Claim No. AD-2020-000015
and
Claim No. AD-2020-000027

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMIRALTY COURT

[2020] EWHC 2462 (Admlty)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/09/2020

Before :

MR ADMIRALTY REGISTRAR DAVISON

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Between:

PREMIER MARINAS LIMITED **Claimant**

- and –

THE OWNER(S) OF M/Y "DOUBLE VENUS" also known as "LLAMEDOS"
THE OWNER(S) OF M/Y "KARMA" also known as "SANTORINI" **Defendants**

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Mr Robert Ward (instructed by **Shoosmiths LLP**) for the **Claimant**
No appearance for the **Defendants**

Hearing date: 10 September 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Admiralty Registrar Davison:

1. These are *in rem* claims which I heard on 10 September 2020. There was no appearance for or on behalf of the defendants. I found the claims proved and said that I would give my reasons in writing. These follow.

2. The claims are against two thirty-foot vessels, "Double Venus", which is a Dutch barge, and "Santorini", which is a motor cruiser. The claimant operates marinas on the south coast of England. The vessels are berthed at the claimant's Brighton marina and the marina dues have not been paid. The claims are Admiralty claims because they fall within the wording of section 20(2)(n) of the Senior Courts Act 1981, namely "any claim in respect of the construction, repair or equipment of a ship or dock charges or dues".

3. The claims have a somewhat complicated and unfortunate procedural history. However, the basic factual background can be very shortly stated.

"Double Venus"

4. Both vessels are owned by Ms Robyn Rainbow-Love. In respect of "Double Venus" (also called "Llamedos"), Ms Rainbow-Love entered into a berthing agreement with the claimant which became effective on 1 April 2018 and was to last until 31 March 2019. The berthing fees were calculated according to the length of the boat, which was stated to be 9.3 metres. The agreed monthly payment was £324.94 and so the annual amount (described in the berthing agreement as the "total premium") was £3,899.28. The agreed interest rate for unpaid amounts was 2% over HSBC base rate. For periods of time beyond 31 March 2019, clause 11.4 provided as follows:

> "We reserve the right to charge You berthing fees at the Visitor Berthing Rate for any periods during which You leave the Boat at the Marina when there is no current berthing licence in relation to that Boat between You and Us."

5. Ms Rainbow-Love received invoices for the monthly fees. But invoices since 3 December 2018 have not been paid. Although, since the beginning of April 2019, the claimant has been entitled to render invoices at the Visitor Berthing Rate, it has not in fact done so. It has continued to charge at the lower rate set out in the berthing agreement. As at February 2020, the berthing fees were £6,466.85 in arrears and by letter dated 3 February 2020 the claimant made formal demand for that amount plus interest and costs. The figure currently due is £9,430.75. That figure comprises the original amount plus an extra £2,963.90 for the period since 1 March 2020, which the claimant has elected to charge at the "Monthly Berthing Rate" rather than the "Visitor Berthing Rate". For a vessel of "Double Venus's" length, the Monthly Berthing Rate is £15.36 per day.

"Santorini"

6. "Santorini" (also called "Karma") was acquired by Ms Rainbow-Love from its previous owner, Mr Philip Maxwell-Stuart. Mr Maxwell-Stuart informed the claimant of the sale by an email dated 5 February 2020. The boat was already the subject of a berthing agreement with a start date of 1 September 2019 and an end date of 31 August 2020. The agreed monthly payment was £322.47 and the "total premium" was £3,869.04. When Ms Rainbow-Love acquired the vessel, she was well aware of the claimant's standard terms for berthing, she did not remove the boat and she and must be taken to have agreed to those standard terms. As at 2 April 2020, she was £644.94 in arrears. The figure has since risen to £2,391.03 comprising the original amount plus the balance of the monthly payments to 1 September (£1,612.35) and a further £133.74 to date of trial, calculated at the "Monthly Berthing Rate", which, for a vessel of "Santorini's" length, is £14.86 per day.

The procedural history

7. In respect of "Double-Venus", the claimant elected first to proceed by way of an *in personam* claim against Ms Rainbow-Love in the county court. The judgment that was entered against

her proved difficult to enforce and those proceedings have effectively been abandoned. Proceedings *in rem* were issued against "Double Venus" on 19 February 2020 and against "Santorini" on 5 March 2020. The vessels were arrested on 6 and 5 March 2020 respectively. No acknowledgements of service were received within the 14 days permitted by CPR rule 61.3(4) and on 23 March 2020 the claimant applied for judgment in default pursuant to CPR rule 61.9. Those applications came before me on 28 April 2020. In the meantime, on 8 April 2020, Ms Rainbow-Love, acting in person, filed acknowledgements of service stating an intention to defend the claims. On 21 April 2020, though no particulars of claim had been served upon her (and were not due), she filed a document described as a defence and counterclaim in respect of both claims; (see further below).

8. Ms Rainbow-Love did not attend the hearing, which was conducted remotely. (I mention that considerable efforts were made by the court staff to enable her to attend. But her stated position was that she was "temporarily isolated in a remote place" and that she had "not been able to supply a suitable telephone number".) Notwithstanding her non-attendance, her late-filed documents presented me with a dilemma.

9. CPR rule 61.9(1) is in these terms:

> 61.9(1) In a claim in rem other than a collision claim the claimant may obtain judgment in default of –
> (a) an acknowledgement of service only if –
> (i) the defendant has not filed an acknowledgement of service; and
> (ii) the time for doing so set out in rule 61.3(4) has expired; and
> (b) a defence only if –
> (i) a defence has not been filed; and
> (ii) the relevant time limit for doing so has expired.

10. This wording is in substantially the same form as CPR rule 12.3(1). But, as from 6 April 2020, that rule (but not rule 61.9(1)) was amended to include a qualifying condition which was that in order for judgment to be given it was necessary that no acknowledgement of service had been filed "at the date on which judgment is entered". This amendment had been introduced by the Civil Procedure Rules Committee in order to resolve a longstanding debate as to the proper construction and application of the rule if an acknowledgement of service was filed after the time permitted by the rules but before judgment was entered. This had been the subject of conflicting judgments.

11. I took the view that I should follow the decision of Andrew Baker J in *Cunico Resources NV v Daskalakis* [2019] EWHC 3382 (Comm) (in turn followed by Master McCloud in *Clements Smith v Berrymans Lace Mawer Service Co. & Anor* [2019] EWHC 1904 (QB)), which held that the court should only enter judgment in default where, at the time of judgment, there was no acknowledgement of service and the time for acknowledging service had expired. In coming to that conclusion, I was influenced by the fact that the failure to amend rule 61.9(1) at the same time as rule 12.3(1) was simply an oversight. It is true that there is a difference between practice in the Admiralty Court and the Queen's Bench Division in that, in the Admiralty Court, default judgment cannot be entered administratively but requires an application notice and a hearing at which the claimant must file evidence "proving the claim to the satisfaction of the court". However, that difference in procedure did not (and does not) appear to me to be a good reason to have a different approach regarding the effect of a late-filed acknowledgement of service or defence.

12. For these reasons, I refused the applications for judgment in default and gave directions for the further conduct of the claim including provision for the filing and service of Particulars of Claim and Defences.

13. Particulars of Claim were filed and served on 13 May 2020. On 22 May 2020, Ms Rainbow-Love filed and served (by email) what purported to be a counterclaim. This was for "sabotaging sale of vessels, preventing sale of vessels, preventing removal of vessels from Marina". This document had to be considered together with the defence and counterclaim she had filed on 21 April. This put in issue the amount owing and raised a number of what I might call "service

complaints" and other matters. I will not recite the full content of the document. This appears sufficiently from the findings that I have made and which are set out in paragraph 23 below.

14. The claimant filed a combined Reply and Defence to Counterclaim in both claims on 10 June 2020.

15. On 15 June 2020, the claimant applied under CPR rule 3.4(2) to strike out the defence and counterclaim on the basis that it was inadequately pleaded and disclosed no reasonable grounds for defending the claim. That application came before me on 15 July 2020. Again, the hearing was a remote hearing held via Microsoft Teams. Ms Rainbow-Love contacted the court shortly beforehand saying she was having "technical issues". The Microsoft Teams invitation contained a telephone number that she was able to utilise and which would have enabled her to attend the hearing by audio – which would have been perfectly adequate. Her attention was drawn to this option. But, in the event, she did not attend. She did, however, submit a video recording which was comprised of her reading out aloud the 9 page "defence and counterclaim" statement which she had filed in April 2020.

16. Practice Direction 3A dealing with striking out a statement of case gives examples of defences which may fall within the scope of rule 3.4(2)(a), which are a defence which consists of "a bare denial or otherwise sets out no coherent statement of facts", or one which sets out a coherent set of facts but which "would not, even if true, amount in law to a defence". Although, for the reasons discussed below, I have found that the defence in these cases is not made out, they did not fall within the terms of the Practice Direction or the rule. In short, upon consideration of written evidence I might, if it had been open to me, have been prepared to grant summary judgment in favour of the claimant. But I could not say that the defence disclosed no reasonable grounds for defending and nor, having regard to CPR rule 3.1A (which requires the court to have regard to the fact that a party is unrepresented), could I say that the defence was so incoherent or poorly pleaded that it fell to be struck out.

17. This indirectly highlights another peculiarity (and arguably a defect) of the rules regarding Admiralty claims, which is that it was <u>not</u> open to me entertain an application for summary judgment or to consider that of my own motion. By virtue of CPR rule 24.3(2)(b), summary judgment is not available in an admiralty claim *in rem*. This rule appears to have been carried over from the former RSC Order 14 rule 1(2)(c) and the rationale for it is obscure. It seems to me likely that the reason lies in the fact that under the old Rules of the Supreme Court an application for summary judgment was heard in chambers, whereas (given the fact that proceedings *in rem* may affect many interested parties) admiralty claims *in rem* require a public hearing in open court. However, applications for summary judgment have long been public hearings and, if this was the rationale for taking *in rem* claims out of scope, it has fallen away. In common with the discrepancy that has inadvertently arisen between CPR rules 61.9(1) and 12.3(1), this is a matter which may benefit from the attention of the Rules Committee.

18. Accordingly, when it came before me on 15 July 2020, I stood the application to strike out the defences over to the trial of the claims, I ordered that the defendant was to pay the court fee for her counterclaim (failing which she was to be limited to putting the claimant to proof of the debt and to raising such matters as could legitimately be raised by way of defence or set-off). I ordered that the defendant was to serve a typewritten witness statement. And I directed that the trial was to be held in person, not remotely, and was to be subject to the social distancing measures which are now standard in the current pandemic. I made the latter order because I did not think that it was in anyone's interests, least of all Ms Rainbow-Love's, for her to try to attend a remote hearing. Remote hearings are difficult to manage in the case of litigants in person. And Ms Rainbow-Love had proved herself unable to attend either of the interlocutory hearings remotely.

19. Ms Rainbow-Love did not pay the court fee for her counterclaim and nor did she file a typewritten statement.

20. By email dated 26 July 2020, she put forward a variety of points for consideration. The material part of that email was as follows:-

> "I feel that it is in my best interests to allow the court to end the cases now on evidence already supplied. Then when I know the outcome of that, which should be soon, I can take further action should I see fit.
>
> The court should also be aware that I have been defending the cases as the owner of the vessels to which the notices were affixed, at the time, but the names are wrong. The boats were wrongfully arrested. The sale of the boats should not have been stopped. But I am aware that due to this, the transfer of ownership is legal because they are not actually the boats that should have had notices put on them. The whole matter is such a mess.
>
> Hopefully the court can put a satisfactory end to the whole thing, Premier Marinas have caused me and the courts a lot of stress and cost a lot of money. The boats meanwhile have been left to deteriorate for the last 12 months and are at risk of flooding and capsizing due to no pumping out of the bilges, and also no routine maintenance etc. The floating masterpiece will need restoring to former glory. Personal possessions on board are also an additional cost and loss.
>
> The admiralty marshal has known all along. There does seem to be a lot going on that is not at all right.
>
> So, will the court please proceed without the need for a trial
>
> Oh, and I also defended because it was wrong for the marina to claim that I owed them money and to try and make others pay an alleged debt which had been falsified."

21. She did not attend the trial. Because she had not paid the court fee in respect of the counterclaim and by virtue of the order that I made on 15 July 2020, her opposition to the claim was restricted to putting the claimant to proof and to any legitimate defence or set-off. When a defendant does not attend the trial, CPR rule 39.3(1)(c) gives the court the power to strike out the defence or counterclaim or both. This provided a basis for striking out additional to the claimant's application of 15 June 2020. But, having regard to Ms Rainbow-Love's email of 26 July 2020, I decided (and Mr Ward, who appeared for the claimant agreed) that I should act in accordance with Ms Rainbow-Love's request to deal with the case "on the evidence already supplied".

22. This is what I have done. But, obviously, that course had its limitations. Ms Rainbow-Love's written evidence was relatively scanty and (because she did not attend) it could not be tested or explored in cross-examination. In short, Ms Rainbow-Love's failure to provide a full and typewritten statement and her failure to attend the trial put her at a disadvantage.

Findings on the evidence

23. I read a witness statement dated 11 August 2020 and heard oral evidence from Mr Geoffrey Collins, the claimant's finance director. Based upon that evidence and the written evidence filed by the claimant I find as follows:

    i. The state of account in respect of each vessel is as set out in paragraphs 4 - 6 above. Ms Rainbow-Love maintained that the accounts had not been correctly calculated, in particular that certain payments she had made had not been taken into account. But Mr Collins' calculations did indeed take into account all payments made by her and these appear to me to me to have been properly credited. Ms Rainbow-Love has not demonstrated that the figures are incorrect or that they leave out of account any payments by her. As I have already observed, if there was some error of calculation or some reason why she was not obliged to pay, Ms Rainbow-Love's case would have been better served by complying with the direction to file a typewritten witness statement and attending the trial to explain her position.

    ii. There was no agreement for "free berthing" in respect of either vessel. From time to time, the Marina will give some days of grace, for example where there has been a transfer of ownership and the new owner is moving the vessel elsewhere or where

there has been a bereavement. But such agreements are always documented and there was none here.

iii. The claimant did not obstruct or "sabotage" a sale of the vessels. When Ms Rainbow-Love informed the Marina of a sale, Ms Grimm, the claimant's credit controller, wrote to the buyers, Mr & Mrs Harvey, asking for proof of ownership etc. This letter, dated 15 November 2019, was in accordance with the claimant's standard procedures and standard terms. In the final paragraph of the letter Ms Grimm also told Mr & Mrs Harvey that it was imperative that they contact her or the marina manager "in respect of the account for the vessel". (She was referring to "Double Venus".) Mr Collins told me that what Ms Grimm would have had in mind was the provision in paragraph 2.2.2 of the Marina Regulations (incorporated by reference into the Berthing Agreement) entitling the claimant to retain possession of the vessel pending payment of the marina dues owing. Mr & Mrs Harvey did not respond to the letter. At the very least, the claimant had an arguable right to do what Ms Grimm had in mind. By inviting Mr & Mrs Harvey to enter into a discussion about this matter, the claimant did nothing unlawful. If this was a genuine sale and if Mr & Mrs Harvey were put off because the account for marina dues was in arrears, then that is not something which gives rise to any cause of action or legitimate complaint on the part of Ms Rainbow-Love. To state the obvious, the marina dues were in debit because she had not paid them, nor had she offered to settle them out of the sale proceeds.

iv. According to Mr Collins, whose evidence was unchallenged and which I accept, no one has in fact attempted to remove the vessels. From time to time, there have been lock closures for maintenance purposes or for operational reasons. However, if the claimant had prevented removal, (which it has not), it would have been contractually entitled to do so because of the unpaid dues.

v. Ms Rainbow-Love's key fob giving access to Marina facilities had been suspended. But this was in accordance with paragraph 2.2.1 of the Marina Regulations which gave the claimant the right to "suspend the provision of any services to the Owner" where the Owner was in arrears.

vi. In her defence and counterclaim document Ms Rainbow-Love made a number of "service complaints" in respect of the supply of water, gas and electricity. She also complained about sea water coming from the boatyard. The claimant had no record of these complaints. Ms Rainbow-Love gave only the barest details of these matters; she did not identify a legal basis for a claim in respect of them and nor did she quantify her losses, if any. In these circumstances, none of these matters is proved and they do not amount to a valid defence to or set-off against the claim.

vii. Ms Rainbow-Love made complaints of trespassing and intimidation. These were phrased too vaguely for the claimant to be able to respond. But Mr Collins denied that the claimant had behaved towards the defendant in any way that was unlawful. In the absence of proper evidence from her, I am not in a position to find otherwise.

viii. She complained of the theft of a dinghy. But, again, there were no details and nothing upon which I could make a finding that the theft could be laid at the door of the claimant.

ix. Lastly, Ms Rainbow-Love complained about the conduct of the enforcement officer who attempted unsuccessfully to levy execution in respect of the County Court judgment. She did not identify any conduct that was unlawful or why and she did not explain why and on what legal basis the claimant would be liable. On the face of it, if there was unlawful conduct and it had caused her loss, the proper defendant would be the enforcement agents (who I understood were The Sherriff's Office). These allegations do not amount to a defence to the claim.

Conclusion

24. The debt in the amounts set out in paragraphs 4 – 6 above is due and owing. There is no defence to the claims. Accordingly, I will make the usual order for appraisement and sale of the vessels.

25. Because the receipt of this judgment will be the first time that Ms Rainbow-Love is acquainted with the both the outcome of the proceedings and the reasons for that outcome, I will extend the normal time for appealing (21 days) by a further 7 days.