

**IN THE HIGH COURT OF THE COOK ISLANDS  
HELD AT RAROTONGA  
(CIVIL DIVISION)**

**PLAINT NO. 19/18**

**BETWEEN DENNIS REGINALD WALKER**

Plaintiff

**AND PACIFIC MARITIME HOLDINGS  
INC.**

Defendant

Hearing Dates: 22 March 2019; and 30-31 May 2019

Counsel: Mr W Rasmussen for Plaintiff  
Mr B Mason for Defendant

Judgment: 16 December 2019

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**JUDGMENT OF HUGH WILLIAMS, CJ**

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[0688.dss]

**A. For the reasons appearing throughout this judgment, the Plaintiff's claim against the Defendant is dismissed.**

**B. Consequential matters are to be dealt with as set out in paragraph [130].**

**Claim and Defence**

[1] By his Second Amended Statement of Claim<sup>1</sup> the plaintiff, Mr Dennis Walker, seeks judgment for \$149,041.12 “as remuneration for expenses he incurred” plus a “full accounting of expenses arising from and incidental to sale” of the motor yacht Tranquility [sic] and costs from the defendant, Pacific Maritime Holdings Inc.<sup>2</sup>

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<sup>1</sup> The original claim was filed on 30 August 2018 and the Second Amended Statement of Claim on 11 February 2019.

<sup>2</sup> PMH.

[2] Mr Walker is Managing Director of Echelon Investigations Pty Limited though brings the action as:

“a personal claim against the defendant to be remunerated for expenses he incurred in finding, securing and sailing the yacht from Fiji to Noumea and securing the yacht in Noumea<sup>3</sup>”.

though he later pleads that he is “owed money for searching, locating, preparing, repairing, sailing and securly berthing the vessel Tranquility in Noumea in November 2016”<sup>4</sup>.

[3] Mr Walker’s original claim has been reduced by \$20,000 for the reasons later canvassed.

[4] Though devoid of dates, Mr Walker’s latest claim elaborated on his action in the following way:

18. The Plaintiff was instructed by the defendant company through its director William Duffy to locate the yacht which was somewhat abandoned in Fiji. Secure and sail it to Noumea for berthing.
19. That Mr Walker located the vessel in Lami Lagoon, south of Suva, Fiji, repaired it at his expense and was further instructed by Mr Duffy to sail the vessel to Port Moselle, Noumea for berthing.
20. Mr Walker co-skippered the vessel the yacht to Port Moselle in Noumea, New Caledonia on a voyage that took three and a half days (3.5).
21. Mr Walker arranged for the berthing, paid for the visa of the Fijian skipper and crew member, customs clearance and fuel for the vessel and once the vessel was secured in Noumea, he flew back to Australia.
22. In November 2016, Mr Walker was again instructed by Mr Duffy on behalf of the defendant company to return to Noumea, secure the vessel for the cyclone season, dismiss the crew, arrange for them to be flown back to Fiji and leave the yacht in the care of the owner of Noumea Yacht Services Herve’ Moar.

and continued to have a supervisory role over the yacht’s status and condition until February 2017.

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<sup>3</sup> Second Amended Statement of Claim, para 4.

<sup>4</sup> Second Amended Statement of Claim, para 24.

[5] It is admitted that PMH is registered under the International Companies Act 1908-1<sup>5</sup> and is the owner of Tranquility. Its registered office is at Southpac Trust Ltd on Rarotonga and its principal director on incorporation was William Edward Duffy, an Australian citizen resident in Queensland, Australia.

[6] PMH denies it contracted with Mr Walker for his services and that he is owed money for those services and, in particular, services including finding and securing Tranquility. It pleads that any instructions to Mr Walker came from Mr Duffy personally, not from PMH; denies he was instructed to locate Tranquility – he having merely gone to its known location – and denies Mr Walker arranged for repairs. It admits Mr Duffy instructed Mr Walker to sail the vessel from Suva to Noumea and that the latter was onboard at the time, but generally denies any obligation to the plaintiff.

[7] While pleading a contract for services between PMH and himself, the final submissions by Mr Rasmussen, counsel for Mr Walker, appeared also to plead a claim in quasi-contract for quantum meruit in seeking “a reasonable amount as payment to the plaintiff”<sup>6</sup> and the final submissions of Mr Mason, counsel for PMH, suggested that, in addition to its general denial of owing Mr Walker anything, a letter on Echelon Group letterhead dated 27 October 2016, also later canvassed, amounted to an accord and satisfaction of the plaintiff’s claim.<sup>7</sup> Those issues were raised with counsel by Minute dated 22 October 2019<sup>8</sup>.

[8] As will be seen, that description of the dispute, wholly derived from the final pleadings and submissions, is disarmingly simple.

### **Pacific Maritime Holdings Inc; Plaintiff 2/18**

[9] PMH has had a somewhat chequered corporate career which, since they are agreed, may, for present purposes, be taken as correctly set out in paragraphs 1-14 of the judgment in *Pacific Maritime Holdings Inc. v Registrar of International and Foreign Companies*<sup>9</sup> and reproduced in a schedule to the judgment of Potter J in that case.<sup>10</sup>

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<sup>5</sup> “ICA”.

<sup>6</sup> At 61.

<sup>7</sup> At 65(d).

<sup>8</sup> Dated 22 October 2019. Mr Mason responded by memorandum dated 29 October 2019.

<sup>9</sup> Plaintiff 2/2018.

<sup>10</sup> 9 August 2018, para 2.

## Parties

1. The Plaintiff is an international company incorporated and duly registered under the International Companies Act 1980-81 (“ICA”) and has its registered office at the premises of Southpac Trust Limited, ANZ House on the main road in Avarua on the island of Rarotonga.
2. The Defendant is the Registrar of International and Foreign Companies duly appointed pursuant to subsection 8(1) of the ICA whose premises are at the offices of the Financial Supervisory Commission, Bermuda House, Tutakimoa Road, Avarua on the island of Rarotonga.

## Particulars

3. The Plaintiff was duly incorporated as an international company 30 September 2013.
4. The sole director of the Plaintiff on incorporation of the Plaintiff was, and remains, William Edward Duffy (“Duffy”), an Australian citizen who resides at 31 Lyrebird Ridge Road, Queensland 4213, Australia.
5. The Plaintiff was issued 100 shares having a par value of USD1.00 each. All shares are owned by Southpac Trust Limited in a trustee capacity.
6. The Plaintiff held an asset namely a 21 metre yacht built in Canada in 1996 by the name of *Tranquility* (“Vessel”) which was in 2013 flagged and registered in the Cook Islands.
7. On 29 September 2016 the registration of the Plaintiff on the register of international companies (“registry”) expired.
8. On 1 December 2016 the Plaintiff was struck off the registry for non-payment of registration renewal fees.
9. Pursuant to subsection 197(2) of the ICA the Vessel vested with the Defendant.
10. The Defendant arranged for the Vessel which was then berthed in Noumea, New Caledonia to be sailed to Auckland, New Zealand for the purposes of its disposition by way of sale.
11. On or about 21 November 2017 the Vessel was duly sold for a consideration of \$483,000.
12. Upon application by Southpac Trust Limited pursuant to subsection 197(3) of the ICA, and upon filing all statutory returns required by the Defendant and paying to the Defendant all prescribed costs and fees, the Defendant on or about 5 February 2018 restored the Plaintiff to the register.
13. The Plaintiff has made demand of the Defendant to pay out to the Plaintiff the net proceeds of the sale of the Vessel (“Proceeds”) but the Defendant has refused claiming application must be made to the Court pursuant to subsection 199(4) of the ICA.

14. The Plaintiff [sic] has advised after deducting the costs and expenses incurred in the sale of the Vessel the net proceeds held in the relevant public account administered by the Financial Supervisory Commission pursuant to the provisions of section 46 of the Ministry of Finance and Economic Management Act 1995-96 are \$169,195.57 (the “Proceeds”).

[10] Since the delivery of Potter J’s judgment on 9 August 2018, PMH has again been deregistered (February 2019) and again re-registered (late February-early March 2019).

[11] Potter J described the preliminary issues of law for her determination in that case as being whether the proceeds of sale of Tranquility reverted to PMH on reinstatement or whether those proceeds remained in the public account subject to claim under s 199(4) of the ICA by PMH and any other claimants.

[12] The nub of the legal dispute in *Plaint 2/18* was whether s 197(3A) was paramount over s 199(1) so the proceeds of sale never vested in the registrar and reverted to PMH, or whether s 197(3A) applies only to assets not then disposed of or dealt with by the registrar and did not apply to the proceeds of realised assets. After analysis of the statutory provisions, Potter J held that the proceeds of the sale of Tranquility reverted to PMH on its reinstatement to the register<sup>11</sup> and, there being at the time a number of claims against the sale proceeds, directed that the proceeds be paid into the trust account of Henry Law PC on interest-bearing deposit – where they currently remain – and required claimants to issue proceedings within 21 days of her judgment and pursue the claims diligently, failing which the proceeds of sale should be disbursed to PMH.

### **Course of proceedings: *Plaint 19/18***

[13] Two persons claiming to be entitled to the proceeds of the Tranquility sale, Mr Walker and a Mr De Clerk<sup>12</sup> issued proceedings against PMH as a consequence of Potter J’s direction.

[14] Those two proceedings came before Keane J, initially on 12 September 2018 on applications for security for costs, and, in a minute issued on the day of the hearing, the Judge, after summarising the two claims said:<sup>13</sup>

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<sup>11</sup> At [19].

<sup>12</sup> *Plaints 19/18 and 20/18*.

<sup>13</sup> At [9].

[9] The essential point PMH takes is that Mr Walker alleges he contracted with Mr Duffy and Mr Foster, understanding them to be the owners of the *Tranquillity*. He does not allege that he did so understanding that they were engaging him on behalf of PMH. PMH relies on the *Salomon* principle that a company has a personality in law in its own right, distinct from and independent of the personalities of its shareholders and directors. Its short point is that any claim Mr Walker may have lies only against Mr Duffy and conceivably Mr Foster.

[15] Keane J made directions in Mr Walker's case for the filing of an "amended pleading on the two issues identified and a memorandum in reply on the issue of security for costs" and timetabled a forecast application by PMH to strike out the claim<sup>14</sup>.

[16] The claims came back before Keane J on 20 November 2018. It is pertinent to note some of the Judge's remarks in the judgment he delivered that day:

[1] On 24 August 2018, Dennis Walker brought this case against Pacific Maritime Holdings Incorporated ("PMH"), then stating that he contracted with William Duffy, the then owner of the vessel as he understood, to find secure and survey the vessel *Tranquillity*. He said also that he received that instruction from Peter Foster and he believed both were the vessel's owners.

[2] On 11 September 2018, PMH applied to have the case struck out on the basis that it did not disclose any reasonable cause of action. The essential point was that, even if Mr Walker had entered into a contract with Mr Foster and Mr Duffy he had not entered into a contract with PMH itself. On the face of it he was unaware that PMH was then the owner of the vessel.

[3] PMH invoked the *Salomon* principle that a company is an entity distinct from its directors and shareholders; the effect of which was said to be that PMH could only have become bound if Mr Walker had known that one or the other was a PMH director, acting on its behalf.

[4] On 12 September 2018, I allowed Mr Walker's counsel the opportunity to file an amended statement of claim and timetabled the matter to allow, if need be, for a further strike out application. An amended statement of claim was filed. However it continued to assert that Mr Walker contracted with Mr Duffy and Mr Foster.

[5] It said that, despite the fact that PMH did not appear to have entered into a contract with Mr Walker, he relied on causes of action in contract and tort not requiring privity with PMH.

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<sup>14</sup> Directions were also made in the de Clerk claim but as that plaintiff failed to meet the security for costs order made against him, the claim failed and passes from consideration.

[6] On the face of it therefore PMH retained the ability to put in issue whether the amended statement of claim contained a reasonably arguable cause of action. And PMH applied a second time to strike out the proceeding. It is that application that I have heard today.

[7] Ordinarily a strike out application is resolved on the pleading as it stands in isolation of the proposed evidence. The allegations made are deemed for the purpose of strike out to be true. The question is whether they are sufficient.

[8] There are instances however where the Court will receive evidence if only to identify whether the pleading challenged sufficiently reflects what the evidence could be. Conversely it can be also to identify whether, even if the pleading were amended, that would serve any useful purpose.

[9] In this case I have permitted Mr Walker to give evidence on the critical issue with whom he considered he was contracting. I have done that, I wish to be clear, not to assess his credibility. That will only arise in the event of trial. I have done it to enable him to say what he would wish reflected in his pleadings on the issue with whom he contracted.

[10] PMH's counsel, Mr Mason, had an instinct question Mr Walker's credibility, given his two pleadings and his declarations. As I said to Mr Mason, however, credibility is for trial. Unless he has evidence, contemporary with the crucial conversations when the contract was established, which renders Mr Walker's evidence incredible, he should reserve his challenge for trial.

[11] Mr Walker has given highly explicit evidence as to with whom he contracted. He says that there was a meeting with Mr Duffy and Mr Foster in mid-August 2016. At that meeting he was told of the vessel Tranquillity and their proprietary interest in it. The owner of the vessel, he was told, was PMH.

[12] That said, Mr Foster then claimed to be the owner and Mr Duffy the beneficial owner and Mr Walker understood that this was through the medium of a Southpac trust, the architect which was an English lawyer, Rob Reichardt.

[13] His ultimate evidence is that, even if Mr Foster and Mr Duffy controlled the vessel, his contract was with PMH, because of the structure set in place. It was on that basis that he accepted engagement.

[14] Had Mr Walker alleged that, if not in his first statement of claim, then in his second, neither strike out application would have been brought. It is an allegation sufficiently exact to found further amended pleadings, which answer the *Salomon* point.

[15] I decline the application and allow the filing of a second amended statement of claim. Counsel are to settle a timetable by 23 November 2018 which I will endorse. Costs on the present application are reserved until the proceeding is resolved.

[17] It is also pertinent to note that it is settled practice, in order to preserve litigants' rights and recourse to the courts, not to grant striking-out applications if the pleadings are capable of amendment in a way which will demonstrate that plaintiffs have an arguable case, in fact or in law, against defendants.

[18] The substantive hearing of Mr Walker's claim was initially set down for the afternoon of 22 March 2019 but the time available was plainly inadequate and it had to be adjourned part-heard. Two further days, 30 and 31 May 2019, were able to be allocated with the evidence then being concluded (most of it having been given by Skype). The claim was then adjourned for production of the transcript of the hearings, the filing of submissions and the preparation of this judgment.<sup>15</sup>

[19] The course of the hearing was recounted in minutes of 17 April 2019 and 10 September 2019 as well as in the transcript. The most salient feature is that Mr Mason, from having, on 22 March 2019, abandoned reliance on experts' recently sworn affidavits, was permitted to reverse that stance. The experts gave evidence by Skype during the substantive hearing.

[20] Therefore, as matters turned out, Mr Walker and his wife were both able to give evidence and their four and two affidavits respectively became part of that evidence as did Mr Duffy's major affidavit and his evidence, being given by Skype, the affidavits sworn in support of PMH's position – both expert and lay – and the evidence given by a Ms Jill Foster.

### **Terms of Arrangement**

[21] In a claim based, as this is, on a contract, or contracts, entered into orally, it is necessary to first consider what are the terms of the contract as shown by the way it is pleaded but also how the evidence matches the terms of the claimed contract, who are the contracting parties, how the contract is said to have been performed and, if it has been performed, what, if anything, remains owing of the consideration.

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<sup>15</sup> The transcripts of evidence became available on 20 July 2019 (22 March 2019) and 22 August 2019 (30 & 31 May 2019), the main submissions of counsel were filed between 14 September – 12 October 2019 with the file being received by the Chief Justice on 14 October 2019 (all NZT). Counsel's submissions are woven into the narrative as they mainly provided helpful marshalling, pro and con, of the facts, the case not being one of great legal complexity.



[22] Tranquility was built in 1996 and is a 21.9 metre, twin engine motor yacht which was purchased on 1 October 2013 for \$NZ1,325,000 from Satori Sailing Inc. by PMH<sup>16</sup> with her name being changed from “Next Adventure” to “Tranquility” on transfer.

[23] There is some evidence that in May 2013 an associate of one Peter Foster contacted an Australian boat broker to purchase a vessel for himself. Next Adventure was located and an offer to purchase her was made “on behalf of a company in the Cook Islands called Satori Sailing Inc. which I understood to be the company owned by Peter Foster”.<sup>17</sup> The purchase price of A\$1M was also confirmed in an email addressed to Mr Duffy, a close friend of Mr Fosters.<sup>18</sup>

[24] After PMH was deregistered for the first time on 29 September 2016 the Financial Supervisory Commission<sup>19</sup> took steps to secure and realise the company’s sole asset, the Tranquility, then in Noumea. The FSC secured her physically, insured her and arranged through an Auckland agent, a Mr Petterson, to reposition her to Auckland, manage her sale and maximise the sale price.<sup>20</sup>

[25] On 6 May 2017 Ms Wittwer, a qualified accountant and commissioner of the FSC, circulated all those interested in Tranquility advising of then position concerning the sale process and saying offers for the vessel should be directed to Mr Petterson.<sup>21</sup>

[26] There is some evidence that, in May/July 2017, Mr Walker was interested in the sale of the vessel, claiming to have a buyer seriously interested in purchasing at a price of \$1M. He was critical of the sale process employed by FSC and Mr Petterson.<sup>22</sup>

[27] The FSC sold Tranquility for \$NZ483,000 as at, it would appear, approximately 21 November 2017, a sum which, after payment of brokerage, crew costs and other disbursements, left \$NZ169,196.07 which, with interest, was the sum with which Potter J dealt.<sup>23</sup>

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<sup>16</sup> DRW, Ex 17 and 18.

<sup>17</sup> Fairweather declaration, 31 August 2016, para 8.

<sup>18</sup> Fairweather declaration 11, DRW Ex 7.

<sup>19</sup> FSC”.

<sup>20</sup> DRW, 21.9.18, 4-9.

<sup>21</sup> Ex. D.

<sup>22</sup> DRW 21.9.18 11, 12 and 24.

<sup>23</sup> Ex. 1.

[28] To support his claim to a share of the Tranquility proceeds, Mr Walker advised Mr Petterson on 17 August 2017 that he would file a statutory declaration “together with copies of my various dockets, invoices and expenses paid out in the execution of my services as a Contractor acting in the capacity of Tranquility Operations Manager as Authorised by the Beneficial Owner William Duffy esq. The Trust and Pacific Maritime Holdings Pty Limited now in liquidation”. He said the detail would include copies of bank and credit card statements and that his claim for wages, normally A\$165 per hour would be reduced to A\$50 per hour.<sup>24</sup>

[29] He followed that with a statutory declaration dated 31 August 2017 which contained a version of his contract concerning Tranquility and said his outstanding account amounted to A\$110,000 details of which appeared in a four page annexure. The schedule actually totalled \$169,041.17, of which claims for professional fees for Mr Walker totalled \$100,800<sup>25</sup>, with disbursements making up the balance. The schedule nowhere identified the currency in which it is denominated, though some disbursements listed were incurred in Fiji and others in New Caledonia.

[30] Mr Walker asserted he sent Mr Petterson all the promised invoices, vouchers and other material, but Mr Petterson’s task was to ready Tranquility for sale and sell her, not to evaluate claims antecedent to that process, so it seems likely that had Mr Walker actually sent him the vouchers, time sheets and invoices he listed, Mr Petterson would have forwarded either the originals, or, at least, copies, to Ms Wittwer. Ms Wittwer denied FSC ever received any data from Mr Walker beyond the declaration.

[31] Crucially, again beyond the declaration<sup>26</sup>, Mr Walker put no material supporting his claims in evidence in this case, an issue discussed later.

[32] The declaration described the arrangements as follows<sup>27</sup>:

“I was retained by the Owners of the Motor Vessel Tranquility ... to make enquiries regarding the circumstances and status of the vessel which had been left in Fiji under the care of a Casual Skipper and a deckhand. I located the vessel at anchor in Lami Lagoon, south of Suva Fiji ... as a qualified Marine Surveyor I was requested and retained by the Owners to conduct a detailed Survey of the Vessel and report back on the Vessel’s condition and seaworthiness. The owners wanted the vessel to be

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<sup>24</sup> DRW Ex 30.

<sup>25</sup> August-December 2016 (\$52,800) and January-May 2017 (\$48,000) thus mostly outside the period with which this claim is concerned. There was no indication of the hourly rate charged.

<sup>26</sup> Two copies of the declaration were put in evidence: both lacked paras 8-19.

<sup>27</sup> Paras 3-29.

relocated from Fiji to New Caledonia ... I arranged and paid for the visas, customs clearance and fuel for the vessel and we departed on a date in October 2016. I acted as Co Skipper on the 3.5 day voyage to New Caledonia. On arrival in New Caledonia I saw to it that the vessel was securely berthed and flew back to Australia. I reported to the Owners the progress we had made and provided them with a progress accounting of my expenditure. I was requested by the Owners to return to Noumea early November 2016, secure the vessel for the cyclone season, dismiss the Crew and arrange to fly them back to Fiji and leave the vessel in the care of the Owner of Noumea Yacht Services... . I then flew back to Australia and reported to the Owners mission completed and accounted to them my expenses. I continued through into early February 2017 supervising the status and condition of the vessel and at all times I was retained by the Owners... I have NOT been paid for my time, effort, professional fees and more importantly the expenditure I paid out on the repairs and management of the boat in order to prepare the vessel for sea and the trip to New Caledonia”.

[33] As well as giving viva voce evidence Mr Walker swore several affidavits in the run up to the fixture.

[34] In the earliest<sup>28</sup> Mr Walker described the arrangement in the following terms:<sup>29</sup>

14. In relation to Ownership of “Tranquility”, at all material times, from the commencement of my Investigations to locate the vessel in Fiji, in or about late August 2016, carry out investigations and enquiries as to the status and bona fides of the Skipper and Crew, carry out an onboard survey of the vessel as a whole in order to determine its present state and to assess and advise the Owner(s) as to what would be required in order to make the vessel seaworthy again, Peter Foster referred to Tranquility as being “his” boat and I was told the story of how he had come to find the vessel and purchase same.
  
15. In addition, I was told by Foster that the vessel was run through a company Pacific Maritime Holdings Inc. Cook Islands and the vessel was registered in the Cook Islands for taxation and business purposes. He also introduced me to a very old close friend of the Foster family, William (Billy) Duffy and told me that he was a Director of PMH Inc. and a beneficial owner through some type of Trust Management.

[35] The third affidavit<sup>30</sup> was mainly devoted to different topics but dealt with the contract in the following terms:<sup>31</sup>

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<sup>28</sup> Sworn 21 September 2018.

<sup>29</sup> Walker 21.9.18, 14 and 15.

<sup>30</sup> Actually the second in Plaintiff 19/18, but the third if the declaration is taken into account. The affidavit was sworn on 28 February 2019.

<sup>31</sup> Walker 28.2.19, 21.

21. Additionally, over the period of my involent [sic] and work surrounding the motor yacht Tranquility, I was in Fiji on a number of separate related visits August-October 2016 and then from about very early November 2016 I was in Noumea New Caledonia on two separate occasions, once after arriving at Port Moselle Noumea after a 3-4 day journey aboard Tranquility as Co-Skipper and again at the end of November 2016 and early December 2016 when I arranged for the Crew to leave the vessel and fly home to their native Fiji, I was instructed by FOSTER/DUFFY and therefore PMH to pay for their flight tickets and pay them some wages on the basis that these expenses would be reimbursed to me upon my return to Qld together with all else I had incurred during the course of my duties under this contract.

[36] Mr Walker's last affidavit<sup>32</sup> described the arrangements in the following way:

20. I submit that my claim to this Court is simple.
21. I was initially asked by Foster to assist with the location of his vessel TRANQUILITY and to determine whether or not he was being ripped off by his Skipper.
22. I was very aware of the veil of anonymity surrounding the vessel and fully appreciated that this was due to Peter Foster's High Profile and Notoriety I was told by Foster that the vessel had been set up in a Trust situation initially by Rob Reichelt and then by Billy Duffy who he described as an old family friend and with a Cook Islands trading company Pacific Maritime Holdings (PMH) and a trust company called Southpac.
23. Following my initial meetings with Foster, I was introduced to Billy Duffy, initially at Fosters Byron Bay (EWINGSDALE) NSW residence and then on many occasions at Fosters Sovereign Islands home Gold Coast Qld.
24. I was being instructed by both Foster and Duffy and at all times fully understood and was told by Foster and Duffy that the operating entity for the care maintenance and upkeep of the vessel was PMH LTD and that DUFFY was the sole Director of his company and as such was entitled to act on the companies behalf.
25. My initial dealings with Foster commenced late August 2016 and in September 2016 I was introduced to Billy Duffy and the arrangements for the Tranquility job continued.
26. I was provided with a Credit Card in the name of William Duffy, BSP card and provided with a Letter of Authority to use the Card for the purposes of the job on Tranquility. The letter referred to me as "Operations Manager Tranquility". The letter was signed by William Duffy, Director and was on Pacific Maritime Holdings Ltd letterhead.

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<sup>32</sup> Sworn 14 March 2019.

27. It is for these and many other reasons that at all times I believed that I was being instructed/retained/contracted by and to the Corporate Ownership Structure that had been assembled around the purchase and ongoing ownership and upkeep of Tranquility.

[37] Before Keane J, Mr Walker's evidence was that the "investigator side of my practice was called upon to locate the vessel and my maritime experience was asked to report upon the vessel and its welfare"<sup>33</sup> and, when asked for whom he was working, said:<sup>34</sup>

"I was under no misapprehension that I was working for a company instruct – and that is Pacific Maritime Holdings Inc, and that the company I was being instructed by representatives of the company – people who held themselves out to me both on paper and verbally to be directly associated with A) the ownership of Tranquility and B) the company under whose protection the vessel was owned, and I was happy to accept that, and at that period of time I was quite pleased at the prospect of an interesting brief and one that was well suited to my talents."

[38] And at this fixture he described the arrangement as follows:<sup>35</sup>

"To put simply, my claim is for professional services, expenses incurred and my time labour and effort putting over three separate trips overseas on behalf of the defendant, all to do with the welfare of the vessel Tranquility. The work was carried out preliminary in Australia, in Fiji at a place called Lami down from Suva, and later in Noumea at a port Port Moselle in New Caledonia. And my claim basically is made I think fairly clear in my second affidavit with the attachments of the expenses."

And, later, said he was introduced to Mr Duffy and:<sup>36</sup>

"It was explained to me that Mr Duffy was a director or the sole director of Pacific Maritime Holdings. I'd already seen the paperwork for the vessel of course in going through the file and it was clear that it was a Cook Islands company owned by a foreign entity and that there was a trust involved and I learned, and certainly formed the clear impression and opinion that the arrangement had been set up to conceal the true identity of the beneficial owner who was Peter Duffy [sic] and of course he has a history which precedes him. The arrangement was not strange to me. Having been around boats for a long time I do know of the trust arrangements that get involved with vessels, I didn't find it strange at all. In dealing with Bill Duffy I knew that I was dealing with a director of the registered owner which was PMH and I took direction in two ways, either directly from Foster in concert with Duffy and of course Duffy in his part acting as a director for the defendant PMH."

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<sup>33</sup> 20.11.2018, at p8.

<sup>34</sup> 20.11.2018, p11.

<sup>35</sup> 22.3.19, p4.

<sup>36</sup> 22.3.19, p6.

and, later, the arrangement was:<sup>37</sup>

“... to go to Fiji, locate the vessel, find out what the true situation was with the crew and then to basically do a shakedown survey of the vessel in order to determine its current status, that is whether or not it was seaworthy, fit for sea and to look at the aspect of just how much it would cost to bring it back to fitness and to report back to them”.

with the payment arrangements being:<sup>38</sup>

“I was to be compensated for my time and effort. I was already doing some work, not directly from Mr Duffy at the time. My usual hourly rates are \$175 Australian for my professional services, that was conveyed to Mr Duffy. It was a verbal agreement however it was formalised in the form of a letter on PMH letterhead which was a letter of authority for me to (a) use a Bank Pacific credit card, which was handed to me, it was in the name of William Duffy; and secondly the letter authorised me to act as the Operations Manager for Tranquility, and this was signed by William Duffy as Director.”

[39] It is to be noted that, however it is construed, the documents described in the last passage do not detail the payment arrangements between the parties.

[40] He then described flying to Fiji on the week-long first trip, finding the vessel in Lami Lagoon, locating William Chute, the skipper, conducting an “audit of the vessel from stem to stern what I would call a shakedown survey” and preparing a scope of works required, and undertaken.<sup>39</sup>

[41] On his second trip to Fiji, about ten days later, Mr Walker described further repairs carried out, a mutual decision to move the vessel to Noumea for the cyclone season, preparing the vessel for the voyage – including Customs and visa requirements – and travelling to Noumea and quartering the vessel there<sup>40</sup>, the whole of which occupied about three weeks, including the 3-4 day voyage.

[42] Following that and, Mr Walker said, discussions with Messrs Duffy and Foster, he returned to Noumea about three weeks later to secure the vessel for the cyclone season, dismissed the crew and left her supervised by the marina owner.<sup>41</sup>

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<sup>37</sup> 22.3.19, p7-8.

<sup>38</sup> 22.3.19, p8.

<sup>39</sup> 22.3.19, p9-12.

<sup>40</sup> 22.3.19, p12-13.

<sup>41</sup> 22.3.19, p15-16.

[43] He said he rendered an invoice to Messrs Duffy and Foster about January-February 2017, but was unable to produce a copy and acknowledged he sent no later invoices or accounts rendered.<sup>42</sup>

[44] Mrs Walker swore two affidavits in this matter and gave evidence by Skype. She was not present at any of her husband's discussions with Mr Duffy or, possibly, Mr Foster in August 2016 or later, but confirmed her husband's trips and, though necessarily hearsay, confirmed his account to her of what he said he had been told by Mr Duffy and "to a lesser extent" Mr Foster. Those conversations, conversations with Mr Foster, his mother and his sister and reading documents relevant to this matter led her to the conclusion that:

"In my mind there was never any doubt that Peter Foster owned TRANQUILITY and pulled all the strings including paying for the Crew and running costs, and all this was done through the levels of and layers of anonymity from him e.g. Bill Duffy, PMH Limited and Southpac"<sup>43</sup>.

though in her affidavit she also spoke of "Director Duffy".<sup>44</sup>

[45] The weight of her evidence was lessened by being hearsay but, to an extent, showed her husband's recitals of what he said he had been told were consistent.

[46] What was Mr Duffy's version of the contact, performance and payment?

[47] Acknowledging he was initially appointed co-director of PMH with a Southpac nominee, he became sole director shortly afterwards.<sup>45</sup> He arranged for Tranquility to travel to Noumea in December 2013 and flew Captain Chute and a deckhand there to look after the vessel and sail it, some months later, to Fiji where, in 2015, Mr Duffy spent six months living on the vessel. At that point his ambition was to live on board for the rest of his life.

[48] Tranquility was repaired in November 2015 and then moored in Lami Lagoon.

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<sup>42</sup> 22.3.19, p17.

<sup>43</sup> JF Walker 2, para 12, 31.5.19, p93.

<sup>44</sup> JF Walker 1, paras 10 & 11; JF Walker 2, para 7.

<sup>45</sup> The nominee director ceased office a month after incorporation on 30 September 2013.

[49] He denied Mr Foster introduced him to Mr Walker or that he told Mr Walker of the ownership structure, directorship and beneficial ownership of PMH and said that “all that points to is that [Mr] Walker contracted with Foster and not with the defendant”.<sup>46</sup>

[50] Mr Duffy said he met Mr Walker on 6 or 7 October 2016 and was given some alarmist news about Tranquility as a result of which “I agreed to fly Walker to Fiji”. He arrived on 16 October 2016.<sup>47</sup> He denied Mr Walker had to “find” the vessel as she was where Mr Duffy’s crew had left her in Lami Lagoon and also denied Mr Walker’s claim he had to survey the vessel.<sup>48</sup> He said he personally prepaid Mr Walker’s accommodation in Lami Bay and, between 8-14 October 2016, gave him A\$8,500 in cash.<sup>49</sup>

[51] He also gave Mr Walker his Bank of the South Pacific cashcard and told him the PIN number, but failed to sign the back of the card. He noted Mr Walker’s admission he did so.<sup>50</sup> He said he did not give him the credit card authorisation letter, seemingly on PMH letterhead, dated 26 October 2016.

[52] Mr Duffy denied receiving documents supporting his claim from Mr Walker and said “I paid him a flat fee for his services and AUD\$8,500 for disbursements. Payments were not made based on invoices”.<sup>51</sup>

[53] Mr Duffy said Mr Walker was in Fiji for four nights, 16-20 October 2016, and on 24 October 2016 emailed asking for \$21,000 plus \$1,000 for cleaning, acknowledging \$10,000 sent on 19 October 2016 debited to his, Mr Duffy’s, bank statement.<sup>52</sup>

[54] The 24 October 2016 email asks for the “balance of the \$21K plus \$1K (\$10K already received) plus \$1,000 for the cleaning job” and was sent to onelongweekend-outlook. Mr Duffy made those payments but told him the \$1,000 should come out of the cash.

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<sup>46</sup> Duffy affidavit, 27. All references to “Duffy” are to his affidavit unless otherwise noted.

<sup>47</sup> Duffy, 33 & 37.

<sup>48</sup> Duffy, 39-40.

<sup>49</sup> Duffy, 42-3, Ex T, U & V.

<sup>50</sup> Duffy, 44-46.

<sup>51</sup> Duffy, 49.

<sup>52</sup> Duffy, 51-52, Exhibits W and W2.



[55] The affidavit then passed to the 27 October 2016 letter discussed elsewhere and two payments to Mr Walker each of \$10,000, made on 19 and 26 October 2016, initially contested.<sup>53</sup>

[56] Mr Duffy said that in November 2016 he asked Mr Walker to return to Noumea to terminate the crew's engagement, arrange for their repatriation and ensure Tranquility was in the care of Noumea Yacht Services.<sup>54</sup>

[57] Later, in early February 2017, Mr Walker returned from another trip to Noumea and Mr Duffy asked him to find a buyer for Tranquility. Though he did not say just when his change of intention arose, it was because:<sup>55</sup>

“I had decided that living out the rest of my days on Tranquility was a dream that would never become a reality. My poor health means I always need to be near medical services. In any event I now no longer had the stamina to live on a boat.”

[58] Mr Duffy's request, he said, would result in payment of a commission should a sale eventuate, but that arrangement never came to fruition as both were unaware PMH had by then been deregistered.<sup>56</sup>

[59] Mr Duffy continued that:

“if [Mr Walker] thought he was contracting with the defendant in October 2016 he would surely have checked to ensure the defendant had the wherewithal to pay him given it is a company registered in another country which he would have known nothing about. ... [Mr] Walker did not contract with the defendant as alleged by him in his affidavit and in parole evidence at the strike out hearing. All payments to him were made by me from my personal account. I never mentioned the defendant during the relevant periods<sup>57</sup>.”

[60] Mr Duffy's affidavit included material disparaging of Mr Walker's truthfulness – another issue which will require later consideration – and concluded that “I believe Walker is merely a gold seeking opportunist. His claims are completely without merit”. He colourfully described this claim as a ‘dash for cash’.<sup>58</sup>

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<sup>53</sup> Duffy, 54-64.

<sup>54</sup> Duffy, 65.

<sup>55</sup> Duffy, 70.

<sup>56</sup> Duffy, 71.

<sup>57</sup> Duffy, 72, 88.

<sup>58</sup> Duffy, 96, 30.5.19, p52.

## Discussion and decision

[61] The first point which requires a decision is the identity of the parties to the contract.

[62] As far as the plaintiff is concerned, the result is clearcut. As managing director of Echelon Investigations Pty Limited, a company whose letterhead describes its business as “Investigations. Intelligence. Risk Services”, he might have entered into the contract with PMH on the company’s behalf, but he was entering into a contract which predominately utilised his services as a “marine master” and so chose to enter into the arrangement with PMH personally. There was little contest to the conclusion that Mr Walker was the correct plaintiff in this litigation.

[63] There was greater dissension as to whether the correct defendant was PMH or Mr Duffy.

[64] While it is trite law that a person, being also a company director, may enter into a contract personally or may enter into a contract on behalf of, and binding, the company of which that person is a director, that principle, mentioned in the the earlier litigation reviewed previously, has little relevance once the evidence in this case is properly analysed.

[65] The arrangement which is at the heart of the case grew out of discussions between two Australian citizens, both with experience in maritime matters but perhaps not as much in law, negotiating, in Australia, for services to be provided by one of the contracting parties to a vessel which was the sole asset of a company registered in a foreign country of which, by then, the other party to the negotiations was sole director. The contract provided for work to be done on the company’s vessel in association with the company’s employees and required moving the company’s sole valuable asset, registered in one country, from a second country to a third. All of that points to PMH being a contracting party.

[66] Performance of the contract required expenditure on the company’s asset, but there was no evidence that PMH ever had funds – or even a bank account – from which to meet the cost of the performance of the contract involving its asset.

[67] On the other hand, the director of the company, who also had a beneficial interest in the company’s asset and thus the means to recoup through the company the costs of the expenditure he personally undertook to have the contract performed was not, by that means, undertaking personal liability, as opposed to committing the company, for the costs of performance.

[68] Put shortly, the actions Mr Walker took in relation to Tranquility could not have been undertaken if his contract was with Mr Duffy personally. He would not even have had the ability to board the company's asset, still less to shift it between countries or pay off her crew.

[69] It follows that the only appropriate conclusion is that, though Mr Duffy undertook to meet the costs of performance of the contract personally, in contracting with Mr Walker he was contracting on behalf of PMH, not contracting personally.

[70] It follows that the parties are correctly described as in the intituling.

[71] As has been mentioned in passing already – and as will require a little more detailed examination later in this judgment – PMH made strenuous efforts to undermine Mr Walker's reputation, paint him as a fabulist, an inveterate liar and a person whose word, even when sworn, was not to be relied on or trusted.

[72] Such allegations are not uncommon in litigation, but often lack much evidential foundation. Here, it must be acknowledged, PMH assembled more material to support its assertion than is commonly found<sup>59</sup> but, even so, as the recitals of the views expressed by Messrs Walker and Duffy as to the arrangement concerning Tranquility and the work to be undertaken by Mr Walker for the company shows, while they differed markedly as to payment of the consideration due under the contract, and differed to a lesser degree as to its performance, there were only minor differences between their respective recitals as to the terms of the contract itself. A large degree of commonality and common ground emerged in their descriptions of the subject matter and terms of the contract. It is therefore somewhat difficult to follow why, apart from payment, PMH made such strenuous efforts to try to undermine or destroy Mr Walker's credibility as a witness.

[73] PMH having bought Tranquility in late September-early October 2013 when she was in Queensland, Mr Duffy had her sailed to New Caledonia later that year and engaged crew who looked after the vessel for several months and then sailed her to Fiji where, in 2015, Mr Duffy spent six months living on the vessel.<sup>60</sup> Mr Duffy returned to Australia to enable Tranquility to be dry-docked and moored in Lami Lagoon at the end of 2015 but, early the following year, his concerns were aroused as to possible mismanagement of the vessel to the

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<sup>59</sup> E.g: A net worth statement of Mr & Mrs Walker claiming a \$700,000 half share in Tranquility as at 13 January 2017 when no claim of any part-ownership of the vessel surfaced in this litigation: Duffy Ex AA.

<sup>60</sup> Duffy 18, Exhibited photos L-O, of him onboard dated mid-July 2015.

point where in September-early October 2016 he thought he needed to engage a private investigator to counter threatened litigation by a third party and to shift Tranquility from Fiji to the Cook Islands. He contacted Mr Walker and, shortly afterwards, Mr Walker gave Mr Duffy the alarmist news to which reference was earlier made.<sup>61</sup>

[74] That led to a meeting between the pair on 6 or 7 October 2016 and Mr Walker's engagement as Mr Duffy was too ill to deal with the issue himself, though he still held the ambition to "see out my days on the vessel".<sup>62</sup>

[75] Mr Duffy agreed PMH hired Mr Walker to travel to Fiji, arriving on 16 October 2016 and, although he confined his evidence mainly to criticising Mr Walker's narrative, it is accepted that Mr Walker's brief on travelling to Fiji was to locate the vessel where Mr Duffy's crew had moored her, investigate Mr Duffy's concerns about the activities of the crew and ascertain Tranquility's condition, all during his four day Fiji visit leaving on 20 October 2016. At that point, with the cyclone season approaching, Mr Walker's brief was to return to Fiji – which he did by 28 October 2017 – and sail Tranquility to a safer anchorage in New Caledonia, something which was accomplished by early November 2016.

[76] Mr Duffy's evidence is accepted that he gave Mr Walker \$8,500 in cash before his first trip to Fiji and, and, as shown in his bank statements, paid his fares and accommodation between 8-14 October 2016.<sup>63</sup> It is also accepted his bank account was debited with \$10,000 on each of 19 and 26 October 2016

[77] Though, as mentioned, there are variations between the narratives they are immaterial and the description of the terms of the contract, and its performance, in the last two paragraphs is, in all essentials, common ground.

[78] Those being the terms of the contract, what is the evidence of Mr Walker's performance of it, and what is the evidence of payment of the contract price?

[79] As to performance, with Mr Walker's passport records not being put in evidence, the dates of his arrivals, and departures from, Fiji over the relevant period are imprecise, but it

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<sup>61</sup> Duffy, 18-31.

<sup>62</sup> Duffy, 2-36.

<sup>63</sup> Duffy, 42-43, Exhibit V.

seems reasonably clear that the first visit was between 16-20 October 2016 and that he arrived in Fiji on another visit on 26 or 27 October 2016.

[80] Though the 27 October 2016 letter speaks of “my original quote to you for the two trips to Fiji and deliver the vessel to Noumea was \$5,000”, the trip to Noumea had not then occurred so performance in that respect was incomplete. At all events, it appears likely that the terms of Mr Walker’s initial engagement included readying the vessel for sea and sailing her to Noumea, a term of the contract which is plausible given the onset of the cyclone season at that time of year.

[81] Then followed the third trip, namely when Mr Duffy asked Mr Walker to return to Noumea later in November 2016, terminate the crew’s engagement, repatriate them and ensure that *Tranquility* was in the care of the Noumea marina owner. The question arises as to whether that trip, and the work being undertaken on it, were part of performance of the contract just discussed – in which case the consideration for that contract would cover that work – or amounted to a separate contract, in which case Mr Walker would be entitled to separate consideration.

[82] To resolve that question it is necessary to return to the pleadings and the evidence, and, in that regard, what determines that the trip directly to Noumea, in what would appear to have been mid/late November 2016, was part of the original contract is that Mr Walker’s claim does not differentiate between that trip and the earlier work he carried out for PMH. He simply pleads that trip as part of the single contract on which he relies.<sup>64</sup> Factually, too, the work undertaken has the air of completion of performance of the contract with the vessel being laid up for the cyclone season, the reason for her removal to Noumea.

[83] What then was the work required by Mr Walker to perform for PMH in the initial period, 6-7 October 2016 to early mid-November 2016?

[84] The finding is that Mr Walker was engaged to travel to Fiji at least twice, board the vessel, ascertain the performance of the crew, check and ensure the vessel was sufficiently seaworthy to satisfy the Fiji Customs and other authorities’ requirements for an ocean voyage,

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<sup>64</sup> See at [4] *supra*.

sail to Noumea to the marina there, arrange safe berthage, later return to Noumea, terminate the crewing arrangements, repatriate the crew to Fiji and then return to Australia.

[85] All this Mr Walker performed.

[86] Though there are minor matters raised by Mr Duffy concerning though whether Mr Walker had to locate Tranquility and whether he undertook a form of survey, there is little significant in either of those.

[87] While Mr Duffy knew where Tranquility was moored in the Lami Lagoon, Mr Walker had to locate her.

[88] It is reasonably clear that Mr Walker did not carry out a full survey. Tranquility had undergone a “standard procedure completion report to repairs” on 25 November 2015 when she was slipped, waterblasted, antifouling applied and had certain engineering work undertaken<sup>65</sup> but that was a year before the Fiji-New Caledonia trip and, although Mr Walker did not undertake a full maritime survey – a much more onerous and intrusive undertaking – he plainly brought Tranquility to a sufficient state of seaworthiness for the Fiji and New Caledonia authorities to agree to her undertaking an open water voyage of 3-4 days.

[89] Is Mr Walker still owed anything by PMH?

[90] It is convenient to commence discussion of that question by saying that the arrangements between Mr Walker and PMH in early February 2017 which followed Mr Duffy’s change of ambitions were a separate contract devoted to a different object – finding a buyer for Tranquility – which would have earned Mr Walker a commission, had a sale eventuated (and had PMH not, by then, had been deregistered). It also appears reasonably clear that, at some time after Tranquility arrived in Noumea in early November 2016 and was later secured, Mr Duffy, however reluctantly, came to the view that “living out the rest of my days on Tranquility was a dream that would never become a reality” because of his health and lack of stamina<sup>66</sup> and either by the end of 2016 or, at the latest, early 2017, decided to sell Tranquility. He instructed Mr Walker to endeavour to find a buyer, both then being unaware

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<sup>65</sup> Duffy, Exhibit P.

<sup>66</sup> Duffy, 70.

PMH had been deregistered. There is nothing pleaded or payable in respect of that second contractual arrangement.

[91] Whether Mr Walker is owed anything by PMH for the first contractual period – early October to mid/late November 2016 – largely depends on the letter dated 27 October 2016 on Echelon Group letterhead addressed to Mr Duffy and appearing to be signed by Mr Walker.

[92] A monochrome copy of the full letter is attached as a schedule to this judgment but the more relevant portion of the letter reads:

“Dear Bill,

Re: Tranquility

You asked for a receipt for the monies you have paid to me and this letter will serve as my receipt. I don’t have a receipt book as such. However I can advise:

I have received \$10,000 from your ING Bank account on the 20/10/16 and a further \$10,000 today. I have also received \$8,500 in cash from you, which I will account for in due course.

Total received \$28,000. Balance owing: Nil.

You also paid for my airline ticket and accommodation, so I assume you don’t require me to provide those receipts as you would have them. There is nothing further owing to me nor do I anticipate anything further. These monies cover my fee and the out of pocket expenses I have paid on behalf of the vessel. I know my original quote to you for the two trips to Fiji and deliver the vessel to Noumea was \$5000. The additional money fully covers fuel and all other sundries.

I also confirm you don’t wish for me to be retained as the vessels manager as I proposed, and that my appointment ends when I safely supervise William Chute berth the boat in Noumea. ...”

[93] When the letter was discovered prior to the hearing of this case Mr Walker said he was “extremely distressed” by it and it came as an “utter surprise”<sup>67</sup>, because he was “genuinely of the firm belief” he had received no payment relating to this matter from Messrs Duffy and Foster. He said “I strenuously deny that this is a letter written by me, and furthermore, the signature at the bottom of the letter IS NOT MY SIGNATURE. I denounce this letter as a fraudulent forgery”, a view he supported by reference to his membership of the Association of Certified Fraud Examiners and by an assertion that Mr Foster may have copied Echelon’s letterhead or removed a sheet from Mr Walker’s briefcase. He claimed he had no access to word processing equipment, printer or letterhead on 27 October 2016. He was critical of the

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<sup>67</sup> 28.2.19, 14-18, 41-2.

phrasing of the letter – saying it appeared to have been mailed, not emailed – and what he regarded as the clumsiness of the letter’s wording, the second paragraph being “simply absolute rubbish” because Mr Duffy has never paid him \$8,500 cash. He vehemently denied the letter was signed by him, denials he maintained in giving evidence before Keane J and at this hearing.

[94] At the latter, he expounded on the way he writes his signature. He drew particular attention to a dot habitually appearing above his normal signature towards the right hand end, a feature absent from the signature on the 27 October 2016 letter.

[95] Those denials led PMH to submit the letter, and photocopies of Mr Walker’s driver’s licence, passport, a signed Queensland Regulated Ship Registration Transfer Application of 11 January 2017 and the net worth statement dated 13 January 2017 plus other documents,<sup>68</sup> to a Mr Marheine, a forensic document examiner in Queensland.

[96] Mr Marheine is a document examiner of some 39 years’ experience, seven of them as a document examiner with the Queensland Police and four years as its chief document examiner, two years as regional document examiner for the Federal Immigration Department plus years in private practice where he is an appointed consultant to a number of criminal inquiries and prosecutions. In his practice as a document examiner he has “been involved in many thousands of separate document examinations” and given “oral evidence on many hundreds of occasions in criminal and civil jurisdictions” in Australia and overseas.

[97] At the conclusion of Mr Marheine’s examination of all the material provided in relation to this case,<sup>69</sup> his findings were:

“After careful examination of all the signatures and evaluation of their characteristics, it is my opinion that:

- i) All the signatures have been written by the one and same person.
- ii) There is no evidence at all, that any signature is a forgery, whether by simulated or traced methods.”

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<sup>68</sup> Including affidavits in this case.

<sup>69</sup> Page 8 of the report exhibited to his affidavit sworn on 22 March 2019, originally one of those on which Mr Mason waived reliance.



[98] Despite Mr Marheine's conclusions, given both in his affidavit and in his oral evidence, Mr Walker maintained his vigorous assertion that the 27 October 2017 letter was not signed by him, but, despite having two months' opportunity between the hearings to consult his own document examiner, he put no evidence before the Court to undermine Mr Marheine's opinion. He relied simply on his denials and drawing attention to Mr Marheine reaching his view on copy signatures, rather than originals.

[99] Mr Marheine said working off several generation photocopies did not undermine his opinion, nor did the absence of a dot from the signature on some of the documents he was given as "the absence of a dot on a disputed document is not fatal to any part, not fatal in in the examination or expressing an opinion. It is just one tiny little element".<sup>70</sup> None of the matters put to him caused him to reconsider or alter his findings.

[100] In addition to Mr Marheine's evidence, that finding is also consistent with the rest of the exhibit. For the letter to be a complete forgery, the forger must not only have obtained a copy of Echelon Group's detailed coloured letterhead, but also known of Mr Duffy's request for a receipt and been aware of the dates and amounts of the payments to which the letter refers and known the other detail in the text, including the numerous qualifications Mr Walker claims.

[101] While Mr Walker speculates that Mr Foster – or Messrs Foster and Duffy – may have had access to all that material, there was no evidence to support it and that view must therefore rank as no more than speculation. While they – or, at least, Mr Duffy – could have known the detail of matters emanating from the defendant's side of this claim, it would have been an unlikely coincidence that they would have known all the matters stemming from Mr Walker's side.

[102] Further, it was proved through the expert evidence of a Mr Morgan that the letter was emailed, and, though not canvassed widely in the evidence, it is noteworthy that the accompanying email effectively duplicates the most significant portion of the letter: "attached is the letter you requested for receipt of money and confirming nothing owing moving forward"<sup>71</sup>

[103] In light of all of that and despite Mr Walker's strong denials, on the evidence the proved conclusion is that Mr Walker personally signed the letter of 27 October 2016. The Court's

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<sup>70</sup> 30.5.19, p72.

<sup>71</sup> Duffy 54, X & X2.

view is accordingly that the letter of 27 October 2016 was a genuine letter written and signed by Mr Walker and emailed to Mr Duffy with the covering note also in evidence.

[104] What then is the legal effect of the letter?

[105] As mentioned, Mr Mason submitted that it amounted to an accord and satisfaction of Mr Walker's claim.

[106] An accord and satisfaction is a means by which parties to a contract enter into a further contract – the “accord” – to accept performance of lesser obligations in “satisfaction” of the greater obligations under the contract, thus bringing about a release from the original bargain. It may be written or oral.<sup>72</sup>

[107] Being unilateral, the letter of 27 October 2016 cannot amount to an accord and, for the reasons about to be explored, the satisfaction is not a reduction in the original contract obligations.

[108] What the letter amounts to in law is, however, as it says, a receipt for the monies due, and paid, by PMH to Mr Walker for his services under the contract.

[109] It acknowledges the two \$10,000 payments and acknowledges receipt of Mr Duffy's \$8,500 cash – evidence of all of which is accepted – and it acknowledges Mr Duffy's payment on PMH's behalf of Mr Walker's airfare and accommodation costs. Although it does not recount the work in performance of the contract Mr Walker had undertaken before the date of the letter, it expressly refers to two trips to Fiji and the delivery of Tranquility to Noumea with the appointment ending when the vessel was safely berthed there and said that “the additional money fully covers fuel and all other sundries”. It thus acknowledged that the ocean voyage to Noumea and safe berthage there still required to be completed to finalise performance of the contract, but said nothing further was payable for that aspect of the matter.

[110] The letter, then, is a receipt for the payment of \$28,500<sup>73</sup> plus payment of travelling and accommodation expenses and a sum covering “fuel and all other sundries”. So the result is, as the letter says, “Balance owing: Nil” and it acknowledges that “there is nothing further

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<sup>72</sup> See e.g. Laws of New Zealand, Vol.28, para 71, p56-7.

<sup>73</sup> Presumably in Australian currency.

owing to me nor do I anticipate anything further. These monies cover my fee and the out of pocket expenses I have paid”.

[111] On that basis, coupled with the findings concerning the third, direct to Noumea, trip, the letter of 27 October 2016 is found to have been signed by Mr Walker and to be an acknowledgment of his receipt of all monies payable under the contract, both retrospectively and prospectively for both trips to Fiji up to safely berthing the boat on the third trip, the one to Noumea, and paying off the crew.

[112] The conclusion is that, on the letter, when taken with the rest of the evidence, there is nothing owing by PMH to Mr Walker and his claim therefore wholly fails.

[113] For completeness, and as additional reasons supporting that conclusion on liability, it is pertinent to briefly discuss some other aspects of the evidence.

[114] The first is that part of the finding that the 27 October 2016 letter was authentic through its recognition of Mr Walker receiving two payments of \$10,000, the first on 19 October 2016 and the second on 26 October 2016.

[115] Initially Mr Walker denied any knowledge of either payment and said so in his first two affidavits,<sup>74</sup> but then, when reviewing Echelon’s and the couple’s bank accounts for the purposes of this litigation on about 18 December 2018, he discovered the two payments, one in Mr Duffy’s name and one said to be in the name of a “Terrell, Carina Judith”<sup>75</sup>. Knowing nothing of her, he issued a formal inquiry through his bank in relation to that payment. The result was that, in his affidavit sworn on 28 February 2019, while maintaining his ignorance of either payment before December 2018 – he said he simply forgot them – Mr Walker accepted the fact of the credits, and, as noted, reduced his claim accordingly.

[116] The Echelon and the Walkers’ accounts, throughout the period of the bank statements in evidence, ran, for the most part, in modest credit so it is difficult to accept Mr Walker had no recollection of the payments between October 2016 and discovering them in December

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<sup>74</sup> Sworn on 31-8-2017 and 21-9-2018.

<sup>75</sup> Both are annotated “:Duffy” in Echelon’s 774 bank statement: Ex 1 but the bank later gave him the remitter as “Terrell, Carina Judith”: 28.2.19, paras 12-39.

2018, particularly when each was followed almost immediately by relatively sizeable internet withdrawals.

[117] Though no more than speculation – certainly not a finding – if Mr Walker could genuinely forget payments to his bank account on 19 and 26 October 2016, each of \$10,000 and on which he immediately drew, perhaps he also genuinely forgot preparing, signing and sending the 27 October 2016 letter.

[118] The next of those peripheral issues is the credit card authorisation letter on PMH letterhead dated 26 October 2016 and purportedly signed by Mr Duffy authorising Mr Walker to use a nominated credit card, the credit card itself in the name of “William E Duffy” and the reverse of the credit card which Mr Walker acknowledges signing, Mr Duffy having left it blank.

[119] Mr Duffy accepted he gave Mr Walker his BSP cash card plus the PIN number but did not think to sign the rear and denied he gave Mr Walker the letter.<sup>76</sup>

[120] Cross-examined concerning the contract by Mr Mason it was put to Mr Walker that the credit card authorisation letter dated 26 October 2016, seemingly signed by Mr Duffy on PMH letterhead, and the associated credit card in Mr Duffy’s name, the reverse of which was admittedly signed by Mr Walker, were the only documents directly linking him to PMH. It was also put to him that registration numbers of international companies are not public and that the ICA number on the letter, 10871/2013, differed from PMH’s Certificate of Incorporation which is number 11012/2013. When it was suggested that the one thing he had to invent for the 26 October 2016 letter was the ICA number, and that he did invent it, Mr Walker vehemently denied it.<sup>77</sup>

[121] There may be weight in Mr Mason’s cross examination of Mr Walker that the sole invention on the letter of 26 October 2016 was the ICA number appearing under PMH’s details but in view of the fact that he was unable to use the card (other than on one minor occasion<sup>78</sup>) and the findings on the major issue in the case, no further exploration of that matter is required.

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<sup>76</sup> DRW 31; Duffy, 44-47.

<sup>77</sup> 22.3.19, p44.

<sup>78</sup> 22.3.19, p42-3.

[122] Similarly, though there was a deal of evidence about Mr Duffy's email addresses and the expert evidence of a Mr Morgan, the case is able to be decided without detailed reference to that material and it is therefore not necessary to explore that aspect of the matter further.

[123] Finally, there were other efforts made by PMH to discredit Mr Walker but they bore only on Mr Walker's credibility and the case has principally been able to be decided on the evidence strictly relevant to the contract, performance and payment as raised in the pleadings and the effect of the 27 October 2016 rather than a broad brush inquiry into Mr Walker's credibility so there is no call to explore those issues.

[124] Though Mr Walker's case has been dismissed on issues of contract, performance and payment, something requires to be said about quantum as, for the reasons about to be discussed, even had Mr Walker succeeded on liability the claim would have failed, wholly or partly, on that front as well.

[125] Mr Rasmussen suggested that in the circumstances of this matter Mr Walker's claim could be dealt with as a quantum meruit with the plaintiff being paid a reasonable sum for his services.

[126] That approach founders on the findings just made concerning the contract and the 27 October 2016 letter but, even without that, a claim in quantum meruit would fail for lack of supporting evidence.

[127] As mentioned, Mr Walker:

- (a) Did not produce a single invoice, chit, account, statement or voucher to support expenditure he claimed to have incurred in performance of the contract, as opposed to private expenditure, nor, though admittedly he denied receiving the \$8,500 it has been found Mr Duffy gave him in cash, did he endeavour to reconcile his contract expenditure with that cash fund;
- (b) Beyond globally marking whole pages of his credit card account statements "Fiji" or "Noumea" he gave no evidence to try to reconcile those statements with his expenditure, or differentiate between contractual and non-contractual expenditure to support his claim.

[128] Further, he produced no timesheets or any other material on which a quantum merit calculation of the time he claimed to have expended on his contract with PMH could have been undertaken. The claims for his time were considerable – about two-thirds of the entire claim – and spread over a lengthy period – much of it outside the period covered by this litigation – so he must have had timesheets or diaries or similar which supported the time he spent on performing his contract with PMH, but he produced nothing to support that part of the claim. Additionally, he did nothing towards splitting the claim for his time during the October-November 2016 contract period out from the August-December 2016 and January-May 2017 periods for which he claimed fees. Further, varying hourly rates appeared in the evidence, but there was nothing to show which was used in calculating his schedule. And finally, though of lesser importance, he provided no translation of the payments he claims to have made into whatever currency payment was sought.

[129] Being so fundamental to Mr Walker's ability to succeed on that aspect of his claim, that complete lack of detail of the sums claimed to have been expended on Tranquility coupled with the entire absence of any material as to the basis on which the significant claim for Mr Walker's time was assessed led to consideration being given to adjourning delivery of this judgment to give Mr Walker a last opportunity to put the material – supposing it exists – in evidence. But it was decided that such a move would be unlikely to produce anything of assistance and would only prolong the matter fruitlessly. Mr Walker has had ample opportunity to provide all that supporting data, either from his own records<sup>79</sup> or from Mr Petterson or the FSC or by way of discovery in *Plaint 2/18* or defendant discovery in this claim or by way of third party discovery in this claim (if the supporting information was ever provided to FSC or its agent). He has known from, at the latest, the filing of PMH's Statement of Defence on 18 February 2019 that the defendant pleaded it owed him nothing so that, in order to have any chance of obtaining judgment for whatever amount was proved to be owing to him, he needed to prove every dollar of his claim. He did nothing of substance to meet that challenge, so, even had he been successful in obtaining judgment on liability, his claim would have wholly or partly failed on quantum.

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<sup>79</sup> Which he should have for his own taxation affairs.

**Result**

[130] In the result:

- A. Mr Walker's claim against PMH is dismissed.
- B. PMH is entitled to costs which are to be decided on memoranda, that from Mr Mason within 20 working days of delivery of this judgment, that from Mr Rasmussen within a further 20 working days, and any final submissions Mr Mason may care to make within 10 working days of receipt of Mr Rasmussen's submissions. Those time limits are to exclude Court holidays.
- C. Although, perhaps, not strictly raised by the issues in the case, it would appear appropriate, unless counsel make submissions to the contrary, to make a declaration that if there is no appeal PMH is entitled to the \$169,195.57 held in Ms Henry's Trust Account, being the net proceeds of the sale of Tranquility, together with the interest which it has earned since its deposit.

A handwritten signature in cursive script, appearing to read 'H Williams', written in black ink on a white background.

**Hugh Williams, CJ**

SCHEDULE

Dennis R. Walker  
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Marine Master V, JPQ  
Managing Director

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27/10/2016

Bill Duffy  
31 Lyrebird Ride Road  
Springbrook, Qld 4213

Dear Bill,

Re: Tranquility

You asked for a receipt for the monies you have paid to me and this letter will serve as my receipt. I don't have a receipt book as such. However I can advise:

I received \$10,000 from your ING Bank account on the 20/10/16 and a further \$10,000 today. I have also received \$8,500 in cash from you, which I will account for in due course.

Total received \$28,500. Balance Owing: Nil.

You also paid for my airline ticket and accommodation, so I assume you don't require me to provide those receipts as you would have them. There is nothing further owing to me nor do I anticipate anything further. These monies cover my fee and the out of pocket expenses I have paid on behalf of the vessel. I know my original quote to you for the two trips to Fiji and deliver the vessel to Noumea was \$5,000. The additional money fully covers fuel and all other sundries.

I also confirm you don't wish for me to be retained as the vessel's manager as I proposed, and that my appointment ends when I safely supervise William Chute berth the boat in Noumea. I am however happy to be the point of contact with the Noumea marina, at no charge to you, in the future as I am hoping one day you will invite me and my wife as a guest for a cruise around the Isle of Pines!

I am considering this as a working holiday as it has been a lot easier than I imagined and most pleasurable. I have enjoyed assisting you these past couple of weeks, and thanks for the opportunity.

I will provide a report in due course.

Yours sincerely,

Dennis R. Walker CFE, FAIPT, MBA, Dip. Fraud, Dip. WH&S, Marine Master V, JPQ.

Managing Director