that the defendant would give vacant possession of the property to the claimant by 10th August, 2015. The evidence suggests that the defendants intended on seeking an alternative area along the coast in order to berth its vessels. This was to facilitate the relocation of its operations. However, efforts to do so did not materialize and in August, 2015, Mr. Rawlinson Isaac, on behalf of the defendant, approached Mr. Kirtley Hardtman, a director in the claimant company. He informed Mr. Hardtman of the predicament facing the company and the effect this would have on the continuation of its business. The parties then entered into a continuance of business agreement with a view to the defendant's continued use of the berthing dock as part of its operations. It was also agreed that the defendant's passengers would be allowed to pass through a strip of land on the property in order to access the vessels and to leave upon arrival. As part of the agreement a number of covenants were included, outlining the obligations of the defendant regarding the use of the property. In particular, covenant 22 of the agreement states as follows:

"TCMD Ltd shall charge Sea Bridge (St. Kitts-Nevis) Inc. specific fees to be used for the maintenance, insurance and security of the Marina. This includes a standard operating fee of \$1,000.00 monthly, and in addition to fees for:

- ***Vehicular fees for pass-through use of Marina being \$25.00 for passenger vehicle.***
- ***Heavy Equipment for pass-through use of the Marina \$50.00.***
- ***Pedestrian Fees for pass-through use of Marina \$5.00.***
- ***Permission for the continued berthing for the second vessel owned by the Sea Bridge (St. Kitts-Nevis) Inc. ONLY during the construction phase for the south side of the Marina to be negotiated by both parties with the understanding that this permission may be revoked at any time to advance the construction work.***

these fees shall commence on October 1st, 2015 and shall be subject to review annually.”

[4] Despite the commencement date of 1st October, 2015, the parties subsequently agreed on a grace period of 3 months and the defendant was not billed until 1st January, 2016. It is also asserted by the claimant, that the defendant increased its boat rates in October, 2015 in order to facilitate payment of the pass-through fees. The defendant did not directly respond to this assertion and I take it as an established fact. The evidence suggests that the claimant employed what is referred to as a Tallyman whose job was to record the number of vehicles and persons passing through its property on a daily basis. This includes information of persons leaving and entering Nevis by way of services rendered by the defendant. This information is used to prepare invoices issued to the defendant. In addition to this, during his evidence Mr. Kirtley Hardtman insisted that the property is fully insured and that there is 24 hour security. He states that the claimant maintains the premises and recalls that the roads had to be repaired due to damage caused by a storm. These repairs were paid for by the claimant. No specific documentation was presented regarding the insurance and the security for the marina. However, in cross examination Mr. Hardtman remained adamant that the property is fully insured and that security is provided around the clock.

[5] Regarding the passenger information on the defendant's vessel, the claimant insists that the defendant does not keep proper records of its own; making it difficult to reconcile the data available. According to the claimant, a total of 37 invoices were issued to the defendant between 1st January, 2016 and 19th September, 2016, totaling \$845,555.00. This was duly paid by the defendant.

However, the defendant was “chronically and habitually late” in the payment of invoices between 26th September, 2016 and 28th January, 2019. In all a total of \$2,488,050.76 was invoiced out of which only \$960,883.24 has been paid. The claimant therefore asserts that the defendant is behind in payment of the pass-through fees in the sum of \$1,527,216.76.

- [6] It is apparent from the evidence that the defendant raised a number of issues regarding the invoices issued by the claimant. By way of letter dated 31st January, 2017, the defendant wrote to the claimant stating the following:

“In relation to the outstanding invoices, we hereby request an additional two weeks until 15th February, 2017 to enable a complete audit to be done, as there appears to be a gulf between the two amounts by the parties ... additional time is required as it appears that there is double counting with respect to your invoices, in accordance with our interpretation of section 22 of the agreement. Pass through represents round trip.”

- [7] Essentially, despite having initially paid invoices submitted by the claimant, the defendant raised for the first time, in that letter, its divergent interpretation of the term “pass-through” as outlined in covenant 22 of the contract. The claimant had always understood the pass-through fees to be payable each time a passenger traverses its property en route to the defendant’s vessels, in addition to passengers leaving the vessels upon arrival from Saint Kitts. The defendant later argued that the fees relate to a round trip. In other words there ought to be one fee charged per passenger which includes the return leg of his/or her journey. It is unclear as to whether the defendant continues to rely on this issue, as the pleadings do not directly address it and mention is not made of the “round trip” issue in the submissions put forward by counsel for the defendant. Nonetheless, the issue was raised in evidence and addressed in the submissions of the claimant. Whilst the defendant raised this issue with the claimant in correspondence in 2017, the claim is not defendant on that basis.

- [8] In January and February, 2017, the parties met in an attempt to resolve the issues regarding outstanding invoices. At the meeting in January, the defendant requested some time as it was conducting a reconciliation exercise regarding the outstanding invoices. In fact, Mr. Hardtman asserts that at a meeting in January, 2017, the defendant admitted that it didn’t keep proper

records. It was therefore unclear as to how this reconciliation would be done without the defendant being able to rely on data of its own.

[9] By way of letter dated 16th April, 2017, the defendant asserted that it was agreed during the meeting of 14th February, 2017 that the defendant would pay 18% of its monthly invoices in pass-through fees. However, Mr. Hardtman, on behalf of the claimant, asserts that this was never agreed by the parties. He states that whilst this was a proposal put forward by the defendant, the claimant noted that approval was needed by its board of directors and that was subject to the defendant's ability to provide monthly audited financial statements. In short, the claimant asserts that there was never an agreement to alter the terms of the continuance of business agreement to include a flat 18% fee from the defendants.

[10] After the filing and service of this claim, the defendant filed a defence and counterclaim in which it was pleaded that the defendant was not obligated to pay the pass-through fees until such time as the claimant had in fact constructed a marina. This seems to be the central issue on which this claim is hinged. The defendant argued that covenant 22 of the agreement makes it clear that the fees are to facilitate ***the maintenance, insurance and security of the Marina***. The defence pleads that covenant 22 creates a condition precedent and also that the claimant has not performed its obligations under the agreement. As such, the fees which constitute maintenance, insurance and security of the marina are not payable unless the marina is in place.

[11] Mr. Rawlinson Isaac, on behalf of the defendant, states that during the negotiation of the continuance of business agreement, Mr. Hardtman of the claimant company represented to him that the construction of a marina was imminent and that it would be completed by October, 2015. This, Mr. Isaac asserts, was reduced into writing and contained in the agreement. He asserts that it was his understanding that the agreement contemplated the construction of a marina which it was anticipated would be completed by 1st October, 2015. The additional pass-through fees were therefore instituted to facilitate the maintenance, insurance and security of the marina which was to be built. Mr. Isaac states that although the defendant had initially paid those fees upon being invoiced by the claimant, it was later realized, upon the conduct of an audit, that these fees ought not to have been paid as there has to date been no marina constructed by the claimant.

[12] Mr. Hardtman for the claimant asserts that it was never agreed that a marina would be built within that time period. According to him, there was no representation made that a marina would have been built by 15th October, 2015. In fact, performance of the contract was to commence in September, 2015. It would have been impossible to have completed the construction referred to by the defendant within that period of time. The response, simply put, is that the defendant willfully agreed to commence payments in 1st October, 2015 with full knowledge of the fact that no construction would have taken place and completed by 15th October, 2015. As such, the payment of the fees could not have been contingent upon any further construction of the facilities available at the time the contract was made. Mr. Hardtman also asserts that the property purchased from the defendant already contained a marina. The sole purpose of entering into the agreement was for the defendant to continue its business operations. There was therefore no agreement for the enhancement of the marina facilities in order to necessitate payment of the pass-through fees.

[13] Essentially therefore, there are two issues for the court to consider. These are:

- (a) Whether the payment of the pass-through fees is contingent upon the construction of the marina; and
- (b) If the answer to that question is no, then the court must assess the amount of outstanding fees which are owed to the claimant. If the answer is yes then the court must determine whether the fees already paid to the claimant ought to be returned to the defendant.

Whether the payment of the pass-through fees is contingent upon the construction of a marina

[14] This issue turns on the interpretation of clause 22 of the continuance of business agreement. In accordance with that clause, the parties agreed that ***“TCMD Ltd shall charge Sea Bridge (St. Kitts-Nevis) Inc. specific fees to be used for the maintenance, insurance and security of the Marina”***. In their written submissions, counsel for the defendant argues that “there was no marina on the site when the continuance of business agreement was executed and all references to a marina were in respect of a future marina that was likely, perhaps not to be built.” They go on to argue that there is currently no marina and one has never been built on the site. There being no marina, the fees are not now payable.

[15] The first issue for consideration is the terminology of the covenant agreed to by the parties.

Counsel for the claimant refers the court to the case of ***Arnold v. Britton and Others***¹ where the Supreme Court of the United Kingdom noted that in interpreting a contract the court must identify the intention of the parties. In doing so the court must consider ***“what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean.”*** Whilst words contained within the contract must be assessed in light of their ordinary and natural meaning, the context and circumstances surrounding the contract must also be considered.

[16] In the more recent case from our own Court of Appeal, ***Malmaison Properties LLC et al v Jeffrey Coyne et al***², Thom JA stated that ***“[t]he court must seek to determine what was the contract according to the true intention of the parties. The parties’ true intention can be gleaned from the contract read in its entirety, having regard to the background and circumstances of which the parties can be taken to have been aware at the time the contract was made.”*** Her Ladyship goes on to note that ***“contractual documents should be interpreted against the “factual matrix” at the time the parties enter the contract.”*** The applicable test therefore is to consider the natural and ordinary meaning of the words used whilst giving due regard to the background and circumstances under which the parties negotiated the contract. This would assist in determining the true intention of the parties. The question is whether the parties had included covenant 22 into the agreement with the understanding that a marina was to be built on the site and that the payment of the pass-through fees was contingent upon that construction.

[17] A marina is defined by the oxford dictionary as ***“a specially designed harbour for small boats and yachts.”*** Collins dictionary goes further to define a marina as ***“a small harbour for small boats that are used for leisure.”*** The Cambridge and Webster dictionaries both include the added feature of pleasure in their definitions with the Cambridge dictionary describing it as ***“a small port that is used for pleasure rather than trade, often with hotels, restaurants, and bars.”*** Therefore, a strict interpretation of the term marina seems to hinge on its size and use. It is a small

¹ [2015] UKSC 36

² SLUHCVP2018/0015

harbor used primarily for the docking of pleasure boats rather than vessels of trade. It is not necessary for the facility to be enhanced or beautified in any way; but that is a usual feature.

[18] Taking these into consideration, the court must also go on to consider the context within which the term was used in the agreement. Mr. Hardtman insists that the facilities are used for the docking of other smaller vessels apart from the defendant's operations. He provided photographs of the facilities. This fact was not addressed by the defendants in any way and I accept it as being truthful. Mr. Isaac, on behalf of the defendant, argues that during the course of the negotiations representations were made to him that there was an intention on the part of the claimant to construct a marina. He states that this was therefore crystalized into writing in the form of covenant 22 of the continuance of business agreement. According to his initial evidence, this marina was to have been constructed by 15th October, 2015. However, when pressed in cross examination he accepted that this was not possible.

[19] In their closing submissions, counsel for the defendants raised an issue of the interpretation of a marina pursuant to the Development Control and Planning Act. I note that no specific section of that Act was referred to and the court could not find any provision in that legislation which seeks to define what a marina is. However, I take counsel's submissions to suggest that planning approval is necessary for the construction of a marina and that such has never been granted. Therefore there can be no marina on the site. I do not agree with that submission. Certainly it is necessary to obtain planning approval to construct a port or enhance marina facilities. But the lack of planning permission is not synonymous with there not being a marina. Surely, it is clear from the evidence that boats berth at that facility and that would be enough to fall within the broad definition of what a marina is. In any event, it is really the intention of the parties that the court is concerned with and not the question of whether planning permission had ever been granted.

[20] Counsel also refers the court to case Number NEVHCV2016/0046 in which the claimant has brought an action against the department of planning, among other persons. This action touches and concerns the issue of planning approval for the construction of a marina towards the north. The defendant argues that the pleadings in that case establish the fact that there is no marina now built on the property in question. I note firstly, that the case referred to by the defendant is sub judice and the court should be more than cautious in making any comments about the facts therein.

Secondly, I also find that there is nothing about that case which assists the court in determining the intention of the parties as it relates to the pass-through fees payable upon the execution of this agreement. This is a question of fact which must be determined within the specific facts of this case and not the broader issues in dispute in case Number NEVHCV2016/0046. In any event it would suffice to say that the facts of case number NEVHCV2016/0046 relate to an application for planning approval at the northern entrance and not on the property previously owned by the defendant.

[21] To my mind, there is nothing in this contract which speaks to the issue of a marina having to be constructed. The context of this agreement was simply that the defendant was contractually bound to cease operating its ferry service on the claimant's land by 15th August, 2015. The defendant encountered difficulties and re-engaged the claimant in negotiations with a view to continuing its business operations via the claimant's land for which a direct fee was payable. That fee was offset by funds which were owed to the defendant by the claimant. The parties further agreed that additional fees were to be paid to facilitate the security, insurance and maintenance of "the marina" and the specific date for the commencement of these payments were included in the contract. In that context, the express terms of the covenant do not substantiate the defendant's assertion that the parties had contemplated a future construction of a marina as a condition precedent for the payment of the pass-through fees. If that was the intention of the parties it certainly could have been expressed more clearly in the agreement itself. Nothing in the contract speaks to this and there is nothing in the context of the negotiations between the parties upon which the court can rely to draw such a conclusion.

[22] Covenant 22 refers to "the marina" in the present tense; giving the impression that a marina existed at the time of the signing of the agreement. There are also a number of occasions within the contract itself where the term marina was used. For example, the 1st covenant of the agreement stipulates that the "Sea Bridge ... shall be allowed to operate a defined number of trips daily in and out of the Marina..." All of these refer to the marina in the present tense and do not substantiate the submissions put forward by the defendant.

[23] Further to this, I agree with the argument of counsel for the claimant that it would be impossible for a marina to have been constructed within less than one month from the date on which the payment of the pass-through fees were to have commenced. I have some difficulty in accepting that the

commencement of these payments was contingent upon the construction of a marina in these circumstances or that Mr. Isaac was ever mistaken in his understanding of that issue. In addition to this, the defendant asserts that Mr. Isaac was the one who negotiated the agreement with the claimant. He was also the one responsible for determining when payments were made by the defendant in keeping with its operational obligations. Yet, it was only upon advice from an auditor did it become apparent to him that these fees ought not to have been paid as there had been no marina constructed. To my mind, had this been the case, Mr. Isaac would have been fully aware from the onset that the fees ought not to have been paid and would not have needed the interpretation of an auditor to determine this issue; especially having paid a significant amount of money to the claimant upon the issuance of invoices commencing 1st January, 2016. It is difficult to reconcile the fact that Mr. Isaac would have been aware that the fees were contingent upon the construction of a marina but yet he agreed to start paying these fees within one month of the signing of the agreement. There was a further agreement that the payments of these fees would be delayed until January, 2016 to give the defendants time to adjust their own operations to facilitate the commencement of these payments. I doubt very much that these circumstances lend themselves to the interpretation which the defendant now wish to place on covenant 22 of the agreement.

[24] The claimant argues that at the time of the agreement a marina already existed. The argument is simply that there is a distinction between the enhancement of a marina and the construction of one. Mr. Hardtman, in his evidence, states that he perceived a marina to be a place to dock and berth boats and that the defendant had already constructed such a facility at the time of the purchase and sale agreement between the parties. In fact, he goes on to point out that the defendant in its audited statement in 2019 refers to the docking slip as an asset and describes it as a “marina slip”. The argument seems to me to be that even the defendants use the term marina to refer to the infrastructure in place for its business operations. I do accept that other vessels use the facilities and that the parties did not negotiate within the context that a marina was to be built, but rather that one was already in place. Mr. Hardtman insisted that security is provided and that the area is insured. Documentary evidence was not provided, but the defendant did not seem to take any issue with that assertion.

[25] To my mind the actual intention of the parties was that the pass-through fees were to assist with the maintenance, insurance and security of the property. The defendant therefore has a duty to pay those fees in order to ensure that this is done. I do not accept the submissions put forward by the defendant that the construction of a marina was a condition precedent to the payment of the pass-through fees. I agree that the contract indicates that there was an intention for the future enhancement of the facilities but the parties clearly did not agree for these enhancements to be in place as a condition upon which the pass-through fees were to be paid. That being the case I find that the defendant is in breach of the continuance of business agreement and must pay the outstanding pass-through fees for the period submitted by the claimant.

[26] The question for consideration therefore is whether the claimant is entitled to the amount of fees which it claims. I considered for a moment the issue of the defendant's interpretation of the pass-through fees as a round trip. The difficulty with this however, is that this was not pleaded as a defence to the case. The defendant filed a counterclaim and no mention is made of this. The claimant has clearly pleaded the invoices on which it relies and the amounts and their interpretation of the clause. I note that in correspondence between the parties the defendant raised the issue of pass-through fees on a round trip basis. However, in subsequent correspondence this was abandoned altogether and an 18% fee on all collections was negotiated by the defendant. This was never agreed to. The defendant therefore did not plead anything relating to the calculation of the invoices other than that it ought not to be paid until a marina was constructed. Even in closing submissions counsel for the defendant made no mention of that issue. I find therefore, having considered the pleadings, the evidence and the information provided that the defendant is liable to pay the outstanding invoices issued by the claimant.

[27] There has been in effect a previous order of the court in which the defendant was to pay \$45,000.00 monthly as an interim payment towards the debt. In these circumstances any award made must be reconciled with the amounts already paid by the defendant prior to the delivery of this judgment.

[28] Judgment is therefore entered against the defendant in the sum of \$1,527,214.76 less any amount already paid in compliance with the interim order of the court. The defendant will also pay interest

at the statutory rate from the date of judgment and prescribed costs in the sum of \$109,566.44. The counterclaim against the claimant is dismissed.

**Ermin Moise
High Court Judge**

By the Court

Registrar