JOHANSSON, ANDERSSON, GRAVES and MULLALLY v. OWNERS OF THE "FLAWLESS"

SKOPBANK OF FINLAND LIMITED v. OWNERS OF THE "FLAWLESS"

SUPREME COURT (Alcantara, A.J.): October 27th, 1993

Shipping—seamen's wages—action in rem—unpaid wages, disbursements and chartering commission recoverable by action in rem, under Supreme Court Act 1981, s.20(2)(o)—other damages so recoverable as wages only if closely connected with service on board arrested ship—damages for future loss may be recoverable only by judgment in personam if service under contract not exclusive to particular vessel

Shipping—mortgage of ship—repossession—arrest of ship not in itself insolvency proceeding justifying action for possession by mortgagee—may repossess if mortgagor allows ship to become and remain burdened by maritime lien, thereby diminishing value of security

The plaintiffs brought actions *in rem* against the defendants' ship to recover damages for breach of contract and moneys loaned for the purchase of the ship.

The first and second plaintiffs in Cause No. 16 of 1992 ("P.G. and Alf") were two Swedish entrepreneurs. They entered an informal agreement with a wealthy American, M, for them to sail and manage a luxury yacht which M had commissioned to be built for his retirement. M's company borrowed the purchase price from the plaintiff bank in Cause No. 18 of 1992 under a five-year loan agreement secured partly on the yacht and governed by Finnish law. The agreement provided for termination in the event of (i) insolvency proceedings against the borrower, (ii) substantial deterioration in its financial situation, (iii) failure to keep the vessel in a good or efficient state, or (iv) the vessel becoming subject to a maritime lien. P.G. supervised the design and building of the yacht.

M hoped to secure charter fees for the yacht to cover the interest payments on the loan, but he began to experience financial difficulties even before the yacht was completed. After its launch a contract of employment was executed in respect of P.G. and Alf. It provided for their service on board the yacht or any other vessel owned by M, and stated, *inter alia*, that they would each receive $50,000 per year in salary and that 5% of net charter revenues per month would be credited to their accounts.

Certain minor defects covered by warranty were repaired by P.G. and Alf with M's consent. They were told by M to bill the makers for repairs,

and that he could not pay their salaries until he had obtained charters for the yacht. No charters were secured at any of the boat shows they attended. The shipbuilders met P.G. and Alf's expenses in supervising further repairs. Although M agreed an itinerary and estimate of expenses prepared by P.G. and Alf, their salaries remained unpaid throughout the next voyage. Unable to contact M, they sailed to Gibraltar, using their own funds for fuel and provisions. Having failed to obtain payment from M through his attorney, they arrested the yacht in Gibraltar. They claimed judgment *in rem* in Cause No. 16 of 1992 for their outstanding wages and disbursements made on account of the yacht.

The plaintiff bank in Cause No. 18 of 1992 then brought proceedings *in rem* to recover the amount owing under its loan to M's company, as a first preferred mortgagee, on the basis that its security was now impaired.

P.G. and Alf, as plaintiffs in Cause No. 16, submitted that (a) moneys were owed under an agreement commenced by a course of dealing before the construction of the yacht and subsequently evidenced in writing by the contract; (b) they were entitled to receive their annual salary at monthly intervals, as P.G. had been accustomed to when overseeing the original design and building, and to damages for loss of earnings for the remainder of the five-year term; (c) they were also entitled to the contractual 5% of charter fees on a monthly basis, and to compensation for the loss of those earnings for the remainder; and (d) they had not at any stage agreed to accept deferred payment of their wages or disbursements.

The plaintiff bank in Cause No. 18 submitted that the defendant company was in breach of the terms of the loan agreement, since (a) the arrest was an act of insolvency; (b) the physical condition of the vessel had deteriorated, reducing the value of the security; (c) the defendant had, by failing to pay the crew's wages, been operating the vessel in a manner inconsistent with the sufficiency of security; and (d) this had given rise to a maritime lien against the vessel in favour of the crew, which entitled the bank to take possession of it.

The defendant company submitted that (a) P.G. and Alf had agreed orally to defer payment of their wages until the yacht began to generate charter income, and were therefore estopped from claiming payment; (b) the salaries were payable in arrears at the end of the year, and were not recoverable in respect of the remaining years of the contract; (c) the plaintiffs' percentages of charter fees were payable upon the sale of the yacht or the expiry of the agreement and were dependent upon the obtaining of charters; (d) the plaintiffs had failed to inform it that they had received payment from the shipbuilders for the warranty work they had carried out, and were therefore in breach of fiduciary duty; (e) since it had not defaulted on the loan, the bank had no right to call it in or exercise any powers contained in the mortgage deed; and (f) the bank had colluded with the crew in procuring the arrest of the yacht, by paying the costs of the arrest and providing security for the crew's costs of claiming contractual damages.

Held, giving judgment for the plaintiffs in both cases:

(1) M's contractual liability to P.G. and Alf was set out in the written contract of employment, and not in any pre-existing course of dealings or subsequent oral agreement, since the contract stated that it superseded all prior understandings and could not be altered or amended save by an instrument in writing. The owners were liable for P.G. and Alf's unpaid wages and disbursements from the first voyage until their repudiation of the contract. The words "per year" in the contract did not indicate that wages were payable at the end of each year, but merely the total payable annually. On a fair construction of this term and on the basis of the parties' conduct before the signing of the contract, wages were payable monthly. Their monthly 5% shares of charter revenues, however, were payable in arrears at the end of the contractual term, since the contract provided for "credit," not "payment" each month. These debts were recoverable by an action *in rem*, under s.20(2)(o) of the Supreme Court Act 1981 (page 197, lines 11–39; page 198, line 23 – page 199, line 29).

(2) However, damages for breach of contract, comprising wages and charter fees for the remaining years of the contract, could not be recovered by an action *in rem*, since P.G. and Alf could be required under the contract to work on any vessel owned by M, and therefore the damages were not sufficiently closely connected with service on board the yacht. In respect of these claims, the court would give judgment *in personam* for six months' wages. It was not satisfied that P.G. and Alf had done all they could to mitigate their loss and that men with their skill and ingenuity were unable to find alternative employment of some kind (page 199, line 30 – page 200, line 28).

(3) The defendants did not have a defence of promissory estoppel merely because P.G. and Alf had been aware of M's financial situation. They had repeatedly asked for payment, and their failure previously to issue a formal demand or threat to sue could not amount to an agreement to defer payment of their wages and disbursements. Nor could they argue that P.G. and Alf had acted in breach of a fiduciary duty to M by carrying out warranty works and taking payment from the shipbuilders, since M had been aware of this and, indeed, had authorized it (page 200, line 45 – page 201, line 43).

(4) The loan agreement between the plaintiff bank in Cause No. 18 and M would be interpreted according to English law, since the parties had not provided satisfactory evidence of Finnish law on the interpretation of contracts. There was no evidence of any failure to keep the vessel in good repair or any insolvency proceedings against M, so as to justify the bank terminating the loan agreement. For the latter purpose, the act of arresting the ship was not an insolvency proceeding. However, the bank was entitled to rely on the fact that M's financial condition had deteriorated substantially and on its common law right to take possession of a

mortgaged ship when the mortgagor had allowed it to become and remain burdened with a maritime lien, thereby diminishing its value as security. The owners had done nothing to discharge the lien following the yacht's arrest by P.G. and Alf. There was no evidence of collusion between the plaintiffs in the two actions. The yacht would be sold and payment out made to the plaintiffs in both, subject to the Admiralty Marshal's expenses and any priorities (page 202, line 6 – page 204, line 37).

Cases cited:

(1) *August 8, The,* [1983] 2 A.C. 450; [1983] 1 Lloyd's Rep. 351, applied.
(2) *Boston Deep Sea Fishing & Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339; [1886–90] All E.R. Rep. 65, distinguished.
(3) *British Trade, The,* [1924] P. 104; (1924), 18 Lloyd's Rep. 65.
(4) *Halcyon Skies, The, Powell* v. *Owners of Halcyon Skies,* [1977] Q.B. 14; [1976] 1 All E.R. 856, considered.
(5) *Hughes* v. *Metropolitan Ry. Co.* (1877), 2 App. Cas. 439; [1874–80] All E.R. Rep. 187, distinguished.
(6) *Manor, The,* [1907] P. 339; (1907), 77 L.J.P. 10, applied.

Legislation construed:

Supreme Court Act 1981 (c.54), s.20(1):

> "The Admiralty jurisdiction of the High Court shall be as follows, that is to say—
>
> (*a*) jurisdiction to hear and determine any of the questions mentioned in subsection (2)…"

s.20(2): "The questions and claims referred to in subsection (1)(*a*) are—

> (*o*) any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages)…"

L.E.C. Baglietto for the plaintiffs in Cause No. 16 of 1992;
A.V. Stagnetto, Q.C. and *G.C. Stagnetto* for the plaintiffs in Cause No. 18 of 1992;
A.A. Vasquez for the defendants.

ALCANTARA, A.J.: This is the story of two Swedes, an American and a boat. There is no similarity between any of the three individuals concerned and the ordinary man in the street—the man on the Clapham omnibus in England or, in Gibraltar, the man who goes to the Piazza to buy the *Chronicle*. They have, however, one thing in common: they think big, maybe too big for their own good. The boat, in turn, is not an ordinary boat.

The two Swedes are Mr. Per G. Johansson and Mr. Alf Andersson, commonly referred to by everyone as P.G. and Alf, and they are the plaintiffs in Action No. 16 of 1992. They both have had a very varied career and colourful life. They met in the fifth or sixth grade in school in Sweden and became friends. They subsequently joined the Swedish navy,

where, according to P.G., they served as officers. After a few years they left the navy and started a shipbuilding business in Gotenburg under the firm name of "Geko." They started building yachts which to the uninitiated could be mistaken for Swan yachts, which are built by the world-famous shipbuilding firm of Nautor in Finland.

In 1982 they sold their business, bought a yacht and decided to sail round the world. This they did and in 1986 they arrived in California, where they docked in Marina del Rey. During their sojourn in California they did all sorts of work, from repairing yachts to building log cabins and office furniture. They were not only cabinet makers but mechanics, electricians, electronic engineers and also experts at designing yachts. The aphorism applicable to them is not that of Jack of all trades and master of none, but rather Jack of all trades and master of all. Two years after their arrival at Marina del Rey, a Mystere 42 with the American on board arrived from Hawaii and docked next to or very near to the yacht belonging to the Swedes.

The American is Mr. Randall Melton, known to his friends as "Chipper." He is the *alter ego* of a company registered in Guernsey under the name of Flawless Adventures Ltd., the defendant in Actions No. 16 and 18 of 1992. He is a shrewd entrepreneur, a self-taught electronic engineer and a fighter. Apart from being a pilot, he has taken part in international aerobatics shows. He is or was a very successful business-man and, until two years ago, a millionaire. He started a business in the United States in 1970, Melco Industries, trading initially in computer graphic systems and ending with computerized monogrammed embroidery designs. The annual sales of his company reached the US$35m. mark.

When he met the Swedes he was living the life of a high-roller. He had a yacht, a Rolls Royce, a Ferrari, a Harley Davidson, a Jeep and, I think, also a Mercedes. Before he ever met the Swedes he was considering selling his company and retiring (if that is the right word).

The boat is the yacht *Flawless*. It is not an ordinary boat but a 90 ft. Swan yacht, the first ever built of its class, length and type, and considered to be the Queen of the Ocean, with a value of US$4.5m.

The Swedes and the American met some time in 1988 at Marina del Rey. Melton's Mystere 42 ft. yacht needed repairs and attention. P.G. and Alf were at hand. They offered or were asked to do the repairs. Melton was delighted with the work they carried out. In evidence, Melton has said that he is a perfectionist, and P.G. and Alf met his standard. A relationship developed between the three of them, which I would describe as a waterfront friendship. P.G. and Alf were allowed to use not only Melton's Rolls Royce but even his Harley Davidson and his yacht. Melton also gave them a key to his flat in Los Angeles—Melton's residence was in Denver, Colorado. During this period Melton used the services of P.G. and Alf in relation to his own yacht, for which they were paid. To give an idea of their relationship, Melton lent them US$40,000,

without security or collateral, to enable them to buy a Mercedes for their own use. They paid him back.

At about this time, the idea of retiring crystallized in Melton's mind. He would sell his shares in the company and would buy a yacht. At first, he says, he thought of a 56 ft. Swan, then an 86 ft. Swan. He would retire and live partly in it. He made enquiries as to the annual cost of ownership of a Swan 86. In January 1989 he sought the advice of P.G. and Alf. They prepared an estimate showing the annual cost of ownership of a Swan 86 in part-time charter. It came to US$301,000. This estimate was more or less confirmed by Mr. George E. Steinmann, the official agent for Nautor in the United States. Melton had conceived a brilliant scheme whereby he could own and enjoy a first class yacht for about two years without it costing him a penny. More of this later.

Melton was so enthusiastic about the estimate that on the back of it he wrote: "Salary P.G. & Alf—100 K. 10% of charter towards equity. Five years' term." There has been some argument as to what this meant. It appears to be clear to me. It meant that if Melton went ahead and bought a yacht he would employ P.G. and Alf at the rate of US$100,000 a year, and if there were to be any chartering they would get 10% of the charter fees at the end of the contract. The contract was to be for 5 years.

Confronted with this, both P.G. and Alf, who were already enthusiastic, became more enthusiastic. Their ambition in life was to sail and manage a first class luxury Swan yacht. They had more or less discovered El Dorado, with Melton as King Midas. Their enthusiasm became contagious and Melton was infected by it. Instead of a Swan 86, which was in production, Melton opted for a prototype Swan 90. The first of its class.

Melton had started marketing his company in 1988. He found a buyer, the international Swiss firm of Sauer. The deal was closed in January 1990 and the sales contract was executed on March 16th, 1990. Melton got a very good deal. He received between US$6 and 7m. for 90% of his shares in his company, plus a contract with Sauer as an executive with a salary of US$400,000 a year with expenses. With part of the capital he bought himself a house in Golden Horn, which he decorated expensively. It was then that he decided firmly to have the *Flawless* built. A year before he had signed a letter of intent and paid a deposit to Nautor's representative in the United States. At this stage Melton was riding on the crest of a wave.

Every week, before and after Melton got his millions, they would get together to discuss the designing and planning of the boat. During this period neither P.G. nor Alf got paid for their troubles or expertise, apart from expenses. There were discussions as to the chartering of the boat. In evidence, Melton has said: "It was a partnership in so far as contribution is concerned regarding the *Flawless*."

I think it is proper for me to make findings of fact, wherever possible, as I relate the story. There is no doubt in my mind, on the evidence, that

there was no question of partnership or joint venture between the parties. There was co-operation and help, enthusiastic help, but no more. Nor was there a legal agreement to employ P.G. and Alf by Melton. At the very highest there was just expectation.

Anyhow, Melton signed the purchase agreement for the *Flawless* with the Californian agent of Nautor in March 1990. It is significant that it was contemporaneous with the sale of his shares. The purchase price was US$4.25m. This is Melton's evidence on that transaction:

> "Signing of purchase agreement. No contact with Skopbank before. Introduced by agent in California. Agent of Nautor offered financial option 100%, except for interest, only five years. Interest only finance package for five years. My intention was to keep vessel for two years and then I would not have to pay capital. The finance package only available if I could furnish 100% with collateral in form of irrevocable letters of credit."

The above financial gymnastics have been made clear to me in the course of the evidence and I think that this is my simplistic view of the situation: Skopbank lent US$4.25m. to Melton to buy his boat, which amount he had to repay at the end of five years. In the meantime, he had to pay interest on that loan (which he never actually received, as it was going to Nautor direct). The interest payments on the loan had to be secured by irrevocable letters of credit which Melton had to give to Skopbank. If Melton sold the boat for the same price he paid before the end of the five years then he would pay the capital to Skopbank. If he was able to secure charters for the boat the charter fees would cover the interest he had to pay.

This is the brilliant scheme to which I have referred above. The following clause can be found in the sales agreement by Nautor signed on March 16th, 1990:

> "The builder has participated in arranging for a buyer's credit through Skopbank of Finland Ltd. ('Skopbank'), covering the purchase price US$4.25m. A separate loan agreement ('loan agreement') will be signed and executed by the buyer and Skopbank."

I have been told that a Swan yacht, like a Silver Cloud Rolls Royce, does not depreciate in value during the first two or three years of its life. This was the basis of the brilliant scheme.

It is pertinent at this stage to refer to the financial arrangements with Skopbank. This is an extract of the loan agreement:

> "This loan agreement is dated April 23rd, 1990 and made between:
>
> (1) Flawless Adventures Ltd., a company owned by Mr. Randall Melton, Guernsey ('the borrower'), and (2) Skopbank, Helsinki, Finland ('the bank').
>
> Now it is agreed as follows:
>
> Subject to the terms and conditions hereinafter mentioned, the bank agrees to lend to the borrower the amount of US$4,250,000.

…

17. Should any of the following events occur, the obligations of the bank under this agreement may be terminated and all amounts outstanding under this agreement shall become due and payable, and the bank shall have the immediate right against the guarantor and the letters of credit [of the] bank:

…

(b) if any bankruptcy, insolvency, liquidation, receivership or similar proceedings are instituted by or against the borrower, the guarantor or the LC-bank under the laws of any jurisdiction;

…

(d) if any substantial deterioration shall occur in the financial condition of the borrower;

…

(g) if the borrower fails to keep the vessel in a good and efficient state so that the value of the mortgage shall essentially decrease.

…

22. This loan agreement shall be governed by the laws of the Republic of Finland."

This loan agreement was signed by Mr. Randall Melton for Flawless Adventures Ltd. In the body of the agreement it is stated that the borrower's attorney is John J. King, Esq. of Denver, Colorado.

The above loan was secured by irrevocable standby letters of credit amounting to US$2.2m., paid by Melton but issued by the Boston Safe Deposit & Trust Co. in favour of Skopbank, dated April 27th, 1990. The balance of the US$4.25m. was provided by a mortgage registered against the *Flawless* in Newport, Wales, the port of registry.

Melton's euphoria over his deal with Sauer was somewhat short-lived. His relationship with them turned sour. He was promoted in title but demoted in status. A dispute arose between them and the upshot was that he was given notice that his contract with them would terminate and that his salary of US$400,000 would come to an end in February 1991.

In August or September 1990, P.G. went to Finland for a year to supervise the building of the *Flawless* by Nautor. According to P.G., he was working full-time in designing the yacht. One thing is certain; Melton wanted him there to control specifications and keep within the estimated price. P.G. was paid for his trouble, expenses and expertise at the rate of $4,000 a month plus, at a later stage, the house rent. It is unnecessary for me to find whether this was a contract of service, a contract for services or just an arrangement between friends.

After February 1991, Melton found himself in financial straits in so far as liquidity was concerned. An attempt by Sauer to settle his action was refused by him. He no longer had the income of US$400,000 from Sauer.

He still had the interest which the irrevocable letters of credit were producing, amounting, according to his estimate, to US$120,000 a month. P.G. was complaining that his dues were not arriving punctually in Finland.

The delivery of the *Flawless* was due on September 15th, 1991. In fact it was launched on that date, but delivered on October 3rd, 1991. Melton was in Finland for the launching but not for the delivery. Alf had arrived earlier in August 1991. It had been arranged that P.G. and Alf would sail to the Canaries and meet there with Melton and a group of German friends to enjoy a sailing holiday on board the *Flawless*. According to Melton, the boat was brand new, in excellent condition, but unfinished. An electrician from Nautor had sailed with the boat. There were electrical faults and other defects. A list of them was made.

In the Canaries the following contract of employment was executed. I set out the contract in full, but before doing so I will say that much of this case turns on the interpretation of the contract. I will deal with this later when I come to consider the pleadings and the submissions of counsel. This is the contract:

"EMPLOYMENT AGREEMENT

THIS EMPLOYMENT AGREEMENT ('the agreement') is entered into on this 16th day of November, 1991, between FLAWLESS ADVENTURES LTD. ('the employer') and PER G. JOHANSSON and ALF ANDERSSON (collectively 'the employees' and individually 'the employee').

1. *Employment.* The employer hereby employs and hires the employees as co-yacht captains to perform the duties set forth below, and the employees accept and agree in such hiring and employment subject to the general supervision, orders and direction of the employer.

2. *Term.* This agreement shall commence on the date of delivery to the employer of the 90 ft. sailboat *Flawless* ('the boat') and shall continue for five years from the commencement of this agreement.

3. *Duties.*

(a) The employees shall be responsible for maintaining the boat in a flawless condition and performing all routine and other maintenance and repairs of the boat, including, but not limited to, mechanical and cosmetic maintenance and repairs such as painting and varnishing the boat.

(b) The employees shall further be responsible for all normal and usual duties of yacht captains of a comparable size and quality as the boat.

4. *Compensation.* The employer shall pay to each employee, in full payment for the employees' services, compensation as set forth below:

(a) The employer shall pay to each employee $50,000 a year.

(b) The employer shall credit to the account of each employee an

amount equal to 5% of the net charter revenues earned by the employer each month during the term of this agreement.

5. *Sale of boat.* The employer reserves the right to sell the boat at any time, in the employer's sole and absolute discretion. Upon the employer's sale of the boat, the employer shall pay to each employee the amount credited to his account, pursuant to paragraph 4(b) of this agreement.

Notwithstanding the employer's sale of the boat during the term of the agreement, this agreement shall continue in full force and effect for its term, as set forth in paragraph 2. Each employee shall continue to be entitled to receive the compensation set forth in paragraph 4(a), and the duties of the employees following the sale of the boat shall be as agreed to by the employer and the employees.

6. *Assignment.* Neither this agreement nor any rights or duties under this agreement may be assigned or delegated by (a) either the employee, unless the employer consents in writing, or (b) the employer, unless both employees consent in writing.

7. *Entire agreement.* This agreement sets forth the entire agreement and understanding of the parties and supersedes all prior understandings, agreements or representations by or between the parties, whether written or oral, which relate in any way to the subject-matter.

8. *Amendments.* No provisions of this agreement may be altered, amended, revoked or waived except by an instrument in writing signed by the party sought to be charged with such amendments, revocation or waiver.

9. *Binding effect*. Except as otherwise provided, this agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective legal representatives, heirs, successors and assignees.

10. *Guarantee.* Performance of this agreement by the employer is guaranteed by Randall Melton, the sole shareholder of the employer.

Executed on the date set forth above.

EMPLOYER: FLAWLESS ADVENTURES LTD.

By: Randall Melton, President

EMPLOYEES: Per G. Johansson and Alf Andersson

GUARANTOR: Randall Melton."

After signing the employment contract, which had been prepared by Melton's attorney, Mr. Michael Sheldon, he, Melton, left for the United States. His guests left subsequently. From the Canaries the *Flawless* had to sail to Antigua in the Caribbean, to attend the Antigua Boat Show on December 10th, 1991. The purpose of this boat show was to book charters for the winter season in the Caribbean. The *Flawless* was also committed to attend the Miami Boat Show later on February 20th, 1992. This was in the interest of Nautor so that the boat could be shown off.

When the boat reached Antigua it was found that there were more defects. These defects were warranty defects which Melton was quite happy should be done by P.G. and Alf, because he did not trust Nautor's employees to do a good job. In my record of evidence, I have noted the following as stated by Melton in relation to what he told P.G. and Alf: "I can't pay your salary until charter so do the repairs and get paid by Nautor." He added: "Whatever they got paid should be applied towards their salary. If warranty work, Nautor should pay."

No charters were secured in Antigua. The peak period of Christmas and New Year had been reserved for Mr. Sheldon, the attorney, to whom Melton was indebted for legal fees. Thus, Sheldon was paid in kind. After Sheldon enjoyed his holiday on the *Flawless* the boat found itself in the Miami Boat Show. One of the witnesses has said that she was the Queen of the Show.

She was a Queen alright, but with clay feet. There was a major defect which gave a lot of trouble; the paint on her hull would flake. After much effort and trouble it was discovered that this was due to the fact that the hull was painted dark blue. Melton had specified blue and wanted blue and was not prepared to budge. This was discovered at Derektor's Yard at Fort Lauderdale, where the boat had been taken for repairs. Derektor's Yard is the officially recognized repair yard for Nautor's Swan yachts. Melton has a very substantial claim against Nautor pending in Finland for breach of warranty and loss of profits. They are, I understand, arbitration proceedings. Nautor has a lot to lose if Melton succeeds.

From the Miami Boat Show the *Flawless* was taken to Derektor's Yard in Fort Lauderdale for repairs. She stayed there until July 1992. P.G. and Alf went with her to supervise repairs and also do some repairs themselves. This was with the full agreement of Melton, who for some reason or other did not trust Nautor. An arrangement was entered with Nautor that they should not only defray the expenses of accommodation for P.G. and Alf, but also provide them with a rented car. I find as a fact that Melton was very much a party to this agreement. P.G. and Alf expected to be paid their wages and living expenses by Melton.

There is before me a record of expenses or disbursements for the period from December 24th, 1990 to December 28th, 1992, kept by Alf. The defendants, in cross-examination, have queried some of the items and amounts. Whilst the *Flawless* was at Derektor's Yard, P.G. and Alf could not cook on board, so it was natural that they should take some of their meals at a restaurant. That was OK, but to give an example of what the defendants object to is the item dated August 11th, 1992: "dinner for crew in Gibraltar—US$247."

P.G.'s answer to this is that so long as they kept to a figure of US$20 a day per member of the crew it was alright. The figure of US$20 comes from the estimate prepared by P.G. and Alf in January 1989. P.G. seems to think that US$20 a day is a contractual right. It is no such thing. It is an

estimate as to what is or is not a reasonable disbursement. Having a big T-bone steak and banana split might be a reasonable disbursement, but having a lobster thermidor with a bottle of Châteauneuf-du-Pape cannot be a reasonable disbursement. I am not aware of what they actually had in restaurants. There is also an item relating to the hire of a car which must be deducted if disbursements are allowed. The hiring of the car was paid for by Nautor.

Anyhow, the *Flawless* was made ready for sailing. I find as a fact that Melton wanted the boat to go to Monaco to see whether charters could be procured. Before sailing, P.G. and Alf had prepared an itinerary and estimate and faxed the same to Melton. The total expenses of the voyage came to $24,632. The itinerary was the Azores, Gibraltar and then Monaco. I find as a fact that the fax was discussed and that Melton agreed with it. On July 11th, 1992 the *Flawless* set sail for the Azores and arrived there on July 25th, 1992. It had been agreed that they should contact Melton from the Azores so that Melton would put them in funds to continue the journey to Monaco. They contacted him by phone once before they got to the Azores, but there was no contact or funds in the Azores. Their understanding was that Melton would join them either in the Azores or Gibraltar.

I accept the version of P.G. and Alf as to what happened in the Azores. They phoned Melton, who was in the United States, and left a message on his answering machine with the name and telephone number of a four-star hotel in Horta, Azores. They phoned again. The answering machine was on but nothing more. After nine days in the Azores they decided to sail to Gibraltar in case Melton was waiting for them here. They had no funds. They had to use their own money to buy fuel and provisions for the next leg of the journey.

Melton's version is that he got the message on his answering machine but was unable to contact the number given or that he was not understood when the number answered. I reject his version.

On August 4th, 1992 the *Flawless* sailed from the Azores to Gibraltar. At this stage P.G. and Alf had already got in touch not only with Mr. Gunner Ost from Nautor but also with the English firm of solicitors, Clyde & Co. They were fed up with Melton. According to them, from the date when the employment contract was signed, Melton had defaulted in his contractual duties. Their salaries were always either in arrears or not paid. They were forced on a number of occasions to use their own money for disbursements because of lack of funds on board which Melton had to provide.

It is a fair inference, on the evidence, that they had decided or had been advised at this stage, if not before, that they should arrest the boat when it reached Gibraltar if Melton was not there or their outstanding salaries were not paid. The *Flawless* arrived in Gibraltar on August 10th, 1992. On that same day a letter was faxed by Clyde & Co. to Melton's attorney, putting the defendant on formal notice that action might be taken. The

reply by Sheldon to Clyde & Co. is worth setting out. It is also dated August 10th, 1992:

> "It was nice to talk to you last Friday, and I am in receipt of your telefax dated August 10th, 1992. Mr. Melton has instructed me to advise you that I should spend no further time on this matter with you, and that to communicate to you only that P.G. and Alf should contact Mr. Melton directly at the earliest convenience. Apparently, Mr. Melton does have some funds to forward to them and intends to work out the matter of wages with them directly."

This, to me, was a bluff. It did not work. I still have to see a bluff working with solicitors. As night follows day, the *Flawless* was arrested on August 13th, 1992 and Sheldon was notified in writing. The reply was this:

> "1. We will immediately transfer US$10,000 to your firm's escrow account which you may then forward to the crew if and only if they immediately dismiss the action in Gibraltar and the boat sails for Monaco. You may forward the funds to your client upon your written assurance to the undersigned that the boat has arrived in Monaco. The boat can be actively chartered and shown for sale, with all charter revenue going to unpaid crew wages payable from the proceeds of sale of the boat or Mr. Melton's home, whichever occurs first.
>
> 2. If the foregoing is not acceptable to your clients, we will utilize the US$10,000 in funds, which is all Mr. Melton has to devote to this matter presently, to engage counsel in Gibraltar to counterclaim for damages caused by your clients against my client. Mr. Melton has instructed me to travel to London first, to meet you Monday morning when your office opens up in a final attempt to resolve this matter.
>
> If we are unsuccessful in this matter, I will then continue to engage co-counsel. We will also evict your clients from the vessel pending the litigation.
>
> Please advise me immediately which of the alternatives you would like us to pursue."

Neither Clyde & Co. nor the plaintiffs were impressed.

At this stage I think that it is important to see what the plaintiffs were initially claiming. The writ *in rem* issued on August 13th, 1992 claimed judgment for the first and second plaintiffs (P.G. and Alf) in the sum of US$41,371 each for wages due to them earned as masters on board the defendants' vessel *Flawless* from August 1991 up to and including July 1992, which were unpaid, and for disbursements made by them on account of the vessel. There was also a claim for damages *simpliciter*.

I will try and follow, as much as possible, a chronological order of events. On August 19th, 1992, Skopbank, the plaintiff in Action No. 18 of 1992, joined the fray. It sent a fax to the defendants, the relevant part of which reads:

> "We have been informed that due to the unpaid wages of the

crew, the yacht is in possession of the Admiralty Marshal of Gibraltar by virtue of her arrest by the crew.

Because of the insolvency proceedings, the evidently deteriorated financial condition of the company and the conditions impairing the security, we hereby declare the loan, being US$4,271,786.53, immediately due and payable."

Two days later Skopbank entered a caveat against the release of the *Flawless* from arrest and issued a writ *in rem* claiming the amount under the loan agreement as a first preferred mortgagee.

Dealing first with Action No. 16 of 1992, the plaintiffs served a statement of claim on September 8th, 1992. There the allegation was that P.G. and Alf had served as masters of the *Flawless* in pursuance of an agreement made between them and the defendants, initially orally in September 1989, and subsequently evidenced in writing on November 16th, 1991.

This allegation was later amended to read: "in pursuance of an agreement made between them and the defendants, initially by a course of dealings begun in late 1988 or early 1989, and subsequently evidenced in writing on November 16th, 1991."

The defence originally served on September 22nd was also amended on February 19th, 1993. The employment contract of November 16th, 1991 is admitted, but the main traverse is that "the defendants will aver that in or about February 19th, 1992, the plaintiffs made oral agreements that they would receive full payment of their wages under the employment agreement when the ship *Flawless* was generating a charter income," and that consequently they are estopped from claiming the payment of wages.

It is common ground that a written contract of employment was entered into on November 16th, 1991. It appears to me that the plaintiffs, in order to reinforce their claim and arguments as to the meaning of the contract, are seeking to introduce evidence of "a course of dealings" before the actual signing of the contract. A not very dissimilar stance is taken by the defendants. They are saying that there were subsequent "oral agreements" and that the plaintiffs are estopped.

The tactical position taken by both sides seems to me to run counter to two clauses in the employment agreement. Clause 7 specifically states that the contract supersedes all prior understandings, agreements or representations, and cl. 8 states that the contract cannot be altered, amended, revoked or waived except by an instrument in writing.

In so far as Action No. 18 of 1992 is concerned, the defence also suffered an amendment with an allegation of collusion. In the statement of claim Skopbank alleges that—

"the defendants have so managed the vessel that their conduct in relation to the vessel has been such as to entitle the plaintiff to take possession of the vessel under the mortgage. Specifically, the

> defendants have been working the vessel in a manner inconsistent with the sufficiency of the security and, by failing to pay their crew their wages, have given rise to a maritime lien against the vessel."

It also relies on the terms of the mortgage as spelled out in the loan agreement, in cl. 17, paras. (b), (d) and (g).

The defence in this case is that the defendants complied with all the terms of the loan agreement, have paid interest on the loan from time to time as required, and that the plaintiff has no entitlement either to call in the loan or to exercise the powers and rights claimed under the mortgage. In other words, there has been no act of default.

And the allegation of collusion in the amended defence reads as follows:

> "The defendants will further aver that the plaintiff has acted in collusion with the crew and has procured the alleged event of default on which it seeks to rely by funding the costs of the arrest in the crew's action against the defendants and by providing, on behalf of the crew, the security ordered by the Supreme Court to be paid by the crew as a condition for the maintenance by the crew of their claim for damages for repudiation against the defendants, which claim the defendants deny and which is preventing the release of the vessel from Gibraltar."

Before I proceed any further I should decide a question of fact. Were there any wages outstanding at the date of arrest? The answer is "Yes." The evidence is overwhelming, regardless of whether actual payment should be postponed or not. The evidence and contention for the defence has been that any money forwarded or provided by Melton to P.G. and Alf after the signing of the employment agreement was for disbursements and not for wages.

I have now to interpret the employment agreement in so far as remuneration is concerned. It has been agreed that it should be interpreted according to English law. Mr. Baglietto, counsel for the plaintiffs in Action No. 16 of 1992 (P.G. and Alf), has argued that the term in cl. 4(a) of the agreement which reads: "The employer shall pay to each employee US$50,000," must mean at the rate of US$50,000 a year, and that consequently they are entitled to receive it *pro rata* monthly. He prays in aid the fact that even before the signing of the agreement P.G. had been receiving $4,000 a month, and on one occasion $4,166, albeit for himself and Alf. He also relies on the correspondence between the parties.

Mr. Vasquez, counsel for the defendants, contends, although it is not part of his specifically pleaded case, that it means US$50,000 at the end of the year.

I am of the opinion that "per year" does not necessarily mean at the end of the year, still less at the beginning of the year. What it means is the totality of emoluments in any one year. An employee is entitled to expect

that he will receive regular payments at regular intervals for the work he has performed or is performing. I have come to the conclusion, not only on a fair reading of the clause but also on the course of conduct of the parties, both before and after November 16th, 1991, that the intention was that P.G. and Alf should receive monthly wages. I find for the plaintiffs on this issue.

Clause 4(b) of the agreement also relates to remuneration. It reads: "The employer shall credit to the account of each employee an amount equal to 5% of the net charter revenues earned by the employer each month during the term of the agreement."

At one stage Mr. Baglietto sought to argue that the plaintiffs were entitled to receive 5% each of the charter fees monthly whenever the *Flawless* was under charter. I do not agree. That entitlement was postponed until the agreement expired or the vessel was sold. It is clear from para. (b) when it speaks of "credit," not payment. This is confirmed by cl. 5 of the agreement. In any case, the defendants were not legally bound to charter it if, for any reason, they did not want to do so. There was no legal agreement between the plaintiffs and the defendants that chartering had to take place, although it was envisaged.

In the plaintiffs' (P.G. and Alf's) statement of claim, the claim for damages is spelt out. The claim is for $208,332 for each of them for the residue of the term of five years, plus a sum to be assessed for the loss of 5% of charter earnings. The issue which arises is whether there can be a claim *in rem* for damages for breach of contract arising out of unlawful dismissal. The plaintiffs are alleging that they were unlawfully dismissed. It is common ground that a claim for a crew's wages, including disbursements, can give rise to a maritime lien and to an action *in rem*. No authority need be quoted for this proposition. Reference to s.20(2)(*o*) of the Supreme Court Act 1981, which applies to Gibraltar, is sufficient.

Whether damages for the residue of the five-year term can be claimed as part of wages in an action *in rem* is another matter. Mr. Baglietto says: "Yes." Mr. Vasquez says: "Only in certain circumstances." There are two conflicting authorities: *The British Trade* (3) and *The Halcyon Skies* (4). The later case is to be preferred. The issue in that case was a very narrow one: whether an employer's contribution to a pension fund during the employment of a member of the crew was properly to be regarded as part of the employee's wages. The court answered it in the affirmative but Brandon, J. expressed himself thus, *obiter* ([1976] 1 All E.R. at 864):

> "…[T]he Admiralty jurisdiction in wages has long been extended, as I explained earlier, to claims founded in damages as well as debt. Further, that extended jurisdiction has not only been exercised regularly in respect of claims for damages after termination of the contract of employment by wrongful dismissal, but also at least once prior to 1951 in respect of a claim for damages for breach of such contract during its subsistence."

I agree with Mr. Vasquez's submission that Brandon, J.'s *obiter dictum* is too widely stated and that for damages to be recoverable as wages in an action *in rem* they must be closely connected with service on board. In the present case there was a contract of service for five years, but not exclusively either on board the *Flawless* or any other vessel: see cl. 5 of the agreement. Counsel has also challenged Mr. Baglietto to produce a single case of a claim for damages *in rem* similar to the present claim. I have formed the view that the claim for damages, on the present facts, is not sustainable as an action *in rem*.

However, damages for breach of contract can be recovered in an action *in personam*, and there is no reason why I should not give judgment *in personam* in this action. Counsel agrees with this view of the law: see *The August 8* (1).

Assuming that the plaintiffs were to succeed, they would be entitled to obtain judgment *in rem* in respect of unpaid wages and disbursements due for the period October 1991 to September 1992 (which is the agreed date of the repudiation of the contract by the defendants). The amount due is said to be US$25,246 for wages and US$16,547 for disbursements, making a total of US$41,793 for each of the plaintiffs. The rest of the claim would have to be a judgment *in personam* against the defendants.

The actual amount of the judgment *in personam* should be assessed, as I am not satisfied that the plaintiffs have done all that was in their power to mitigate damages. I cannot accept that men of their calibre and expertise have not been able to find alternative employment, even if not necessarily as sailors. A judgment *in personam* is really a Pyhrric victory, as the defendants are a shell company with no real assets. My assessment of their damages would be six months' wages. In other words, US$25,000 each.

I prefaced the earlier paragraph with the word "assuming" advisedly and for a very good reason. I still have to consider the two main defences put forward by the defendants, which are (a) promissory estoppel, and (b) breach of fiduciary duty.

Dealing with promissory estoppel first, counsel for the defendants relies on *Hughes* v. *Metropolitan Ry. Co.* (5), where Lord Cairns, L.C. put forward the following proposition (2 App. Cas. at 448):

> "…[I]f the parties … afterwards enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

I have to add that the above case was one dealing with relief from forfeiture, and not a master and servant action.

What the defendants contend is that at certain stages Melton's financial

position was discussed and that P.G. and Alf were aware of the situation. Furthermore, in an alleged conversation with Melton's attorney, Mr. Sheldon, in "L'Habitacion" regarding their wages, when wages were not forthcoming, P.G. told Melton: "Don't worry. We got into this together; we shall get out of it." This, counsel contends, amounts to an agreement or promise to defer wages.

The evidence for the plaintiffs, which I accept, is that they were always asking for money in respect of their wages and disbursements. It is true that they never made a formal demand or sued or threatened to sue before August 10th, 1993. They merely waited patiently to be paid. These facts do not constitute a promissory estoppel. There is nothing inequitable in the plaintiffs' finally taking legal action to recover what was due to them. This defence fails.

I now turn my attention to the defence of breach of fiduciary duty. The allegation here is that P.G. and Alf did warranty work on board the *Flawless*, that Nautor paid them for some of the work, and that the defendants were not made aware that such payment had been made. Counsel has drawn my attention to the case of *Boston Deep Sea Fishing & Ice Co.* v. *Ansell* (2), where Cotton, L.J. said (39 Ch. D. at 357):

> "If a servant, or a managing director, or any person who is authorized to act, and is acting, for another in the matter of any contract, receives, as regards the contract, any sum, whether by way of percentage or otherwise, from the person with whom he is dealing on behalf of his principal, he is committing a breach of duty. … [W]hat I say is this, that where an agent entering into a contract on behalf of his principal, and without the knowledge or assent of that principal, receives money from the person with whom he is dealing, he is doing a wrongful act, he is misconducting himself as regards his agency, and, in my opinion, that gives to his employer, whether a company or an individual, and whether the agent be a servant, or managing director, power and authority to dismiss him from his employment as a person who by that act is shewn to be incompetent of faithfully discharging his duty to his principal."

I feel bound to follow the law as stated by the learned judge, but has it got direct application to the present case? In the authority quoted, a director had been receiving secret commission which his employers were unaware of. In the present case, in argument, P.G. and Alf have been accused of moonlighting, but such has not been their case. They were doing work under the blue sky and blazing sun (hardly moonlighting) at the request or with the consent of Melton, who at least on one occasion told them "get paid by Nautor." Further, the work they were doing was warranty work. I find as a fact that the warranty work was not part of their written contract of employment. This defence also fails.

Having found for the plaintiffs in Action No. 16 of 1992, I have now to consider Action No. 18 of 1992. They are two different actions altogether

and must be considered separately, although they have been tried at the same time. Needless to say, they have one thing in common; the purchase of the *Flawless*. This latter case by the bank centres on the interpretation of the loan agreement. The agreement specifies that Finnish law applies.

Two experts on Finnish law, Dr. Juha Poyhonen and Mr. Peter Backstrom, have produced written opinions and adduced evidence. With all due respect to them, they have not been very helpful in the sense that they have both directed their minds on how, if they were a Finnish court, they would have interpreted this agreement. Needless to say, they arrived at different conclusions. I do not need help in this particular area. What I required was a statement of the law in Finland regarding interpretation of contracts. It appears to me, taking into consideration their evidence, that there is not much difference between Finnish law and English law on this subject. I think that in coming to a decision, I will pray in aid Rule 18 of Dicey & Morris, 1 *The Conflict of Laws*, 11th ed., at 217 (1987), which states:

> "**Rule 18.—**(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.
>
> (2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case."

As a matter of record, Finnish law was not pleaded, but nothing arises out of that, as I told counsel during the hearing that their claim or defence would not be defeated because of their pleadings. I will interpret the loan agreement according to English law.

Skopbank is relying on four acts of default in justification of terminating the loan agreement, namely, (i) insolvency, (ii) deterioration, (iii) impairment of security, and (iv) *The Manor* (6).

Dealing with (ii) first, reliance is placed by Skopbank on the wording of cl. 17(g) which reads: "…[I]f the borrower fails to keep the vessel in a good and efficient state so that the value of the mortgage shall essentially decrease…" There is no evidence that the value of the security (the *Flawless*) had deteriorated at the time of arrest or that, up to that stage, it was not in a good and efficient state. The plaintiffs cannot rely on this paragraph.

Dealing next with (i), the act of default alleged is cl. 17(b), which states: "…[I]f any bankruptcy, insolvency, liquidation, receivership or similar proceedings are instituted by or against the borrower … under the laws of any jurisdiction…" Mr. Stagnetto has argued that an arrest in Admiralty amounts to an act of insolvency under the words "or similar proceedings." In fact, he has contended that the mere arrest is in itself an act of insolvency and that the word "arrest" should be implied in the paragraph. I do not agree. It is true that in certain circumstances an arrest brought about by the existence of a maritime lien could amount to an act

of insolvency, but not all arrests. The plaintiffs cannot rely on this paragraph.

The third alleged act of default is under cl. 17(d) which provides: "…[I]f any substantial deterioration shall occur in the financial condition of the borrower…" In considering this last act of default under the loan agreement, I think that it would be quite proper for me to deal with it in conjunction with *The Manor* (6). I take this course because I consider that act of default and the ruling in *The Manor* to be the two faces of the same coin. This seems to be the view in *Temperley's Merchant Shipping Acts*, 5th ed., at 29 (1954):

> "*Right to take possession.*—The mortgagee's right to take possession is generally regulated by the collateral deed of covenants which usually accompanies the mortgage deed … But apart from such express agreement the mortgagee may take possession under the mortgage whenever the mortgagor is in default in the payment of interest or repayment of the principal, or where the mortgagor allows the ship to remain burdened with maritime liens which impair the security, even in the absence of such default. *The Manor*…
>
> He may act on his own initiative and responsibility in the exercise of his rights at common law or under his special contract (if any), or may invoke the assistance of the court by arresting the ship in a mortgage action…"

The above view is echoed by *Roscoe's Admiralty Practice*, 5th ed., at 53 (1931):

> "Although it has been enacted that a mortgagee of a British ship only becomes the owner for the purposes of the mortgage, so that he may be protected from claims for which he would otherwise be liable as owner in possession, yet the mortgage gives him a right to the actual possession of the ship at any time after the debt is due, and even before the debt is due, if the property is being dealt with in such a way as to impair the security…"

The headnote to *The Manor* in the *Law Reports* reads ([1907] P. at 339):

> "If the dealings with a ship by the mortgagor are of such a character as to be inconsistent with the sufficiency of the security, the mortgagee may take possession, although there has not been any actual default on the part of the mortgagor under the mortgage, and although the mortgagee has not commenced any formal proceedings."

Mr. Vasquez has directed my mind to a passage in *The Manor*, where Fletcher Moulton, L.J. had this to say (*ibid.*, at 361–362):

> "It may well be that to allow a ship to become subject to a maritime lien may not be an infringement of the rights of the mortgagee, even though that maritime lien ranks above claims under

> the mortgage. For example, it cannot be said to be a breach of the rights of the mortgagee, if a ship in distress accepts salvage assistance, though a maritime lien thereby arises. But there is an obvious difference between allowing a ship to become burthened with a maritime lien, and allowing her to remain burthened with such a lien, without the power to discharge it, for, to that extent, you have, as in this case, substantially diminished, that is to say, impaired the value of the mortgage security."

The above was brought to my attention for the proposition that the mere creation of a lien does not of itself create a right in the mortgagee to take action, but when one reads the quotation carefully, I do not think it favours the defendants.

The uncontroverted facts in this case are that there were delays in the payments of interest due by the mortgagor. Letters dated January 27th, 1992 and July 3rd and 20th, 1992 were sent by Skopbank to Flawless Adventures Ltd. calling to their attention that interest payments were overdue. On July 31st, 1992 the bank issued a notice of default against the defendants, again for non-payment. Later, on August 3rd, 1992, the bank withdrew the notice on receiving payment. It then came to its knowledge that the *Flawles*s had been arrested in Gibraltar in an action for unpaid crew's wages.

From the date of arrest to the final notice of default on August 19th, 1992, nothing was done to secure the discharge of the lien the *Flawless* had been burdened with. This, to my mind, was a default, to quote Fletcher Moulton, L.J. in *The Manor* (6) (*ibid.*, at 362), "allowing her to remain burthened with such a lien, without the power to discharge it…"

In any case, during the hearing it has become obvious that the defendants are in serious financial difficulties, and even if they had wanted to they would not have been able, at the time of arrest or shortly after, to discharge the lien in respect of crew's wages.

I come to the conclusion that the plaintiff succeeds in its claim both under cl. 17(d) of the loan agreement and under *The Manor* (6).

I still have to deal with the allegation of collusion. I dismiss that allegation. There is no evidence upon which I could find collusion. At the very highest, there was a suspicion of support and sustenance by either Nautor or Skopbank to the crew's claim, but nothing more than that.

Accordingly, I enter judgment in Action No. 16 of 1992 on the following terms:

1. Judgment *in rem* in the sum of US$41,793 in favour of Per G. Johannson.

2. Judgment *in personam* in the sum of US$25,000 in favour of Per G. Johansson.

3. Judgment *in rem* in the sum of US$41,793 in favour of Alf Andersson.

4. Judgment *in personam* in the sum of US$25,000 in favour of Alf Andersson.

5. Interest from the date of the writ.

6. The plaintiffs are to have the costs of the action.

7. Appraisment and sale of the vessel; the sale not to take place before the expiration of 30 days.

8. Payment out, subject to the Marshal's expenses and subject to priorities, if any.

In Action No. 18 of 1992, I enter judgment as prayed in the statement of claim, with an order for appraisement and sale. The sale is to be delayed for 30 days in case there should be an appeal. Payment out is to be subject to the Marshal's expenses and subject to priorities, if any. The plaintiffs are to have their costs of the action.

Finally, and for the sake of completeness, the counterclaims in both actions stand dismissed. On the evidence, they cannot succeed.

Judgment for the plaintiffs.
