THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV2020-02700

ADMIRALITY CLAIM IN REM AGAINST THE M.V. CEARUS
AGAINST GOLDEN HIND LTD

BETWEEN

OCEAN STAR SHIPPING LIMITED

Claimant

AND

GOLDEN HIND LTD

First Defendant

THE OWNERS AND/OR PARTIES INTERESTED IN
MOTOR VESSEL "CEARUS"

Second Defendant

Before the Honourable Madame Justice Quinlan-Williams

Date of Delivery: 5th January 2021

Appearances: Mr. Seenath Jairam S.C. leads Ms. Saira Lakhan instructed by Ms. Shantal Jairam for the Claimant
Mr. Gilbert Peterson S.C. instructed by Ms. Gretel Baird for the Defendants

---

DECISION ON THE NOTICE OF APPLICATIONS DATED THE 8TH OCTOBER 2020 AND THE 13TH OCTOBER 2020

Admiralty claim in rem against the General Cargo Ship, the "CEARUS" of St Vincent and the Grenadines, IMO Number 6919837

1. The claimant and the defendants had been engaged in business for some time until eventually, the claimant alleged that the relationship had gone sour, causing them to terminate their agreement and leaving them with no alternative but to file a claim against the first and second defendants. The claim was filed on the 2nd day of September 2020 and the defendants entered Appearances on the 3rd day of September 2020. Thereafter the matter should have taken the usual course.

2. On the 8th day of October 2020, defendants filed a notice of application and affidavit evidence in support thereof. They have since supported the application with submissions. The claimant has objected to the application. The claimant responded with their own evidence in answer. Submissions in response followed. The defendants raised a number of issues, the preeminent ones being:
    a. Is the defendants' application procedural/interlocutory or final;
    b. Should the court stay the proceedings pursuant to the parties agreement and section 7 of Arbitration Act chapter 5:01; and
    c. Is the claim void ab initio consequent on the procedure used to commence it.

3. In brief, the claimant pleads that they and the first defendant entered a BIMCO Shipman 2009 Standard Ship Management Agreement (Management Agreement) on the 1st day of April 2018 for the management of the second defendant. The claimant claims the defendants breach of the Management Agreement and seek, inter alia, consequential monies owed. The claimant terminated the Management Agreement on the 2nd day of August 2020.

4. The claimant also asserts, during the permanency of the Management Agreement, they operated extra-contractually but with the agreement of the first defendant. This included the expenditure of monies by the

claimant to pay for repairs to the second defendant. The claimant says they are owed those sums of monies.

5. Clause 23 of the Management Agreement is titled the "BIMCO Dispute Resolution Clause". In that clause, paragraphs (a), (b), (c) and (d), sets out a number of alternatives to resolving disputes arising between the contracting parties. In the event of non-selection by the parties of an identified alternative, the option at (a) would stand as the default method of dispute resolution.

Issue one

6. The first issue is whether the application is procedural or final. The applicants/defendants submit that this fact would determine whether the deponent must swear to facts proven by their own knowledge or can contain a statement of information and belief: CPR Part 31.2(1) and (2).

7. Depending on the decision whether the issue is procedural or final, the court may need to consider the evidential objections filed by the applicants/defendants.

8. The respondent/claimant relied on the judgment of *Alan Dick and Company Limited v. Fash Freight Forwarders Limited* Civil Appeal No. 214 of 2010. This court is bound by that judgment of the court of appeal.

9. It is clear that the application before this court raises preliminary and procedural issues. The applicant has taken preliminary objection to the court's jurisdiction to hear the matter.

10. The determination of this application, will not resolve whether there was a breach of contract, whether there are monies owed outside the

Management Agreement or the others substantive issues. In deciding this application, the court will determine whether it can hear the claim at all. Secondly, the court will determine whether the form used to initiate the action is the appropriate form. If the court agrees with either or both submissions, and dismisses the claim, the court is not satisfied that the dispute would have been adjudicated upon such that it cannot be litigated again there by raising the doctrine of res judicata.[1]

11. This application is also made before the trial or final hearing. Consequently, this court is satisfied that the defendants' application is procedural or interlocutory. Based on the nature of the application before this court and applying *Alan Dick and Company Limited v. Fash Freight Forwarders Limited* (supra) the court is satisfied that this application is procedural.

12. This finding therefore resolves the objections made by the defendants to the evidence sworn by Banie Bennue Gajadhar on the 11th day of December 2020. As noted earlier, CPR 31.3(2)(b) permits an affidavit to contain statements of information and belief where the affidavit is used for any procedural or interlocutory application. Banie Bennue Gajadhar's affidavit was used for this procedural or interlocutory application. Similarly, all the affidavits in answer to the evidence that supports the application may contain statements based on information and belief and the court is free to consider same.

13. The court therefore dismisses the evidential objections filed on the 23rd day of December 2020. Those objections were hinged upon the averments being based on information and belief.

[1] Zuckerman on Civil Procedure Principles of Practice. Third Edition, paragraph 25.64

Issue two

14. The defendants have asked the court to refer the claim to arbitration pursuant to the Management Agreement and stay the claim under section 7 of the Arbitration Act. The respondent/claimant has resisted this application and asserted that in any event, the applicants/defendants are out of time to take advantage of a section 7 application. The respondent/claimant submits that the point should have been taken on or before the 1st day of October 2020. The specifics of the claimant's submission are based on the timelines required by the CPR for the filing of a defence.

15. The claim was filed on the 2nd day of September 2020 and the applicants/defendants entered appearances on the 10th day of September 2020. The applicants/defendants' defence was due on the 1st day of October 2020. However, by consent of the claimant, the time was extended to the 8th day of October 2020. The applicants/defendants' application challenging the court's jurisdiction was filed on the 8th day of October 2020.

16. The question therefore, is when according to the CPR, should these applications be made? The CPR Part 9.7 states that a defendant who wishes to dispute the court's jurisdiction to try the claim must first enter an appearance and that "An application under this rule must be made within the period for filing a defence".

17. The period for filing a defence, is set out in CPR Part 10.3. The general rule is that the period for filing a defence is 28 days after the date of service of the claim form and statement of case.

18. There are exceptions to this general rule outlined in Part 10. For example, a period of 42 days is permitted where the proceedings are against the state.

19. In addition to specific exceptions to the general rule, Part 10 also makes specific provision for section 7 of the Arbitration Act. Section 7 of the Arbitration Act deals with the power to stay legal proceedings pending arbitration:

> "7. If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the arbitration agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

20. Section 7 of the Arbitration Act is clear; such applications are to be made before filing and delivering any pleadings or taking any other step in the proceedings.

21. Specific reference is made in the CPR Part 10.3(4), with regard to staying legal proceedings pursuant to section 7 of the Arbitration Act:

> "Where the defendant within the period set out in paragraph (1) (2) or (3) makes an application under section 7 of the Arbitration Act (Chap. 5:01) to stay the claim, the period for filing a defence is extended to 14 days after the determination of that application."

Paragraph (1) is the general rule of 28 days, paragraph (2) deals with the filing of a defence where the claim form is served without a

statement of case or the statement of case has been amended and paragraph (3) deals with claims against the state.

22. Therefore, where a defendant wishes to rely on section 7 of the Arbitration Act, the application must be made in conjunction with and in consideration of the general rule – that is within 28 days after service of the claim form and the statement of case.

23. How, if at all, does the CPR 10.3(6) change the application of the general rule when applications to stay legal proceedings are made pursuant to section 7 of the Arbitration Act? CPR 10.3(6) provides that:

> "The parties may agree to extend the period for filing a defence specified in paragraph (1), (2) or (3) up to a maximum of three months after the date of service of the claim form (or statement of case if served after the claim form)."

Where the time to file a defence is extended by agreement between the parties, for instance by seven days (7), the general rule outlined in paragraph (1), requires recalculation. The altered timeframe for a filing a defence would then be is 35 days instead of 28 days. In other words, after considering CPR 10.3(6) the period set out in CPR 10.3(1) will be 28 days plus the agreed time of 7 days for a total of 35 days.

24. When deciding the issue the court considered a number of facts; firstly the title or heading to Part 10.3 "The period for filing defence". The title informs the court that Part 10.3, in its entirety, deals with the subject of the period for filing a defence. A reading of Part 10.3 is illustrative why it is titled "period" as a distinct from "time" for filing a defence. Not only because a defence can be filed within a specific number of days based on the different sub rules, but also because the time may vary depending on different circumstances outlined in Part 10.3.

25. Secondly, the court is of the view that all the sub rules under Part 10.3 are related to each other and must as far as possible, where there is no absurdity, be interpreted together as one rule. The claimant is allowed to consent to an extension of the general time for filing a defence under CPR 10.3(1). When consent is given, the court is of the view that reading the Rule as a whole, the period for filing a defence under CPR 10.3(4) will be the time set out in paragraph (1) in addition to any time extended by consent of the claimant.

26. In this case, the time for filing the defence, with the extension of time, was the 8th day of October 2020. Therefore, the time for an application to stay the proceedings, should have been made between the time the appearance was entered and the time for filing a defence. The time for filing a defence was extended to the 8th day of October 2020, therefore the application to stay the proceedings was required to be made by the 8th day of October 2020.

27. Zuckerman, on Civil Procedure Principles of Practice, Third Edition, states at paragraph 6.47:

> "An extension of time to serve a defence does not extend the period for objection to jurisdiction. A request by a defendant for an extension of time for service of a defence cannot be construed as also being a request for an extension of time for making an application to contest the jurisdiction."

This opinion is in context of the UK provision under Part 11 outlining the procedure for disputing the court's jurisdiction. Part 11(3) states that "An application under this rule must – (a) be made within 14 days after filing an acknowledgment of service".

28. Trinidad and Tobago's CPR does not set the same or similar criteria. As noted earlier, the time for making applications challenging the court's jurisdiction is related to the period of time for filing a defence. On the

court's interpretation of Part 10.3, this would also include extensions of time for the filing of a defence.

29. The court is satisfied that the applicants/defendants have made the application in good time. The court does not agree with the respondent/claimant's assertion that the application by the applicants/defendants and the consent by the respondent/claimant to extend the time for the applicants/defendants to file a defence, has had the effect of the applicants/defendants abandoning the right to arbitration and submitting to the jurisdiction of the court to determine the issues in dispute.

30. This matter can be distinguished from *Climate Control Ltd v C.G. Construction Services Ltd*[2] where Kokaram J (as he then was) noted that action taken which show unequivocal submission to the court's jurisdiction include the serving of pleadings or taking other steps in respect of the claim.

31. This claim is also distinguishable from *Thema Yakaena Williams v Trinidad and Tobago Gymnastics Federation et al*[3] where the defendants filed pleadings in response to the claim thereby unequivocally submitting themselves to the jurisdiction of the court.

32. Before the court deals with the substance of the application, whether the claim should be stayed, it became necessary to consider the third issue.

[2] CV2015-03486
[3] CV2016-02608

Issue three

33. The applicants/defendants submit that there has been a misjoinder of claims in rem and in personam, and as such, the claim should be struck out. The respondent/claimant disagrees and says that the claim complies with Part 74.

34. The claim filed by the respondent/claimant names two defendants; Golden Hind Ltd as the first defendant and The Owners and/or Parties interested in Motor Vessel "CEARUS", as the second defendant.

35. The claim as intituled, described it as an "Admiralty claim in rem against the General Cargo Ship, the "CEARUS" of St Vincent and the Grenadines, IMO Number 6919837". The pleadings describe the first defendant whose address is in St Lucia, as the owner of the second defendant, the vessel CEARUS.

36. The CPR Part 74.3 provides for claims in rem to be made in the following circumstances:

> "Admiralty claims in rem
> 74.3 (1) In the case of any such claim or question as is mentioned in rule 74.2 (a), (b),(c) or (s) a claim in rem may be brought against the ship or property in connection with which the claim or question arises.
> (2) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, a claim in rem may be brought against that ship, aircraft or property.
> (3) In the case of any such claim as is mentioned in rule 74.2(e), (f) and (h)
> to (r) where—
>
> (a) the claim arises in connection with a ship; and
> (b) the person who would be liable in a claim in personam ("the relevant person") was, when the cause of action arose, the owner or charterer, or in possession or in control, of the ship, a claim in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought against—

(i) that ship, if at the time when the claim is made the relevant person is the beneficial owner of that ship as respects all the shares in it; or
(ii) any other ship of which, at the time when the claim is made the relevant person is the beneficial owner as respects all the shares in it."

37. Further CPR 74.4(4) states that "A claim in rem and a claim in personam may not be combined in the same claim form." It is clear that the claim before the court has combined a claim in personam against the first defendant and a claim in rem against the second defendant. It is immaterial, as the respondent/claimant now says that no claim in personam can be filed against the first defendant because they are not ordinarily resident in Trinidad and Tobago.

38. Claims in rem and personam are commenced on different filing forms. A claim in personam "must" initiate by a claim in Form 1 Part 74.4(2). The claim against the first defendant must have commenced with the use of Form 1.

39. According to 74.4 (1), a claim in rem "must" be commenced by a claim in Form 16. The claim against the second defendant, with the subject of the claim being the ship, is a claim in rem which must have been initiated with Form 16.

40. The use of "must" in CPR 74.4(1) and (2) in the court's view has to be interpreted as directory or mandatory – there is no option of commencing a claim in rem otherwise than by Form 16 and a claim in personam otherwise by Form 1.

41. Therefore, the claim against the first defendant, a claim in personam, commenced by the Form 16 does not comply with the mandatory requirement of CPR 74.4.

42. Further, CPR 74.4(4) says that a claim in personam and a claim in rem "may not" be combined in the same claim form. The court has already determined that the claim against the first defendant is a claim in personam. Although the use of the word "may" in CPR 74.4(4) might give the impression that it is permissive and not mandatory, in context of the mandatory provisions in CPR 74.4(1), (2) and (3), it is difficult not to give a mandatory interpretation to CPR 74.4(4). That rule would not be coherent if it were to have a permissive meaning.

43. Therefore, the court is satisfied that the respondent/claimant has not complied with the requirements to commence an action in personam otherwise than with the use of a Form 1 and by combining a claim in personam and a claim in rem in the same action.

44. The respondent/claimant has asked the court, if it agrees with the applicants/defendants on this submission, to exercise it power under CPR 26.8 to put matters right. In deciding whether the claim should be dismissed as being void ab inito or to putting matters right, the court has considered a number of matters:
    a. The stage of the proceedings – the pleadings are not closed, and the court has not taken any steps to manage the claim;
    b. The serious nature of the claim and the amount of money alleged to be owed to the claimant, the evidence that supports the application and the evidence in objection to the application as well as the reliefs sought;
    c. Any prejudice to the applicants/defendants – this includes the fact that no pre-action protocol letter was served, the applicants/defendants have not filed their defences, and that the applicants/defendants know the general nature of the claim or claims against them;

d. The overriding objective – to treat with claims justly, including the avoidance of multiplicity of claims and savings of costs to parties;

45. The court also considered the second issue, whether the claim should be stayed pursuant to section 7 of the Arbitration Act. The respondent/claimant pleaded that they extended its own monies, ab extra the Management Agreement, to upkeep, repair and maintain the vessel as seaworthy but have been unpaid and unreimbursed for a long period. Further, the claim says that a London arbitration is costly and likely to cause delays. The applicants/defendants, on the other hand say that the Arbitration clause in the Management Agreement should be enforced and the legal proceedings stayed.

46. Having decided that the claim as filed and pleaded has combined claims in personam and in rem, this court could not now take a decision whether to stay the claim or part of the claim, under the Arbitration Act. Secondly, regarding the respondent/claimant's claim against the first defendant, they allege that some of what is owed is because of activities ab extra the Management Agreement. This court cannot embark on any exercise to compartmentalize the respondent/claimant's claim and apply section 7 of the Arbitration Act to some parts of the claim and not to other parts.

47. After considering all the matters reference above, the court has decided, that in the exercise of its discretion under CPR 26.8 a just order will be to allow the claim an opportunity to put matters right, if they so choose.

Disposition

48. Consequently, it is hereby ordered that:

a. The respondent/claimant shall file and serve an amended claim form and statement of case to cure the failure to comply with the rules laid out in Part 74.4.

b. The amended claim form and statement of case are to be filed and served on or before the 19th day of January 2021 by email. Thereafter the claim will take it usual course.

c. If the respondent/claimant fails to file and serve an amended claim form and statement of case on or before the 19th January 2021, claimant's claim form and statement of case are struck out.

d. The respondent/claimant is to pay the applicants/defendants' costs of this application, as agreed between the parties. In default of agreement, the costs are to be assessed by this court.

e. The matter stands adjourned to 10th February 2020 at 9:00am

…….

Justice Avason Quinlan-William

JRC: Romela Ramberran