



IN THE SMALL CLAIMS TRIBUNAL

ADJUDICATOR: DR PHYLLIS AQUILINA LL.D.

Sitting of Tuesday 2nd May, 2017.

Claim Number: 836/2015PA

David Bajada

vs

Frederic Brenneisen and All Yacht Services Ltd

The Tribunal,

Having seen the Notice of Claim filed on 22nd October 2015 in virtue of which plaintiff premised that he wanted to organise two boat parties for the LGBT community, and clients of AXM Malta, on a yacht pertaining to defendants, or any of them; that he paid a deposit to defendants, or any of them, on this account, which they, or any of them, duly received; that one of the boat parties was postponed for 12th July 2015 on account of bad weather; that subsequently, defendants, or any of them, refused to execute their obligations contracted in favour of plaintiff without good cause; that he incurred expenses as a result of this contractual violation, including advertising, printing and other expenses related to said boat party which was planned to be held, in conjunction with others, on said yacht; that in consequence of this conduct on the part of defendants, or any of them, he had to charter another yacht to be able to hold the party; that the damages which he thus incurred were considerable, including €205 (posters and artwork); €950 (difference

between price of this yacht, and the substituted yacht); €110 (printing of flyers); €250 (marketing), and judicial and legal expenses of a judicial letter and legal letter, totalling to €1,550.40c (excluding costs of judicial letter); that he had called upon defendants by virtue of a judicial letter dated June 2015, and a legal letter dated August 2015, to compensate him for said damages, but to no avail. Plaintiff thus requested this Tribunal to condemn defendants, or any of them, to pay him the sum of €1,550.40c by way of damages as premised, with costs, including those of the said judicial letter, and legal interest.

Having seen the documents annexed to the Notice of Claim, namely a signed copy of a legal letter dated 25th August 2015 sent on behalf of plaintiff, addressed to defendants (Doc. 'A', fol. 2), and an informal copy of a judicial letter which plaintiff appears to have filed against defendants (Doc. 'B', fol. 3-6).

Having seen the Reply which defendant Frederic Brenneisen filed on 6th November 2015 (fol. 10), pleading that he is not the legitimate defendant to answer for plaintiff's claims, because he is a director of defendant company All Yacht Services Limited, and his communications with plaintiff were done exclusively in that capacity.

Having seen the Reply which defendant company All Yacht Services Limited filed on 10th November 2015 (fol. 12) pleading that (i) plaintiff's demands are unfounded in law and in fact; (ii) it is not true that defendant company had to organise two boat parties for plaintiff, and it is not true that plaintiff paid the deposit requested in the Proforma Invoice annexed as Doc. 'A' to this Reply, and therefore it is not true that a boat party was to be held on 12th July 2015, thus defendant is not responsible for damages which plaintiff may have incurred; (iii) defendant company executed its obligations in terms of its terms and conditions (Doc. 'B' annexed to Reply), and the Proforma Invoice, and reminded plaintiff that the requested deposit had to be settled for the selected dates to be booked – plaintiff did not pay said deposit, and therefore any expenses he opted to incur in connection with their advertising and organisation shall remain to his account;

and (iv) defendant company had no contract with defendant for the holding of any boat party.

Having seen the evidence produced before this Tribunal.

Having heard plaintiff **David Bajada**'s testimony (fol. 21 et seq.) wherein he explained that in April 2015, he had contacted Tip Top Cruises (the name appearing on defendants' boat) with an enquiry about booking the boat for boat parties to be held on four dates. The first boat booking was confirmed for 14th June 2015. He said that he paid the deposit which defendant company requested from him in regard to said boat party. That deposit amounted to €650. He related that on 9th June 2015, he visited the boat with the manager of his club, Ben Hibert, to prepare for the party. It so happened that on 14th June 2015, the seas were rough, and the boat party had to be cancelled. Plaintiff explained that he then spoke to a Lianne, who was in charge of his bookings at defendant company, and she suggested the 12th July 2015 as an alternative date. On that date, the President's Charity Cruise was to be held, and plaintiff decided to join in.

Plaintiff then explained how, on 25th June 2015, he received a call from an Albert Buhagiar, who organises boat parties on board vessels pertaining to defendant company, stating that he had an exclusive agreement with defendant company for organising boat parties. Plaintiff tried to reach Lianne the following day, but to no avail. She replied however to his sms, saying that his booking for 12th July 2015 had to be cancelled because defendant company had an agreement with Mr Buhagiar, which was signed three years before.

In regard to defendant company's defence that the booking was never confirmed because plaintiff had failed to pay the deposit requested, plaintiff declared that the sum of €650 which he paid to defendant company represented the deposited which they asked for in regard to the first boat party, which was to be held on 14th June 2015, which was then cancelled because of bad weather, and transferred to the new date of 12th July 2015.

Plaintiff declared that, following this cancellation, he had to book a boat from a different operator, Captain Morgan Cruises, at a higher price, and further, to print all advertising material again, at an extra cost. According to plaintiff, this cancellation caused him undue hassles.

In support of his claims, plaintiff exhibited a screenshot of a text message reading *'Hi David, unfortunately we need to cancel as Frederic have an agreement with Albert which was agreed 3 years ago, I will forward you again the email as it was stuck in the'* (fol. 27); a chain of electronic correspondence that passed between Lord Haydn Pope and defendant Frederic Brenneisen following plaintiff being advised that the boat charter was not confirmed (fol. 28-40; 44-53; 55-56); an electronic booking for a substitute boat from Captain Morgan Cruises for 12th July 2015 between Lord Haydn Pope and Josette Agius (fol. 41-42; 57-65; 71-77); a Proforma Invoice on defendant company's letterhead, addressed to plaintiff, dated 28th May 2015, showing four boat charters, requesting €2,500 *'50% down payment on the boat price to secure the dates'* and *'Rest to be paid prior departure of charters €625.00 each'* (fol. 54); an invoice which Anthony Murray issued to AXM Manchester dated 12th May 2015 for *'June Boat Party, Posters, Cover Photo and Facebook Event'* for £160 (fol. 66); a Cash Sale receipt dated 25th June 2016 which Lombarding Printers issued to AXM – David Bajada for €309.16c in respect of printed adverts and tickets for boat parties (fol. 67); a pay slip issued on 'axm Malta' letterhead reading that Gary O'Hear acknowledged payment of €250 for services rendered in June on Boat Party Promotion (fol. 68); a confirmation for the payment of €800 to Captain Morgan Cruises (fol. 69) on account of the total charter price of €2,200; and a confirmation that Captain Morgan Leisure Ltd received the sum of €2,200 from plaintiff in settlement of the full price of two exclusive boat charters held in Summer 2015 (fol. 138).

In his cross-examination, plaintiff **David Bajada** declared that the 12th July 2015 was not a new, substitute date, for the boat charter of 14th June 2015 that was cancelled because of bad weather, but one of the four original dates booked for the boat charter. With reference to the deposit of €2,500 requested through the Proforma Invoice, plaintiff

said that this deposit was requested in regard to the four parties, and that he had paid the deposit requested for the first charter, which was set for 14th June 2015, and then cancelled because of bad weather. Plaintiff initially declared that the price of the charter which Captain Morgan cruises requested for the boat party to be held on 12th July 2015 was €1,600, and that he paid an €800 deposit. Subsequently, he remembered that a member of the staff of Captain Morgan Cruises had called him to inform that the price quoted should have read €2,200. Plaintiff re-iterated that this move was done because of defendant's company cancellation on account of an exclusive agreement which it said it had with Mr Buhagiar.

With reference to his relationship with Gary O'Hear, plaintiff declared that he was an employee of 'AXM Scotland (Glasgow)', a different company from his company. Asked for a fiscal receipt covering the payment mentioned in the document exhibited in fol. 68 of the acts of these proceedings, plaintiff explained that this employee of 'AXM Scotland' happened to be in Malta, and helped with the organisation of the party, and that any fiscal receipt would be held by 'AXM Scotland'. He further explained that AXM Club Malta is the name of an outlet which he personally had at the time, and that he was fiscally responsible for it. He further explained that Anthony Murray was the designer of the posters, who worked for AXM International. The flyers bought, as shown on the document exhibited in fol. 67, were ordered with regard to the boat party to be held on 12th July 2015.

Plaintiff confirmed that he never signed a charter agreement with defendant company, and added that he was never asked to do so. In so far as the involvement of Lord Haydon Pope with defendant company is concerned, plaintiff explained that he intervened on his behalf with defendant company to try to solve the dispute.

Having heard the testimony of the General Manager at AXM club, **Ben Hibert**, who declared on oath that he recalled booking four gay boat parties on a boat which defendant company operates, advertised as 'Tip Top Cruises', and that everything was fine until they received an sms saying that their event had to be cancelled because it

clashed with another event. He declared that plaintiff had received this sms on his mobile phone, and showed it to the witness. The first boat party, to be held on 14th June 2015, was put off because of bad weather. The motivation for the cancellation was that explained in the sms. It was only in a subsequent email that defendant company claimed that the charter was never booked because plaintiff did not pay the deposit. **Hibert** repeated that, to his knowledge, the deposit paid on the first booking for 14th June 2015 was transferred to the substitute booking for 12th July 2015.

Hibert explained that this cancellation required them to charter another boat from another operator, at a higher price. This other operator was Captain Morgan. He confirmed that these additional expenses are those highlighted in yellow on fol. 67, and all others shown on fol. 66 to 70.

In his cross-examination, **Hibert** declared that the facts he related in regard to the deposit payment to defendant company, and its transfer to the substitute date, were communicated to him by a member of the club's staff. He declared that the invoices exhibited for the additional expenses incurred were paid for by the club. The head office of 'AXM Club' is in the United Kingdom, but 'AXM Malta' is owned by plaintiff personally. **Hibert** declared that he settled the invoice exhibited in fol. 67 himself, and that all other invoice were paid for by AXM in Manchester.

Having seen defendant **Frederic Brenneisen's** affidavit (fol. 108 *et seq.*) in which he declared that defendant company owns and operates the sailing catamaran 'Tip Top One', and that he is a director of this company. He denies ever contracting or contacting plaintiff in his personal capacity.

With regard to defendant company's relationship with plaintiff, Brenneisen declared that around 9 or 10 April 2015, defendant company's employee received a call from plaintiff regarding an enquiry for chartering this boat. Defendant company offered plaintiff a discounted price for four boat charters. **Brenneisen** insists that defendant company had informed plaintiff from the start that booking for the charters would only

take place following receipt of payment of the deposit. Instead of proposing the dates, plaintiff had initially requested photos of the boats, and after a month, proposed his dates.

After checking the boat's availability, defendant company requested him a deposit of €2,500 representing 50% of the total price of the charters, on account, sending him a Proforma Invoice, with its terms and conditions, and reminding him that dates will only be booked upon receipt of payment of the deposit. As neither a reply nor payment were received, defendant company sent out a reminder on two occasions, again reminding plaintiff that dates will only be booking once payment is received, and that since the dates were open for other clients, whoever paid first would secure his booking. Following said reminders, plaintiff asked to see the boat, which he was allowed to do. Bad weather was forecasted for 14th June 2015. By 8th June 2015, plaintiff had not yet paid the deposit requested. Subsequently, he paid €650, which was less than the requested deposit. The balance was never paid.

Brenneisen further declared that, on 26th June 2015, he informed plaintiff in writing that the dates he had indicated were no longer available, since he did not pay the requested deposit, and other clients had taken them up. The other employee of defendant company, Lianne Psaila, had sent him an sms conveying also this message.

Following this advice, a Lord Haydn Pope requested refund of the deposit of €625 which plaintiff had paid to defendant company, and defendant **Brenneisen** declares to have obliged immediately. He also requested compensaton for costs incurred, but this request was turned down. After hearing before this Tribunal that plaintiff had never encashed that deposit, plaintiff company proceeded to deposit it in Court in virtue of a Schedule of Deposit (fol. 124).

Defendant **Frederic Brenneisen** insists that 'AXM Manchester' is neither plaintiff nor 'AXM Malta', in support whereof he exhibited screenshots from AXM Group website (fol. 125-127).

Having heard the final oral submissions which counsels for both parties presented to the Tribunal.

Considers that:

This dispute revolves around plaintiff's claim that defendants breached their contractual obligations when they unilaterally cancelled a charter for their boat 'Tip Top One' intended to house a gay party on 12th July 2015, which plaintiff was organising in his capacity as owner and representative of 'AXM Club Malta'. Plaintiff thus contends that defendants should carry full responsibility for the loss which he suffered in consequence thereof, consisting in the advertising and organisational expenses incurred in connection with the party scheduled to be held on their 'Tip Top One' on 12th July 2015.

On his part, defendant Frederic Brenneisen pleads that he is not the legitimate defendant to stand in this judgment, because he never communicated or contracted with plaintiff on this matter.

Defendant company All Yacht Services Limited pleads that plaintiff's claim is unfounded in law and in fact, because no charter agreement was concluded following plaintiff's failure to pay the requested deposit, and consequently it did not contract any obligation whatsoever with plaintiff in regard to the requested charters – consequently, it can bear no responsibility for any consequential losses incurred, or which plaintiff claims to have incurred.

In so far as defendant Frederic Brenneisen's presence in this judgment is concerned, the correspondence which plaintiff exhibited in these proceedings, and his explanation of the enquiry and communications which he had in regard to this boat charter, show very clearly that he knew, or should have known, that the boat charters were offered by defendant company All Yacht Services Limited, and that Lianne Psaila and defendant Frederic Brenneisen were communicating with him in that regard in their

capacity as officers and representatives of said defendant company. The Proforma Invoice dated 28th May 2015, which plaintiff confirms to have received from defendants in regard to his booking, is also issued by All Yacht Services Limited, showing its address, fiscal details and bank details.

It is therefore clear that defendant Frederic Brenneisen, in his personal capacity, is not answerable for plaintiff's demand, and should not have been cited in this judgment. His plea in this regard therefore merits to be upheld.

In so far as the merits of plaintiff's case against defendant company All Yacht Services Limited are concerned, plaintiff contends that defendant company's unilateral withdrawal from the charter agreement followed its realization that plaintiff's booking for 12th July 2015 conflicted with an exclusivity agreement which it had previously contracted with a Mr Buhagiar, who called plaintiff personally to lament in that regard, and which realization was disclosed to plaintiff in Lianne Psaila's mobile message sent on 25th June 2015. Defendant company contests plaintiff's contention that the booking for the boat charter on 12th July 2015 was completed, and confirmed on its part, attributing this to plaintiff's failure to pay the requested deposit, and deducing that it was therefore in no position to unilaterally cancel that booking to the detriment of plaintiff.

The Tribunal considered at length the documentary evidence which both plaintiff and defendant company exhibited, largely overlapping, consisting mainly in electronic communications between plaintiff, and subsequently Lord Haydn Pope (who did not testify in this case), and defendant company's representatives Lianne Psaila (who did not testify in this case) and Frederic Brenneisen. Considering the sequence of these communications, the Tribunal concludes that, whilst it is true that defendant company conditioned the four charters' booking upon plaintiff settling the requested deposit of €2,500, defendant company ceased reminding plaintiff to pay the deposit following his indication that he would immediately oblige, in his email dated 8th June 2015 (09:28) (fol. 113), presumably because plaintiff had actually obliged, paying however to defendant company the sum of six hundred and twenty five Euro (€625) representing half

the price of the boat charter for 12th July 2015, which was to replace the first charter scheduled for 14th June 2015. Although plaintiff failed to prove the date of payment, the parties are in agreement that this payment was effected between 8th June 2015 and 25th June 2015. There is no evidence showing that, following receipt of said sum, defendant company advised plaintiff that the deposit paid was not acceptable, or insufficient to secure the bookings. That advice was expected, considering the efficiency which defendant company manifests in its preceding correspondence, and that the scheduled boat parties were by then reduced to three, from the original four, because the first one was cancelled on account of bad weather. More importantly, the Proforma Invoice itself mentioned the sum of €625 as the balance to be paid on the date of each charter.

Plaintiff's contention is further supported by his declaration that he received a call from a Mr Buhagiar, complaining about plaintiff's 12th July 2015 charter for defendant company's boat, and alleging that he had an exclusivity agreement with defendant company, and the subsequent acknowledgement on the part of Lianne Psaila, representing defendant company that *'unfortunately we need to cancel as Frederic have an agreement with Albert [Buhagiar] which was agreed 3 years ago'* (fol. 27).

On the strength of this evidence, the Tribunal is satisfied, on a balance of probabilities, that defendant company has opted to consider plaintiff's booking for the 12th July 2015 charter of 'Tip Top One' as confirmed on receipt of the payment of €625, and that it could not therefore unilaterally proceed to cancel that booking without bearing the responsibility for consequential losses. The Tribunal notes that the law requires no additional or special formality for the conclusion of this kind of contract. In the commercial, and particularly in the maritime, realm, for a commercial obligation to be contracted, it is enough for an offer and an acceptance to co-incide (**art. 110, Commercial Code**). In its various electronic communications with plaintiff, defendant company never mentioned that it intended this agreement to be expressed in a charter agreement (**art. 114, Commercial Code**). The signing of a charter agreement is only mentioned, in very small print, in the Terms and Conditions accompanying the Proforma Invoice, which plaintiff denies having received from defendant company, and which defendant company

did not prove to have specifically brought to plaintiff's attention. Electronic communications suffice to create commercial obligations, where such communications embody the necessary requisites (**art. 10 and 11, Electronic Commerce Act**, Chapter 426 of Laws of Malta). On a side note, the Tribunal notes that the very wide powers of unilateral cancellation which defendant company seeks to reserve unto itself in the Terms and Conditions accompanying the Proforma Invoice (fol. 112) do not exonerate it from bearing civil responsibility when its failure to execute its contractual obligations to the prejudice of the other contracting party is proved to the satisfaction of a court or tribunal to have caused damage.

In so far as the claimed losses are concerned, defendant company contends that 'AXM Malta' and 'AXM Group' are not one and the same thing, and that plaintiff failed to present fiscal receipts for the expenses he claims to have incurred in consequence of this cancellation.

After reviewing at length the documentary evidence which plaintiff filed in this regard, and considering his own, and his club's manager Ben Hibert's declarations in that regard, in the light also of the documentary evidence which defendants filed in regard to the organisation of 'AXM Group', the Tribunal is satisfied that 'AXM Malta' was a trade name used to refer to a commercial undertaking pertaining to plaintiff. It is not however clear to the Tribunal how this trade name figured within the wider context of the 'AXM Group', and in particular plaintiff failed to explain why AXM Group's representative Lord Haydn Pope intervened directly, following this cancellation, to ask for the refund of the deposit which plaintiff had paid to defendant company, and to claim compensation.

In his Notice of Claim, plaintiff demands that defendants refund him the sum of €205 incurred in regard to posters and artwork); €950 representing the difference between price of this yacht, and the substituted yacht); €110 for printing of flyers expenses and €250 for marketing expenses incurred. In support of this demand, plaintiff presented documentary evidence shown on fol. 66 to 70 and 136 of the acts of these proceedings.

Plaintiff managed to prove that the substitute charter which he obtained from Captain Morgan Cruises cost him €2,200, instead of €1,250, meaning that he ended up paying an additional €950 for the charter which defendant company cancelled of its own volition, and as a result thereof.

Ben Hibert confirmed in his testimony that he effectively paid, on behalf of 'AXM Club Malta' the amount due to Lombardi Printers Ltd, and shown on the Cash Sale receipt dated 25th June 2015, including an expense of €92 (+VAT) incurred for 2000 Boat party flyer 4 colour a6 (fol. 67).

Defendant company argues that plaintiff could very well avoid this expense, considering that it was paid on the same day when defendant company informed him that the charter was cancelled.

The Tribunal however rejects this argument. Plaintiff testified that the first hint of the possible cancellation reached him from a third party, and then on 25th June 2015, he attempted contacting defendant company's representative for a confirmation, but to no avail, saving the sms received in the afternoon. Defendant company did not prove that this expense was incurred willingly, after plaintiff had already received advice from defendant company that the 12th July 2015 charter was not booked.

With respect to the other expenses claimed, the Tribunal is not satisfied, on a balance of probabilities, that plaintiff is entitled to their refund. The expense of £160 to Anthony Murray refers to a '*June Boat Party ...*', and not the cancelled 12th July 2015 party (fol. 66). Besides, plaintiff did not present proof of settlement of this invoice. In so far as the €250 payment to Gary O'Hear (fol. 68) is concerned, plaintiff once again failed to prove payment, and he presented no supporting evidence, or fiscal receipt, covering the alleged payment of this expense.

In view of the fact that the Tribunal is upholding plaintiff's demand for payment limitedly, his demand for the payment of legal interest cannot be upheld.

After considering all these points of law and fact, the Tribunal disposes of this case, and therefore upholds defendant Frederic Brenneisen's plea that he is not a legitimate defendant for plaintiff's demands, with costs against plaintiff; and whilst rejecting defendant company All Yacht Services Limited's pleas as unfounded in law and in fact, upholds plaintiff's demands limited, and only in so far as directed against said defendant, and consequently, upholds his first demand and declares All Yacht Services Limited responsible for the damages which plaintiff suffered, totalling to one thousand and fifty eight Euro and fifty six cents (€1,058.56), and consequently orders All Yacht Services Limited to pay in favour of plaintiff the said sum of one thousand and fifty eight Euro and fifty six cents (€1,058.56).

Defendant company All Yacht Services Limited shall bear plaintiff's costs for this case, including the costs of the judicial letter exhibited on fol. 3 of the acts of these proceedings.

Advocate Phyllis Aquilina LL.D.

ADJUDICATOR