REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2015-02237

BETWEEN

STEPHEN TEELUCKSINGH

Claimant

AND

NATIONAL ENERGY CORPORATION OF TRINIDAD AND TOBAGO

First Defendant/Ancillary Claimant

GULF SHIPPING LIMITED

Second Defendant/First Ancillary Defendant

MARITIME & TRANSPORT SERVICES LIMITED

Second Ancillary Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. S. Roopnarine and Ms. S. Balgobin for the claimant

Mr. R. Nanga Instructed by Ms. L. Mendonca for the first defendant

Mr. S. De la Bastide instructed by Ms. N. D. Alfonso for the second defendant

No appearance on behalf of Maritime & Transport Services Limited

Judgment

Contents

The Claim

1. By Amended Claim Form filed on the 20th January, 2016, the thirty-eight year old claimant claims damages for personal injuries and consequential loss as a result of negligence of the first and second defendants. At the material time, the claimant was employed as a Boarding Agent with Inchcape Shipping Services Trinidad and Tobago Limited. On the 23rd April, 2013 ("the said date"), the claimant was a passenger on the NEC Pride (a tug boat), and was being transported to the MT Tradewind (a large cargo ship). The claimant alleges that the NEC Pride was being manned, operated and controlled by a crew employed and provided by the first and/or second defendants. It is the case of the claimant that on the said date, the agents and/or servants of the defendants negligently operated the NEC Pride causing same to collide with the MT Tradewind. The claimant claims that as a result of the collision, he has suffered damages, personal injury, loss and expenses. Although the claimant was given the opportunity to file closing submissions, he chose not to do so.

The defence of the first defendant

2. By Amended Defence filed on the 12th April, 2016, the first defendant admitted that on the said date the claimant was a passenger on the NEC Pride and that the NEC Pride collided with the MT Tradewind. The NEC Pride is owned by the first defendant. However, the first defendant claims that the collision occurred due to the negligence of the second defendant since the NEC Pride was being manned, operated and controlled by a crew employed and provided by the second defendant and Maritime & Transport Services Limited, a competent and qualified Independent Contractor.[1]

3. The first defendant therefore avers that at all material times its servants and/or agents were not manning, operating or controlling the NEC Pride. Accordingly, the first defendant claims that its servants and/or agents were not negligent. As such, the first defendant denies that it breached any duty owed to the claimant and therefore claims that it is not liable to

[1] See Agreement for Crewing and Manning services dated the 9th February, 2011 ("the agreement for crewing and manning services") between the first and second defendant.

the claimant for any injuries or loss he may have suffered (which the first defendant requires the claimant to prove).

The defence of the second defendant

4. By Amended Defence filed on the 12th October, 2016 the second defendant admits that on the said date the NEC pride collided with the MT Tradewide. However, the second defendant does not admit that the collision caused any personal injuries to the claimant and therefore requires the claimant to prove same.

5. The second defendant admitted that under the agreement for crewing and manning services, it and Maritime & Transport Services Limited agreed that they would employ and provide the appropriate crew members to serve on and operate certain vessels owned by the first defendant including the NEC Pride. The second defendant therefore admitted that the NEC Pride was manned, operated and controlled by a crew employed and provided by it. However, the second defendant denies that the collision was caused by negligence of the crew. According to the second defendant, the collision resulted from a defect in the throttle used to operate the port engine of the NEC Pride.

6. The second defendant avers that pursuant to the contract, it was not required or authorized to carry out maintenance or repair work on the NEC Pride other than emergency repairs and certain basic routine maintenance. Consequently, the second defendant claims that it was neither responsible for nor did it owe any duty of care in relation to the mechanical operation, condition or state of repair of the port throttle. It is therefore the case of the second defendant that the first defendant owed the duty of care in relation to the mechanical operation, condition or state of repair of the port throttle and that the collision was caused by the first defendant in breaching that duty of care.

Ancillary claims

7. There are two ancillary claims. By Ancillary Claim filed on the 30th October, 2015 the first defendant/ancillary claimant (NEC) claims a declaration to be fully indemnified by the first and second ancillary defendants (GULF and its insurer) against the claimant's claim, interest and costs of the action.

8. By Ancillary Claim filed on the 24th March, 2016 the second defendant/first ancillary defendant (GULF) claims a declaration to be indemnified by the first defendant/ancillary claimant (NEC) against such sums as may be awarded to the claimant against the first ancillary defendant (including the costs of the claimant's claim, the costs of the ancillary claimant's claim against the first ancillary defendant and the costs of the ancillary claim of the first ancillary defendant against the ancillary claimant).

9. For the purpose of convenience, despite the existence of the ancillary claims, the parties shall for the sake of simplicity be referred to in this judgment by their titles set out in the original claim. Further, the second ancillary defendant has never entered an appearance or taken any part in these proceedings, but in any event having regard to the decision of the claim against that party must be dismissed. Further, this trial was by agreement, a trial on the issue of liability only because of the complexity of the facts and issues in respect of liability.

Disposition

10. The court will dispose of this claim as follows;

    a. It is ordered on the claim;

        i. Judgment for the claimant against the Second Defendant for negligence.
        ii. The Second Defendant shall pay to the claimant the prescribed costs of the claim.

b. It is ordered on the ancillary claim of the National Energy Corporation of Trinidad and Tobago;

   i. The ancillary claim is dismissed.
   ii. The First Defendant/Ancillary Claimant shall pay to the Second Defendant/Ancillary Defendant the costs of its ancillary claim.

c. It is ordered on the ancillary claim of Gulf Shipping Limited;

   i. The First Defendant National Energy Corporation of Trinidad and Tobago is liable to and shall indemnify the Second Defendant Gulf Shipping Limited for all damages, costs and interest which the Second Defendant has been ordered to pay to the Claimant in respect of the finding of liability for negligence on the claim set out at the first paragraph of this order.
   ii. The First Defendant shall pay to the Second Defendant the prescribed costs of the ancillary claim of the Second Defendant.

d. Damages are to be assessed and costs quantified by a Master on a date to be fixed by the court office.

ISSUES

11. The principal material issue is that of which of the defendants is liable for breach of the duty of care. As such, the following issues have to be resolved;

   i. Whether the crew or any member of the crew operating the NEC Pride caused or contributed to the cause of the collision by their negligence;

ii. Whether the first defendant knew there was a defect in the throttle used to operate the port engine of the NEC Pride and failed to repair same and if so, whether the first defendant's failure to repair the defect caused or contributed to the cause of the collision by its negligence in failing to repair;

iii. If there was negligence on the part of the crew or any crew member in the operation of the NEC Pride, whether the first defendant is vicariously liable for such negligence;

iv. If there is a finding of negligence;

a) Whether the first defendant is entitled to be indemnified by the second defendant and the ancillary defendant; or

b) Whether the second defendant is entitled to be indemnified by the first defendant.

The case for the claimant

12. The claimant gave evidence for himself. As part of his duties as Boarding Agent, he is required to inform Customs and Immigration of foreign vessels docking into Trinidad to trade with this country. He also goes off-shore to check the captain's paperwork before accompanying the vessels to dock and trade. Additionally, he boards the vessels for inspection purposes.

13. On the 23rd April, 2013 ("the said date") at approximately 12:30 pm, the claimant was part of a team on board the NEC Pride who were being transported to the MT Tradewind ("Tradewind") which was anchored off-shore at Point Lisas. The claimant testified that it was overcast but that the sea was calm at shore. However, further out the sea was choppy. He remained standing on the aft deck (rear) and was holding onto the guard rail.

14. During cross-examination, the claimant testified that he travelled on the NEC Pride four times prior to the said date. However, he has travelled on other vessels on countless occasions.

15. After about twenty minutes, they approached the Tradewind. The claimant testified that the NEC Pride continued to approach the Tradewind without reducing its speed. He kept expecting the NEC Pride to throttle down but it did not. He began to panic but could not move because the NEC Pride was going so fast, he would have fallen had he moved. He continued to hold onto the guard rail in fear that he would have fallen into the sea.

16. The next thing he knew was that the Tradewind was in front of the NEC Pride. He testified that the collision happened very quickly and that it was very severe. He was unable to maintain his grip on the guard rail and so was thrown forward on impact. He landed by the crane system which was approximately fourteen feet away from where he was standing. He hit his back, head and right foot on the crane system.

17. According to the claimant, the NEC Pride remained anchored at the collision site for approximately twenty minutes, while the various crew members inspected their vessels. Thereafter, he was taken back to shore by the NEC Pride which was driven by the same captain at half throttle. He knew that because he was in the wheel house on their way back to shore. It took approximately half an hour to return to shore. The Tradewind stayed out at sea. On arriving on shore, the claimant left to seek treatment for his injuries.

The case for the first defendant

18. The first defendant called one witness, its former Port Captain, Solomon Theodore ("Theodore") who is now retired. Theodore has been in the maritime industry since November, 1976. In 1976 he was a Deckhand Assistant Engineer. After working as an Estate Constable for approximately two and a half years, he returned to the maritime industry as a deckhand in July, 1982. He became a Captain in 1985 and has held various positions within the industry since that time.

19. As the Port Captain, his duties include the following;

    i. Overseeing the operation of the Company's International Safety Management ("ISM") System to ensure compliance with the requirements of the ISM Code;

ii. Appraising the performance of staff under his supervision;
iii. Monitoring classification and statutory survey schedules and taking appropriate action to ensure timely and successful execution of surveys;
iv. Encouraging appropriate safety and pollution control culture;
v. Maintaining an effective and efficient system for all shipboard communication;
vi. Planning and organizing periodic visits to vessels to check structural integrity, safety and navigational equipment and reporting of same; and
vii. Developing employee developmental programs for Captains, Sailors and subordinate staff.

20. As Port Captain, he became very familiar with the operations of the first defendant. He testified that the first defendant owns a number of vessels including the NEC Pride. He further testified that in 2013, the first defendant hired the second defendant to provide a crew to operate the NEC Pride.[2] During cross-examination Theodore testified that he created developmental programs for employees including the crew that the second defendant provided to operate the first defendant's vessels. He further testified during cross-examination that he was involved in the training of the crew members to the extent that he developed training programs for them. Moreover, Theodore testified that he is aware that the Agreement for Crewing and Manning services between the first and second defendants was renewed in 2016.

21. According to Theodore, the NEC Pride is a 45 ton bollard pull Harbour Tug with gross tonnage of 141 tons.[3] He testified that as he captained tugs similar to the NEC Pride, he was familiar with the operations of the NEC Pride. The NEC Pride has a delay mechanism which operates to prevent excessive wear and tear to the engines. He further testified that once new crews are hired to operate the first defendant's vessels including the NEC Pride, they will receive training onboard the vessels at which time the details and operations of the vessels will be explained to the crews. During cross-examination, he testified that this training which new crews receive is done by the captains of the vessels.

[2] See Agreement for Crewing and Manning services dated the 9th February, 2011
[3] Classed by Lloyds Register, Conventional Screw with a L.O.A of 22.64m

22. Theodore testified that on the said date, the NEC Pride was being operated by Captain Grevelle Leighton (Leighton), Engineer Ricardo Law ("Law") and Deckhands Wilfred Lewis ("Lewis") and Nicholas Babb ("Babb"). Leighton was operating the NEC Pride for approximately one year prior to the collision. Theodore further testified that when Leighton was first placed to captain the NEC Pride, the operations of the same was explained to him and so he would have been familiar with its operations, including the delay mechanism.

23. According to Theodore, as a captain, Leighton would have been aware of the need to report any defects or problems with the operation of the NEC Pride. Further, as Captain, if he was not comfortable with the operations and condition of the vessel or there were defects, Leighton could have refused to operate the vessel until it was repaired. As such, Theodore testified that the captain of a vessel is ultimately responsible for the safety of the crew and the vessel.

24. Theodore testified that on the said date, the crew headed by Leighton took over operation of the NEC Pride at 8:30 am. That handover protocols were followed by the captains and engineers (incoming and outgoing). The handover protocols include a condition report of all the equipment and instrumentation onboard the vessel along with fuel remaining onboard checks. According to Theodore, if there was a defect in the throttle, it would have been noted on the handover and it was open to Leighton to refuse to operate the NEC Pride in that condition.[4] During cross-examination, Theodore testified that a condition report is filled out at every shift, so that there would be a condition report for the NEC Pride for every shift during April, 2013. Those reports are kept by the first defendant. He further testified during cross-examination that if there was a defect with the throttle of the NEC Pride, same would have been mentioned in the condition report and so one would have been able to identify whether there was a defect from looking at the condition reports. However, it is to be noted that those reports specifically the condition reports for the 23rd April, 2013 were not provided to the court.

[4] The throttles are key to the operation of the vessel and controls the speed of the vessel, very much like the accelerator in a motor vehicle.

25. According to Theodore, upon commencement of their shift on the said date, Leighton and his crew assisted two vessels with berthing at Plipdeco's Berth #3 and Ispat. Berthing involves the tug guiding the vessels into port. The throttle was therefore used to accomplish that task.

26. At approximately 12:15 pm, Leighton was required to carry out a launch service which involved taking the claimant to the Tradewind which was anchored at sea away from the port. Theodore testified that after the collision he was required to prepare a report and in so doing he interviewed the crew of the NEC Pride.[5] Based on the interviews he carried out with the crew who were all employees of the second defendant, he was able to understand what had occurred. During cross-examination, Theodore testified that the report exhibited at *"S.T.3"* of his witness statement was not produced by him. That someone wrote that report based on what he submitted to the first defendant after he conducted his interviews with the crew.

27. He testified that the claimant boarded the NEC Pride and Leighton and his crew proceeded towards the Tradewind. As Leighton reached approximately fifty metres off the Tradewind, he pulled back on the throttle from full-ahead to half-ahead as it was his intention to slow down the vessel, initiate a turn to port using the engines and move alongside the starboard side of the Tradewind.[6] According to Theodore, whilst carrying out that maneuver, the NEC Pride collided with the Tradewind. He testified that the impact was head-on in the region of the port quarter of the Tradewind[7] and the resultant angle between the fore and the aft lines of the Tradewide and the NEC Pride was approximately eighty degrees to each other.[8] At that time, the remainder of the crew was in the mess-room[9] and the claimant was on deck.

28. Theodore testified that Leighton indicated to him that the throttle became stuck and as a result the collision occurred. The NEC Pride has two throttles. During cross-examination,

[5] See report at "ST3" of Theodore's witness statement.
[6] Starboard is the right-hand side of the vessel.
[7] Port quarter of the Tradewind refers to the front left-side of the vessel
[8] Fore is the front of the vessel.
[9] The mess-room is a dining room onboard a vessel.

Theodore testified that Leighton did not mention which one of the throttles became stuck. He also testified during cross-examination that where the report exhibited at *"S.T.3"* stated "throttles", it was supposed to be "throttle". He further testified that after the collision, Law checked the throttle and found that it was in good working order. According to Theodore, immediately after the collision Leighton checked on the status of the claimant and the crew and also made an assessment of the damage to the NEC Pride and the Tradewind. After he satisfied himself of the structural integrity of the NEC Pride, Leighton communicated the incident to the first defendant's Marine Coordinator. Law also proceeded to make checks of the NEC Pride in accordance with the vessel's safety management system.

29. After the checks were carried out, Leighton maneuvered alongside the Tradewind in order to receive two crew members off of the Tradewind to take photographs of the damage that was done to the Tradewind. After the photographs were taken, Leighton was able to once again pull alongside the Tradewind for the two crews members to return to their vessel. Theodore testified that Leighton indicated to him that he had no problems performing those two maneuvers.

30. Thereafter Leighton returned to port and was able to dock without any issues. After docking, all personnel onboard the NEC Pride were taken to a health facility.

31. Theodore testified that based on his experience as a captain and based on Leighton's account, it was highly unlikely that the throttle became stuck. He further testified that there were no previous reports that the throttle was sticking and that had the throttle been sticking it would have been difficult for Leighton to accomplish those tasks that were done by him with the NEC Pride prior to and after the collision.

32. According to Theodore, the NEC Pride has a delay mechanism which came installed by the manufacturer. There is a three second delay in the system when going from ahead to astern in order to prevent under shock load and to safeguard the equipment. He testified that a three second delay is a standard delay mechanism and that it is neither a defect nor an excessive delay. He further testified that there was no defect in the delay mechanism.

That after the collision when the NEC Pride returned to port, he checked the throttle and found it to be in good working order and there was no need to effect repairs on the throttle. During cross-examination, Theodore testified that it is possible for there to be a defect in the delay mechanism which would cause the delay to be longer than three seconds. He also testified that if such a defect does occur, it is unlikely for it to occur intermittently. The delay would therefore occur on a consistent basis. He further testified during cross examination that sometime after the collision there was a report that the delay was longer than three seconds.

33. Theodore testified that Leighton indicated to him that when he was approximately fifty metres from the Tradewind, he proceeded to decrease his speed to 10 to 13 rpm. According to Theodore, the NEC Pride proceeding at full-ahead making way at eleven knots would traverse fifty metres in approximately eight seconds. He therefore testified that if Leighton did in fact reduce ahead rpm on the throttles fifty metres away from the vessel, there would not have been sufficient time and sea room between the two vessels for the NEC Pride to slow significantly and stop. As such, he testified that the speed at which Leighton was travelling, approximately fifty metres away from the Tradewide did not constitute a safe speed when factoring in the prevailing conditions and proximity to the vessel. According to Theodore, Leighton's training should have taught him how to properly maneuver the vessel, what was a safe speed to operate at and to follow the training given. Moreover, he testified that had Leighton maintained a safe speed, he would have been able to execute the maneuver that he intended to do without the collision taking place.

34. During cross-examination, Theodore testified that his approval was required when a new captain was being appointed to one of the first defendant's vessel. That he would look at the individual's curricular vitae and experience and further observe the person carry out a practical assessment of his skills which included carrying out certain maneuvers with the vessel before approving the appointments of the captains to vessels.

35. During cross examination, Theodore was referred to the daily log extracts annexed at "P" to Captain Brian Anthony Brown's witness statement. These extracts all related to the NEC Pride. On log number 7898 dated the 4th April, 2012 Captain Jerold Dyerm recorded that

there was *a "delay on the port gearbox".* During cross-examination, Theodore testified that a delay on port gearbox meant the time between when the throttle was physically engaged to the time it took to get a response. Theodore could not recall if any action was taken by the first defendant in relation to this comment made in the log book.

36. On log number 7900 dated the 6th April, 2013 Captain Gerald La Touche ("La Touche"), recorded that there was a *"backlash in port gear box".* Theodore testified that the phrase backlash in port gear box meant that the Captain heard a noise. That the noise indicated that there was wear to the components of the transmission or there was a timing defect. He further testified that an excessive delay in the built in delay mechanism, would not cause a backlash. Theodore also could not state whether the first defendant took any action in relation to this comment made by Captain La Touche. He was thereafter referred to the log numbers 7903, 7909, 7912 dated the 10th April, 2013, the 15th April, 2013 and the 18th April, 2013 respectively. He testified that he could not say if the first defendant took any action with respect to those comments in those logs. He accepted that all of the logs would have been submitted to the first defendant.

Case for the second defendant

37. The second defendant called three witness, Captain Brian Anthony Brown ("Captain Brown"), Grevelle Leighton ("Leighton") and Sonja Voisin ("Voisin").

38. **Voisin** is the Managing Director of the second defendant and has held that position since 2015. In 2013, she was the General Manager of the second defendant. As General Manager, her duties included managing the day to day operations of the second defendant, seeking new areas of business, generating new partnerships between the second defendant and other commercial entities and fostering good relations with the second defendant's existing clientele.

39. Voisin testified that since 2011 the main business of the second defendant included acting as an agent for ship owners and freight forwarders and acting as a protecting and indemnity correspondent for international maritime insurance entities.

40. On the 11th January, 2010, the proposal was accepted and by written agreement dated the 9th February, 2011 ("the crewing agreement") the second defendant and Maritime & Transport Services Limited ("MTSL") agreed to provide the first defendant with certain crewing services including the provision of suitable, qualified crews to serve on and operate its vessels.

41. Caribbean Crewing and Manning Services Limited ("CCMSL") and the second defendant entered into a written contract dated the 1st February, 2011 ("the agency contract") under which CCMSL agreed to act as an agent for the second defendant in providing the crewing services in accordance with the terms of the crewing agreement. Voisin incorporated CCMSL for the purpose of acting as an agent for the second defendant and to enter into the agency contract. She has been the Managing Director of CCMSL since its incorporation.

42. According to Voisin, prior to 2010 the first defendant operated tug boats, work boats and launches ("the NEC fleet") out of the ports in Port of Spain and Point Lisas. She testified that during the ten month period prior to the second defendant entering into the crewing agreement, the first defendant directly employed approximately one hundred persons to operate ("the crew") the NEC fleet. Prior to that, for approximately ten years Coloured Fin Management Limited employed and provided the crew for the NEC fleet and before that the crew for the NEC fleet were employed and provided by PHILPDECO.

43. Voisin testified that it was understood that the first defendant would terminate its contracts of employment with the persons it employed as crew upon executing the crewing agreement and that the second defendant would step into the first defendant's shoe as employer by offering those persons contracts of employment to work as crew on the NEC fleet. Pursuant to that understanding, CCMSL offered contracts of employment to all of the crew members previously employed by the first defendant. By letter dated the 26th

January, 2011 the first defendant informed their former employees of the arrangements under which the second defendant would be offering them probationary employment.

44. According to Voisin, at the time the second defendant entered into the crewing agreement, all of the captains previously employed by the first defendant held a captain's license issued under the provisions of the Motor Launches Act Chapter 50:08 ("the Act") and all of the engineers employed held an engineer's license also issued under the Act. Voisin testified that shortly after the execution of the crewing agreement, the first defendant asked the second defendant to arrange the following;

    i. For each of the captains to participate in and complete the Boat Master II training course conducted by an institution approved by the Maritime Services Division ("MSD") and to obtain a Boat Master II or Boat Master I license; and
    ii. For each of the engineers to participate in and complete the Boat Engineer I/II training conducted by such as institution and to obtain a Boat Engineer I/II license from the MSD.

45. The second defendant acting through its agent CCMSL required all of the engineers to undergo training to pass the Boat Engineer I/II examination conducted by Costal & Offshore Maritime Institute ("COMTI").[10] CCMSL acting as agent for the second defendant arranged for the engineers to be trained for this examination by its former Marine Superintendent, Roger Xavier ("Xavier") and by Carl Scott, a Class I Marine Engineer who at that time had over fifteen years' experience acting as a Chief Engineer on tug vessels in Jamaica.

46. In November, 2011 twenty-six engineers sat COMTI's Boat Engineer I/II internal examination. Eighteen of those engineers, including Law were successful in that examination. The engineers who were unsuccessful in that examination subsequently re-sat the exam and were successful.

[10] COMTI is an institution approved by the MSD to conduct maritime training and assessment of seamen.

47. The second defendant also required all of the captains employed on the vessel in the NEC fleet to complete the Boat Master II training course conducted by COMTI from the 27th March to the 3rd May, 2012. CCMSL on behalf of the second defendant arranged and paid for this course. Twenty-one captains including Leighton participated in this course and were successful in completing the course and passing the examination.

48. According to Voisin, in May, 2011 Xavier left CCMSL and around the 1st June, 2012 CCMSL employed Captain Brown as its Marine Superintendent. She testified that during the period of the 15th October to the 18th November, 2012 Captain Brown carried out further training with the captains who had not successfully completed COMTI's Boat Master II Those captains successfully completed the course in November, 2012. She further testified that since his appointment as Marine Superintendent, Captain Brown had been responsible for all in house training and supervision of the captains, the engineers and the crew of the NEC fleet. However, the second defendant acting through CCMSL has also arranged for third parties such as COMTI, Marine Safety (Training & Consultants) Ltd. and Glenroy Scott to conduct further training with the crews employed on the NEC fleet.

49. On the said date, Voisin received a report that there had been a collision between the NEC Pride and the Tradewind. According to Voisin, the four man crew operating the NEC Pride at the time of the collision were all directly employed by the first defendant in their respective capacities prior to and up to the date the first defendant entered into the crewing agreement with the second defendant. After the second defendant entered into the crewing agreement, its agent CCMSL became their employers and continued to employ them as crew for the NEC fleet. Voisin testified that prior to the said date, the first defendant did not raise any issues with those persons being employed on the NEC Pride.

50. After the collision, Voisin was informed by the first defendant that it was conducting an investigation into the collision. During cross-examination, she testified that Captain Brown assisted the first defendant in its investigations into the collision. She further testified during cross-examination that Captain Brown would have investigated the collision independently of the first defendant. The first defendant instructed the second defendant to keep Leighton off duty pending the outcome of their investigation. In accordance with

that instruction, Captain Brown on behalf of CCMSL wrote to Leighton by letter dated the 15th May, 2013 informing him that he was off duty until the first defendant's investigation was completed.

51. According to Voisin, upon completing its investigation, the first defendant came to the conclusion that the collision had occurred as a result of Leighton's failure to comply with certain procedures and guidelines which was reflective of negligent behaviour in the execution of his duties. The first defendant informed the second defendant of its conclusion and instructed that the second defendant cease to employ Leighton as a captain on any of its vessels. A copy of the first defendant's report on the collision was supplied to Voisin. During cross-examination, Voisin testified that she did communicate to the first defendant that she thought that the report was not one hundred percent accurate. However, she did not provide any documentary evidence to the court of that communication.

52. In accordance with the first defendant's instruction, CCMSL terminated Leighton's employment as a captain and offered to employ him as a linesman. By letter dated the 27th June, 2013, CCMSL wrote to Leighton informing him of the investigation into the collision, the findings of the investigation and the fact that he was being demoted to lines man. The letter which was signed by Voisin stated as follows;

"On April 23rd 2013 you were on active duty on board the vessel NEC Pride and were functioning as Captain of this vessel when it came into contact with the M/T Trade Wind Union… This resulted in severe damage to the MT Trade Wind Union and injuries to the crew and passenger on board your vessel.

Subsequent to this, an investigation was held (29th April, 2013) and the findings were that the accident occurred solely due to gross negligence on your behalf…

The Company has given consideration to your request to be allowed to return to work in position of Deck hand or Lines Man. You will be required to commence working in this position effective 1st July 2013…"

53. During cross-examination, Voisin testified that the investigation stated in the above letter would have been Captain's Brown investigation into the collision. She further testified that

Captain Brown would have found that the collision occurred solely due to the gross negligence of Leighton. Voisin accepted that this letter made no mention about a problem with the throttles of the NEC Pride.

54. Moreover, during cross-examination Voisin accepted that the position taken in the above letter was different from the second defendant's defence. She testified that the letter was written from a *"human resources perspective"* and that subsequent documents caused her to change her view as to the cause of the collision. She further testified that the daily log extracts exhibited by Captain Brown in his witness statement at *"P"* were some of the documents she was referring to which caused her to change her view.

55. Voisin testified that after the collision, the first defendant did not raise any objection to Law, Babb or Lewis being employed on the NEC pride or on any other of its vessels. As such, CCMSL continued to employ those seamen on the vessels. Voisin further testified that prior to the commencement of these proceedings, the first defendant never suggested to the second defendant or CCMSL that the collision resulted from a failure on the second defendant's part to provide adequate training and/or adequate supervision of the NEC Pride crew or to Leighton in particular. Additionally, Voisin testified that after the collision the second defendant did not make any changes in the manner in which it supervised the efficiency of the crews employed on the vessels of the NEC fleet or the manner in which they were trained.

56. According to Voisin, clause 15 of the crewing agreement provides that the agreement was for a period of three years from the 9th February, 2011 to the 8th February, 2014 and that unless notice of termination is given two months prior to that date, the agreement shall continue until it is terminated by either party giving to the other notice in writing. She testified that in December, 2014 the first and second defendants agreed to extend the crewing agreement for a period of six months and continued to agree to six month extensions thereafter until 2016. In 2016, the first defendant invited tenders for a three year contract to provide it with the crewing services. The second defendant along with three other entities tendered for that contract and the second defendant was again selected by the

first defendant. Subsequently, the first and second defendant entered into a further contract for the provision of the crewing services.

57. **Captain Brown** is employed as a Marine Superintendent with CCMSL. He has been employed in that post since the 1st June, 2012. Some of his evidence was the same as Voisin's and so there was no need to repeat that evidence. He testified that since he joined CCMSL, its main and only business has been supplying, supervising, managing and training the crews for the NEC fleet. During cross-examination, he testified that CCMSL does not provided crewing services to any other client besides the first defendant.

58. Captain Brown's duties as Marine Superintendent include the following;

    i. managing and supervising the crews supplied by CCMSL to operate the NEC fleet;
    ii. training and development of the crews;
    iii. recruiting persons to serve as crew members for the NEC fleet;
    iv. handling disciplinary matters pertaining to the crews; and
    v. liaising with the first defendant's representatives on matters related to the crews.

59. According to Captain Brown, since June, 2012 the arrangement between the first and second defendants with regard to the maintenance and repair of the vessels of the NEC fleet has been that the second defendant through CCMSL is responsible for carrying out basic routine maintenance work and if necessary simple emergency repairs to the vessels and the first defendant is responsible for carrying out all other maintenance and repair work to the vessels. Captain Brown testified that on board each vessel, there is a daily log book for that vessel in which the captain records in triplicate during and/or at the end of each shift, information in relation to the operation of the vessel during that shift, including any problems, technical or otherwise, which the captain experienced in operating the vessel during that shift. The captain then submits one carbon copy of that daily log to the first defendant, one to CCMSL, and one remains in the daily log book.

60. Captain Brown testified that although CCMSL assigned a crew to each of the first defendant's vessels and provided, managed, trained and generally supervised those crews,

it did not instruct the crews as to the operations for which the vessels were to be used. All instructions regarding such matters were issued directly to the captain of each vessel by a Marine Coordinator employed with the first defendant or PLIPDECO.

61. Typically the first defendant used its fleet to assist in berthing and un-berthing vessels and in delivering items and persons to vessels anchored offshore. PLIPDECO with the first defendant's consent also used the NEC fleet for berthing and un-berthing. In the case of a delivery of passengers or items to a vessel, the first defendant's Marine Coordinator instructed the captain of the vessel as to the number and identity of the passengers or the number or type of items to be delivered, where and when those items or passengers were to be picked up and the vessel to which the items or persons were to be delivered. In the case of berthing and un-berthing vessels, the Marine Coordinator instructed the captain as to the vessel to be berthed or un-berthed and when and where the vessel was to be berthed or un-berthed.

62. In this way, the first defendant directly controlled the crews in the performance of their work. Captain Brown testified that the first defendant's control over the crew was however not exclusive as CCMSL controlled the crews in matters such as the manner in which they sailed the vessels, the maintenance work they performed on the vessels, the vessels which individual crew members worked on, the working hours of the crews, the training and management of the crews and the discipline of the crews. Any complaints which the first defendant had regarding the crews were made to Captain Brown. He would investigate the complaint and provided it was well founded, take the necessary action to address the complaint.

63. On joining CCMSL, Voisin instructed Captain Brown that CCMSL required him to improve the level and quality of service provided by the second defendant through CCMSL, particularly the quality of the services of the crews provided to the first defendant. Captain Brown was also required to assist CCMSL in improving relations between CCMSL and the first defendant, particularly between the crews and the first defendant.

64. When he joined CCMSL, the majority of the crews and almost all of the captains had served on the vessels of the NEC fleet for a number of years. He found that the captains were generally experienced and more than capable of maneuvering and handling the vessels to which they were assigned. However, he identified a number of areas in which the performance of the crews were less than satisfactory and so in seeking to improve the service provided by CCMSL to the first defendant, he focused on improving those areas of performance through close supervision and training. Those areas which required improving included the following;

    i. Punctuality of crew members;
    ii. Absenteeism of crew members;
    iii. Basic deck and engineering maintenance;
    iv. Use of Personal Protection Equipment ("PPE");
    v. Proper record keeping;
    vi. Observing handover protocols with respect to the vessels; and
    vii. Safe operation of vessels.

65. As part of Captain Brown's efforts to achieve and maintain improved performance in the areas set out above, as well as generally, he attended (and continue to attend) the daily changes in crews of the vessels operating out of the Point Lisas port, save and except those crew changes occurring on a Wednesday. Every Wednesday, he attends the Port of Spain port to be present for the weekly change in crews for the vessels operating out of that port.

66. He uses his attendance at those crew changes as an opportunity to do the following;

    i. monitor and enforce the punctuality of the incoming crew;
    ii. monitor any absenteeism on the part of the crew members and in the event of same take immediate action to ensure each vessel has a full crew;
    iii. ensure the necessary basic routine maintenance was being performed in relation to each vessel;
    iv. ensure that the relevant records and reports were being maintained;

v. ensure the safety standards and practices were being observed and implemented;

vi. ensure that the proper protocols regarding the handover of vessels by outgoing captains to incoming captains were observed;

vii. meet and discuss with the captains of the vessels about any complaints made by the first defendant about their performance, the standard of performance that were expected of them, the areas in which they were failing to meet those standards and any issues or problems which they were experiencing; and

viii. observe the general handling and operation of the vessels by captains as they entered and left the port.

67. During cross-examination, Captain Brown testified that during handover protocols the outgoing captain would inform the incoming captain of any problems with the vessel and that if there were any problems with the vessel same would be recorded in the daily log book.

68. He also used his attendance at the shift changes as an opportunity to conduct remedial training in those areas where the performance of the crews were not satisfactory. During cross-examination, Captain Brown testified that remedial training was an on-going training which would have been conducted every day. Further, it was his practice to travel onboard different vessels without giving prior notice to the captains in order to monitor the performance of the crew while conducting an operation and thereby ensure that the crew's performance and the captain's handling of the vessel and his crew was safe and efficient. During cross-examination, Captain Brown testified that when he undertook those surprise visits, his presence was recorded in the visitor's log book of the vessel.

69. He usually conducted such onboard reviews for the purpose of monitoring the performance of those captains or crew members of whom he had concerns or received complaints about and where necessary for the purpose of conducting remedial training in the operation of the vessel. He conducted those onboard reviews fairly regularly within the first twenty-four months of his employment with CCMSL but thereafter, as the performance of the

crews improved, the frequency with which he conducted such reviews decreased and the reviews became more selective than before.

70. From time to time it is still necessary for Captain Brown to issue warning to members of the crews who are not meeting the required standards and in some cases disciplinary action in the form of suspension or termination of employment is necessary. In addition to meeting with the captains, Captain Brown issues a number of memos each month to all the crews. The main purpose of those memos are to remind and urge the crews and in particular captains to comply with certain procedures, protocols and requirements in the performance of theirs duties. By those memos, Captain Brown raised the following matters with the crews;

    i. The need for improved punctuality;
    ii. The need for improved reporting/ logging including the completion of the official log and implementation of hand over protocols;
    iii. The need to conduct safety inspections of the vessels;
    iv. The need for better decision making and observance of instructions;
    v. The requirement that work order forms be completed to ensure the vessels are well maintained;
    vi. Training courses arranged by CCMSL for the crews and the requirement that the crews attend same;
    vii. The requirement for the crew members and all person onboard the vessel to wear personal flotation devices;
    viii. The requirement that passengers onboard the vessel be seated inside the wheelhouse; and
    ix. The requirement that vessels be operated at a safe speed.

71. In October, 2012 CCMSL launched a drive to increase the safety awareness of the crews and to highlight the importance of safety drills. In that regard CCMSL contracted the services of Marine Safety (Training & Consultants) Limited ("Marine Safety") to provide its standard onboard training program to the crews. The standard onboard training program was conducted from the 8th November, 2012 to the 21st December, 2012. During that period Marine Safety conducted training sessions with each of the crews. By letter dated the 18th

January, 2013, Marine Safety wrote to CCMSL enclosing an overall drill report stating the objectives of the training, the drills that were carried out on the vessels, the dates on which training secessions were held with each crew as well as a report on the defects and deficiencies on board the vessels of the NEC fleet. In this letter the defects listed for the NEC Pride were as follows;

i. The port side fire monitor to be repaired;
ii. Portable fire pump to be acquired;
iii. SART to be acquired; and
iv. Light on chart table to be repaired

72. Captain Brown prepares monthly or bi-monthly reports pertaining to CCMSL's provision of the crewing service. These reports contain a schedule showing for each of the previous six months the number of crew members hired by CCMSL, the resignations received by CCMSL, the number of crew members suspended, the disciplinary notices issued by CCMSL, the number of incidents reported, the number of memos distributed by CCMSL and the number of non-conformance notices issued by the first defendant.

73. The non-conformance notices issued by the first defendant notifies CCMSL of the alleged breaches of the first defendant's safety management system by the members of the crews. Incidents refer to a variety of matters ranging from accidents onboard or with another vessel, late departures or arrivals of the vessels, loss of personal belongings of the crew members, verbal or physical altercation between crew members, any mishaps during an operation including those for which neither the crew nor the vessel was responsible for in any way.

74. According to Captain Brown, in May, 2012 the month before he joined CCMSL, the number of non-conformance notices issued by the first defendant was eight. That number rose to twelve in June, 2012. However, in July, 2012 the number of such notices dropped to three and thereafter during the period of August, 2012 to July, 2013 fluctuated between four and two notices per month. Captain Brown testified that the significant drop in non-

conformance notices issued by the first defendant was due in large part to the program of close supervision and training.

75. On the said date, Captain Brown received a report that there had been a collision between the NEC Pride and the Tradewind. He testified that at the time he received the report he was conducting a training seminar for persons selected to serve for a new vessel which the first defendant was acquiring. During cross-examination, Captain Brown testified that CCMSL did do a report on the collision but that report was lost in a hard drive situation. He further testified during cross-examination that in CCMSL's report it was stated the cause of the collision was that the NEC Pride was not kept within the safe speed and that the vessel had an ongoing throttle issue.

76. Captain Brown testified that in conformity with CCMSL's standard procedure, the captain of the NEC Pride at the time of the collision, Leighton prepared and signed a written report of the circumstances surrounding the collision. Leighton's report was submitted to the first defendant. Law, the engineer of the NEC Pride at the time of the collision, also prepared written a report on the collision.

77. During cross-examination, Captain Brown testified that Law was a competent engineer. He further testified that he trusted Law's account of the collision. Captain Brown received and read Law's report on the collision. During cross-examination, Captain Brown testified that based on Law's report, there was no attempt to slow the NEC Pride down.

78. According to Captain Brown, at the time of the collision, Leighton had well over six years' experience as captain on the vessels in the NEC fleet and about one years' experience as captain on the NEC Pride. Captain Brown testified that prior to this collision, Leighton was not involved in any other collision or incident at sea while serving as captain of any vessel. Further, he testified that prior to this collision, he has never received any complaints from the first defendant with respect to Leighton's captaincy or handling of the vessels he served on. Moreover, prior to the collision, Captain Brown found out that Leighton discharged his duties as captain of the NEC Pride satisfactorily save and except that he was issued a

warning about his punctuality. Captain Brown had no concerns about Leighton's abilities or performance as captain.

79. Captain Brown testified that according to Leighton's report, the collision took place at around 1:00pm in the anchorage area outside of the Point Lisas port as the NEC Pride was approaching the Tradewind for the purpose of delivering a passenger to the Tradewind. Leighton further stated in his report that when the NEC Pride was fifty metres or less away from the MT Tradewide, he (Leighton) decreased the power of the NEC Pride's engine to between 1000 to 1300 rpm. The vessel would have been travelling at a speed greater than 8 to 9 knots before Leighton decreased its power to 1000 to 1300 rpm. The decreased power would produce a speed of 8-9 knots assuming there were no significant currents affecting the speed of the vessel.

80. Moreover, Captain Brown testified that Leighton stated in his report that there was a defect in the port engine in that he experienced a longer delay when he engaged the port throttle astern. According to Captain Brown, the gearbox/transmission of some of the vessels in the NEC fleet including the NEC pride are designed to prevent the captain from putting the engine immediately into astern. This is achieved by way of a built-in delay which occurs before the engine goes into astern and which will override an attempt to go immediately into astern. During cross-examination, Captain Brown testified that if there is a defect in the built-in delay mechanism, the problem can be intermittent.

81. According to Captain Brown, the built-in delay feature is an obvious feature which will be apparent to a captain of the NEC pride. He testified that it is a feature of both the port and starboard engines of the NEC Pride. He further testified that an excessive or longer than usual delay in putting the port engine into astern is a matter which the captain ought to report in the daily log of the vessel and is a matter to be investigated and repaired by the first defendant. Captain Brown located in CCMSL's files copies of the following daily logs for the NEC Pride;

    i. Jerold Dyer, a captain of the NEC Pride recorded in log number 7898 dated the 4th April, 2012 that there was *a "delay on the port gearbox";*

ii. Gerald La Touche ("La Touche"), captain of the NEC Prided recorded in log number 7900 dated the 6th April, 2013 that there was a *"backlash in port gear box";*

iii. La Touche recorded in log number 7903 dated the 10th April, 2013 that there was a *"delay on port transmission";*

iv. La Touche recorded in log number 7906 dated the 12th April, 2013 that there was a *"backlash on port transmission";*

v. La Touche recorded in log number 7909 dated the 15th April, 2013 that there was a *"delay on port transmission";*

vi. La Touche recorded on log number 7912 dated the 18th April, 2013 that there was a *"delay on portside transmission";* and

vii. La Touche recorded on log number 7915 dated the 21st April, 2013 that there was a *"delay on port transmission".*

82. According to Captain Brown, the operation the crew on the NEC Pride was conducting at the time of the collision namely, transporting a passenger form the port to the Tradewind was a relatively straightforward and simple operation. He testified that the training, experience and competency of Leighton and his crew was more than sufficient to enable them to carry out the operation safely and successfully.

83. Captain Brown testified that although proper training and supervision of seamen reduces the chances of them making mistakes or committing negligent acts and omissions, it by no means guarantees that they will not do so. He further testified that seamen who are sufficiently trained and have the capability and knowledge to safely carry out the duties assigned to them can make errors of judgment or can be negligent in discharging their duties. As such, it was his testimony that if such errors are made or the seamen are negligent does not mean that they were not sufficiently trained or supervised.

84. During cross-examination, Captain Brown testified that if he was a passenger on the NEC Pride, he would be able to hear a change in the vessel's engine when it is slowing down. He would also realize that the vessel is slowing down.

85. **Leighton** is employed as a line handler with CCMSL. His duties as line handler are to handle the lines used to secure cargo vessels which are berthed at the Point Lisas port. Some of his evidence was the same as Captain Brown's evidence and therefore that evidence need not be repeated.

86. During cross-examination, Leighton testified that he could not recall the tasks he would have undertaken with the NEC Pride on the said date prior to transporting the claimant to the Tradewind.

87. Prior to leaving, Leighton instructed his crew to cast off and to ensure that the claimant was seated in the mess. Leighton then sailed the NEC Pride out of the harbor and headed towards the location where the Tradewind was anchored. He testified that at that time it was not raining and visibility was good. He was able to see the Tradewind when he was still at a considerable distance away from same.

88. According to Leighton, in the area where the Tradewind was anchored, the water was choppy and the wind was stronger than usual. He approached the Tradewind at an angle of 20 to 25 degrees at the port quarter. He recalled moving both throttles to half speed in order to slow the vessel. During cross-examination, Leighton testified that before he moved the throttles to half speed, the throttles were at three quarter speed. However after he moved the throttles to half speed, he realized that the vessel was still travelling too fast so he put both engines into neutral with the intention of putting the port engine in astern. During cross-examination, Leighton testified that when he put the throttles in neutral, the NEC Pride slowed down. He testified that after putting the port engine in neutral, there is a usual unavoidable delay before it can be put into astern ("the design delay"). He further testified that on this occasion, when he attempted to put the port engine in astern, the delay was longer than the design delay. This excessive delay was something Leighton had experienced previously from time to time with the port engine and which he had reported to the first defendant by listing it in the daily log book which was submitted to the first defendant. During cross-examination, Leighton testified that on the said date he did not record in the daily log book that the delay was longer than the design delay. He further

testified during cross-examination that the longer delay he experienced was approximately six seconds over the design delay of three seconds.

89. Upon observing that the delay was longer than the design delay, Leighton realized that he was in danger of colliding with the Tradewind. In an attempt to avoid collision he then successfully put the starboard engine in astern and by then the port engine was also in astern. However, in spite of that the NEC Pride did not decelerate in time to avoid colliding heavily with the Tradewind. The NEC Pride collided *"bows on"* with the Tradewind.

90. After the collision, Leighton checked the crew who were all fine. However, Lewis had suffered a cut to his head. Leighton testified that the claimant indicated that he was okay and that he still wanted to go onboard the Tradewind.

91. After making sure everyone was okay, Leighton cancelled the operation and informed one of the first defendant's Marine Coordinators of the collision. However, before returning to port Leighton allowed two persons from the Tradewind to come onboard the NEC Pride to take photographs of the damage to the Tradewind. Thereafter, he returned to the port. During cross-examination, Leighton testified that he had to maneuver alongside the Tradewind in order to receive the two persons off of the Tradewind to take the photographs of the damage that was done to the Tradewind. He further testified that after the photographs were taken, he had to once again pull alongside the Tradewind for the two persons to return to the Tradewind. He agreed that he did not mention that he had any problems with the throttles of the NEC Pride whilst undertaking those tasks.

92. After returning to the port, Leighton prepared and signed a written report setting out the circumstances leading up to and surrounding the collision. He testified that his report is an accurate reflection of circumstances leading up to the collision save and except the statement that he decreased his speed to 10 to 13 rpm which was incorrect. Leighton intended to say that he decreased the power of the vessel's engines to 1000 to 1300 rpm. Also, he testified that although he suggested in his report that he was fifty metres or less from the Tradewind when he decreased his speed to 1000 to 1300 rpm, he is certain that he was considerably further away from the Tradewind when he reduced the vessel's

engines power to that level. He estimated that he would have been about fifty metres away from the Tradewind at the time he decided to put the starboard engine into astern.

93. According to Leighton, if the NEC Pride was fifty metres or less away from the Tradewind when he decreased engine power to half speed, then he would not have had the time to realize his speed was too fast, attempt to put the port engine into astern, realize the delay in doing so was more than usual and then engage the starboard engine in astern (after having waited for the usual delay period) before the collision had taken place.

94. Notwithstanding the above, Leighton testified that having thought further about the circumstances leading up to the collision, he believes that because of an error on his part, his speed approaching the Tradewind in the circumstances was still too fast and that he should have approached the Tradewind at a slower speed. He believes in approaching the vessel, he failed to take into account the strength of the current pushing the vessel and so misjudged the distance between the NEC Pride and the Tradewind. Although, the longer than usual delay he experienced in attempting to put the port engine astern hindered his efforts to avoid the collision, he believes that had he not made this error in approaching the Tradewind, the collision could have been avoided.

95. During cross-examination, Leighton testified that had he been traveling at a safe speed, the collision would not have occurred. He further testified that the sole cause of the collision was the speed at which he was travelling with the NEC Pride. Additionally, he agreed with the contents of letter dated the 27th June, 2013 which stated that the collision occurred solely due to his gross negligence. However, when Leighton was being cross-examined by Counsel for the claimant, he changed his evidence and testified that had there not been an excessive delay when engaging the port engine astern, it would have slowed the vessel down, he would have gotten his angle and therefore avoided the impact and skirt alongside the Tradewind.

96. Leighton testified that the error he made in approaching the Tradewind on the said date was a rare misjudgment on his part and one that he sincerely regrets. Apart from this collision, he has not been involved in any other collision or near miss incidents at sea. He

further testified that prior to this collision, none of his employers nor had anyone else including the first defendant expressed any concerns to him about his ability to operate the vessels he served on as captain.

97. According to Leighton, the job of delivering the claimant to the Tradewind and returning him to port was a straightforward and simple one. He testified that due to his experience and training, the task was well within his capabilities. He further testified that he has experience and training to perform much more challenging jobs as captain such as operating tug vessels in assisting in the berthing and un-berthing of vessels.

Issue 1 – *whether the crew or any member of the crew operating the NEC Pride caused or contributed to the cause of the collision by their negligence*

The submissions of the first defendant

98. The first defendant submitted that the second defendant's witness, Leighton (who was at the material time the captain of the NEC Pride) admitted that the sole cause of the collision was the speed at which he was operating the vessel. As such, the first defendant submitted that the sole cause of the collision was due to the negligent operation of the NEC Pride by Leighton. According to the first defendant, the cause of the collision, being the negligence of Leighton was corroborated by letter dated the 27th June, 2013 ("the 2013 letter") which was signed by Voisin and which stated that after an investigation into the collision, it was found that the sole cause of the collision was the gross negligence of Leighton.

99. The first defendant submitted that although Voisin attempted to resile from the 2013 letter, her attempt was less than credible. According to the first defendant, when Voisin was confronted with the 2013 letter and shown the second defendant's Amended Defence, which was signed by her and which was inconsistent with the letter in so far as to the question of the cause of the collision is concerned, Voisin attempted to say that the letter was wrong, that the letter was written from a *"human resource perspective"* and that subsequent documents caused her to change her view as to the cause of the collision. When

pressed, Voisin indicated that the documents she was referring to were the logs that were discovered in September 2017. The first defendant submitted that at the time Voisin signed the second defendant's amended defence, on her own case she would not have had the logs and so would not have been able to dispute the 2013 letter.

100. Consequently, the first defendant submitted that the inescapable conclusion is that Voisin's attempt to resile from the 2013 letter was simply an afterthought that was contrived during cross-examination. The first defendant further submitted that had Voisin's explanation of the 2013 letter in fact been the truth, it was very easy for her to have explained that in her witness statement but she failed to do so. Moreover, the first defendant submitted that it is noteworthy that Leighton remains a Line Handler, having been removed as a captain. According to the first defendant, if the second defendant honestly believed its Defence was the truth, then it was reasonable to infer that Leighton would have been reinstated as a captain.

101. Further, the first defendant submitted that the evidence of Captain Brown showed that at the time of the collision, the performance of the crews were less than satisfactory and that there was an issue with the crews operating the vessels at unsafe speeds. Consequently, the first defendant submitted that the claimant is entitled to judgment against the second defendant since it was proven that the sole cause of the collision was due to the negligent operation of the vessel at the material time.

The submissions of the second defendant

102. The second defendant does not dispute that the evidence of Leighton at paragraph 30 of his witness statement establishes that he was negligent in the operation of the NEC Pride, and in particular, in bringing that vessel alongside the Tradewind.

103. The second defendant submitted that it is well settled that for a claimant to be successful in establishing a claim for negligence he must prove not only that the defendant was negligent but that such negligence caused him actual damage of the type of which he complains. According to the second defendant, in order to establish causation the claimant

is required to establish both factual causation and causation in law. The second defendant submitted that whether factual causation has been established is determined by applying the "but for" test. The "but for" test asks whether on the evidence adduced it is more than 50% probable that "but for" the defendant's wrongdoing the relevant damage would not have occurred.[11]

104. The second defendant does not dispute that Leighton's evidence that the collision could have been avoided had he not made the error with respect to his operation of the NEC Pride is sufficient to establish that "but for" his negligence the collision would not have occurred. As such, the second defendant accepts that Leighton's negligence caused the collision. However, it does not accept that it was the sole cause of the collision but simply a cause of the collision.

105. The second defendant submitted that the 2013 letter did not amount to an admission that the sole cause of the collision was the negligence of Leighton. According to second defendant, the purpose of the 2013 letter was to inform Leighton of the findings of the first defendant's investigation and to comply with the first defendant's instruction that he be terminated as captain. Further, the second defendant submitted that whether it had the daily logs in its possession at the time it issued the 2013 letter or was of the view that the excessive delay in going astern was in part or entirely the cause of the collision was not relevant given that the first defendant's view was that Leighton's negligence was the sole cause of the collision and that the first defendant dictated whether Leighton was to be removed as captain of the NEC Pride.

106. Additionally, the second defendant submitted that the reason why it has not reinstated Leighton as a captain even though it was of the view that the collision was not solely caused by his negligence was mainly due to the fact that the first defendant's approval was required for any person to hold the position of captain. As such, the second defendant submitted that although it may have taken a different view as to the cause of the collision, it was the first defendant's right to call for Leighton to be removed as captain. The second defendant further submitted that as the first defendant was CCSML's only

[11] *Clerk & Lindsell on Torts* 21st Edition at para 2-09

client, it is not surprising that in the interest of maintaining good relations with its client and in order to secure a renewal of its contract, it sought to replace Leighton as captain at the first defendant's instructions.

Findings

107. The court finds that Leighton's negligent operation of the NEC Pride contributed to the collision. This much is clear. However, the court agrees with the submissions of the first defendant that Leighton's negligent operation of the NEC Pride was the sole cause of the collision. This is so because in the court's view the evidence of Leighton was inherently unreliable for the reasons set out hereinafter.

108. Leighton in his witness statement testified that having thought further about the circumstances leading up to the collision, he believed that the speed at which he approached the Tradewind was too fast. He further testified that he failed to take into account the strength of the current pushing the vessel and misjudged the distance between the NEC Pride and the Tradewind. He then testified in no uncertain words that although the longer than usual delay he experience in attempting to put the port engine astern hindered his efforts to avoid the collision, he believed that had he not made the error in approaching the Tradewind at the speed at which he was travelling with the NEC Pride, the collision could have been avoided. During cross-examination, Leighton also testified that had he been traveling at a safe speed, the collision would not have occurred.

109. However, Leighton attempted to change his evidence when he was being cross-examined by Counsel for the claimant. He testified that had there not been an excessive delay when engaging the port engine astern, it would have slowed the vessel down, he would have gotten his angle and therefore avoided the impact and skirt alongside the Tradewind. The court finds that this attempt to change his evidence was highly inconsistent with the testimony he gave in his witness statement. It is therefore abundantly clear that Leighton was attempting to deceive the court.

110. Further, during cross-examination Leighton testified that he could not recall the tasks he had done prior to transporting the claimant to the Tradewind. He also testified during cross-examination that after the collision he did not maneuver the NEC Pride alongside the Tradewind to pick up two crew members from the Tradewind to take photographs of the damages. That the crew members came onboard from the collision point. Thereafter he suddenly remembered that he did maneuver alongside the Tradewind to pick up the crew members, take them to the point of collision and then take them back to the ladder rigged on the Tradewind for them to make their way back onto their vessel. He further testified that he had no problems with the throttles whilst doing those maneuvers. This evidence was omitted from Leighton's witness statement. A court must ask itself, why would Leighton hide that information and what was he hiding. The court finds that common sense would dictate that he sought to hide those maneuvers because he had no problems with the port throttle when doing those maneuvers. It was astonishing that Leighton would have left this material evidence out of his witness statement and the court finds that it was in fact designed to deceive. The court therefore finds that Leighton did not experience any excessive delay on the port throttle at the time of the collision.

111. In relation to the 2013 letter, the court accepts that one of the purposes it was written was to inform Leighton of the findings of the investigation and that he was being demoted. The court further finds that it is reasonable to infer that one reason the second defendant would not have reinstated Leighton as captain even though it was of the view that the collision was not solely caused by his actions, was to maintain good relations with the first defendant.

112. However, the court also finds that the 2013 letter was evidence that the second defendant accepted the findings of the first defendant that the sole purpose of the collision was due to the gross negligence of Leighton. If that was not the case, common sense would dictate that although the second defendant wanted to maintain good relations with the first defendant, it would have communicated its disagreement with the first defendant's findings and at the very least would have insisted on further investigations before demoting Leighton. The failure to so do leads to the inference that the findings were accepted.

113. The court also finds that although the second defendant may not have had the physical copies of the daily logs in hand, it would have been aware that there had been complaints of a delay on the port engine transmission. That coupled with the fact that Leighton in his report stated that there was a longer delay than the design delay on the port throttle were sufficient grounds for the second defendant to insist on further investigations into the collision, if it was in disagreement with the findings of the first defendant. As such, it is pellucid that the second defendant appears to have changed its position from that articulated in the 2013 letter in a veiled attempt to allocate some culpability to the first defendant for the collision.

114. Having regard to the findings on the evidence of Leighton, his inherent unreliability and lack of credibility, Theodore's evidence is to be preferred on this issue. The court therefore accepts Theodore's evidence that after the collision, Law checked the throttle and found that it was in good working order. The court further accepted Theodore's evidence that after the collision when the NEC Pride returned to port, he checked the throttle and found it to be in good working order and there was no need to effect repairs on the throttle. Moreover, the court accepted Theodore's evidence that the speed at which Leighton was travelling, approximately fifty metres away from the Tradewide did not constitute a safe speed when factoring in the prevailing conditions and proximity to the vessel.

115. Additionally, the court finds that the first defendant cannot be held vicariously liable for the negligent act of Leighton. The reasons for this finding is set out hereinafter. The second defendant accepted that as between itself and the claimant, it is vicariously liable for Leighton's negligence, by virtue of the fact that it is the employer of Leighton. It is therefore the finding of the court that the second defendant is liable for the following in that it;

i. Failed to take any or any adequate precaution for the safety of the claimant on the vessel;
ii. Exposed the claimant to a risk of danger, or injury of which it knew or ought to have known;

iii. Failed to take any or any adequate precautions to ensure that the said vessel did not collide with another vessel;

iv. Failed to slow down and/or halt the vessel in time;

v. Sailed the vessel in such a cause and/or in such a manner that he did not or alternatively could not avoid the collision; and

vi. Failed to pay any or any due regard to the other vessel anchored and collided with the other vessel.

Issue 2 – *whether the first defendant knew there was a defect in the throttle used to operate the port engine of the NEC Pride and failed to repair same and if so, whether the first defendant's failure to repair the defect caused or contributed to the cause of the collision by its negligence in failing to repair*

The submissions of the first defendant

116. According to the first defendant, the second defendant failed to challenge the claimant's evidence that Leighton did not throttle down the NEC Pride when he was approaching the Tradewind.[12] The first defendant submitted that the second defendant is therefore taken to have accepted that evidence and ought not to be permitted to maintain that the NEC Pride was throttled down and placed in astern when it was approaching the Tradewind. In so submitting, the first defendant relied on the case of ***Markem Corp & Anor. v Zipher Ltd***[13] wherein Jacob LJ stated as follows at paragraph 58;

"*Browne v Dunne is only reported in a very obscure set of reports. Probably for that reason it is not as well known to practitioners here as it should be although it is cited in Halsbury's Laws of England para 1024 for the following proposition:*

'Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence,

[12] See paragraph 4 of the claimant's witness statement.

[13] [2006] IP & T 102

or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.""

117. The first defendant submitted that the above position has been accepted in this jurisdiction in the case of ***Basdeo v The Attorney General of Trinidad and Tobago***[14] wherein Kokaram J at paragraph 17 stated as follows

"*Fifth, there was no cross examination of the Defendant's witnesses on the reason for detaining the Claimant in the Chaguanas police station for the three day period before he was charged. It is well settled that if a party decides not to cross examine on a particular point, he will be in difficulty in submitting that the evidence should be rejected. See Phipson on Evidence 16th Ed para 12-12 at p 322. See also Halsbury Laws of England at paragraph 1043:*

"Purpose of cross-examination. Cross examination is directed to (1) the credibility of the witness; (2) the facts to which he has deposed in chief, including the cross examiner's version of them; and (3) the facts to which the witness has not deposed but to which the cross examiner thinks he is able to depose. Where the court is to be asked to disbelieve a witness, the witness should be cross examined; and failure to cross examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence. This paragraph must be read in the light of the court's general discretionary power to control the evidence, including its power to limit cross examination."

118. The first defendant further submitted that the report done by Law (the former employee of the second defendant who was the engineer onboard the NEC Pride at the time of the collision) stated that he did not hear the engines of the NEC Pride slow down. As such, the first defendant submitted that Law's report supported the claimant's evidence that Leighton did not throttle down the NEC Pride.

119. The first defendant therefore submitted that the effect of this failure on the part of the second defendant is to render its entire case of a defective throttle irrelevant, since even

[14] CV2012-00763

if it was able to establish that the throttle on the NEC Pride was defective (which the first defendant state they have not done), on the basis that Leighton at the material time did not throttle down, a defective throttle would have not played any part in the collision. Consequently, the first defendant submitted that if there was a defect in the throttle of the NEC Pride, same was not a cause or the cause of the collision.

120. Notwithstanding its position that the question of the defective throttle has been rendered irrelevant, the first defendant proceeded to examine whether the second defendant established that the vessel had a defective throttle. According to the first defendant, the evidence of the defective throttle came from the evidence of Leighton and Captain Brown. Leighton stated that he experienced the excessive delay and that he reported this in the daily logs. Captain Brown tendered copies of the daily logs. The first defendant submitted that when the logs were examined, there was nothing in same which complained of an excessive delay. Further, that there were no logs prepared by Leighton complaining of this alleged excessive delay.

121. According to the first defendant, Leighton accepted that if the vessel was unsafe to operate, as captain he had the authority to refuse to operate the vessel. As such, the first defendant submitted that if the vessel was in fact defective and had an excessive delay that would have affected its performance, Leighton would not have operated the vessel.

122. The first defendant further submitted that when the evidence from Theodore on behalf of the first defendant is examined, it was clear from his evidence that there was no defect on the port throttle. At paragraph 20 of Theodore's witness statement he clearly indicated that when the vessel returned to the port he checked the throttles and found them to be working properly and there was no need to effect repairs. The first defendant submitted that although in cross-examination Theodore indicated that it was possible that there could be an excessive delay, it is unlikely that such defect will be intermittent.

123. The first defendant submitted that Leighton gave his evidence in a very unconvincing manner, whereas Theodore was very forthright, withstood the rigors of cross-examination and was not discredited. As such, the first defendant submitted that where

there were conflicts between Theodore's evidence and Leighton's evidence, the court should accept Theodore's evidence.

The submissions of the second defendant

124. The second defendant submitted that Leighton's evidence that he experienced the excessive delay in approaching the Tradewind was not shaken in cross-examination. The second defendant further submitted that the references to the *"delay on gearbox"* and *"delay on portside transmission"* in the daily logs books (which were all recorded in April, 2013 prior to the collision) corroborate and support Leighton's evidence that prior to the collision the excessive delay occurred from time to time and further corroborated his evidence that there was an excessive delay on the day of the collision. According to the second defendant, the first defendant's witness Theodore admitted that the daily logs were submitted to the first defendant. As such, the second defendant submitted that it follows that prior to the collision, the first defendant had notice or ought to have had notice of the excessive delay and the defect causing same. The second defendant further submitted that the daily logs contradicted Theodore's evidence that no complaint about the excessive delay was made prior to the collision. Additionally, the second defendant submitted that the court is entitled to and ought to draw an adverse inference from the first defendant's failure to provide the daily logs or any other logs prepared in respect of the NEC Pride.

125. The second defendant submitted that it is highly unlikely that those comments in the daily logs refer to the design delay given that this delay was a standard feature of the vessel and would be experienced regularly by and known to the captains of the NEC Pride as a design delay. According to the second defendant, Theodore also confirmed that the captains of the NEC Pride would have known of the design delay. As such, the second defendant submitted that it was very unlikely that the captains would have recorded in the log book a delay which they knew to be a standard design feature of the NEC Pride and which they experienced routinely.

126. Moreover, the second defendant submitted that the first defendant seemed to rely on the fact that since on the day of the collision, the excessive delay did not occur either

prior to the collision or after the collision, demonstrated that it could not have occurred at the time of the collision. The second defendant submitted that was contradicted by the evidence of Captain Brown who in cross examination stated that such a delay may occur intermittently.

127. Consequently, the second defendant submitted that as the first defendant was aware there was a defect in to throttle and it was their responsibility to carry out all repair and maintenance work on the NEC Pride, the first defendant acted in breach of its duty by providing the NEC Pride to transport the claimant to the Tradewind.

128. Moreover, the second defendant submitted that Leighton's evidence was sufficient to establish on a balance of probabilities that had the excessive delay not occurred, then the collision would not have occurred. The second defendant submitted that although Leighton's evidence at paragraph 30 of his witness statement is sufficient to establish factual causation with respect to that error under the 'but for' test, it did not in any way suggest that the excessive delay was not also a cause of the collision.

129. According to the second defendant, in cases such as the present, where there is more than one negligent act or omission that can be said to have caused the claimant's loss under the "but for" test, the court is required to determine which of those negligent acts/omissions are in law to be deemed the cause or causes of the claimant's loss. The second defendant submitted that the approach that the court take in such cases was succinctly explained in the following extract from Lord Reid's judgment in ***Stapley v Gypsum Mines[15];***

"One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that

[15] (1953) A.C. 663 at 681, per Lord Reid

one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

130. The second defendant further relied on the case of ***Rouse v Squires***[16] wherein the English Court of Appeal held that the prior negligence of a lorry driver who skidded and obstructed the motorway continued to be an operative cause, and contributed to a subsequent accident that occurred when another negligent driver failed in dark, frosty conditions, to see the obstruction caused by the lorry soon enough, and skidded, killing the claimant. Cairns L.J. stated the following at 898;

"If a driver negligently manages his vehicle as to cause it to obstruct the highway and constitute a danger to other road users, including those who are driving too fast or not keeping a proper lookout, but not those who deliberately or recklessly drive into the obstruction, then the first driver's negligence may be held to have contributed to the causation of an accident of which the immediate cause was the negligent driving of the vehicle which because of the presence of the obstruction collides with it or with some other vehicle or some other person."

131. Further, MacKenna J at 899 deduced the following rule from the cases;

"Where the person guilty of the prior negligence has created a dangerous situation, and the danger is still continuing to a substantial degree at the time of the accident, and the accident would not have happened but for this continuing danger, he is responsible for the accident as well as the party who was subsequently negligent."

132. The second defendant submitted that although the facts of the present case are somewhat different to those in ***Rouse*** supra, the principles discussed therein apply equally here. According to the second defendant, in the present case the defect causing the excessive delay, and the danger caused by that delay, was present prior to the collision and up until the collision. The second defendant submitted that the collision would not have

[16] (1973) 1 QB 889

occurred but for that continuing danger. As such, the second defendant submitted that according to the principles set out in Rouse supra, the negligence of first defendant in using the NEC Pride to transport the claimant when such a defect and excessive delay existed, was in law a contributory cause of the collision and the claimant's loss. Moreover, the second defendant submitted that the fact that Leighton was also negligent in his operation of the NEC Pride, and that the collision would not have occurred but for such negligence, does not preclude first defendant's negligence as a cause of the collision. Consequently, the second defendant submitted the negligence of the first defendant and that of Leighton ought to be deemed as the two contributory causes of the collision.

133. The second defendant submitted that Law was not called as a witness, and therefore was not subjected to cross examination. As such, the second defendant submitted that to the extent that the first defendant relies on his written statement for the truth of its contents and in particular to establish that the NEC Pride did not slow down, the statement is hearsay and carries no evidential weight. The second defendant further submitted that although the claimant stated in his evidence that the vessel did not reduce its speed, his evidence carries little weight given that the claimant was not a seaman, had little experience travelling on the NEC Pride, and was at the stern of the vessel for the entire voyage. Moreover, the second defendant submitted that even though Leighton's evidence in relation to him throttling down on approaching the Tradewind and going into astern was challenged, his cross-examination remained unshaken.

134. Additionally, the second defendant submitted that although there may be circumstances in which a party's failure to cross-examine can be treated by the court as an acceptance of the witnesses' evidence, there are also circumstances in which a party is not required to challenge a witness' evidence in cross-examination in order to dispute same and will not be treated as having accepted the truth of that evidence merely because it has not been challenged in cross-examination. The second defendant further submitted that on its pleadings, it was clear to the claimant that it was challenging his position that Leighton did not throttle down. As such, the second defendant submitted that the effect of a failure to comply with what is commonly referred to as the rule in Browne v Dunn is in the

discretion of the court and there is no absolute rule that by virtue of that failure a party is treated as having accepted the truth of such evidence. In so submitting, the second defendant relied on an array of cases. In ***Vishnu Sagar v Bissoondaye Mungroo***[17], Justice Rajnauth Lee stated the following at paragraph 37;

"The Court accepts that the rule in Browne v Dunn is applicable in this jurisdiction even after the introduction of the C.P.R…The rule is not absolute, however, and in order to determine the extent and manner of its application, the Court has to consider all the circumstances of the case."

135. As such, the second defendant submitted that the aforementioned in conjunction with the inherent improbability that Leighton would sail the NEC Pride into the Tradewind at full speed, is sufficient to establish on a balance of probabilities that Leighton did take the steps to slow and turn the vessel as stated in his witness statement.

Findings

136. On an evaluation of the evidence, the court finds that there was no defect on the port throttle of the NEC Pride at the time of the collision. The main evidence of the defective throttle comes from Leighton and the daily logs tendered by Captain Brown. The court accepts Leighton's evidence that he did throttle down and put the throttle in astern but rejects his evidence that there was an excessive delay on the throttle.

137. The dates of the daily logs which recorded that there was a delay on the port transmission/throttle were the 4th, 10th, 15th, 18th and 21st April, 2013. No log for the date of the collision was provided to the court. The court does not accept the second defendant's submission that it is highly unlikely that those comments in the daily logs refer to the design delay since the captains of the NEC Pride would have been aware of the design delay. The court finds that as the captains of the NEC Pride would have known there was a design delay on the throttle, it was incumbent upon them to specifically state that the delay was in

[17] CV2007-02831

excess of the design to ensure that the first defendant was aware that there was a problem with the throttle. The court therefore finds that these logs did show that there was a delay on the port engine throttle but that it did not prove that there an excessive delay on the port engine throttle and that the first defendant failed to investigate same. Even if the inference is that the log entry showed that there was an excessive delay, there is no evidence that any such delay was logged on the said day.

138. The court accepts Theodore's evidence that when the vessel returned to the port, he checked the throttles and found them to be working properly and that there was no need to effect repairs on same. Consequently, the court rejects Leighton's evidence that there was an excessive delay on the throttle on the day of the collision.

139. Even if the court is wrong in its finding that there was no defect, the court finds that the defect was not a contributing factor to the collision since Leighton was very clear in his evidence that even though there was a delay on the throttle, the collision would have still occurred because of the speed at which he was approaching the Tradewind. During cross-examination, Leighton testified that had he been traveling at a safe speed, the collision would not have occurred. He further testified that the sole cause of the collision was the speed at which he was travelling with the NEC Pride. Additionally, he agreed with the contents of the 2013 which stated that the collision occurred solely due to his gross negligence. However, when Leighton was being cross-examined by Counsel for the claimant, he changed his evidence and testified that had there not been an excessive delay when engaging the port engine astern, it would have slowed the vessel down, he would have gotten his angle and therefore avoided the impact and skirt alongside the Tradewind.

140. Leighton's change in his evidence was clearly inconsistent with his witness statement evidence. At paragraph 30 of his witness statement, Leighton in no uncertain words stated that although the longer than usual delay he experienced in attempting to put the port engine astern hindered his efforts to avoid the collision, he believed that had he not been approaching the Tradewind at the speed he was, the collision could have been avoided. As such, the court finds that upon analyzing the evidence, it is pellucid that if Leighton was travelling at a reasonable speed and there was an excessive delay in the

throttle, the collision would not have occurred as there would have been sufficient time for the throttle to respond and go in astern. The court therefore rejects the submission of the second defendant that the collision would not have occurred but for the continuing danger of the defective throttle. Consequently, the court finds that the sole cause of the collision was Leighton's negligent operation of the NEC Pride.

Issue 3 – *if there was negligence on the part of the crew or any crew member in the operation of the NEC Pride, whether the first defendant is vicariously liable for such negligence*

The submissions of the second defendant

141. According to the second defendant, the claimant's case is that both the first and second defendants are vicariously liable for the negligence of their servants and/or agents in the operation of the NEC Pride. The second defendant submitted that it does not dispute that the captain was negligent in his operation of the NEC Pride nor does it deny that as between itself and the claimant, it is vicariously liable for the captain's negligence, by virtue of the fact that it is in law the employer of the captain.

142. The second defendant submitted that it has long been recognized by the courts that a relationship can give rise to vicarious liability even in the absence of a contract of employment. As such, the second defendant submitted that the fact that the first defendant had not entered into an employment contract with the crew or Leighton in particular, does not necessarily preclude it from being vicariously liable for their actions.[18] The second defendant further submitted that in the case of ***Viasystems (Tyneside) Limited v Thermal Transfer (Northern) Ltd.***[19] it was recognized that it was possible for two parties to be held vicariously liable for the negligent act of a tortfeasor in circumstances where only one of those parties was in law the employer of the tortfeasor. The second defendant further relied on the followings cases;

[18] See Cox v Minstry of Justice (2016) UKSC 10 at para. 16 per Lord Reed.
[19] (2005) EWCA Civ 1151.

i. ***JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust***[20];

ii. ***Various claimants v Catholic Child Welfare Society and others***[21]**;**

iii. ***Cox v Ministry of Justice***[22]**; and**

iv. ***Various Claimants v Barclays Bank plc***[23].

143. The second defendant submitted that in ***Various claimants*** supra it was held that the test to be applied in determining whether a party is vicariously liable for the acts of a tortfeasor (even though the party is not the employer of the tortfeasor) was a synthesis of the two following stages;

i. The first stage is to consider the relationship between the relevant parties D1 and D2 to see whether it is one capable of giving rise to vicarious liability; and

ii. The second stage is to consider whether there is a sufficient connection or a sufficiently close connection between that relationship and the act or omission of the tortfeasor in question.[24]

144. With respect to the first stage, Lord Phillips in ***Various claimants*** supra noted that there were policy reasons which usually made it fair, just, and reasonable to impose vicarious liability on an employer when the following criteria were met:

i. the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;

ii. the tort will have been committed as a result of activity being taken by the employee on behalf of the employer;

iii. the employee's activity is likely to be part of the business activity of the employer;

[20] (2012) EWCA Civ 938
[21] (2012) UKSC 56.
[22] (2016) UKSC 10.
[23] (2017) EWHC 1929.
[24]Para 21

iv. the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; and

v. the employee will, to a greater or lesser degree, have been under the control of the employer.[25]

145. In relation to the second stage, Lord Phillips in ***Various claimants*** supra at paragraph 62 stated as follows;

"Where an employee commits a tortious act the employer will be vicariously liable if the act was done "in the course of the employment" of the employee. This plainly covers the situation where the employee does something that he is employed to do in a manner that is negligent. In that situation the necessary connection between his relationship with his employer and his tortious act will be established. Stage 2 of the test will be satisfied. The same is true where the relationship between the Defendant and the tortfeasor is akin to that of an employer and employee. Where the tortfeasor does something that he is required or requested to do pursuant to his relationship with the Defendant in a manner that is negligent, stage 2 of the test is likely to be satisfied..."

146. The second defendant applied the first and second stages identified in ***Various claimants*** supra in great detail and concluded that there was a sufficient connection between; (a) the relationship between Leighton and the first defendant on the one hand; and (b) the negligent acts of Leighton on the other hand, as to make the first defendant vicariously liable for negligent acts of Leighton in transporting the claimant to the Tradewind.

The submissions of the first defendant

147. Firstly, the first defendant submitted that there was no pleading that at the material time Leighton was its servant and/or agent or that it and the captain shared a relationship that was akin to employment. The first defendant further submitted that although there was a broard pleading by the claimant on the question of agency, there was no material fact

[25] Para 35.

pleaded that Leighton was its servant and/or agent for the purposes of making it vicariously liable for his actions.

148. Secondly, the first defendant submitted that as between the defendants, the issue of both defendants being vicariously liable for Leighton's actions was not pleaded.

149. Thirdly, the first defendant submitted that the second defendant admitted that it was an independent contractor. As such, the first defendant submitted that since the second defendant admitted that it was an independent contractor, it cannot now seek to maintain that the first defendant is vicariously liable for the negligence of its servant.

150. Fourthly, the first defendant submitted that the second defendant's reliance on the cases of Vaisystems, JGE, Various claimants, Cox and Barclays Bank supra is misplaced. According to the first defendant, all those decisions are distinguishable from the instant case as there is no question of a relationship akin to employer and employee arising between the first defendant and Leighton. The first defendant further submitted that the second defendant's analysis and application of the five factors ignores one critical element that is, there was no relationship whatsoever between the first defendant and Leighton independent of the contract with the second defendant.

Findings

151. It is undisputed that the second defendant was an independent contractor. Generally, an employer is not vicariously liable for the negligence of an independent contractor, his workmen or agents.[26] However, the cases of ***Various Claimants v Catholic Child and JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust*** demonstrates that the law of vicarious liability is developing.

152. In ***Aaron Jiaram v Trincan Oil Limited and others***[27], Justice Kokaram stated the following at paragraphs 114 and 115;

[26] See Charlesworth & Percy on Negligence, 12th Edition, page 212, paragraph 3-173.
[27] CV 2010-04153

"Ashley J in Deutz gives a very helpful detailed analysis of the history and development of the doctrine of vicarious responsibility distinguishing two possible situations. One is where the loaned employee has injured a third party, and the issue raised is whether the temporary employer or the general employer should be held vicariously liable for the injury. The second is…where it is the loaned employee who has been injured, and the question is whether the temporary or the general employer should provide compensation for the injury.

Control over the employee is seen to be a key ingredient in imposing responsibility on that person to take care for the employee's safety and welfare. In the first situation, on the question of vicarious liability authority establishes that the courts may sometimes regard the temporary employer as the worker's employer pro hac vice and impose vicarious liability or the employee's actions on the temporary employer. This will exonerate the general employer from its usual obligations. However, it has been held that there is a very heavy burden of proof on the general employer in these circumstances, and what must be shown is that there is a transfer of the right not merely to say what work should be done but also the way in which the work must be done."

153. On the facts of this case, the second defendant does not dispute that it is the employer of Leighton (through its agent CCSML). Leighton was part of the crew supplied by the second defendant to operate, man and control the first defendant's vessel. Although the first defendant did direct the tasks required to be done by the crews, it is clear from the evidence that the manner in which those tasks were done remained under the control of the second defendant. This was the clear evidence of Captain Brown when he testified that CCMSL controlled the crews in matters such as the manner in which they sailed the vessels, the maintenance work they performed on the vessels, the vessels which individual crew members worked on, the working hours of the crews, the training and management of the crews and the discipline of the crews.

154. Further, the fact that the Theodore developed training programs for the crews and approved new captains being appointed to the first defendant's vessels did not show that the first defendant controlled the crew and Leighton in particular. Under the contract, the second defendant has clear jurisdiction over the training and supervision of the crews it

supplied. Therefore, although Theodore developed training programs, it was for the second defendant to execute and/or implement that program. Also, the approval by Theodore of the captains was no more than a means of assessing and/or ensuring that the second defendant was complying with the terms of the crewing agreement which was to provide suitably qualified staff.

155. Additionally, it is clear from the evidence that if the first defendant had a problem with a crew member's performance, it would communicate same to Captain Brown who in turn would take the appropriate measures to remedy the situation. This again shows that the first defendant had no authority or control over the crews.

156. Therefore, the court finds that the only relationship between the first defendant and the crews was to assign jobs and that once that was done, the control of how those tasks were done was within the remit of the second defendant who was responsible for training the crews, ensuring that the crews were competent to operate and control the vessels and for the supervision of the efficiency of the crews. It follows therefore as the second defendant was responsible for the supervision of the efficiency of the crews and undertaking corrective action where there were inefficiencies, the second defendant as opposed to the first defendant would have been in a position to identify and prevent negligent acts of the crew of the NEC Pride in the operation of the vessel. Consequently, as the first defendant was neither in control of the crew nor in a position to prevent the negligent acts of the crew, it cannot be held vicariously liable for the negligent act of Leighton and the court so finds.

Issue 4 – A) *whether the first defendant is entitled to be indemnified by the second defendant and the ancillary defendant*

157. Having regard to the court's findings above, this issue no longer arises the court having found that the collision was caused solely by the negligent act of Leighton and that the second defendant alone was vicariously liable for the acts of Leighton.

B) *Whether the second defendant is entitled to be indemnified by the first defendant.*

The submissions of the second defendant

158. The second defendant submitted that its claim for an indemnity is based on clause 11.4 of the crewing agreement which provides as follows;

Indemnity. Except to the extent and solely for the amount therein set out that the Crew Managers **(the second defendant)** *would be liable under sub-clause 11.2 the Owner* **(the first defendant)** *hereby undertakes to keep the Crew Managers and their employees, agents and sub-contractors indemnified and to hold them harmless against all actions, proceedings, claims, demands or liabilities whatsoever or howsoever arising which may be brought against them or incurred or suffered by them arising out of or in connection with the performance of the Agreement and against and in respect of all costs, loss, damage and expenses (including legal costs and expenses on a full indemnity basis) which the Crew Managers may suffer or incur (either directly or indirectly) in the course of performance of this Agreement.*

159. Clause 11.2 provides as follows;

"Crew Managers' Liability to Owners. Without prejudice to sub-clause 11.1 the Crew Managers shall be under no liability whatsoever to the Owner for any loss, damage, delay or expense of whatsoever nature, whether direct or indirect (including but not limited to loss of profit arising out of or in connection with detention of or delay to the Vessel) and howsoever arising in the course of performance of the Crew Management Services UNLESS same is proved to have resulted solely from the negligence, gross negligence or willful default of the Crew Managers or any of their employees or agents, or sub-contractors employed by them in connection with the Vessel, in which case (save where loss, damage, delay or expense has resulted from the Crew Managers personal act or omission committed with the intent to cause same or recklessly and with knowledge that such loss, damage, delay or expense would probably result) the Crew Manager's liability for each incident or series of incidents giving rise to a clam or claims shall never exceed a total of six (6) times the monthly lump sum payable hereunder."

160. The second defendant submitted that clause 11.2 must be construed together with the other clauses in the agreement, in particular clause 11.3. According to the second defendant, it is plain from the language used in clause 11.3 that it (the second defendant) is not liable under clause 11.2 for the negligent acts/omissions of the crew unless such acts/omissions are as a result of a failure on its part to discharge its obligations under clause 4 of the Contract. Clause 11.3 provides as follows;

"Acts or Omissions of the Crew. Notwithstanding anything that may appear to the contrary in the Agreement, the Crew Managers (the second defendant) shall not be liable for any act or mission of the Crew, even if such acts or omissions are negligent, grossly negligent or willful, except only to the extent that they are shown to have results from a failure by the Crew Managers to discharge their obligations under Clause 4, in which case their liability shall be limited in accordance with Clause 10."

161. The second defendant further submitted that although when read in isolation, clause 11.2 appears to place liability for the negligent acts/omissions of all employees on the second defendant's shoulders, when read in conjunction with clause 11.3, it is clear that the intention of the parties is that with regard to the crew, the liability for their negligence is placed on the shoulders of the first defendant unless it can be shown that such negligence was caused as a result of the failure of second defendant to discharge its clause 4 obligations.

162. The second defendant submitted that as the first defendant failed to prove that it breached its clause 4 obligations, under clause 11.2 it is not liable for the negligence of the crew. As such, the second defendant submitted that it follows that under the terms of clause 11.4 it is entitled to be indemnified by first defendant against such liability to the claimant as may be found against it.

<u>The submissions of the first defendant</u>

163. The first defendant submitted that the interpretation the second defendant is attempting to put on clause 11.4 is strained. That clauses 11.2 and 11.3 deals with the extent of the second defendant's liability to the first defendant whereas clause 11.4 deals with the

second defendant's indemnity. The first defendant further submitted that if the intention of the parties was that the second defendant's indemnity would be applicable only to the extent of the second defendant's liability to the first defendant, the contract would have stated that by including reference to clause 11.3 in clause 11.4 just as there was reference to clause 11.2.

164. The first defendant submitted that it was clearly the parties' intention that the second defendant's indemnity would not apply where the second defendant was negligent. That from a plain reading of 11.4 that is clear. The first defendant further submitted that the only time a secondary meaning will be resorted to is where the plain and literal interpretation gives rise to an absurdity, which in this case it does not.

165. Consequently, the first defendant submitted that since the second defendant's negligence caused the collision, the question of an indemnity from it simply does not arise.

Findings

166. It is a fundamental rule that when the court is called upon to interpret a contract, the court must first determine whether the terms are clear and free from ambiguity and if it is the clear terms must be applied even if the court thinks some other terms would have been more suitable.

167. In the case of Admas Project Management & Construction Ltd. and Leon Koon Koon & others[28], Justice Boodoosingh relied on the case of ***Attorney General of Belize and others v Belize Telecom Ltd and another***[29] to ascertain the meaning of a contract. In Belize Telecome Ltd. supra Lord Hoffman stated as follows at paragraph 16 to 20;

"…The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract…It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person

[28] CV2015-03619
[29] [2009] UKPC 10

having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed…It is this objective meaning which is conventionally called the intention of the parties… The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.

In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means. The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority. In Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 1 WLR 601, 609 Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:

"the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to

give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."

168. In the court's view, there appears to be no ambiguity in the terms and there is no need to imply a term. Clause 11.2 specifies that in the case of a personal act or omission by the crew manager, in the present case the Captain, the liability to the owners for those acts does not exceed a particular amount assessed in a particular manner by recourse to another clause in the contract. This clause clearly treats with the consequences of actions of which causes damage to the owner. The clause does not treat with the same issues dealt with in the indemnity clause, 11.4. The indemnity clause is clear in its terms. In essence it sets out that the first defendant is liable to indemnify the second defendant against all actions against the crew except that where liability arises under 11.2 (liability to the owners) and the crew remains liable for a specific amount calculated in the prescribed manner, the first defendant (owner) will only be liable to indemnify the second defendant against the excess in liability. By way of example, should liability have arisen under 11.2 in relation to destruction of property of the first defendant which results in loss, so long as it results from personal action by the crew manager, the second defendant remains liable for a particular sum in respect of the loss (namely six times a lumpsum paid under clause 4) and nothing more as it is entitled to be indemnified by the first defendant for the balance of the loss.

169. With regard to the indemnity clause however, the second defendant is entitled to a full indemnity in respect of claims that do not involve liability between the first and second defendant. So that the nature of the claim is of utmost importance when reconciling the terms of the relevant clauses. In the present case, there is no claim by the first defendant in respect of direct damage suffered by it by way of the actions of the second defendant which if successful would have imposed liability under clause 11.2 upon the second defendant for damage to the owner (first defendant). It means that the exemption clause must stand alone as this is a claim in which liability for negligence has been found in favour of **the claimant** against the second defendant and not in favour of the first defendant against the second defendant.

170. Additionally, the court agrees with the submission of the second defendant that when clause 11.2 is read in conjunction with clause 11.3, it is clear that the intention of the parties is that with regard to the crew, the liability for their negligence is placed on the shoulders of the first defendant unless it can be shown that such negligence was caused as a result of the failure of second defendant to discharge its clause 4 obligations but there has been no finding that the second defendant has failed to discharge its obligations under clause 4. The evidence as to proper training and supervision has been largely unchallenged and the court by its decision would have accepted that evidence. The finding on liability was based on the personal act of negligence on the part of the captain and therefore the principle of vicarious liability.

171. In the result the first defendant, by virtue of its agreement to indemnify will be liable to the second defendant under clause 11.4.

Dated the 26th day of April 2018

Ricky Rahim

Judge