SMALL CLAIMS TRIBUNAL
(GOZO)

ADJUDICATOR
DR MICHELA SPITERI LL.D.

Sitting of Friday 17th of January 2020

Case Number: 32/2017MS

Eustance Barry

vs

Karl Pace and Andrew Schembri

The Tribunal

Having seen plaintiff's claim filed on 4 August, 2017 wherein he requested this Tribunal to order respondents to pay him the sum of €2,643.20, representing an amount due for damages sustained to plaintiff's boat *Vagabond* and caused by an overhanging tender of respondents' boat *Amethyst 7*, as per invoice issued and marked Doc. A. With costs.

Having seen respondents' reply filed on the 6 September 2017, rejecting plaintiff's claims in fact and at law and denying any responsibility for the damages allegedly sustained to plaintiff's boat; and in any event and without prejudice, that the amount claimed is inflated. With costs.

Having seen the acts of the case and heard the evidence under oath.

Considers:

That the case under examination concerns damages sustained to plaintiff's boat *Vagabond* while berthed at Gozo's Mgarr Marina, which damages plaintiff imputes to an overhanging tender belonging to respondents hitting the side of his boat causing damage to its self-adhesive strips.

The Tribunal heard the following witnesses:

Gennaro Xerri, General Manager of the Mgarr Marina in Gozo, where he has worked for about five years, testified in these proceedings and said that he has known plaintiff - a boat owner - ever since he brought his boat to berth at the Marina. He was aware of the dispute that arose between plaintiff and respondents and had seen some scratches on plaintiff's boat, which, from personal experience appeared to be the result of damage by an oar belonging to a tender (fol 16). Asked how he came to know of such damages, Xerri said that it was plaintiff himself who brought the matter to his attention and that he had, on more than one occasion, urged that tenders not be left in the water to avoid situations such as these. He also confirmed that the only vessel berthed to the port side of *Vagabond* during the period in question was *Amethyst 7*, owned and operated by respondents. (fol 29) He pointed out that although it was normal for tenders to be attached to boats in the Marina, this was specifically excluded in the contract. Finally, he assessed the amount of damages anywhere between 500 to 1,000 Euro excluding the costs of hauling the boat out of the water.

Under cross examination, Xerri confirmed that maintenance works to boats are done yearly, or every second year and that in this case, replacing an adhesive strip was not considered urgent because damage in such a case was cosmetic - i.e. no actual harm is done to the boat. In his view, the damage was not that bad and was not immediately noticeable. Asked how the damage might have occurred, Xerri could not say how it had occurred exactly and could not exclude the possibility that the damage was caused by something floating in the sea, hitting the boat. He also confirmed that leaving tenders attached to boats was not allowed, despite the fact that it was something that sometimes happened. In fact, it was a practise that was discouraged, precisely to avoid alleged similar situations occurring. The damages were compatible with the boat being hit by the oars of a tender, and that from his personal experience and judging from the height of the damages, the most probable cause was indeed the protruding oars from the tender. (fol 132)

Barry Eustance, plaintiff, an airline Captain, testified in these proceedings confirming that he berths his boat at the Marina in Gozo and that when he left Gozo on the 14th June 2016 his boat was intact and damage-free. The first time he used his boat after that was on the 8th July 2016, which is when he first noticed the damage to the boat's port side. Given the dynamics and the fact that *Amethyst 7* was berthed alongside his boat and that its tender was seen between the two vessels, he wrote to respondents, attaching an indication of the quotes he had received for repairs.

Several emails and letters later, when respondents refused to accept liability for damage and when it was clear that an amicable settlement would not be reached, he went ahead with the works all the same. In November 2016, the boat was lifted out of the water and put on the hard for two weeks, which is when the work was carried out. During this time, plaintiff also took the opportunity to repair a separate unrelated leak, which does not form part of the subject matter of this case, and for which he did not claim any money from respondents. Plaintiff also refers to an off the record conversation he had with respondent, where the latter had allegedly offered him €1,000 to settle the issue. The offer was never put into writing and not followed on.

In his evidence before the Tribunal tendered on the 2 November 2017, plaintiff says he is claiming the sum of €3,232, which excludes the cost of taking the boat from Mgarr to Valletta and back again. It is to be noted however, that in the original claim, plaintiff had requested €2,643.20.

In a subsequent affidavit, plaintiff also clarifies that although he had indicated the 8th July 2016 as the first time he had used his boat, it was also possible that he actually left Mgarr harbour on the 7th July 2016 and set sail for a few days, returning on the 11th July. He also confirms the dynamics of the berthing arrangements, where vessels *Vagabond* and *Ma Claire* were on either side of *Amethyst 7*. Both boats sustained the same damages on their port sides.

Paula Mac Pherson plaintiff's partner, also testified in these proceedings by means of an affidavit, where she confirmed that prior to and on the 13th and 14th June 2016 there was no damage to the boot stripe of the vessel. On 7th July 2016, while leaving Mgarr harbour for Dwejra on *Vagabond,* she noticed damage on the boot stripe of *'Ma Claire'*, also berthed next to *Amethyst 7.* She discussed the damage with plaintiff who had also noticed the damage. Upon arriving in Dwejra and having anchored, she went for a swim and observed on the port side of the vessel, an almost identical damage on *Vagabond* to that noticed earlier on *Ma Claire*. Both vessels - *Vagabond* and *Amethyst* was berthed at Mgarr Marina between 13th June and 7th July 2016.

Claire Farrugia Delceppo, secretary at the Kalkara shipyard, testified in these proceedings and confirmed that plaintiff brought his boat over to shipyard for repairs on two self-adhesive

strips on the portside, which were damaged. Witness was mainly responsible for invoicing plaintiff. The works were carried out between 7th - 21st November 2016 and plaintiff settled all expenses. She also confirmed that during these two weeks, other works (high pressure cleaning/ repairs on the bow thruster/ lubrication of the seacocks) were carried out, which works were unrelated to this issue and for which plaintiff was invoiced separately. When asked how many days were needed for repairs which formed the merits of this case, the witness confirmed that fourteen days were needed as the process to remove the tape, order the tape, clean the glue and set up the boat with scaffolding took time. Moreover, the other side had to be changed too, for the sake of symmetry and for both sides to match. Witness confirmed that this was the main job requested by plaintiff and that the other works carried out were secondary.

Andrew Schembri and Karl Pace, respondents, testified in these proceedings by means of an identical affidavit. The thrust of their defence is that plaintiff did not ever witness the damage and that such could have occurred elsewhere, in another yacht Marina, and was not necessarily caused by respondents' tender. They also confirm that during the timeframe that plaintiff claims that the damage occurred (approximately 14th June - 7 July) their boat was at the Marina for 10 and a half days out of the 24. Respondents contend that plaintiff had a sea-water leak, which of its nature is urgent, and which he did not repair for at least 8 months. Moreover, respondents note that plaintiff opted to have repairs carried out at Kalkara Boat yard even though they were significantly more expensive than other yards. Not only were the rent fees and the fees for lifting and launching the boat much higher than that quoted by other shipyards, but unrelated works on the boat were carried out during this time. Respondents deny making plaintiff an offer of €1,000.

Under cross examination, Andrew Schembri confirmed that the tender was often left in the water for an hour or two, in violation of the rules, because taking the tender up onto the boat involved a substantial amount of work. He also confirmed that the damages on plaintiff's boat were next to the side where respondents' boat was berthed. On page 163 respondent admits that it was they (respondents) who scratched the sticker, but later changes this to "*he (plaintiff) is saying we scratched a sticker*." Despite his initial categorical denial of the €1,000 offer, under cross examination Schembri concedes that respondents and plaintiff were trying to reach a reasonable compromise and that some sort of conversation took place.

Under cross examination, Karl Schembri confirmed that the tender was left down in the water but that after the incident, the practise stopped and nowadays the tender is never left in the water. He also confirmed that he spoke to plaintiff multiple times about the damage and initially it was a friendly exchange. <u>On page 179, witness also openly admits that damages were caused by respondents, however, insists that such was cosmetic.</u>

“ .. we were also being sued for the boat being taken out of the water which is the bulk of the expense, to take the boat out of the water you need a crane to lift it which costs a lot of money basically, probably eight hundred Euro and to put it back in the water, and you need to leave it in the marina for some time, and we were being charged for all those things which doesn’t make sense, because, I tell you why it doesn’t make sense, ***the damage we made was a cosmetic damage*** *which could have waited till the next time, a boat is scheduled for lifting, every few years. I wouldn’t take my boat out for some cosmetic damage, you know, unless someone else is paying for it. "*

Considers

That respondents' main defences are threefold: -

firstly, that plaintiff has no way of knowing with certainty whether it was respondents' tender that hit his boat;

Secondly that given that the damage caused was cosmetic in nature, the works were not urgent, particularly when plaintiff had ‘lived’ with a leak (at some risk) for several months. Respondent contends that the plaintiff could have waited and combined the repair with routine maintenance works when the boat would have been lifted out of the water at any rate.

Thirdly that plaintiff chose the more expensive boatyard for something which was ultimately cosmetic, going against the principle of containment of damages.

Considers

As to the first plea, it is to be noted that in civil cases, the standard of proof required is that ‘on a balance of probability', which the Tribunal feels has certainly been reached in this case. The Tribunal is more than satisfied with the explanations provided by plaintiff and his partner, (who are clearly very hands on) and with the testimony of Gennaro Xerri, who confirmed that the damage which was above the water-line was compatible with a tender oar hitting the side of the boat. Parties who testified in this case, (respondents included) confirmed that the tender in question was, on more than one occasion, left in the water next to plaintiff’s boat, in violation of the contract and respondents were even alerted to this

before the incident. Moreover, damages to plaintiff's boat were sustained on the side next to respondents' boat. Furthermore, and significantly, when caught off guard under cross examination, both respondents admitted that this damage was caused by their tender, leaving no doubt in this Tribunal's mind as to the cause of the damage.

As to the second plea, plaintiff confirms that he had lived with the leak on his boat since 2015 and in fact the leak was not repaired and still existed after the boat was taken to the shipyard. Plaintiff insists that the boat was taken to the shipyard primarily for repairs to the damage to the boot-strip and that the other repairs were an afterthought and secondary in nature. Moreover, given that *Vagabond* had just been lifted out of the water in March 2016, it would have been unreasonable to expect plaintiff to live with the damage to his boat until 2018 or even longer.

Although the Tribunal tends to agree with plaintiff's argument, namely that one should be able to carry out repairs to damages caused by third parties, at one's convenience and not at the convenience of third parties (after all aesthetics do play a very important part in the enjoyment of an object, particularly when it comes to cars and boats, which for many, are akin to one's home); and although it is clear from the evidence that the plaintiff did not just opt to repair the boat without first trying to reach an amicable settlement, the fact of the matter is that once the boat was on the hard, plaintiff opted to carry out numerous repairs to his boat, which were completely extraneous and unrelated to the case. Afterthought or not, the works were in fact carried out and if one compares Doc A ((€2643.20) with Doc CF (€2,512.19), one immediately notices that the lion's share of the sum invoiced in Doc A relate to the lifting and launching and the hard-standing fees which amount to €1260, whereas the repair/ polishing and fixing of the self-adhesive tape was €980. The entire amount invoiced in Doc CF on the other hand (€2,512.19) refers exclusively to the extra unrelated works which were carried out at the same time. While it is true to say that plaintiff did not charge respondents for these works and that these are the matter of an entirely separate invoice, it seems very unfair to burden respondents with the entire cost of lifting, launching, haulage etc (€1260 + VAT) and the Tribunal feels that these have to be apportioned.

As to the third plea, namely that plaintiff opted for the more expensive option, the Tribunal notes that the Manoel Island quote (fol 23) for the same repair is not really different when one considers that the Kalkara Yard quoted for the replacement of the stripe to both sides of the boat (€980), whilst the Manoel Island quote (€470) refers only to one side (portside). Thus, in reality there is little difference between the two and these are practically the same. The Tribunal also agrees that boot-strips have to match and repairing just one side would leave a mismatch and defeat the purpose altogether.

Considers

That when testifying before this Tribunal, plaintiff increased the amount original requested by him in his claim, to €3,232. In the absence of a formal request for correction, the Tribunal is bound by the written claim and cannot entertain plaintiff's increased request. Aside from the fact that the increase was never justified or corroborated by evidence. As to the apportionment of the amount claimed for lifting and haulage, it is the considered opinion of this Tribunal that this should be 60 / 40 % with the latter figure being the apportionment due by respondent.

For this reason, the Tribunal calculates the amount due by defendant in the following manner:

€1260 x 40 % = €504 x18 % (Vat) = €594.72

€980 x 18 % (Vat) = €1156.40

Total amount due: €1751.12

For this reason, the Tribunal accedes in part to plaintiff's request and orders respondents to pay plaintiff the sum of one thousand seven hundred and fifty-one Euro and 12 cents. (€1751.12).

With costs to be borne by the respective parties.

Dr Michela Spiteri LL.D.
Adjudicator

Daniel Sacco
Deputy Registrar