[2023] JMCC Comm 29

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE ADMIRALTY DIVISION

CLAIM NO. 2018A00003

BETWEEN	**MATRIX ENGINEERING WORKS LIMITED (OWNERS OF THE CABIN CRUISER CHAPERONE)**	**CLAIMANT**
AND	**M/V PEDRO ALVARES CABRAL**	**1ST DEFENDANT**
	SODRACO INTERNATIONAL SAS	**3RD DEFENDANT**

Admiralty- Negligence – Whether waves generated by moving vessel caused damage-Whether damage reasonably foreseeable- Whether duty of care- Whether operator of moving vessel in breach of duty of care- Whether damaged vessel moored in unreasonably shallow water- Whether contributory negligence- Measure of damages- Whether total loss- Whether cost of maintaining vessel until trial recoverable- Whether loss of use recoverable for pleasure craft.

Mr. Abe Dabdoub and Mrs. Karen Dabdoub-Harris instructed by Dabdoub, Dabdoub & Co for the Claimant.

Mr. Kwame Gordon instructed by Samuda & Johnson for the Defendants.

HEARD: 1st ,2nd 3rd ,7th ,8th, & 9th, February, 22nd, 23rd, 24th & 25th March, 27th April, 31st May, 30th & 31st August 2022, 21st April and, 7th July 2023.

IN OPEN COURT

COR: BATTS J

INTRODUCTION

[1] The pre-trial preparation, and the trial, of this matter absorbed a tremendous amount of the court's time and resources. Having seen and heard the evidence I must say that, in the final analysis, the resources committed may have been

disproportionate to the legal and other issues involved. This is not necessarily a criticism of the attorneys but may have more to do with the way our system of justice is organised. It may also be the consequence of contending expert opinions.

[2] The claim arises out of a boating incident at Lime Cay (pronounced "key") which is a popular recreational area off the south coast of Jamaica. It is one of several cays located outside the Kingston Harbour. Judicial note can be taken of the high quality of the beach located there. That is not, however, what this claim is about. The Claimant's allegation is that its cabin cruiser was moored at Lime Cay on the 19th day of February 2017, at 10:30 a.m. Its bow (front) line was secured to a permanent mooring buoy offshore and the stern (rear) secured by the boat's anchor on land. The 1st Defendant is a motor vessel which was at all material times being used for dredging activities in Kingston Harbour. The 3rd Defendant was conducting the said dredging and, for that purpose, operated the 1st Defendant. The 2nd Defendant is no longer a party to the claim which was discontinued against it on the 6th day of November 2019.

THE ISSUES

[3] The Claimant alleges that the 1st Defendant was so negligently operated that it generated bow waves which caused damage to its vessel. The Defendants deny that the 1st Defendant (which will at times be referred to as the dredger) was negligently operated and specifically pleaded the following:

> *"9. The Particulars of Negligence are denied and the 1st and 3rd Defendants will contend that at the material time:*
>
> *a. the 1st Defendant proceeded in a manner and at a speed which was careful and safe in the circumstances.*
>
> *b. the 1st Defendant had due regard for other vessels in the vicinity.*
>
> *c. the crew of the 1st Defendant observed that there were other vessels moored in the vicinity, and some of these vessels were similar to the vessel allegedly*

owned by the Claimant, but none of these vessels have contended that they suffered damage from the waves which were created by the 1st Defendant's manoeuvring.

d. *in fulfilment of its engagement by the Port Authority the 1st Defendant was required to traverse the route which it did; and*

e. *the 1st Defendant was manoeuvred in accordance with all international rules of the sea and in particular in accordance with* ***Harbour Rules, 1971****".*

[4] The 1st and 3rd Defendants also allege that the, or any, damage to the Claimant's vessel was caused and/or contributed to by the negligence of the Claimant (meaning its servants or agents I suppose) being:

"10…….

a. *Failing to moor or properly moor the vessel allegedly owned by the Claimant at the material time.*

b. *Mooring the vessel at a location which was unsafe in the circumstances.*

c. *Failing to take heed of the dredging activities which were being conducted in the Harbour at the material time.*

d. *Failing to heed the presence and/or the movement of the 1st Defendant.*

e. *Failing to take into consideration the safety and security of the vessel allegedly owned by the Claimant."*

Importantly the Defendants contend additionally and/or alternatively that:

"20 ….

a. *in the light of the recommendation that the said vessel be treated as a write-off, the Claimant is not entitled*

to any claim for those expenses which would be incongruous with the said recommendation; and/or

b. the Claimant is not entitled to aggravated damages."

[5] Several witnesses were called in the course of this trial. This included three expert witnesses. The Claimant called three witnesses who assert that they were present and observed events on the day in question. The Defendant called no eyewitnesses to the event not the captain or even any crew member of the 1st Defendant. I cannot hold that against the Defendants because there may be very good reasons having to do with their availability or otherwise. Furthermore, the Defendants have no legal burden of proof. This remains always on the Claimant who must satisfy me, on a balance of probabilities, both as to liability and quantum. The Defendants relied heavily on an expert witness, Commander. Hay, who gave evidence from a remote location with respect to both liability and damages. I will look more closely at his evidence later in this judgment.

CONCLUSION ON LIABILITY

[6] It suffices to say that I have little hesitation in finding, on a balance of probabilities, that the Defendants are liable to the Claimant jointly or severally. The witnesses for the Claimant gave accounts of what transpired which, although not identical, are sufficiently similar to suggest credibility. Their response to cross-examination reflected genuine efforts at recall and did not suggest fabrication. One has to bear in mind that the event was dynamic and unexpected and so some decisions, taken on the spur of the moment, may not always on reflection have been the best in the circumstances. It was common ground between the parties that, outside Kingston Harbour, there was no specified speed limit because the Harbour Rules did not apply. The duty was therefore to move at a speed such that the vessel could safely proceed having regard to all the circumstances. These circumstances include, in this case, the presence or proximity of other vessels. The dredger had been on the job for over one month on the day of the incident. It made that trip, on average seven and a half times daily and, worked non-stop for three to four weeks breaking only for one day to do scheduled maintenance, see paragraphs 4 and 7 of the witness statement of Mr Kris Baert who was the Defendants' project manager. The

Defendants' captain and crew were therefore aware, or reasonably ought to have been aware, that pleasure craft often moored at Lime Cay. The Claimant's vessel was in any event clearly visible. Given that the Defendants' servants and/or agents knew, or ought reasonably to have known, of the size and power generated by their vessel's bow waves an inference of negligence is difficult to avoid. The detailed review of the evidence which follows will demonstrate precisely why I have come to this conclusion.

CLAIMANT'S EVIDENCE ON LIABILITY

[7] The Claimant put in evidence a most compelling document, exhibit 2, being a video recording of the incident or a major part of it. The recording corroborated much of the Claimant's witnesses' evidence. Even as to the depth of water in which the vessel was moored. This because in part the recording showed members of the crew and passengers in the water holding the tow line to the rear of the boat or attempting to do so. The existence of the video is credibly explained by the person making it. He is Captain Mendes a former Assistant Vice President and Port Captain of the Port Authority of Jamaica. Captain Mendes was a passenger on the Claimant's vessel that day. He is a close friend of a director of the Claimant and often went with him on excursions to Lime Cay aboard the Claimant's vessel. He stated, and I accept, that while at work at the Port Authority a report came in from the Jamaica Defence Force Coast Guard concerning bow waves generated by the Defendants' dredger. When therefore he saw the dredger in the distance, on the day in question, he decided to use his telephonic device to film its approach. That is how the video recording of the event came about.

[8] The rational stated, for the video recording of the dredger's approach, is supported by exhibit 12. That is an emailed communication passing between, Mr Hopeton Delisser (of the Port authority) and, Mr Dupois Dieter (of the 3rd Defendant). It is copied to Captain Mendes. In that message a complaint from the Jamaica Defence Force Coast Guard, about the effect of the dredger's bow waves, is recorded and a suggestion made that it should proceed more slowly within the Kingston Harbour. The communication predates the incident by two days. This document does not prove that the dredger was travelling at excessive speed or was otherwise in breach of duty. It does however prove that a complaint about the effect of the 1st

Defendant's bow waves, within the Kingston Harbour, was brought to the Defendants' attention.

[9] Fnally, in assessing the evidence and arriving at my conclusion, I considered the fact that the Claimant's vessel had, prior to this incident, moored in that manner and in a similar location every Sunday for over 30 years. This was the evidence of the Claimant's witness, see paragraph 5 of witness statement of Mr Louis Williams dated 30th March 2021, which I accept. The ebb and flow of wave movement at Lime Cay did not in all that time result in damage to the vessel. No other explanation for the damage has been posited although, as I discuss below, the Defendants' expert opined that the damage to the vessel was not caused by waves generated by the dredger. I was moved to ask Defendants' counsel, rhetorically, whether the suggestion is that the vessel was towed to Lime Cay in a damaged condition.

[10] The Claimant's witnesses, as to liability, had been either passengers or crew on its vessel and were present on the day of the incident. Captain Gimen Mendes formerly Assistant Vice President Port Captain of the Port Authority of Jamaica said, at paragraph 10 of his witness statement dated 24th March 2021:

> *"10. I started to video the M/V Pedro Alvares Cabral following them throughout their approach until I could not video them any longer due to the fact that the waves created by the passage of the M/V Pedro Alvares Cabral started tossing the M/V Chaperone around violently."*

[11] Another eyewitness was Mr Basil Anthony Lindo a retired Chief Executive Officer of the Bank of Nova Scotia Jamaica Ltd. He had over many years been a regular passenger on the Claimant's vessel during its trips to Lime Cay. He was in the water at the rear of the vessel when he noticed the dredger approaching. He stated:

> *"8. That at the speed that the dredger was travelling it created a large amount of waves which caused the Chaperone to be torn from its anchor and tossed into the reef. The Chaperone clearly sustained considerable damage*

as it was unable to return to Port Royal under its own power and arrangements had to be made for it to be towed back to Port Royal."

[12] Mr Louis Williams is the Claimant's Managing Director and captained the vessel on the day in question. He stated that his son Max Williams, Rowan "Ricky" Salmon, along with the other two witnesses above named, were aboard the Claimant's vessel that day. He describes the incident thus: -

"10. That the swells of waves caused as a result of the tremendous speed at which the 1st Defendant was travelling reached the M. V. Chaperone causing it to be torn from its anchor and thrown on the reef as a result of which it sustained considerable damage."

[13] It was suggested to him in cross-examination that the vessel was moored in water which was too shallow. Further that, upon seeing the waves, he ought to have released the stern mooring line and have Captain Mendes start the engine so it could go out to deeper water. The witness adequately responded to each suggestion. As regards the depth of water it seems to me, having viewed the video, that there is nothing to suggest the vessel was in less than four to five feet of water. I accept that it was safely moored. As the captain explained it was sheltered by a reef. Normally at that location, he explained, waves created by the wind do not come from the direction from which those, generated by the Defendant's dredger, were approaching. It was the unusually high waves from that direction which created an unforeseeable danger. One exchange with the cross examiner is telling:

"Q: In your experience where waves approach a vessel in shallow water with a stern anchor on the land and a bow anchor at sea doesn't it make sense to pull up stern anchor to allow the vessel to drift out into deeper water.

A: there are a lot of considerations. If time allows it's the right thing to do

Q: Why not in that hypothetical disconnect the stern line from the boat

Obj: answered already

J: Not already disagree

A: Any boat unmanned and left to the whims and fancies of the sea is in danger. A boat of that size without engine and crew in waves like that is liable to be damaged."

I reject the suggestion that in trying to hold the stern line, and therefore keep the anchor from dragging, Captain Williams acted unreasonably. In the emergency which faced him it was the natural thing to do. It may be that upon sober reflection the possibility of releasing the line, starting the engine and, moving out to deeper sea could have been considered. However, this pleasure boat captain cannot be faulted for responding as he did when unusually high waves, from an unanticipated direction, were created by the Defendants' passing vessel.

[14] The suggestion put to Captain Mendes, see paragraphs 7, 8 and. 10 above, was that when he saw the dredger, he ought to have contacted the Port Authority and have them instruct the dredger to slow down. This also is one of those things that only someone in the calm relaxed arena of an office might think about. However, it is hardly an idea that would come naturally during an emergency. Furthermore, Captain. Mendes gave a credible explanation:

"*Q: Wouldn't it have been prudent for you to make contact and send word for them to advise dredger to slow down.*

A: as previously answered I did not anticipate waves that big but further it gets out into open sea less effect it would have had on other marine interests.

Q: but if other marine interests are close to vessel they could be impacted by the waves

A: Yes, small craft"

[15] As to the suggestion by the Defence, that the boat was moored in unsafe water, the undisputed fact is that the Claimant's vessel had been going to these cays for some 30 years. If the waters around the cay had been unsafe for anchorage damage should have earlier occurred. It was the generation of waves by the Defendants' vessel which made the mooring unsafe. The point was ably made in an exchange with Captain Mendes.

"Q: if the vessel was anchored in deeper water less likely it would have suffered hull damage

A: if wave did not come it would not have had hull damage either if vessel was not there. The vessel would have had to be a reasonable distance away

Q: in deeper water

A: yes, further away further out away from the island."

[16] The expert witness for the Claimant was Captain Cecil Morgan a marine surveyor with some experience as a seaman. During cross-examination he gave the most comprehensive answer to the Defendants' suggestion that the captain and crew failed to take adequate measures.

"*Q: Do you think they could have released stern line to allow craft to go into deep water*

A: No. Swells coming from the west. Once released stern lines they could not have enough manpower to keep her off the shallow.

Q: What if engine engaged and stern line released

A No. (1) If I decide to engage engine the props coming too close to the ground. (2) If people in water can't do anything that might injure the people result in loss of life. (3) don't want the line to end up in the prop. Speed causing stern line might get caught up in

propeller. May cause more damage or injure persons."

In other words, the suggested ameliorative measure of releasing the anchor, in the opinion of the Claimant's expert, may have caused even greater danger. This I accept. I also accept his evidence that having seen the video it reinforced his opinion that the dredger was travelling at a speed which caused dangerous waves (he calls them swells) to be generated.

[17] This witness, in the course of cross-examination, gave a helpful and graphic description of wave movements which was not challenged.

"Q: Difference between swell and wave

A: Swell usually generated by some force in water but wave by wind. When swell coming at you if not at an angle you cannot see it. The swell moves under water. Entire body of water is actually moving. The displacement of water causes the energy or force."

The description explains, to the uninitiated "land lubber" like myself, how and why it was possible for bow waves generated by the Defendants' vessel to cause such damage. It also explains why persons watching may not perceive danger because the swell "*moves underwater*". In his opinion bow waves generated "swells" not waves.

[18] Captain Morgan in re-examination also gave evidence which reinforces my conclusion on liability:

"*Q: You said it was in safe waters*

A: yes, I believe she was in safe waters. My investigation, my experience as a seaman. This is area normally used by vessels to anchor off lime cay. That buoy placed there by Port Authority confirmed to me it was safe. That area is protected by reef, normally absorb swells."

DEFENDANTS' EVIDENCE ON LIABILITY

[19] In their defence the Defendants called three witnesses two of whom were experts. The first was Mr. Errol Williams a marine surveyor and the managing director of Ship-owners P &I Services Limited. He inspected the Claimant's vessel on the 5th June 2017 at the same time and in the presence of representatives of the Claimant. Mr. Williams did not complete his inspection on that date because he was unable to conduct an underwater inspection. It was his opinion that, as there was an allegation that the yacht was damaged when it hit the seafloor, an underwater inspection was necessary. He criticised the Morgan Marine expert reports, relied on by the Claimant, for inconsistencies in the value stated for the vessel. He stated that he had never done a report. His evidence mostly concerned damages and is considered further below, see paragraph 52.

[20] Mr. Kris Baert was called as a representative of the operators of the 1st Defendant. He said the Defendants had been informed of a speed limit of 10 knots within Kingston Harbour but no limit outside the harbour. Dredging operations commenced on 5th January 2017. He said during the dredging the vessel made an average of 7½ trips per day and worked nonstop for 3 to 4 weeks at a time stopping only for scheduled one day's maintenance. He says he never received any complaints about the dredger proceeding too fast outside the harbour. When shown exhibit 12 (an email with a complaint about its speed within the harbour and discussed at paragraph 8 above) the witness explained that it would have gone to the works manager and not to him. He did not challenge the authenticity of the document. The witness gave evidence, with reference to exhibit 18, of the specifications of the dredger. However, this is not particularly relevant. The duty of an operator is to travel at a speed so as not to cause reasonably foreseeable damage. The maximum or minimum speed of the vessel is therefore not terribly relevant.

[21] The Defendants' other witness was Commander Edward Hay who is a marine surveyor and the senior surveyor at American Nautical Services Inc. His evidence was by video link and related to both liability and damages. I will be dealing with the issue of damages later in this judgment. On the matter of liability however his evidence was largely speculative, unhelpful and, generally

unreliable. I will now say why.

[22] Commander Hay's evidence in chief consisted of a witness statement dated 21st June 2021, a report dated 28th October 2019 (exhibit 19) and, evidence given in amplification. The report is professionally prepared and well presented. The expert considers liability against the backdrop of the "*International Rules of the Road (COLCREGS)"* because the incident occurred outside of the Kingston Harbour. The report does not consider the general duty of care in the law of negligence. That is a part of the law of Jamaica and applies anywhere within Jamaican territorial waters. So, for example, when considering the allegation of proceeding too fast in a narrow channel or fairway, Commander Hay concluded (exhibit 19 page 6):

> *"The intent of Rule 6 is to guide the person in command of a vessel operating under COLREGS to operate the vessel at a speed that will permit the stopping of the vessel in enough time to avoid collision. The rule names specific facts to be considered that may influence the distance required to stop the vessel and avoid collision. There is nothing in this Rule that sets a specific speed of a vessel in any given situation. Rather, it is purposed in terms of distance needed to stop the vessel to avoid collision based on circumstances."*

The expert overlooks the fact that damage may be caused other than by way of collision. Hence a duty of care may require consideration of the waves generated at a particular speed and the potential impact of such waves.

[23] The report considered the allegation of failure to give due consideration to other vessels anchored in the vicinity of the channel. In this regard Commander Hay had regard to the video evidence (exhibit 2), which I referred to in paragraph 7 above, and stated (exhibit 19 page 9),

> *"The fact that the Port Captain for Kingston Harbour was aboard the M/Y and the person that took the video indicates that at least*

one person associated with the M/Y knew or should have known there were no speed restrictions in the East Channel; that deep draft vessels operating inbound and outbound in the channel would produce bow waves consistent with their displacement and speed; and that such bow waves travel to the shoreline of Lime Cay that neighboured the East Channel and potentially interact with any small craft anchored in vicinity of Lime Cay. Captain Mendes took a video but it does not appear that he sounded a danger signal; or called his office to request transmittal of a radio warning to the dredger to slow down due to the MY's anchored status in shallow water; or take any action to lessen the risk to the MY.

Review of Claimant's video indicates the M/Y was improperly anchored in water too shallow for its safety at time of the alleged incident."

[24] This passage gives no consideration to the fact that for 30 years the M/Y had ventured to Lime Cay and moored at that location without incident. Commander Hay's report indicates that he visited Lime Cay on the 3rd May 2019 (page 30 of exhibit 19). He was however unable to locate the particular coloured buoy to which the yacht was tied (page 35 of exhibit 19). To the extent anything turns on this site visit there is no confirmation that the expert was at the precise location. The expert report nevertheless contained the following observations on liability (exhibit 19 page 35),

"The operator of the M/Y understood to be Mr. Williams Sr. along with Captain Mendes on board as either deckhand or guest, both understood to be experienced boat handlers with years of seamanship experience chose to position the M/Y in water with approximately 3" to 6" clearance to a sandy bottom.

Given their years of experience with the M/Y and Lime Cay, I believe it reasonable to (sic) that they knew or should have known that deep draft vessels using East Channel would produce a bow wave that would increase in

height as the wave energy encountered the shallow water surrounding the Cay. This phenomenon is well known by seamen and experienced boaters (see attached Bowditch abstract). I consider it strange that these two individuals considered to be experienced boaters would position the M/Y as they did and then video the passing of a deep draft vessel with outcome of wave generation and rocking of the M/Y a reasonable consideration to be anticipated and provided for."

[25] Commander Hay ignores the fact that after 30 years mooring in a similar position the Claimant's captain and crew can be forgiven for thinking that their craft was safe and protected by the reef. As explained by Capt. Mendes, even as he filmed the passing dredger, he did not expect the bow waves generated to be a danger to the vessel. The greater question, and one Commander Hay does not address, is whether the captain of the dredger, who presumably knew the size waves his vessel generates at a particular speed, ought not to have had concern for pleasure craft moored at the cays. That presumption may have been answered by evidence explaining either, his failure to anticipate the wave size or, that the waves generated would have climbed the reefs or, evidence that he had previously sailed past the cays at similar speed, while vessels were moored at that location and had done so without incident. There was however no such rebuttal evidence before me. Therefore, the presumptions, that he saw or ought reasonably to have seen the Defendants' vessel and that he knew or ought reasonably to have known the height of bow waves generated and their potential impact on moored vessels, were not rebutted.

[26] In amplification of his evidence in chief Commander Hay confirmed, with reference to a nautical chart (exhibit 3), that the incident occurred outside of the Kingston Harbour. He explained how bow waves were created:

"Q: Go to page 9 (of exhibit 19 his report] "deep draft" vessels.

A: Forward motion creates a bow wave. That is function of how deep is vessel and the speed of the vessel. It has a shape so as it moves forward it pushes water aside. The faster it goes the more displacement water gets pushed aside."

Accepting that evidence, and I do, makes it clear that only someone familiar with the vessel, and its operation could predict the extent of, or danger presented by, bow waves it generates. Only such a person would know the cargo carried and therefore how deep in the water is the vessel. Only such a person would know its speed. Only such a person is likely to have observed the waves generated previously. Therefore, I do not see how it can credibly be suggested that the captain and crew of the Claimant's vessel ought to have anticipated damage from the bow waves generated by the Defendants' dredger. Moreso, because they had been in the habit of mooring safely at that location for many years.

[27] The Commander, also in amplification, defended his position that the Claimant's vessel was in water that was too shallow:

"*Q: In the paragraph above you mention that video indicates Chaperone was in extremely shallow water what you mean by that look at page… of [of exhibit 19] you say estimated depth less than 4 feet, so page 9 what mean by extremely shallow water.*

A: The Chaperone, there is depth between water line and lowest part of vessel … when I attended the dive survey. I had diver measure 37 inches from bottom of post-up. The video shows one man standing in water that is waist deep. Mr. Williams Snr. Is in video and assuming he is 6 feet tall it's at his waist which is 42." So if lowest part of boat is 37 metres then boat has 5-inch clearance (between bottom of rudder and seabed is 5 inches) very shallow water for me."

The expert has failed to take into account the fact that the person seen in the video is not standing immediately behind the rear of the vessel. The witness'

estimate differs from mine because it seems to me, and I so find, the person was at least five feet away from the rear of the vessel when the water is seen at his waist.

[28] Cross-examination of Commander Hay ably demonstrated that the dive platform/ transom at the rear of the vessel extended approximately four feet but that it was not measured by him. Neither did he measure how far from the transom were the propellers. Commander Hay ultimately accepted that because the water gets deeper, as one moves away from shore and towards the boat, it is not the depth at which the person in the video is standing which should be considered. Furthermore, there is evidence which I accept that the waves ebbed and flowed and that the video shows, at that point, the receding of the wave i.e., its lower manifestation. I therefore find that the vessel was in water which was more, not less, than five feet deep. Finally, I turn to the 30 years of experience at that location. Even if on Commander Hay's hypothesis (which I have rejected), the vessel was in less than four feet of water and therefore had only five inches of clearance, that clearance had proved quite sufficient for 30 years. In this case it is therefore difficult, if not impossible, to find contributory negligence as a result of the Claimant's vessel being moored at that location.

[29] The cross examination also reinforced my unfavourable view of Commander Hay's opinion insofar as liability is concerned. The revelation, that the expert had not disclosed all instructions (particularly instructions which prompted changes to his original draft report) did not enhance my view of him. Neither did the witness's effort to conclude on liability based on an incredible theory, see for example:

> *"Q: Your conclusion on bent propellers*
>
> *A: Divers report bent propellers*
>
> *Q: What conclusion, you say they were damaged before they went to Lime Cay*
>
> *A: Yes*

Q: *did you consider damage to boat being slammed to sea floor*

A: *I am not sure if it is an accurate description*

J: *repeats question*

A: *yes, I considered in context of report of my findings. Included fact that seabed was sand, propellers bent back and there is evidence of prior major damage inside boat*

Q: *did you mention in your report bottom of boat hitting the seabed*

A: *don't believe I said that anywhere in report*

J: *why not*

A: *the issue of what happened I don't have. From looking at video, height of waves, height of men at back of boat and measuring depth of boat I believe above 6 inches' clearance between bottom of rudders and sand bottom. The rudders and propellers did go into sand and couple inches. It is possible keel touch sand but no evidence that hull was slammed into sand. It is possible bottom of boat touched sand but don't think it was slammed.*

Q: *was all that put in your report*

A: *No*

Q: *do you agree they ought to have been put in report*

A: *easy to Monday morning quarterback. If so I apologize.*

Q: *did you ever consider the question of boat hitting of the sea [floor]*

A: *yes*

Q: In report you gave a different view

A: I never said it never touch the bottom of sea

Q: you were aware it did

A: I say the rudder and propellers went to sand. Possible hull touch sand

Q: you did not say that in report

A: no"

[30] I have quoted extensively this exchange because it reveals Commander Hay's determination to take a jaded or one sided view of facts. He initially used the fact that all "*fingers"* of the propeller were bent to conclude that, as the propellers were not in motion, the boat was not damaged by wave motion. It seemed not to have occurred to this expert, at least until it was put in cross-examination, that if the boat was in shallow water and affected by the waves described, the bending of propellers may in fact support the allegation that the boat was slammed into the sea floor repeatedly. Such a scenario, it seems to me, would likely lead to damage to all the fingers on the propeller. This is not a matter of being wise after the fact but, at the very least, forms a credible alternative scenario to the one painted by Commander Hay's evidence. The expert ultimately comes grudgingly to this realisation:

"Q: These facts would detract from your opinion

A: No

Q: those facts may cause someone else to come to a different conclusion.

A: I think these facts are guided by the measuring. The complaint is boat was damaged because it touched bottom. I am agreeing with that.

Q: show me in your report where you said that

A: it does not say that in narrative form. The measurements are in the report."

[31] When re-examined Commander Hay essentially walked back on any inferences he had drawn from the damage to the propellers:

"J: What you wanted from dive surveyor and why not include possibility in your report.

A: Trying to get dive surveyor to be more specific in his findings. Does it look like all vertical deflection or was it damaged while turning? I did not I think I do address it in the report. I don't think I put that in because the dive surveyor was not clear so I could not come to any conclusions. So much marine growth. Best you can see is rudder post bent back. The deflection of propellers is difficult to see. Did not want to say anything in report that was not clear from dive surveyors.

Q: you attach a report by Marine Logistics to your final report is this (Exhibit 25 shown) the same report.

A: yes, both identical."

The witness was further cross-examined on a document that was disclosed very late in the day. In the course of that exercise he displayed further inconsistency as he tried unsuccessfully to explain, why with the rudder "fused" to the hull the vessel may still have been seaworthy and, why he doubted the dive surveyor's report to that effect.

[32] Another flaw, in this expert's consideration of liability, is that he appears to treat the video as an entire recording of events. In fact, the witness, who did the recording, stated that he stopped recording shortly after the waves started to affect the boat in order to go into the water and assist the others. There seems also, and this appears to be common ground, a break in the recording. The witness could not recall if one occurred and if so why it did. This means that there is no basis to assume that higher waves, than appeared in the video, had not affected the boat. The alternate suggestion, that the boat was brought to the location in that condition, is not just incredible but to my mind most improbable. The expert did not, in his report, address his mind to the question of an explanation for the damage if it were in fact sustained on that date and at that location.

[33] I have conducted a detailed review of Commander Hay's evidence to demonstrate that, as far as liability is concerned, he had not adequately supported the Defence. To the contrary in some respects the totality of his evidence supports a finding that bow waves from a large vessel, dependent on its speed and depth, can do considerable damage. Further that a vessel docked in relatively shallow water can sustain damage to its rudder and propellers if it makes contact with the seafloor. Therefore, the damage to the propellers and rudders, as described in the dive survey report, are not inconsistent with the Claimant's account. I am therefore fortified in my decision to accept the evidence of the Claimant's witnesses.

FINDINGS OF FACT

[34] I find that the Claimant's vessel was safely moored in a manner and at a place it had been accustomed to be, on one day of each week, for over 30 years. On this occasion however the Defendants' dredger passed by and generated high bow waves (called swells by the Claimant's witness) which crossed the reef and caused the Claimant's vessel to make repeated and heavy impact with the seafloor. It was an event which was not reasonably foreseeable by the Claimant's captain or crew. I find on the other hand that the operators of the 1st Defendant ought reasonably to have foreseen this possibility. They were aware of the bow waves their vessel generated and had recently been cautioned about same. Furthermore, having passed that location on previous occasions, they knew or ought reasonably to have known that pleasure craft and small vessels moored at Lime Cay. I find also that just as their vessel was visible by the Claimant's captain and crew so too the Claimant's vessel ought to have been visible to the Defendants' captain and crew. The 1st Defendant ought therefore to have proceeded at reasonable speed and in a manner which did not generate bow waves likely to adversely affect the Claimant's vessel. This they failed to do. This being my conclusion on liability I now turn to consider the damage, if any, suffered in consequence of the Defendants' breach of its duty of care to the Claimant.

ASSESSMENT OF DAMAGES

[35] The claim for damages is outlined, in the Particulars of Claim filed on the 26th October, 2016, as follows:

> *"17. As a consequence of the negligent conduct and control of the M/V Pedro Alvares Cabral, the Chaperone was heaved then dropped on the sea floor repeatedly, resulting in extensive damage to such an extent that after a joint examination on the 6th day of June 2017 the Marine survey report by Morgan Marine recommends that the vessel be treated as a write off.***
>
> *THE CLAIMANT CLAIMS that the Defendant be ordered to pay to the Claimant general damages from the date of service of the claim form in the matter until judgment, as well as compensatory aggravated and exemplary damages, in respect of resulting losses amounting to US$482,727.05 with interest at the commercial rate to date and continuing at the rate of US$240.00 per day and such further and/or other relief as this Honourable Court deems just.*
>
> *AND THE CLAIMANT FURTHER CLAIMS aggravated damages of $3,000,000 for the unmitigated delay and frustration to date on the basis that the Claimant has lost the benefit of the use of the chaperone, and has incurred loss, injury, harm and damage."*

The Particulars of Claim has a table with the following detailed special damage claim:

"1.	*Estimated value of vessel*	*US$120,000.00*
2.	*Cost of condition and valuation report*	*US $75,000.00*
3.	*Maintenance, Cleaning and upkeep costs J$667,952.41 (@US$1 to J$135) is US$4,947.79 being J$7,766.00 per week from 19th February, 2017 to 19th October, 2018 and continuing*	*US $5,238.84*

4.	*Security Costs including watchman amounting To J$7,687,515.34 @US$1 to J$135.00) being $7,994.37 per week from 19th February, to 19th October, 2018 and continuing at the rate of $J7,365.00 per day for 576 days to the 19th October @US$1 to $135)*	*US$5,392.28*
5.	*Berthing payments amounting to J$786.240.00 being J$1,365.00 per day for 576 days to the 19th October 2018 @U$1 to $1350*	*US$6,166.59*
6.	*Mitigation of Loss – Payment to Jamaica Public Service Company Ltd., 20 months' payment of electricity J$201,148.56 from 19th February 2017 to 19th October 2018 (@1USto J$135)*	*US$1,577.64*
7.	*Mitigation of Loss – Payment to National Water Commission for 20 months of water supply J$190,000 from 19th February 2017 to 19th October 2018 (@1US to J$135)*	*US$1,490.20*
8.	*Payment to Winston Whyte engineer on weekly basis to check on condition of electrical system and ensure dewatering system is fully functional and ensure that boat stays afloat and to ensure generator remains operational at J$20,000 per week from 19th February, 2017 to the 19th October 2018 not totalling J$1,720,000 which is the equivalent @US$135 of US$12,740.74*	*US$13,490.20*
9.	*Paid R.Commock for repairs to generator J$30,000 which is US$235.29*	*US$235.29*
10.	*Paid for generator parts*	*US$1,205.25*
11.	*Loss of use in hiring vessel for total of 176 days at US$1,000 per day*	*US$176.000*
12.	*Interest from the 19th February 2017 to 19th October 2018 on US$120,000 (daily rate*	*US$145,680.00*

	from date of damage @ US$240.00 per day and continuing)	
13.	*Court fees J$30,000.00 or US$240 (@US$1 to J$127.50)*	*US$235.90*
14.	*Attorneys at law has fixed costs J$270,000*	*US$2000.00*
	Total	***US$481,238.05"***

[36] The claim is supported by the evidence of various witnesses, a plethora of documents being mainly invoices and, expert reports. The Defendants countered with an expert whose report challenges the extent to which the condition of the Claimant's vessel is the result of the incident on the 19th February 2017. He alleges that there was pre-existing damage and that the Claimant's vessel had not been adequately maintained prior to the incident.

DEFENDANTS' SUBMISSION ON DAMAGES

[37] In detailed written and oral submissions, the Defendants' counsel took issue with the claimed damages. I hope I do no disservice to the formidable, and well structured, submissions by summarising as follows:

a. The vessel was determined to be a "write off" (meaning it was a total loss) therefore its market value is the starting point of any assessment of damages.

b. The Claimant's expert witness (Captain Morgan) gave several values which remain unexplained. His opinion on value should therefore be disregarded.

c. Commander Hay on the other hand assessed its fair market value at US$25,000 as at the 18th February 2017; the shipping costs, for any replacement purchased, being approximately US$12,700.00.

d. There should be no award for loss of use as the yacht was a pleasure craft and was not used for business or commercial purposes. The Claimant, a company,

received no benefit from the use of the yacht. A company, unlike an individual, has no appreciation of non-pecuniary value. There was no evidence, either that the yacht was chartered for hire or, that the Claimant company was other than a commercial entity or, that it was involved in not for profit business activity.

e. In the event the court is of the view that the correct measure of damage is the cost to repair the vessel then Commander Hay's estimate of US$20,268.38 ought to be accepted.

f. The estimated time to repair is 42 days (as per Commander Hay's report). If loss of use is to be awarded therefore only 6 days should be considered given the evidence from the Claimant's witness that it was used only 1 day of each week.

g. The cost to maintain the vessel afloat until trial ought to be disallowed because it is clear the Claimant had the financial means to repair the vessel but chose not to do so. The Claimant therefore failed to mitigate its losses.

h. The justification, for maintaining the vessel, being so that the Defendants could examine the "res" is to be rejected. In the first place there was no agreement with the Defendants nor was there even an understanding to that effect. Furthermore, the vessel has continued to be maintained even after the Defendants experts examined it.

i. The Claimant failed to act prudently and mitigate by doing a damage assessment and valuation and then repairing or replacing the vessel once it had been determined to be a total loss.

j. It is unreasonable to expect the Defendants to pay the cost of maintaining the vessel in the same condition it had been since the date of the incident. The sums spent far exceeds both the value of a comparable vessel and the cost to repair it.

k. As regards the cost of security, maintenance, light and docking fees the evidence is that these expenses had been incurred even prior to the incident and were a necessary part of ownership of a vessel and would have been paid in any event.

[38] Mr. Gordon relied on various authorities. On the duty to mitigate he submitted that whereas a claimant is not obliged to take such steps if he fails to do so the defendant should not be asked to pay for loss he could, by that means, have reasonably avoided. Counsel cited **Charlesworth & Percy on Negligence 13th ed. 386** and **Davis v Burke SCCA No. 85 of 2001 (unreported judgment dated 8th October 2003) at page 9 per Smith JA:**

> *"(iii) Where a plaintiff had his damaged chattel repaired at a cost exceeding its market value instead of trying to purchase a comparable chattel at the market price, he cannot recover the cost of such repair. This because it is his duty to mitigate his loss- Derbyshire v Warren [1963] 3 All ER 310."*

[39] On the question of the appropriate measure, when the chattel is assessed to be a total loss, Mr. Gordon referenced **McGregor on Damages 16th ed. p 896**. In this event the appropriate measure is the market value of the goods destroyed at the time and place of destruction. The value of any salvage is to be deducted. The Court of Appeal of Jamaica endorsed this principle in **Davis v Burke** (cited above).

[40] As regards loss of use, **Andrew Burrows "Remedies for Torts, Breach of Contract and Equitable Wrong" 4th Ed at 217** was cited in support of the proposition that no such award is appropriate for a non-profit earning chattel***. Voaden v Champion (The Baltic Surveyor) [2002] CLC 666*** was relied on in relation to a yacht which was totalled, see per Rix LJ at page 706 E:

> *"99. In my judgment there is nothing in The Liesbosch [(1933) AC 449] or in any of the earlier Admiralty cases cited*

by Miss Bucknell (but only in her skeleton) to justify in this case an award of more than £145,000 plus interest from the date of loss. As Lord Wright said in The Liesbosch at page 464:

'The true rule seems to be that the measure of damages in such cases is the value of the ship to her owner as a going concern at the time and place of her loss'

100. It is true that was said in the context of a commercial vessel, but then Baltic Surveyor was presented in Ms Voaden's claim primarily as a charter-earning vessel even though she may have been chartered out for only a comparatively very small part of the year. Even if she is presented primarily or even exclusively as a pleasure yacht, a chattel purely for personal use and enjoyment, that is precisely the use for which an owner pays for her. ***The finding of her market value as such a yacht then brings with it as much (or as little) personal use as an owner wishes. Miss Bucknall accepted that the loss caused by the destruction of such a yacht (or any other chattel whose virtue lies in its attractiveness or private use) does not depend on how much or how little use her owner puts her to. A Hepplewhite chair, much as it might delight its owner by its uniqueness, irreplaceability or beauty and however much difficulty the assessment of its value in the case of loss may cause, once that value had been found, is not to be made the subject of a further head of damage for loss of use depending on whether it is more or less used or more or less loved."[emphasis added]***

Mr. Gordon relied upon **Andrew Burrows "Remedies for Torts, Breach of Contract and Equitable Wrongs p.216-217** for his submission that damages for non-pecuniary losses ought not to be awarded to a corporation unless it has non-profit earning objectives.

CLAIMANT'S SUBMISSION ON DAMAGES

[41] In written submissions, filed on the 24th March 2023 Mr. Dabdoub, for the Claimant, agreed that where there is a total loss the appropriate measure is the market value of the goods at the time and place of destruction, see paragraph 126 of Claimant's written submissions. Interest on the market value is also to be awarded, see **McGregor on Damages 15th ed 797** which cited **The King Magnus [1891] p.223.** He relied on the final report of Ship-owners P & I Services Ltd. dated 5th June 2017 (exhibit 26(b)) which assessed the vessel's "*fair market replacement value*" at US$110,000. He referenced also the opinion of Morgan Marine and P & I Services (exhibit 14 (a) and 3 (a) page 16) that the price of a 39-foot Defender Cruiser of similar engine, design and, age is approximately US$110,000 - US$120,000. As regards the expense of preserving the vessel it was submitted that the Claimant "*had no choice but to*" maintain it in that condition until trial so as to preserve the evidence of damage. The expense was therefore legitimate and should be awarded. No authority was cited in support of this latter submission.

APPLICABLE LEGAL PRINCIPLES

[42] There is not much difference between the parties on the law insofar as the assessment of damages is concerned. I agree that damages in tort seek to place the Claimant in the same position it would have been in had the tort not occurred insofar as money can do so, per Rix JA at page 702H in the **Voaden** case (cited at paragraph 40 above). Where the damage involves chattels, which have been lost or destroyed, the measure is the market value of the chattel. That is the price one would have to pay in the market in order to purchase an item similar in type, age and condition. If the cost to repair a damaged chattel is less than its market value it will be unreasonable, and hence constitute a failure to mitigate, for the Claimant to purchase another chattel. The court will in that event award its reasonable cost of repair rather than the market value. The Claimant is not to end up better off than he otherwise would have been. That would be the position if he received market value whilst keeping a chattel which could be repaired for an amount less than its market value. The market value of a chattel is only awarded where the cost of repair exceeds the market value or where it cannot

be repaired. In doing so the value if any of the damaged chattel is to be deducted from the award. The Claimant is also entitled to any loss suffered in consequence of not having the use of its chattel. Such loss often entails, either the cost of hire for a replacement chattel or, the cost of any alternate methods of transport utilised and/or, any loss occasioned by its absence. The period for which hire or alternate expense is awarded must be reasonable and is usually the time period for the chattel's repair or, if it is adjudged a total loss, the time it would take to go into the market place and purchase its replacement. All these elements are usually the subject of expert opinion. In the absence of precise evidence, the court can only do the best it can on the evidence presented. The above principles are well settled and ably supported by the authorities cited in the arguments referenced above.

[43] In the law of torts, the Claimant has an overarching duty to mitigate its losses. The consequence of this duty is that a Defendant will not be ordered to pay compensation for losses incurred which the Claimant, either could have avoided by taking reasonable steps or, caused by taking unreasonable action. The Defendant is therefore not liable for all loss caused by its act of negligence. The Defendant is liable only for such loss as was reasonably foreseeable. Denial of compensation for loss, caused by a breach of the Claimant's duty to mitigate, may be regarded as flowing from the fact that the loss was for that reason not reasonably foreseeable. The Defendants are entitled to expect that the Claimant will act reasonably and hence, a failure to do so by reason of not taking reasonable steps in mitigation, will result in unforeseeable loss, see discussion generally in **Davis v Burke** (cited at paragraph 38 above). Causation of damage, and the Claimant's duty to mitigate such damage, are matters on which the principles are clear but their application to the circumstances of any particular case can prove challenging.

[44] Finally, on the legal principles applicable, I accept the Defendants counsel's submission that as the Claimant is a company there should be no award for the loss of use of its non-profit earning chattel. The company, not being human, can get no pleasure from the use of the vessel any more than it could from observing a painting on the wall of its office. If the painting is destroyed the company loses

the value of the painting. Its aesthetic appeal will be to the company's directors, shareholders, employees and perhaps its clients, however, as they are separate legal entities that aesthetic loss is not, in the absence of exceptional circumstances, a loss to the company. An exception was made where the company was carrying out public works (see **The Greta Holme [1897] AC 596**). There may also I suppose be scope for an award for loss of use if evidence is lead that the chattel adds value to productivity in consequence of some aesthetic quality. That, is likely to be a difficult case to prove and, is not the case here. At least one author doubts whether there should ever be an award to a corporate body for loss of use of a non-profit earning chattel, see **Burroughs** at page 217 (cited at paragraph 40 above).

ANALYSIS AND ASSESSMENT

[45] In the case at bar the chattel is a pleasure craft owned by a privately owned company of limited liability. There is neither evidence, that the vessel was used in connection with the business of the company nor, that it was ever chartered out for hire or reward. There is in short, no evidence to support a claim for loss of use of this non-profit earning chattel owned by the Claimant company**.**

[46] Commander Hay, the Defendants' expert, at page 34 of his report (exhibit 19) estimates the market value of the vessel, as at the day before the incident, at US $25,000. He estimated the cost to transport the purchased vessel to Jamaica at US$12,700.00 (exhibit 19 page 34). The cost to repair is estimated at US $20,268.00, page 28 exhibit 19. Captain Morgan, the expert called by the Claimant, issued three reports with figures which were contradictory, see exhibit 5, pages 9, 15 and 34. In cross-examination he said $110-$120,000 is the latest value, see exhibit 17 report dated 17th June 2017, and he stood by that. When asked to clarify the different figures he seemed confused:

> *"Q: Advise whether there was an additional survey by you*
> *A: No, trying to as the information is new. There was a typo here. 75 to 80,000 would be without import tax. The 120,000 is cost of vessel with import tax*

included. The other are not correct. Something is wrong here.

Q: 70 to 80,000 valuation says international market price and import taxes.

A: see that

Q: p. 34 says same thing not import tax explain

A: all these typo errors. Gave 2 figures was 75 – 80,000 but was not with import tax.

Q: you say you never take into account import tax

A: all these typo errors. Gave 2 figures was 75-80,000 but was not with import tax.

Q: you say you never take into account import tax.

A: yes

Q: but 110 – 120,000- takes import tax into account

A: Yes

Q: even though report says not taking into account import tax

A: correct

Q: did you issue any document explaining this

A: just within last couple days I realise these differences

Q: these are your reports

A: Yes, never seen this report but did not realise there was a typo

Q: typo is where

A: in both. The 120,000 should say price inclusive of import tax. Not sure why we have 75 and 72.

Q: you issued both reports as proof of our survey and valuation

A: only report I am familiar with is for 120,000 when I check my computer I know 120,000. Don't know how the others left our offices."

[47] Commander Hay was more detailed, than was Captain Morgan, in his examination and report on the condition of the vessel. I accept, as he said, that

the vessel was not in particularly good condition. After 30 years why would it be. Furthermore, it appears not to be used for anything other than the personal enjoyment of the Managing Director of the Claimant and his family. So there would be no need to be keep it spotless or in 'A' one condition. The engine and essentials were in good working order and Commander Hay does not suggest otherwise. I have already rejected his suggestion that the rudder and propellers were damaged otherwise than in this incident. It is important to note that, when assessing the cost of repair, these items were included by Commander Hay, see the schedule in his report at pages 27-28 of exhibit 19.

[48] On the matter of the claim for the cost of preserving the vessel, in the identical state it was at from the date of the incident to the trial of the action, I find the Claimant's conduct unreasonable. There was no need of the vessel as an exhibit at this trial. There was no application made for the court to examine the vessel and if one were made it is most unlikely to have been granted. A judge looking at the vessel is in no better, and in many ways is in a worse, position to draw any conclusion. It is the expert analysis and observations that are germane. To the extent observations may assist photographs suffice adequately. It was the duty of the Claimant to, as soon as reasonably possible after the experts had completed their reports, take steps to repair and/or replace the chattel and so mitigate its losses. The question of loss of use, and its mitigation, does not arise for reasons I have already explained. The Defendants ought not to be burdened with costs and expense unreasonably incurred by the Claimant. A Claimant who is in doubt, as to whether the damaged chattel will be needed at trial, may seek agreement from the other parties or apply for directions from the court. The Claimant did neither. I will therefore only consider as a reasonable period the time between the date of the incident and the date of examination by the Defendants' expert. However, I make no award given the uncontradicted evidence, elicited in cross-examination of the Claimant's witness, that the costs related to the vessel's maintenance would have been incurred in any event as they are necessary incidents to ownership of such a craft, see cross-examination of Mr. Louis Williams (on the morning of 2nd February 2022).

[49] Commander Hay's report states that when considering the cost to repair he assumed the damage which "*could have occurred"* at the time of the incident. He did so without prejudice to his prior expressed opinion about the incident, see pages 25 and 26 of exhibit 19. The expert made a detailed analysis of the various estimates for repair and I accept his analysis as to those items which required repair and those which did not. However, for reasons explained below, I find that he failed to take into account the structural damage detailed by the other two experts. Commander Hay omits the cost of repairing struts and in footnotes explains that the dive surveyor report shows they were undamaged. Importantly he allowed the amounts of US$3,400.00 and US$5,146.00 for rudders and propellers respectively. No other expert gave an estimate of repair as they were of the opinion that the structural damage rendered the vessel a total loss.

[50] As regards the market value of the vessel Commander Hay's estimation was markedly different from the others. He describes the vessel as being in "*poor condition prior to the incident"* due to improper repairs, incomplete repairs, lack of maintenance, neglect, unrepaired damage and age related deterioration, see page 32 exhibit 19 and photographs in support at pages 57 et seq. Commander Hay valued the post incident wreck of the vessel as at 3rd May 2019 at US $5000 to US $10,000. He valued the pre-incident vessel as at the 18th February 2017 at US $25,000.00. The report states "*the difference in value of the M/Y between the February 18, 2017 and May 3, 2019 can be attributed to lack of maintenance, neglect, and age related deterioration.*" That statement contradicts his earlier statement that the damage assessment took into account damage which allegedly occurred due to the incident, see page 26 exhibit 19. One would have thought that a major reason for the difference in valuation between the 18th February 2017 and the 3rd May 2019 was the damage which occurred on the 19th February 2017. It seems that whereas for the purpose of assessing the cost of repair Commander Hay assessed all damage (except structural) alleged to be due to the incident he, for the purpose of doing the valuation as at 3rd May 2019, reverted to his position that the damage seen did not result from the incident. Unfortunately, he was not asked about this specifically, but it seems to be the only reasonable conclusion and I so find.

[51] Morgan Marine and P& I Services, in its report dated 26th June 2017, estimated the value of the Claimants vessel at US$70 to US$82,000.00, see page 15 Exhibit 5. In a second report of the same date, they described the vessel as well maintained and determined its value to be US $110,000 to US $120,000, see page 34 exhibit 5. Captain Morgan's inadequate explanation for the inconsistency is dealt with at paragraph 46 above. Morgan Marine also recommended that the vessel, having been damaged in the incident, be treated as a "*total loss*." An underwater survey was recommended or that the vessel be dry docked to allow for inspection of the underwater area of the hull such as propellers, shafts, rudders etc., see page 6 exhibit 1 (Agreed Bundle of Documents). The report concludes, unlike Commander Hay, that the vessel's structural strength had been compromised, see page 14 of exhibit 1 (Agreed Bundle of Documents) and exhibit 17.

[52] Mr. Errol Williams, the Managing Director of Ship-Owners P& I Services Limited, in a witness statement filed on the 3rd May 2021 stated that he was unable to complete his report because he was not able to examine the underwater areas of the vessel, see exhibit 26(b) and paragraph 5 witness statement of Errol Williams, filed 3rd May 2021. He critiqued the fact that Morgan Marine had, without explanation, significantly revised their valuation of the vessel, paragraphs 8,9 and 10 of his aforesaid witness statement. Mr. Errol Williams' report exhibit 26(b) states:

> *"The forward bulkhead in the machinery compartment appeared (sic) was deformed and appeared to have buckled. What appeared to be a 3-member crack was seen at the lower end on the aft deck house cabin bulkhead. There was an appreciable gap between the swim platform and the transom. The teak strips affixed to the gunnel is weathered with longitudinal cracks throughout. It was not possible to confirm if there were cracks in the gunnel beneath the teak covering. Survey was conducted in the presence of the attending surveyor"*
>
> And later,

"This vessel appears to be a standard version sports fishing vessel and is in fair condition for its age. The surveyor interest is to determine the vessels condition to determine the estimated market value. The circumstances at the time of the survey did not allow for the performance of sea trials. After consideration of the condition of the vessel at the time of the survey it is the surveyor's opinion that the "fair market/replacement value of subject vessel and her related equipment is US $110,000.00".

[53] Pursuant to an order of this court both experts Morgan and Hay consulted with each other on the 28th April and 3rd May 2021. Each expert gave a report on that consultation, see exhibits 15 and 16. They were unable to agree and it appears that the main area of disagreement related to the structural integrity of the vessel. Whereas both experts agreed that the main structural frame was compromised, they did not agree that this was caused by the incident. Mr. Morgan stated, see report 14th June 2021 exhibit 16:

"*The damages, (sic) observed of the structure of the vessel and the review of reports of the incident, were clearly caused by the repetitive grounding due to the mechanically generated waves by the Dredger vessel known as the Pedro Alvares Cabral. The damage observed including the damage to the underwater hull in my opinion is consistent with a vessel which has been exposed to repetitive grounding of the bow waves created by the Pedro Alvares."*

[54] In the case of Commander Hay, the revelation, in the course of cross examination, that he had consultations with Mr Errol Williams prior to arriving at his valuation was disturbing particularly because it was undisclosed:

"Q: Do you agree these photos show clearly the condition of the vessel both interior and exterior.

A: No my photos I took I show

Q: two years later

A: yes

Q: those photos were in 2017. It speaks to photos. Taken during initial inspection in 2018.

A: correct

Q: sent by E. Williams

A: Correct

Q: E. Williams was part of inspection in 2017.

A: correct

Q: These photos sent to you by same person who sent you his final report, Mr. Williams

A: yes, sir

Q: Did Mr. Williams in that report say what value of vessel was.

A I don't recall

Q: let me suggest that Mr. Errol Williams assessed the value in 2017 for US $110,000.

Obj: is there evidence to support

J: Can't put suggestion unless you have evidence

Q: was there a valuation by E. Williams of US $110,000 in 2017.

A: trying to look and see what I have here, I don't recall

Q: did you say earlier you initially valued it, on condition in 2017 for $90,000

A: yes an assumption it was in good condition without seeing the boat

Q: it was after you looked at these photos

A: no sir, on my research

Q: changed view after you came to Jamaica

A: yes

Q: the condition was one over 2 years later

A: yes that's true."

[55] Commander Hay later confirmed that Mr. Errol Williams did give a valuation of $110,000 (see exhibit 26 (a)). Commander Hay changed his initial assessment from $90,000 to US $110,000. The evidence overall is such that one has to be

concerned about the extent to which Commander Hay's opinion on value was influenced by the opinion of others. There is, of course, nothing wrong with experts consulting and with one expert accepting or acting on information presented to him by another. The rules however require that this be stated in his report. Commander Hay, like Captain Morgan, has not explained adequately the reasons for his change of opinion on the value of the vessel. Nor indeed has he stated whether he agreed the vessel was uneconomic to repair i.e., a total loss. It is also unclear, or more accurately ambiguous, as to whether his opinion on value and cost of repair, discounted any items he assessed as not being caused by the incident. One such major item is the damaged bulkhead regarded as structural. It is the damage to bulkhead which prompted Capt. Morgan, in his opinion, to conclude that the vessel ought to be treated as a total loss. When asked by the cross-examiner Commander Hay's response was rather opaque:

"Q: Commander whether or not you consider the M/V Chaperone to be a "write off"

A: Generally, that is insurance term 70% or 75% underwriters have different percentages. To try to answer your question the vessel hull has its integrity. Problem it has sustained a number of repairs in general prior to incident.,

Vessel has its own issues strictly because of incomplete prior repairs. Today 2022 it is my guess it has continued to deteriorate. It is probably a write off right now. As for back then, I would think that you will want to ask me how does it validate pre-existing damage, reference the video.

J: at time you did your survey,

A: it is in my report that value of report was not high so overall it had low market value, see page 27 to 28 to try to assess what contributed to low value. My estimated cost to repair.

Q: p. 37, you say not well maintained etc. Mr. Williams in his report said that (2017) "fair condition" for its age. Do you agree

A: I did not see inside of cabin in 2017, could have been in better condition than in 2019, when I saw it but you can't see into cabin in video and in those shots looks better than when I saw in 2019. I agree with Mr. Williams about cracks. I could see in video but disagree about overall condition of vessel."

[56] Mr. Nigel Black of Port Royal Slip Way Limited gave evidence that his company provided dry dock services for the Claimant's vessel. They had routinely serviced it every 18 months and last did so on the 24th June 2015. He said the vessel had not, prior to February 2017, suffered any accident or incurred any damage and has always been maintained by its owner. This position is supported by the evidence of Mr. Roger Williams, see his witness statement filed 10th June 2021. He is employed to the Claimant company and had responsibility for the maintenance of the vessel. He gave details of the expenses related to preserving the vessel since the date of the incident. Mr. Louis Williams when cross-examined agreed that similar expenses would have been incurred even had the vessel been seaworthy, see paragraph 48 above.

CONCLUSION AND AWARD

[57] In the result, whereas I found Commander Hay's report useful because of his detailed observations on the condition of the vessel as he saw it in 2019, I found his assessments both as to its value and cost of repair untrustworthy. I preferred the evidence of the other expert witnesses. I accept that when regard is had to the condition of the vessel, in consequence of the damage caused by the incident, it would have been uneconomic to effect repairs. I accept the evidence that its pre-accident market value is US $110,000. The cost to transport the purchased vessel to Jamaica was not pleaded but, as Commander Hay's report implies, any replacement would have to be purchased in the United States. Therefore, the cost to transport it to Jamaica is a necessary part of the cost of

replacement. This he estimated at US$12,700. I find that the vessel had been in fair condition and seaworthy, although poorly maintained, prior to the incident. Thereafter the damage to rudder, propeller, bulkhead and the structural issues rendered it unsafe and unseaworthy. Given its age and pre-accident value repairing it will be uneconomic and unreasonable. Commander Hay was the only expert to assess the value of the wreck, see paragraph 50 above. I accept and adopt the median point of his range being US$7,500. As indicated earlier I found the expense incurred to maintain the vessel in that condition until trial unreasonable. I accept also that most if not all these expenses would have been incurred had the vessel not been damaged as they are incidental to normal vessel upkeep and protection. There is no evidential basis to award exemplary or aggravated damages and indeed no written submissions were made in that regard.

[58] There will therefore be judgment for the Claimant against the Defendants jointly and severally in the amount of US$190,200 being: the value of the vessel (US$110,000) plus, the cost of expert opinion (US $75,000), the cost to ship the replacement vessel to Jamaica (US$12,700.00) and, minus the value of the wreck (US$7,500). Interest is awarded at 3% from the 19th February, 2017 until judgment. The parties have asked to be heard on the question of costs and I will hear submissions now.

David Batts
Puisne Judge.

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