

BRITISH VIRGIN ISLANDS

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. BVIHCV2002/0227

**(1) AUDUBON HOLDINGS LIMITED
(2) NORMAN ISLAND SERVICES LIMITED**

Claimants/Applicants

-and-

**(1) THE TREASURE ISLAND COMPANY LIMITED
(2) DAVID SIMS
(3) VALERIE SIMS**

Defendants/Respondents

Appearances:

Mr Stephen Moverley Smith QC of XXIV Old Buildings, London and with him, Mrs Hazel-Ann Hannaway-Boreland and Ms Emma Sparshott of Harney Westwood & Riegels for the Claimants/ Applicants

Mr Sydney Bennett QC and Mr Thomas Theobalds of J.S. Archibald & Co. for the First and Second Defendants/ Respondents

Third Defendant/Respondent absent

2007: May 15, August 17, November 08, November 15, December 06
2008: May 21

JUDGMENT

[1] **HARIPRASHAD-CHARLES J:** The present application (“the Account Application”) has its genesis in a judgment delivered by this Court on 31 March 2006 (“the Trial Order”). It seeks to determine the actual sum due to the Claimants in relation to mooring revenues.

Procedural history

[2] This case has a fairly extended and chequered history. The Claimants commenced proceedings on 4 December 2002 which sought to enforce their rights under two contracts namely the First Amendment, which dealt with the 73 moorings around Norman Island on

which permission was given by the BVI Government (“the moorings”) and the Second Amendment, which dealt principally with the turnover rent payable by the First Defendant (“the Company”) under its lease of the “Billy Bones” restaurant.

[3] For reasons which are not germane to the present application, the substantive trial did not get off the ground until 31 October 2005. It lasted for five long days. Judgment was delivered on 31 March 2006. The Court found wholly in favour of the Claimants and granted them the entirety of the relief sought. On 21 July 2006, in the presence of all Counsel, the Court formalized the Trial Order by simply adding a Penal Notice. The Trial Order provided inter alia as follows:

- i. The Defendants to provide accurate monthly statements of fees and expenses from 1 October 2001 to date.
- ii. An account of what is due to Audubon from the Defendants for monies received by the Defendants in respect of mooring fees collected from 1 October 2001 to date for and on account of Audubon.
- iii. An order for payment of the sum found due on the taking of the account with interest thereon at such rate and for such period as the court may think fit.
- iv. An order for the provision of copies of the books and records in respect of the revenues from the operations of Norman Island.

[4] Suffice it to say, the Defendants did not comply with the Trial Order despite the fact that it was endorsed with a Penal Notice and served on them. On 15 September 2006, the Claimants filed another application seeking essentially compliance of paragraphs (i) to (iv) of the Trial Order. On 27 September 2006, the Court ordered the Defendants (a) to produce by 31 October 2006 an account verified by Affidavit in accordance with CPR 41.3 (1) with exhibits of supporting documents, of what is due to Audubon from the Defendants in respect of mooring fees collected from 1 October 2001 to date for and on account of Audubon (paragraph 3) (“the Account”) and (b) by 7 November 2006, to file and serve detailed points of objection to the

Claimants' claim for costs, together with the Defendants' respective schedules of costs and supporting documents.

- [5] Notwithstanding that this Order was also endorsed with a Penal Notice, the Company and Mr Sims failed to serve any evidence on the Claimants until 10 November 2006. The Claimants were however served with Ms Sims' evidence on 1 November 2006.
- [6] On 27 September 2006, the Court gave further directions for a hearing on 22 November 2006 and once again, extended the deadlines for compliance with the Trial Order.
- [7] The Court heard several applications on 22 November 2006 and delivered a written judgment a month later. It ordered, inter alia, that the Defendants do serve on the Claimants' solicitors on or before Monday, 15 January 2007, originals or true copies of all documents in their joint or several possession evidencing all entries in the accounts verified by the affidavit of the First and Second Defendants filed on 31 October 2006, including and without prejudice to the generality of the foregoing: (a) mooring receipt books; (b) bank statements; (c) invoices and (d) receipts for any expenses claimed by the Defendants together with a list of all such documents verified by affidavits.

The Account Application

- [8] On 29 January 2007, the Claimants filed this application to determine the actual sum due to them in relation to mooring revenues. It was supported by an affidavit dated 29 January 2007 from Dr Henry Jarecki ("Dr Jarecki"). On 9 March 2007, at a hearing attended by Leading Counsel on behalf of the Defendants, the Court ordered that the Defendants attend for cross-examination on 14 May 2007 (re-listed for 15 May 2007) and file and serve evidence in reply to Dr Jarecki's affidavit by 4 April 2007.
- [9] No evidence was filed and served by the Defendants until after the close of business on Friday, 11 May 2007 when an affidavit from Mr Sims was received.

- [10] A hearing took place on 15 May 2007 (“the May Hearing”) at which Mr Sims was cross-examined about the account that he had produced in relation to the mooring fees. Following his cross-examination by Learned Queen’s Counsel, Mr Moverley Smith for the Claimants, the Court gave further directions for the provision of further documentation and evidence by the Defendants by 20 June 2007 and the filing of written submissions by 23 July 2007.
- [11] As a result of the late filing of evidence by Mr Sims and the indisposition of Counsel¹, the parties agreed to a revised filing date for written submissions of 17 August 2007. This was not communicated to the Court. Nonetheless, both Counsel filed their submissions in the Court Office where it remained until certain inquiries by the Claimants were made in or about the month of October 2007. This atypical situation was expeditiously addressed. However it became apparent on the reading of those written submissions, that another hearing was necessary. On 8 November 2007, the Court re-convened to continue its deliberation of the matter. At the end of that hearing, the parties revised their submissions. The Defendants filed and exchanged additional written submissions on 15 November 2007 and the Claimants did likewise on 6 December 2007.
- [12] It is to be observed that the Defendants filed two further affidavits from Mr Sims on 29 June and 12 July 2007 respectively. They also filed an affidavit from the one-time collector of mooring fees, Mr Kevin Rowlette (“Mr Rowlette”) and an affidavit from a bookkeeper in Mr Sims’ office, Ms Marva Shepherd (“Ms Shepherd”).
- [13] This further evidence has provided some clarification and has enabled the Court to lessen the areas of disputes which it has to decide.

The issues

- [14] In his First Affidavit sworn to on 31 October 2006, Mr Sims had helpfully divided up the period of the Account into three:
- a. 1 October 2001 to 31 December 2001 (“the First Period”);
 - b. 1 January 2002 to 6 December 2002 (“the Second Period”);

¹ The Court as well as Counsel for the Claimants were fully aware that Mr Bennett QC was indisposed.

c. 7 December 2002 to 7 July 2006 ("the Third Period").

[15] For ease of reference, the parties have agreed that the Court should follow the above format. Some relevant facts are that altogether, there are 73 moorings; 45 of which were subject to the receivership ordered by the Court on 6 December 2002. The income in relation to the remaining 28 was collected by the Sims until 7 July 2006.

[16] The First Period commences on 1 October 2001 because there was a settled account between the parties at the end of October 2001 for the period down to the end of August 2001 (there were no collections in September 2001). The commencement date of the Third Period reflects the fact that 6 December 2002 was the date of the receivership. It will be recalled that under the First Amendment, until the lease of "Billy Bones" was determined on 31 March 2002, the income derived from the moorings less expenses of collection and maintenance, was to be shared 50/50 between Audubon and the Defendants. From then onwards, 100% was to go to Audubon.

[17] As a matter of convenience, I have also adopted the format prepared by the Claimants in consideration of the issues before the Court. Essentially, they are as follows:

- 1) Expenses, where no invoices are produced;
- 2) Whether the Defendants should be entitled to claim increased collection fees in the First Period;
- 3) Whether the Defendants should be entitled to claim the fuel and maintenance costs of a truck in the Second and Third Periods;
- 4) Whether the Defendants are entitled to claim \$10,000 charged by Mr Sims' company, Beacon, for "*Installation and Financing*;"

- 5) Whether the Defendants are entitled to claim "*interest on installation costs*" i.e. on the amount referred to in (4) above;
- 6) Whether the receipts produced by the Defendants for the Third Period show gross receipts of \$196,600, as established by a detailed examination of those receipts carried out by the Claimants (no such exercise having been carried out by the Defendants);
- 7) Whether fees were collected for the periods when no receipts were produced, and, if so, for how much;
- 8) What collection fees need to be deducted;
- 9) Whether prescribed costs should be calculated on the revenue from the 28 moorings as well as the 45 which were subject to receivership.

[18] Before I venture any further, I ought to emphasize that upon the delivery of some 21 boxes of original receipts by Mr Sims on 29 November 2006, the Claimants engaged themselves in a scrupulous exercise which form the basis of the comparison between the figures produced by Mr Sims in the First Sims' Affidavit and the amounts disclosed by the original receipts, set out in paragraphs 39 - 41 of Dr Jarecki's affidavit.²

Issue 1- Expenses

First Period

[19] **Moorings –Repairs and Maintenance:** The Claimants have alleged that the "expenditure of \$393 remains unsupported by any invoice and should be rejected". The Defendants have subsequently produced this invoice. This was accepted by the Claimants at the hearing on 8 November 2007. Consequently, this is no longer a live issue.

² See tab 3 of Hearing Bundle at pages 10-13.

Second Period

- [20] **Boats –Fuel:** The Claimants have correctly submitted that part of this expenditure relates to the truck issue (Issue 3). According to them, invoices still have not been produced for \$1,190 of expenditure, which accordingly should be rejected. The Defendants submitted that in such a case, the Court should take a common sense approach in dealing with the issue. In my view, in the absence of contemporaneous documentary evidence, this claim ought to be rejected.
- [21] In addition, \$3,294 of the invoices just say “gas”. According to the Claimants, since the boats appear to be approximately 80% of the bill totals, the adjustment sought is \$659. In the absence of proper documentation, I will accordingly make the adjustment sought by the Claimants in the amount of \$659.
- [22] **Boats– Repair and Maintenance:** at paragraph 13 of the supplemental outline submissions, the Claimants assert that the expenditure of \$6,240.78 was adequately explained by Mr Sims in cross-examination and is no longer challenged, so also was his elucidation of “Baby Bones”. However, no receipts have been produced for \$384 of expenditure which should therefore be rejected. Under cross-examination on 15 May 2007, Mr Sims identified the receipt of \$384. Undoubtedly, this is no longer an issue.
- [23] **Moorings –Repairs and Maintenance:** Some invoices were produced and the initial adjustments required by the Claimants have been varied accordingly. Nonetheless, the amount of \$1,720 remains unaccounted for and ought to be rejected. The Defendants have conceded that this adjustment ought to be made.
- [24] **Stationery –** The Defendants claimed \$1,324 for stationery. The Claimants argued that although further invoices have been produced, there is still an un-vouched balance of \$224.30. Where there are no receipts, the reasonable approach of the Court is to disallow the claim. Otherwise, the Court will be drawn into speculation. Judges have been admonished not to do so. Therefore, the un-vouched balance of \$224, unsupported by documentary evidence, is accordingly rejected.

Third Period

- [25] **Payments to Attorney-General:** these were adequately explained by Mr Sims in cross-examination and are no longer pursued.
- [26] **Stationery:** The Defendants claimed \$77 for stationery. The amount is unsupported by invoices and is therefore rejected.

Issue 2- Increased Collection Fees in the First Period

- [27] **Moorings collection fees –current and overdue:** the Claimants have disputed the claim of the Defendants to an increased collection fee of \$2,000 per month for the months of March – December 2001. They maintained that the fee had been fixed at \$1,500 per month. Mr Sims stated that the collection fee was made in respect of 30 moorings installed up to February 2001. In March 2001, the number of moorings for which collections had to be made had increased from 30 to 45. According to Mr Sims, servicing of these additional moorings involved a greater expenditure of time and expense because not only was there a 50% increase in the number of moorings to be collected but those moorings were spread over a wider geographical area. He alleged that the additional fee of \$500 per month represented only a 33% increase in collection fees and a continuing loss to him.
- [28] Mr Sims next argued that by letter dated 19 October 2001, under the signature of John Hartman, the Claimants agreed to the additional charge. The letter stated: *“As we indicated to you in our letter of 9/10/01, Dr Jarecki is willing to pay you 6 months of the increased collection fee retroactive to the transfer of the seabed leases as required under your lease agreement with Audubon. To this end, we have set aside \$3,000 in a special account.”* This presupposes that an additional fee was payable if the transfer of the moorings was done. This, to my mind, cannot be construed as an agreement to increased collection fee.
- [29] The Claimants have correctly pointed out that pursuant the terms of the First Amendment (Annex 1), the amount of any fees was to be approved by Audubon. Audubon had not agreed to any increase in fees. If the Defendants wanted an increase, it was incumbent on them to negotiate and reach such an agreement with Audubon.

[30] However, I do agree with Mr Bennett QC that the Court should take into consideration the fact that Audubon had set aside \$3,000 which they had intentions of paying. I think that on this basis alone, the Defendants should be paid the \$3,000. To add, they have done additional work for which they have not been paid.

[31] In those circumstances, the claim of \$6,000 is reduced to \$4,500 and the amount of \$3,000 claimed by Mr Sims as overdue mooring collection fees is allowed.

Issue 3 –Truck Expenses (Fuel and Maintenance)

[32] This issue concerns automobile and fuel expenses for the Second and Third Periods: see Schedules B and C. In cross-examination, Mr Sims explained that it was necessary to use the truck to collect fuel for the boats. The Claimants argued that in reality, the truck was primarily used by the Sims to travel to work³ as gas is required on an average every four days or so. The Claimants argued that this is not chargeable.

[33] The Defendants refuted this allegation. They alleged that this was not the cost of the Sims traveling to work but it is the cost in respect of driving to and from the gas station to fill up tanks for the boats, transporting staff to and from the dock and delivery of revenues collected to the office for recording and deposit. They alleged that these are clearly expenses incurred recurrently in the proper carrying out of the revenue collection process and are plainly deductible. The Defendants further alleged that the amount of \$685 does not even represent the actual cost since they sometimes paid out of their pockets without reimbursement.

[34] In the absence of invoices to substantiate this claim, I will disallow it.

[35] **Boats Fuel – Second and Third Period:** with respect to fuel for the boats, the Claimants have alleged that although part of the fuel expenditure relates to the truck (Issue 3), there are still missing invoices to the tune of \$1,190 which should accordingly be rejected.

³ See paragraph 24 of Mr Sims' second affidavit.

- [36] The Defendants claimed \$5,388 as fuel for boats in the Third Period. The Claimants submitted that invoices totaling \$3,294 just say “gas”- the boats appear to be approximately 80% of the bill totals. Hence, an adjustment of \$539 will be made. The Defendants contended that the amount claimed was in respect of the operations of the vessels for the exclusive purpose of collecting the moorings revenue. These amounts were confirmed to be paid by cheques issued by Ms Shepherd, the employee of Beacon Capitals responsible for the receipt and banking of moorings revenues received as well as for the preparation of cheques in payment of expenses.
- [37] Learned Queen’s Counsel, Mr Bennett repeated that where receipts are not produced, the Court should take a common sense approach to the issue of whether or not the claimed expenses had in fact been incurred. In my opinion, it is fair to make the necessary adjustment required by the Claimants.
- [38] **Boats– Insurance:** The Claimants argued that \$550 was for a third boat, “Baby Bones” which had nothing to do with the moorings. However, Mr Sims pointed out that “Baby Bones” was in fact used in the collection of mooring fees. I am satisfied that the amount claimed by the Defendants under this sub-head is justified.

Issue (4) - \$10,000 Invoice raised by Beacon

- [39] The Defendants argued that the fee charged by Beacon Group was for obtaining quotes for the installation of additional moorings around Norman Island, negotiation of pricing in respect thereof, for providing finance to pay for the installation of these moorings as well as liaison with the vendor regarding locations for installation, monitoring of progress, supervision of the process and inspection of the moorings once installed and included time spent reviewing the damage to certain of these moorings in Privateer Bay from what it appeared to be a deliberate act of sabotage, discussion and agreement of reinstallation fee. According to the Defendants, this extended over a 6-month period and at a rate of approximately \$250 per hour. The amount represents a charge for approximately 40 hours which they alleged, is nominal.
- [40] Mr Bennett QC submitted that there is nothing extravagant about \$10,000. He cautioned that if the Court does not allow it, it would mean that the Claimants were unjustly enriched.

[41] The Claimants disputed the validity of the claim by referring to it as a “spurious” expense. They alleged that shortly after the receivership commenced on 6 December 2002, Beacon issued the invoice of \$10,000⁴ which effectively, is a payment to the Sims themselves. According to the Claimants, no particulars are given for the work done and more significantly, no agreement was ever reached with Audubon for Beacon to carry out any work. In passing, it is to be observed that the First Amendment only sanctioned the deduction of expenses for collection and maintenance.

[42] Mr Moverley Smith QC contended that the moorings were installed by Moor Seacure, a well-known, local professional mooring installation company at a cost of nearly \$23,000. He argued that it is impossible to conceive that any significant amount of time would be spent selecting that company or that a trust company would have the appropriate qualifications to do so. He also argued that it is equally impossible to conceive what qualifications a trust company would have to supervise the installation of moorings by such experts.

[43] It is undisputed that there was no express or implied request from the Claimants for the additional works, by the installation of more moorings. The Learned Authors of **Chitty on Contracts, 29th Edition, Volume 1, para 29-073** state as follows:

“...But no obligation arises unless there is an express or implied request from the defendant to the claimant for the work to be done or the services to be rendered.

...The mere receipt of a benefit, when the defendant has no real option to accept or reject it, does not justify a claim of quantum meruit.”

[44] In **Falcke v Scottish Imperial Insurance Co**⁵, Bowen LJ said:

“The general principle is, beyond all question, that work and labour done on money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs, any more than you can confer a benefit upon a man against his will....There can, as it seems to me, according to the common law be

⁴ See part of Exhibit 4 to Mr Sims’ affidavit of 31 October 2006 and annexed hereto as Annex 5.

⁵ (1886) 34 Ch D 234, 248-249.

only one principle upon which a claim for repayment can be based, and that is where you can find facts from which the law will imply a contract to repay or to give a lien.”

[45] I agree entirely with the submissions of Mr Moverley Smith QC that this claim ought to be rejected in its entirety and I so hold.

Issue (5) –Interest on Beacon Invoice

[46] Given the conclusion of the Court in the above paragraph, it would be a futile exercise to further explore this issue.

Issue (6) – Receipt for Third Period

[47] The Claimants alleged that upon delivery of the boxes of mooring invoices, they scrupulously examined them. In his affidavit of 29 January 2007, Dr Jarecki alluded to the vast difference in mooring fees.⁶ He deposed that for the period 7 December 2002 to 7 July 2006, the comparison for the 28 moorings shows a gross discrepancy in the actual figure based on receipts and expenses as opposed to the figure of \$61,890 detailed by Mr Sims in Exhibit 5 and 5A. In addition, the Claimants alleged that no attempt had been made by Mr Sims to go through the invoices and consequently, there is no reason to infer that their figure is incorrect.

[48] An explanation for the discrepancy between the figure of \$196,900 given by the Claimants and that of \$135,010 given by the Defendants is advanced by Ms Shepherd in paragraph 6 of her affidavit of 29 June 2007. She deposed that the figure of \$135,010 declared by the Defendants relates to the monies actually received by them and excludes the collection fees withheld by the collection agent, Mr Rowlette. At paragraph 9 of his affidavit of 29 June 2007, Mr Rowlette referred to and confirmed the accuracy of a summary of moorings receipts, fees and expenses marked “DS1” which is exhibited to his affidavit. The summary shows gross moorings revenue of \$205,077 of which some \$70,067 was retained by him as collection fees. The sum of \$135,010 was the net amount actually received by the Defendants.

⁶ See paragraph 41 of Dr Jarecki’s affidavit of 29 January 2007.

[49] The Defendants are liable to account to the Claimants for mooring fees monies actually received by them. Such duty is upon them. They alleged that the Claimants have not produced any actual evidence of under-declaration of mooring revenues. The sole basis for the challenge is the Claimants' comparison of the receipts reported in relation to the 28 moorings with those collected by the receiver for 45 moorings situated in a more favourable location. At paragraph 8 of his affidavit, Dr Jarecki stated:

“...in light of the fact that the net sum collected in respect of the 45 moorings subject to the receivership over an approximate 28 month period equated to US\$289,121.30, it was believed that the actual amount collected by the Defendants and owed to the Claimants in respect of the 28 moorings for the three year period was substantially more than US\$134,650.”

[50] Mr Bennett QC forcefully argued that the fact is, for a considerable part of the period under review, revenue from the 45 moorings subject to receivership and the 28 moorings which were not, were collected by the same person, Mr Rowlette. In his affidavit, Mr Rowlette has confirmed the accuracy of the account given by Mr Sims as to the monies actually received in mooring fees in respect of the 28 moorings. He argued that the Claimants' allegation of under-reporting of revenues is thus shown to be a conjecture.

[51] If the affidavit testimony of Mr Rowlette and Ms Shepherd is to be believed (since it stands uncontroverted), there is a plausible explanation for the discrepancy between the Claimants' figure, based on receipts and expenses of \$196,000 and the Defendants' figure of \$135,010. It is that the gross moorings receipts amount to some \$205,610; an amount in excess of the sum claimed by the Claimants, but that \$70,067 of this sum was withheld by Mr Rowlette as collection fees and \$135,010 received by the Defendants.

Issue (7) – Missing Mooring Receipts

[52] The Claimants claim an additional amount of \$31,600 based on allegedly missing receipts. This claim is particularized at paragraphs 43 - 45 of Dr Jarecki's affidavit.

- [53] In his written submissions of 17 August as well as 15 November 2007, Learned Queen's Counsel, Mr Bennett addressed the issue of "missing receipts" in great detail.⁷ He also referred to the numerous affidavits and exhibits of Mr Sims.
- [54] He submitted that the Schedule purportedly proffered by the Claimants is a purely theoretical exercise whereby monies are claimed for 28 moorings based on an extrapolation of collections made by the receiver of 45 moorings situate at a different location and in a different year. He submitted that the unrealistic nature of the exercise is demonstrated by the review of the claim made for 7 December 2002 to 10 December 2002. The Defendants argued that as a basis for comparison, the \$5011 referred to by the Claimants as revenue for the four day period equates to \$1,253 per day or 63 moorings per night – this, he said, was at a time when only 45 moorings were the subject of receivership. He submitted that the figures put forward as a basis of comparison is therefore fatally flawed.
- [55] The Defendants also argued that the Claimants' assertion under this head represents an attempt to double dip by claiming the same amount twice, once as unreported revenue on the 28 moorings and again as monies represented by missing receipts. They submitted that the Defendants have shown that for most if not all the days for which the Claimants asserted that receipts were missing, there were either receipts submitted, or in any case revenues were shown on the books of account. Moreover, as has been the experience of the court-appointed receiver, there were several days when no collections were made due to seasonal low traffic or bad weather. Thus, missing physical receipts do not automatically translate into missing revenue.
- [56] The Defendants alleged that the claim is purely speculative. They pointed out that by way of illustration, the Claimants alleged that some \$730 is due on the basis of missing receipts for 28 moorings for the period 15-17 December 2001. At that time, the 28 moorings had not yet been installed. Again, the receipts allegedly missing for the period 1-15 January 2002 were not in

⁷ See para. 4.3.4 of 17 August 2007 final submissions on behalf of the First and Second Defendants and paragraph 8 of 15 November 2007 outline notes.

fact missing. They were in the boxes in the possession of Harneys and this was pointed out by Mr Sims during cross-examination on 15 May 2007.

[57] Mr Sims appeared to have acknowledged that there were missing receipts but provided reasons why there were no receipts for some days.⁸ He stated that for many of these days either:

- a) there were no collections in which case no additional amount could have been collected; or
- b) there were no physical receipts found but collections were received and moneys received by Ms Shepherd and included in the books of account and the accounting provided by Mr Sims as more fully detailed in Exhibit DS3 and the notes annexed hereto, numbered 1 to 25 in the document marked "DSY"; or
- c) physical receipts were found and are now been provided to the Court for the avoidance of doubt; or
- d) exhibit "DSZ1" in respect of the First and Second Periods and "DSZ2" in respect of the Third Period were submitted. "DSZ1" shows that no amounts are to be added back on account of missing receipts for the reasons stated. "DSZ2" recalculates the correct amount that could have been claimed on the basis stated by the Claimants, but is adjusted to reflect the correct collection ratio and also the important fact that the Defendants received only 50% of the amount collected under the terms of their arrangement with Mr Rowlette.

[58] In short, the Defendants emphasized that missing receipts are not proof of underreporting to which I totally agree. On the other hand, it was incumbent on them to keep proper accounts. To say, as Mr Rowlette did, that *"there were a good number of days where we simply had no remaining receipts left to issue to boaters due to the receipt books supplied by Beacon having run-out"* begs the question. He also said that when it rained, no business was done on that

⁸ See affidavit of David Sims of 11 May 2007.

day. This could have attracted a notation to that effect rather than to speculate whether it rained or not, or whether or not there were boats in the Bight.

- [59] In order to estimate what amounts are likely to have been collected, reference has been made to the collections made by the receiver. For the First Period (when there were 45 moorings), no adjustment needs to be made (the figures being taken from the receiver's collections for 2003); the revenue thereby collected being \$912. For the Second Period, January to April 2002, no adjustment has been made because there were still 45 moorings. Subsequently, the 28 moorings were installed, to give a total of 73. The Claimants have made certain adjustments. In error, they have applied 20% reduction for the First and Second Periods, when in fact, up until May 2002 (midway through the Second Period), the Defendants were collecting only the 45 moorings (and thus in the same position as the receiver). Thereafter, for the remainder of the Second Period, they were collecting the entirety of the 73 moorings, thus the estimated figure is \$14,044 and not \$13,027. For the Third Period, the figures proposed by the Claimants have been properly challenged and which I accept. Consequently, no adjustment is made to that period also.

Issue (8) –Collection Fees

- [60] The amount of \$135,010 is claimed by Mr Sims as being the actual amount of mooring fees received by his wife, Mrs Sims in respect of the 28 moorings between 7 December 2002 and 7 July 2006.
- [61] The Claimants challenged the Sims' accounting as being an understatement of moorings revenue actually collected. Dr Jarecki stated that his solicitors identified total mooring fees for the period July 2003 to July 2006 of \$199,965 and not \$135,010 as accounted for by Mr Sims. He submitted that Mrs Sims asserted that the net revenue for the 28 moorings over the three year period was \$134,650 (corrected to \$135,010) but up to September 2006, she had not produced any documentary evidence to support her assertion. Dr Jarecki next submitted that *"in light of the fact that the net sum collected in respect of the 45 moorings subject to the receivership over an approximate 28 month period equated to \$289,121.30, it was believed*

that the actual amount collected by the Defendants and owed to the Claimants in respect of the 28 moorings for the three-year period was substantially more than \$134,650.”

- [62] The Claimants’ claim for the higher amount of revenue appears to have been based on the notion of the amount collected by the Receiver in respect of the 45 moorings which were the subject of the receivership as well as receipts and expenses.
- [63] The Defendants say that it is unfair to use the basis of computation of mooring fees as suggested by the Claimants. They say that all 45 moorings under receivership were in the Bight, one of the biggest and safest anchorages in the BVI, which provides maximum protection and safety from the elements as well as being favourably located with respect to the two restaurants in the Bight namely Billy Bones and Willy T, being in close proximity to both. These moorings are always the first choice for boaters. On the contrary, of the 28 moorings, only 15 are located in the Bight. The remaining moorings are located outside the protection of the Bight and are both more remote and less frequently used. These moorings are only used when boaters have no option but to use them or the conditions are calm and they seek additional privacy.
- [64] In addition, Learned Queen’s Counsel, Mr Bennett submitted that from 7 December 2002 to 30 June 2003, revenues from the 28 moorings were collected by Mrs Sims and were recorded in the books of account. On 1 July 2003, Mr Rowlette was appointed to collect moorings revenue on behalf of Mrs Sims. Additionally, he was appointed by the Receiver to collect the revenue in respect of the 45 moorings under receivership. Mr Rowlette has produced handwritten records of his collection from 1 July 2003 when he commenced such collections to 30 June 2004. According to Mr Bennett QC, Mr Rowlette is able to confirm the accuracy of the net revenue stated by Mr Sims for the period. There is further support by the affidavit dated 29 June 2007 of Ms Shepherd, who was responsible for the collection and banking of the moorings revenue from 1 April 2002 to 18 June 2006. She produced daily collection sheets which she maintained for the period 1 July 2003 to 30 June 2004. Additionally, she personally verified from firsthand knowledge that the sum of \$66,090 was derived as net revenue for the moorings for the period 1 July 2004 to 18 June 2006.

- [65] Mr Bennett QC forcefully argued that the Claimants have not proved any under-declaration of mooring revenues. The sole basis for the challenge to the Defendants' accounting is the Claimants' comparison of the receipts reported in relation to the 28 moorings with those collected by the receiver for 45 moorings situated in a more favorable location. He submitted that Mr Rowlette has confirmed by affidavit evidence the accuracy of the account given by Mr Sims as to the monies actually received in mooring fees in respect of the 28 moorings so rendering the Claimants' allegation of under-reporting of revenues to be mere unsubstantiated conjecture.
- [66] In her affidavit filed on 1 November 2006, Mrs Sims set out her calculation of the mooring fees due to the Claimants. In her notes to the calculation she recorded that Mr Rowlette was appointed from late July 2003 and was paid a fee of \$5 per mooring. The evidence of Mr Rowlette at paragraph 3 of his affidavit discloses that he was remunerated at a significantly higher rate, that is, \$10 each for the first 7 moorings collected with \$5 per mooring thereafter with a cap of \$90 per day.
- [67] The Claimants do not dispute that Mr Rowlette charged and received a much higher collection fee in respect of the 28 moorings. They allege that the Defendants arrived at an arrangement with Mr Rowlette that gave him an entitlement to nearly 60% of the gross mooring fees and that the Defendants did not seek and obtain their consent to delegating collection to Mr Rowlette or agreeing to payment of an extortionate fee of 25% to him. They say that it was plainly unreasonable to do so. They therefore proposed to calculate monies due to the Claimants on the basis of an amount adjusted to reflect a far lesser collection fee than was paid to Mr Rowlette.
- [68] Mr Bennett QC submitted that in considering the appropriateness of this approach, the Court is reminded that the 28 moorings in respect of which this claim is made were installed after the termination of the Defendants' tenancy and through the Defendants' independent efforts and at their own expense. This was admittedly a completely unauthorized venture in that it was done without consultation with or permission from the Claimants. He next submitted that whatever business arrangements the Defendants made for operation of the unauthorized moorings is not

the concern of the Claimants. The moorings were not installed at the Claimants' request and they are not entitled to require the unauthorized business to be operated in any particular way. It is therefore irrelevant that the Defendants paid more than the Claimants would have to Mr Rowlette to collect mooring fees or that the operations would have been more profitable had they been operated in a different way. Learned Queen's Counsel argued that the Claimants' claim is not in contract for the profits that the business would have earned had it been operated in an agreed manner. According to him, it is a claim in equity for an account of the monies that were actually received by the Defendants for the unauthorized operation. The evidence, as accepted by the Claimants, including the affidavits of Mr Rowlette and Ms Shepherd show the monies actually received by the Defendants and how the monies were disposed of.

[69] Indeed, it is always a difficult task for the task for the Court to look at diametrically opposed affidavit evidence and to decide which one appears more plausible. Cross-examination would have certainly shed some light. However, on 15 May 2007, when cross-examination had commenced, it was aborted so as to minimize what would have been a long-drawn-out hearing. Both Queens' Counsel used their best endeavours to assist the Court by providing comprehensive submissions. Nonetheless, the evidence of Mr Rowlette is not inherently improbable, was not challenged by cross-examination and stands uncontradicted.

[70] It is a fact that the figures put forward by the Claimants are estimates based on net sum collected in respect of the 45 moorings subject to the receivership over a 28 month period. The Claimants believed that the actual amount collected by the Defendants was substantially more than \$135,010. They say that there is an under-declared \$43,474. That figure is calculated on the basis of a collection fee of \$5 per mooring, an amount that is considerably less than the fee actually retained by Mr Rowlette.

[71] I have looked at the numerous affidavits and exhibits in this application particularly those of Mr Rowlette and Ms Shepherd. I believed Mr Sims when he gave reasons why Privateer Bay should not be compared to the Bight and the reasons why business there might be less lucrative. Taking into consideration all of the facts and circumstances, I am not prepared to find

on a balance of probabilities that there was an under-declaration of revenue in respect of the 28 moorings.

Issue (9) –Prescribed costs

[72] In his affidavit of 12 July 2007, Mr Sims suggested that prescribed costs should not be computed by reference to the revenue generated by the 28 moorings which was not the subject of litigation. I agree with the Claimants that this is a wholly wrong approach. Not only did the litigation seek a declaration in relation to all 73 moorings, but the Defendants, in accounting for the revenue in the present application, rightly acknowledged that it is the subject of the account which the Claimants sought in their claim and the Court has so ordered. The submission of the Defendants on this issue is wholly without merit.

Additional Expenses claimed for first time in David Sims' affidavit

[73] At paragraph 29 of Mr Sims' affidavit filed in July 2007, he claimed additional expenditure of \$11,065.71 for the following items:

(i)	Insurance for boats in June 2003	\$3,470
(ii)	Mooring collection licence for 2006	\$400
(iii)	Insurance and repair costs for the truck	\$1,445
(iv)	Payment into BVIG for floating dock (for 1998-2003)	\$1,500
(v)	Work permits for 2003-2006 for Ms Shepherd, the Sims	\$4,575

[74] The Claimants have not actually challenged the substance of these claims but the fact that the additional expenses came very late in the proceedings. Although Mr Sims has been tardy in making this claim, in furtherance of the overriding objective of the Civil Procedure Rules 2000 ("the CPR"), the Court must deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. Therefore, no useful purpose will be served in omitting the additional expenditure which can be dealt with once and for all. As such, I propose to deal with them.

[75] The Claimants do not take any objection to items (i) and (ii) which I will accordingly allow. The insurance and repair costs to the truck are legitimate expenses and I will also allow them. Item

(iv) includes the year 1998, even before Audubon purchased Norman Island. Accordingly, the amount claimed is reduced by \$300, thereby allowing \$1,200.

[76] With respect to work permits, the Claimants resonated why this claim should be rejected. The Defendants conceded to the reasons given by the Claimants.

[77] In the circumstances, I will allow the sum of \$6,515 as legitimate expenses incurred by the Defendants.

Conclusion

[78] In the premises, the net amount due on judgment is \$110,501 which is reflected in the table shown below.

Postscript

[79] Last but not least, I apologize for the protracted delay in the delivery of this judgment and thanked all parties for their patience. However, I must confess that it was a daunting task for me as I tried to grapple with figures; a task certainly not fitting for a legal mind. Lastly, I am extremely appreciative to both Queens' Counsel and Mrs Hannaway-Boreland for their colossal attempts at narrowing the issues and assisting the Court with the final preparation of the judgment calculations.

Indra Hariprashad-Charles

High Court Judge

SCHEDULE A

THE FIRST PERIOD: October 2001 – December 2001				
DISPUTED ITEM	AMOUNT CLAIMED BY DAVID SIMS	ADJUSTMENTS REQUIRED BY CLAIMANTS	ADJUSTMENT APPROVED BY COURT	REASONS
Mooring Collection Fees-current	6,000	+1500	+1,500	The fee was set at US\$1,500 per month. For the 3 month period, the fee should have been US\$4,500
Mooring collection fees-overdue	3,000	+3,000	None	See paragraph 32 of the Judgment
Moorings- repairs and maintenance	3,471	+393	None	Issue with respect to \$393 now resolved
Adjustment		\$4,893	+\$1,500	Increase in net revenue

SCHEDULE B

THE SECOND PERIOD: January 2002- 6 December 2002				
DISPUTED ITEM	AMOUNT CLAIMED BY DAVID SIMS	ADJUSTMENT REQUIRED BY CLAIMANT	ADJUSTMENT APPROVED BY COURT	REASONS
Automobile expenses	685	+685	+685	No receipts were produced to substantiate charge even if it were for petrol
Boats- Fuel	6,809	+1190 +659	+1190 +659	No receipt for \$1190 of expenditure. \$3,294 of the invoices just say "gas" – adjustment of \$659 required
Boats – Repair				Expenditure of

and Maintenance	11,931	+384	None	\$6,240.48 satisfactorily explained. Receipt for the remainder of \$384 produced on 15 May 2007
Moorings-Repairs and Maintenance	6693	+1,920	+1,720	Invoices have been produced but still no invoice for \$1,720
Stationery	1,324	+224.30	+224.30	No supporting documents
Interest in Installation Costs	1,759	+1,759	+1,759	No agreement between parties
Beacon Group Installation and Financing	10,000	+10,000	+10,000	No agreement between parties. First Amendment only permitted expense of collection and maintenance
Adjustment		\$16,821	\$16,621	

SCHEDULE C

THE THIRD PERIOD – 7 December 2002 – July 2006				
DISPUTED ITEM	AMOUNT CLAIMED BY DAVID SIMS	ADJUSTMENT REQUIRED BY CLAIMANTS	ADJUSTMENT APPROVED BY COURT	REASONS
Mooring Fees	135,010	+43,474	None	Under-declaration of mooring fees
Boats –Fuel	5,388	+539	+\$539	Necessary adjustments as suggested by Claimants
Stationery	715	+549	+77	Unsupported by invoices
Adjustment Required		\$44,090	\$616	

BVIHCV 2002/0227- JUDGMENT CALCULATIONS

REVENUES		Sims % Under Lease	Audubon's % Under Lease
<u>Net Revenues admitted by DS</u>			
1 st Period Oct 2001- December 2001	27,624	13,812.00	13,812.00
2 nd Period Jan 02 to 6 Dec 02	41,330	5,166.25	36,163.75
3 rd Period for the 28 moorings 7 Dec 02 - July 06	<u>49,770</u>		49,770.00
	118,724		-
<u>Revenue for Missing Receipts</u>			
1 st Period Oct 2001- December 2001	912	456.00	456.00
2 nd Period Jan 02 to 6 Dec 02	14,044	1,755.50	12,288.50
3 rd Period for the 28 moorings 7 Dec 02 - July 06	0		
3 rd Period for the 45 moorings 7 Dec 02 - July 06	<u>0</u>		
	14,956		
TOTAL REVENUES	133,680	21,189.75	112,490.25
<u>EXPENSE ADJUSTMENTS</u>			
1 st Period	Increased Moorings Collection fees - par 32	1,500	750
2 nd Period	Automobile expenses - schedule B	685	
	Boats Fuel - sch B, par 20	1,190	
	Boats Fuel - sch B, par 21	659	
	Moorings Repair & Maint - sch B, par 23	1,720	
	Stationery - sch B, par 24	224	
	Interest on Intallation - sch B, par 47	1,759	
	Beacons Installation Invoice – sch B, par 46	<u>10,000</u>	
		16,237	700.00
3 rd Period	Moor fees - under decleared - par 73 revised	0	
	Boats fuel - sch C	539	
	Stationey - sch C para 27	<u>77</u>	
		616	
TOTAL PERIOD ADJUSTMENTS		18,353	
Additional Expense claim awarded - par 79		-6,515	
NET TOTAL EXPENSE ADJUSTMENTS		11,838	
<u>REVENUES/EXPENSE ADJUSTMENTS AMOUNT DUE</u>			
Gross Amount Payable	145,518		
Paid on Account	-101,092		
Plus: Sims 50% ratio on expense adjustments to Mar 03	1,450		
Less: Sims 50% net revenue entitlement up to Mar 03	<u>-21,190</u>		
BALANCE DUE	24,686		

COURT COSTS

Receiver Collection			237,366
Net Amount Payable by DS on Accounting			125,778
TOTAL VALUE OF CLAIM			363,144
First	30,000	30%	9,000
Next	20,000	25%	5,000
Next	50,000	20%	10,000
Next	150,000	15%	22,500
Remaining	113,144	10%	11,314
High Court Costs			57,814
Court of Appeals Costs			28,000
TOTAL COURT COSTS			85,814
Balance due on net revenues collected by DS			24,686
Sum due on High Court and Court of Appeal Costs			85,814
NET AMOUNT DUE ON JUDGMENT			110,501

Indra Hariprashad-Charles
High Court Judge