

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ App No. P028 of 2022

Claim No. CV 2020-01178

BETWEEN

CASHMAN EQUIPMENT CORPORATION

**(A company incorporated and organized under the Laws of the Commonwealth of
Massachusetts, United States of America) (as Owners of the Barge “JMC 50” Official No:
1069223)**

Appellant / Claimant

AND

EMCS CARIBBEAN LIMITED

**(A limited liability company incorporated under the Laws of Tortola, British Virgin Islands and
the persons and/or entities currently in possession of the “JMC 50”) (as Charterers of the
Barge “JMC 50” Official No: 1069223)**

AND ALL OTHER PERSONS CLAIMING TO BE INTERESTED IN THE BARGE JMC 50

Respondents / Defendant

PANEL:

M. Mohammed JA

P.A Rajkumar JA

DATE OF DELIVERY: 5 May 2022

APPEARANCES:

Mr. Simon De la Bastide, Ms. Nyree D. Alfonso, Mr. Asif A. Hosein-Shah for the appellant.

Mr. Farai Hove Masaisai, Ms. Antonya Pierre, instructed by Mrs. Jennifer Farah Tull for the respondent.

I have read the judgment of the Honourable Rajkumar JA. I agree with it and have nothing further to add.

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Mark Mohammed

Justice of Appeal

JUDGMENT

- 1) The subject matter of this appeal is a US flagged barge, (the barge or the vessel). The instant action is a procedural appeal against the decision of a trial judge to decline to rule on preliminary issues and to defer their consideration until the trial listed for June 13, 14 and 15, 2022. The appellant also seeks the release from arrest of the subject vessel to it, upon provision of bail. The trial judge ordered its release to the respondent upon provision of a bond in the sum of US \$450,000 (the current value of the vessel as alleged by the appellant).

Background

- 2) The background to this matter is as follows:
 - i. The barge was the subject of an agreement, (the agreement) between the appellant and the respondent.
 - ii. The agreement made provision for the hiring of the vessel by the respondent, the payment by it of charter hire payments, and an option to purchase.
 - iii. The sum of US five hundred thousand dollars, (\$500,000.00 US) was paid by the respondent to the appellant. It is disputed whether that sum constituted a security deposit or a part payment towards the purchase price of the vessel. It is not necessary for the purpose of this appeal, which is a procedural appeal, to determine contested issues of fact at this stage. In fact, it would be undesirable to do so given that the matter is listed for trial in June. Suffice it to indicate that it is disputed between the parties whether that sum, together with a portion of the charter hire payments, were actually payments on account of the purchase price of the vessel.
 - iv. It is alleged by the appellant, who is the registered owner of the vessel, that the respondent had ceased to make charter hire payments, thereby placing it in

breach of the contract, and entitling the appellant to repudiate the agreement. That is disputed, and again it is unnecessary to make any determination as to whether or not that is the case. In fact for the purpose of this procedural appeal the reasons are expressly confined to matters which are not in dispute.

- v. The vessel was arrested by the appellant in Trinidad, and an action was filed by it claiming inter alia, damages, possession of that vessel, and a declaration that it is its lawful and beneficial owner. The respondent counterclaims for inter alia, specific performance of an agreement for sale, and damages for breach of contract as a result of wrongful arrest. It alleges that it was deprived of profits that it would have made from the vessel if it had not been wrongfully arrested by the appellant.
- vi. The vessel is in need of repairs, although the extent thereof and its impact on the vessel's functionality or certifications are not agreed¹.

Alleged preliminary issues

- 3) Before the trial judge was an application by the appellant for the determination of preliminary issues on the basis that the determination of those issues would have saved time and expense. This is disputed by the respondent for reasons explained hereunder.
- 4) Those issues were, whether assuming the facts pleaded by the respondent are true:-
 - i. The respondent is entitled to specific performance of the written agreement for the sale of the JMC 50 (the vessel) pleaded by the parties;
 - ii. The respondent or the appellant is the beneficial and equitable owner of the vessel;
and
 - iii. The appellant or the respondent is entitled to possession of the vessel.

¹ (See for example the affidavits of Howard Johnson and N Wheatley both sworn on 24 February 2022 on behalf of the respondent. See paragraphs 5(c) and 11 of the Wheatley affidavit)

- 5) The appellant's contention is that, even if one accepted all the allegations of the respondent, at highest its claim was one for damages². The appellant contends that in the absence of any **pleading** that the vessel was unique or had some special value or purpose the respondent would not, as a matter of law, be entitled to claim specific performance. It bases this allegation on the Sale of Goods Act and contends that a claim for damages, rather than specific performance would be the default position in respect of the respondent's claim.
- 6) The appellant contends that, this being so, the issue of its own claim to possession could have been determined as a preliminary issue. That is because even if the respondent were successful it would be entitled at most to damages, rather than possession of the vessel.
- 7) It should be noted that the respondent's counter claim for possession, and in effect specific performance, is predicated on its acceptance that even on its construction of the arrangement, a further sum of US nine hundred and fifty thousand dollars (US \$950,000) remained due and that upon payment of that sum it would be entitled to specific performance and the transfer of legal ownership.
- 8) The respondent disputes that the matter is as simple as this. It claims that the appellant has ignored the fact that inter alia it has also alleged that it has a lien³ over the vessel with respect to the amount it alleges that it has paid.
- 9) It further submitted that:
 - a) the issue of whether it was entitled to specific performance was fact dependent,

² According to the affidavit of N Wheatley referred to above, the barge's daily **earnings** (as opposed to net profits) were US \$2862.89, see paragraph 4 (v), page 7).

³ Incorrectly described in some places as a maritime lien page 32 of its submissions filed 25 March 2022, but not so described at page 41.

b) even the question of whether it was in breach of contract at all (by being in default of charter hire payments), and
c) to what extent sums in respect of the charter hire payments were to be attributable to the purchase price of the vessel,
were all matters of fact to be determined at trial.

10) For example, it pointed to a sample of email correspondence emanating from the appellant, which allegedly suggested that an agreement for sale was being contemplated at some stage.

11) The issue therefore inter alia, of whether the agreement for sale existed, or continues to exist, as well as potential specific enforceability remain live issues for determination by the trial court.

12) The trial judge agreed⁴, and in the exercise of her discretion considered that all of those matters together with the interpretation of the pleadings necessary to support the preliminary point, would properly be determined when the evidence was being considered at a trial. She therefore gave directions for determination of all relevant matters at a trial in June.

13) In the circumstances which have been canvassed in the submissions of the parties, and in the exchanges with the court on this appeal, it is clear that there are disputes of fact with respect to:

- a) the arrangement between the parties and its existence, and the terms thereof,
- b) any alleged breach thereof,
- c) if a breach, the stage at which such a breach occurred, and
- d) if so, which party was responsible.

⁴ See inter alia at page 3, lines 25 to 43 of the transcript of hearing.

14) These are all matters that require investigation by the court. The trial judge correctly concluded that they were not suitable to a summary determination because of the highly disputed nature of the factual context and disputes on almost every aspect including the contractual arrangements⁵. In the circumstances it was not unreasonable far less plainly wrong for the trial judge to conclude that they were not matters that lent themselves to a ready summary determination and disposition by a court at a stage preliminary to that of a trial, when evidence and findings thereon would be considered by that court within a matter of four months.

15) It might at first sight appear attractive to suggest that the respondent's claim can only be for damages, and that even the respondent's claim at highest for a lien, if any, could only be to the extent of such money as it has paid for the vessel, or was attributable to its payment in respect of the vessel⁶. However, there are too many disputed issues of fact to state with certainty at this stage that it would be impossible for the respondent to obtain specific performance of whatever agreement existed between the parties.

16) Further, the appellant's argument is not enhanced by considering its application for a ruling on the preliminary issues to be another facet of an application to strike out part of the respondent's claims. Apart from this apparently being a new argument it is established law that a court could consider a range of options on such an application if it had been actually made, before exercising the most draconian one.

17) We express no view on this because it is not possible to do so at this preliminary stage. We also emphasise that it is not desirable to do so on a procedural appeal such as this. In fact, it is still not clear at this stage what was the full extent of the agreement between the parties.

⁵ Even an apparently simple matter as the vessel's current classification status is disputed. It is in contention for example whether the vessel's classification remains valid until 2023 or has been suspended.

⁶ (that is including a portion of the charter hire payments)

- 18) In those circumstances the exercise by the trial judge in a conservative manner of what was clearly a discretion, based upon her recognition that all the facts were not yet fully before her and had not been tested in a manner that could permit a judicial finding of fact on key issues, could not be faulted.
- 19) The law with respect to the exercise of the discretion by a trial judge and its review by an appellate court cited by both parties is too well known to require repetition. Suffice it to say that the shorthand version of the principle that applies, namely that it needed to be demonstrated that the trial judge was plainly wrong (recognizing that this is an abbreviated expression of more comprehensive principles, could not be said to be applicable here).
- 20) In the circumstances, to the extent that the procedural appeal challenges the trial judge's exercise of discretion **not** to have the preliminary issues determined prior to trial, that exercise could not be said to be plainly wrong. In those circumstances, that portion of the procedural appeal is rejected and must be dismissed.

Application for Release of the Vessel

- 21) There was however another application before the trial judge. The appellant sought the release of the vessel from arrest and the substitution instead of equivalent bail. The respondent also sought the release of the vessel from arrest upon the provision of suitable bail. The trial judge released the vessel to the respondent upon the respondent's providing a bond in the sum of US \$450,000. The basis of that decision was that it represented the status quo prior to the arrest and the order was designed to reinstate that status quo⁷.
- 22) The trial judge made no provision in relation to that bond for its review or supervision or approval by the Court or any officer of the Court. The bond which it ordered was to be

⁷ See page 5 of the transcript.

issued and underwritten by NAGICO Insurance Company Limited⁸. The bond that the respondent has sought to provide is by NAGICO BVI, a British Virgin Islands based company.

23) Any enforcement necessary would need to be against that company in the BVI unless it could be established that it has assets available for enforcement in this jurisdiction. The asset that the bond is supposed to replace is the vessel itself which is currently under arrest by the appellant in this jurisdiction. The purpose of bail is to provide equivalent security so that the vessel itself no longer needs to be maintained, with possible ongoing deterioration.

24) The vessel had not been arrested by the respondent. However, in the submissions with respect to bail and release, the parties appear to have treated the situation as equivalent to if that had been the case, and that the vessel, though arrested in a claim for possession by the holder of its registered title, was also capable of standing as security for the respondent's claims in its own counterclaim for possession. On that apparent basis the appellant and the respondent accepted that any bail could not exceed the value of the vessel⁹. The respondent had a claim for the \$1.3 million US dollars (which it claimed were payments attributable to it as made towards the purchase price of the vessel), and a continuing claim for loss of **revenue** from the barge in the daily sum of approximately US \$3000 from the date of arrest. This was based on its contention that because of its alleged wrongful arrest the respondent could not earn revenue from the vessel.

25) However the vessel itself could not provide security for that claim because it was, on the evidence of value of both parties, for an amount in excess of that value. The respondent at one stage before the trial judge had submitted evidence that that value was between \$750,000 and \$825,000 US dollars. The trial judge accepted the appellant's evidence of

⁸ Page 5 line 27-28 of the transcript of hearing.

⁹ See page 51 submissions of the respondent filed 25 March 2022 citing *The ship M/V Bay Star v Mario Cirino Pomicino SPA* referring to the case of *Singh v F/B Alisur Blanco*"

value of \$450,000 US dollars, although the basis on which she did so has not been explained. Her order for bail was based on this value.

26) In failing to adequately address the purpose of any bond ordered, and to make provision for any security ordered as a suitable equivalent source of recovery by any party who succeeded at trial to be enforceable in this jurisdiction, the trial judge failed to consider a material factor. The exercise of her discretion to order release of the vessel to the respondent was for this reason flawed.

27) However, it was also flawed for another reason. The trial judge considered that a release of the vessel to the respondent would represent a return to the **status quo**, that status quo being use of the vessel as an income earning chattel by the respondent as hirer of the vessel.

28) To the extent that the trial judge considered that the status quo was simply that the respondent was entitled to utilize the vessel without more, that constituted a failure to appreciate the full extent of what the status quo actually was. Even if the status quo were the utilization of the vessel by the respondent to earn income, the full context of the status quo, (assuming that the agreement put before the court by the parties was in effect), was for payments to also be made to the appellant, the registered owner of the vessel.

29) The release of the vessel to the respondent therefore, without making provisions for any payments to be made for its use either to the appellant, or into court, or into a joint account held by the attorneys of both parties, or in any other manner whatsoever was a flawed exercise of discretion.

30) It was further flawed in that it failed to take into account that: (i) the registered title holder of the vessel remained the appellant, (ii) any claim by the respondent to **possession** of the vessel, even on its own case, was predicated on its paying nine hundred and fifty

thousand U.S dollars, before it could obtain specific performance of its alleged agreement for sale, (iii) there was no evidence that the remaining sum had been offered or made available by the respondent, and (iv) that any future claim that it might have in respect of **damages** for alleged wrongful arrest, was at this stage dependent upon a determination to this effect by the trial court. The existence of such a potential unascertained claim therefore could not negate the respondent's own assertion in its counter claim that it still owed the sum of nine hundred and fifty thousand U.S dollars as a pre-condition to its claim to have legal title and possession of the vessel vested in it.

31) In failing to demonstrate that the entirety of the context had been taken into account by the trial court before it made the order at that preliminary stage to release the vessel from arrest by the registered owner to a party (i) who was not the registered owner and (ii) could not on its own case be entitled to the transfer to it of legal title, unless it paid the further sum of US\$950,000.00, the exercise by the trial judge of her discretion to release the vessel to the respondent was clearly plainly wrong. The decision by the trial judge to release the vessel to the respondent can therefore be considered afresh by this court.

32) We have omitted reference to any factual issues that are still in dispute between the parties. Nothing stated here is to be considered an expression of any view as to the outcome of the substantive claim in this matter, which we have decided needs to be determined by the trial judge at trial and not on the basis of determination of preliminary issues.

Whether the vessel should be released from arrest

33) It is not in dispute that Admiralty practice recognizes the undesirability of prolonging the arrest of a vessel beyond the period when that is actually necessary. Without enumerating all the well-known and undisputed reasons therefor they include the expense of maintaining an arrest and the risk of its deterioration. The vessel while under arrest can earn no income but requires expenditure thereon for numerous matters for

example, maintenance, certification, insurances. It is not in dispute that the vessel now requires some repairs. It is in neither party's interest to have a potentially deteriorating vessel in need of repair with its certificates, inspection and classification status lapsing while remaining in the custody of the court where it cannot be repaired¹⁰. While under arrest, it can earn no income for any party and its value can only depreciate while awaiting the resolution of contested court proceedings. This would not be in keeping with the overriding objective and in particular that of saving expense, especially the unnecessary expense of funding a continuing arrest given that an alternative non-depreciating security can be readily substituted.

34) In those circumstances the issue is therefore not whether the vessel should remain under arrest but simply resolves into:

- i) in what form and **amount** should bail as equivalent security be provided, and
- ii) to whom should the vessel be released once such security is provided.

35) It is not in dispute that bail to be provided in substitution for the actual physical custody of a vessel should not exceed the value of that vessel. It is also not in dispute that the value of the vessel on one valuation, accepted by the trial judge is US \$450,000, although the respondent put forward evidence from Mr. Menzies that its value was between US \$750,000 and US \$825,000.

Amount of Security

36) In considering this matter, the following must be taken into account. The appellant is the registered titleholder of the vessel. To the extent that the respondent has a claim amounting to a lien thereon of some type based upon the amount that it alleges that it has paid towards its purchase price, the value of that claim, although subject to final determination by the trial court, would exceed the value of US \$450,000 asserted by the appellant. That is because even the sum of US \$500,000 paid by it (though the appellant

¹⁰ One estimate for cost of repair by Mr. Lange was \$800,000 US.

contends that was a security deposit and not a down payment) would exceed that value. The respondent's own claim is that it has spent as much as US \$1.3 million towards the purchase of the vessel¹¹. This would exceed the alternative value of US \$750,000 to US \$825,000 contended by the respondent, before it apparently accepted that US \$450,000 would be adequate security if it was the party providing it.

37) Even if the respondent has a claim specifically for possession of the vessel, it is conditional upon payment of US \$950,000. Its claim for recovery of amounts spent towards the purchase price, if substantiated, as well as its claims for loss of profits continuing from the date of arrest to the date of judgment can be described in monetary terms. If successful a judgment for damages in those amounts can be obtained.

38) Given that the parties have apparently accepted that the vessel represents security for the respondent's claim, and the security for that claim could not exceed the value of the vessel, provision of the security to the extent of a reasonable approximation of its value would compensate the respondent in the event that the vessel itself is not available to satisfy any judgment. That is because the vessel itself, even if retained in the custody of the Admiralty Marshal and sold to satisfy any judgment that it might obtain for damages, could not be sold for more than its value¹². As discussed above there would be no point in keeping the vessel as security for any such potential money judgment when security equivalent to the value of the vessel could be provided.

39) Although the trial judge accepted the appellant's valuation of US \$450,000 there was a competing valuation of US \$825,000 from the respondent. The respondent had at some stage offered to provide security in this amount. The trial judge appears to have overlooked that matter. Given that the vessel is in need of some repair, that the appellant has asserted that it is in a position to effect those repairs, and to maintain or restore any

¹¹See page 49 respondent's submissions filed 25 March 2022.

¹² (This does not even take into account costs incidental to sale.)

necessary classifications and certificates, and that it is likely that in so doing that the vessel's value may become more in line with that of the respondent's valuation¹³, the existence of that valuation needs to be taken into account. In fairness to both parties given the competing valuations for the vessel and the impossibility of preferring one over the other at this stage the security to be provided would be based on the average of the expert valuations that is US \$637,500.

To whom should the vessel be released

40) It was contended by the respondent that it was entitled to the release of the vessel to it by reason of the Civil Proceedings Rules (CPR) Part 74.17 (2) (a) set out hereunder.

Where a ship or aircraft has been arrested in respect of a claim under rule 74.2 (a) or (b) the court may-

(a) Permit the person in possession of the ship or aircraft to continue trading upon such person providing sufficient bail; or

(b) Deal otherwise with the operation of the ship during the period of arrest.

Claims to be dealt with under this Part

74.2 The following claims, questions, and proceedings namely (a) any claim to the possession or ownership of a ship or to the ownership of any share therein, including power to settle any account outstanding and unsettled between the parties in relation to the ship, and to direct that the ship, or any share thereof, must be sold and to make such other order as the court thinks fit. (b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;

41) The instant claim is a claim under CPR 74.2 (a) being a claim to possession or ownership of a ship. The court has power on such a claim to direct that a ship be sold and to make such other order as the court thinks fit. Under CPR 74.17 (2) the court **may** "permit the

¹³ See affidavit of Mr. Lange file 9 August 2021 paragraph 11-13.

person in possession of the ship to continue trading upon such person providing sufficient bail”.

42) In the instant case i) the value of the vessel could provide an adequate substitute for the respondent’s claim to ownership or part ownership thereon, ii) the respondent has quantified the daily earnings of the vessel and its claim ultimately for loss of profits can be included in any claim for damages at trial, iii) the undisputed evidence is that the vessel requires repairs which the appellant is in a position to effect, iv) the respondent made no offer or provision for payment to the appellant in respect of its use of the vessel even while seeking to continue such use to earn income, v) there is evidence from Mr. Lange that the vessel may need to have its trading certificates restored before it can even resume operation on a commercial basis, and that classification societies would only deal with a registered owner. It would not be unreasonable to consider that the ability of a vessel to trade without trading certificates may be compromised in the manner that he attested to and that restoring the vessel’s classification status, (the appellant’s position) or even maintaining it, (the respondent’s position) would pose fewer difficulties for its registered owner.

43) In those circumstances, it would be appropriate to order the release of the vessel to the appellant, rather than assume that the respondent would be in a position to trade with it in its current condition. We do not need to consider for this purpose the contested issue of whether repairs conducted outside of the US would permanently affect its ability to operate there. The appellant is to provide suitable security pursuant to CPR 74.17 (4) by a bond or bank guarantee or other security from a reputable financial institution acceptable to the Registrar of the Supreme Court in the amount US \$637,500. If it is proposed that security be provided by an international financial institution it is to be approved by the Registrar of the Supreme Court with the input of the respondent, such approval not to be unreasonably withheld.

44) The matter is remitted to the trial judge for determination of the entirety of the issues after evidence is led at the trial scheduled in June 2022. The parties will be heard on costs.

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Justice of Appeal

Peter A Rajkumar