[2021]JMCC Comm 39

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL COURT

CLAIM NO. SU2021AD00001

BETWEEN	**ASPERA SCHIFFAHRTSGESELLSCHAFT, MBH & CO. KG (OWNERS AND/OR BAREBOAT CHARTERERS FOR THE MOTOR VESSEL VERA D)**	**CLAIMANT**
AND	**THE TUG OCEAN KINGSTON PRIDE**	**1ST DEFENDANT**
	LOCATION OCEAN INCORPORATED AND/OR THE BAREBOAT CHARTERER OF THE TUG OCEAN KINGSTON PRIDE	**2ND DEFENDANT**
	LE GROUPE OCEAN INCORPORATED	**3rd DEFENDANT**

Admiralty Claim- Application to strike out claim – Collision between two vessels- Contract for towage services-Whether contract incorporated exclusive jurisdiction clause-Whether Jamaica a *forum conveniens* – Whether claim in rem- Whether incorrect form of claim .

Kwame Gordon instructed by Samuda & Johnson for Claimant

Krishna Desai and Amanda Montaque instructed by Myers Fletcher & Gordon for Defendants

Heard: 30th September and , 21st October 2021.

IN CHAMBERS : By Zoom

Cor: Batts, J

[1] At the commencement of this hearing Mr. Desai indicated that affidavits filed on behalf the Claimants, although executed and notarised, did not have a certificate confirming the validity of the Notaries' commission. The affidavits had been executed in a non-Commonwealth jurisdiction. Mr. Desai did not wish this irregularity to prevent his application proceeding. He therefore asked that, should his application fail, the Claimant correct the omission. Mr. Gordon for the Claimant offered, and the court accepted, his undertaking to make every effort to have the commissions certified.

[2] The application before me was the Defendant's application, filed on the 26th May 2021 to have the claim struck out. It is asserted that the contract between the parties has a clause requiring that any dispute was to be resolved in Canada and under the laws of Canada. The Claimant does not agree. It denies that there is a written contract and/or that there is any such term in the contract even if it is written. The Claimant argues further that even if there is such a term the court must consider whether Jamaica is the "*forum conveniens*." The Defendants admit that this latter issue arises for determination in either event. Each side has a different perspective on how that question is to be resolved.The Defendant also urges the court to dismiss the claim due to some procedural irregularities.

[3] The Claimant is the charterer of the "*Vera D*", an ocean going vessel , which sailed into the port of Kingston Jamaica. The 1st Defendant is a Jamaican registered Tug named "*Ocean Kingston Pride*" (hereinafter referred to as The Tug). The 2nd Defendant is the legal owner of the Tug . The 3rd Defendant is the beneficial owner of the Tug . Both the 2nd and 3rd Defendants are registered in Canada.This claim arises out of a collision between the two vessels

[4] The affidavit of Litrow Hickson, filed on 26th May 2021, supports the Defendants' application. He asserts that the Tug had assisted the Vera D during certain manoeuvres and that, after they were completed and lines had been passed back, the Tug suffered a "*technical failure*" and "*came in contact with"* the Vera D. Mr Hickson states that the United Kingdom Standard Terms and Conditions

(hereinafter referred to as the UKSTC) were incorporated as terms of the contract governing towage services between the two vessels. This is by virtue of an invoice which attached the said terms as well as by practice in the trade. The Defendants assert that similar invoices, attaching similar terms, had been used between the parties on several occasions since 2018 , see the affidavit of Natola Meredith filed on the 1st September 2021. The Defendants also say that the 3rd Defendant was not a party to the contract for towage services and should,also for that reason, be dismissed from this claim.

[5] The important term of the UKSTC, for the purpose of this application, is Clause 9. That reads :

> "*9.(a) The agreement between the Tugowner and Hirer is and shall be governed by the Canadian maritime law as this expression is defined under Section 2 of the Federal Courts of Canada and the Tugowner and the Hirer hereby accepts, subject to the provision contained in sub-clause (b) hereof, the exclusive jurisdiction of the Federal Court of Canada.*
>
> *(b) No suit shall be brought in any jurisdiction other than that provided in sub-clause (a) hereof save that either the Tugowner or the Hirer shall have the option to bring proceedings in rem to obtain the arrest of or similar remedy against any vessel or property owned by the other party hereto in any jurisdiction where such vessel or property may be found."*

[6] The Claimant responds, to the affidavit of Litrow Hickson, with an affidavit of Tom Summerwerck filed on the 28th July 2021. He is a director of the company which manages the Vera D and the managing director of the vessel's insurance broker. He states that in his position he would be aware of all contracts entered into. He has had this role since 2005. He denies that the services provided were pursuant to the UKSTC and says that there is no contract incorporating the said terms. He

indicates also that advice received suggests that a claim in Canada would, at this time, be barred by statutory limitation (see paragraph 10 of his affidavit). His affidavit also addresses factors related to the issue of forum conveniens. These I will address later in this judgment.

[7] The Claimant also relies on the affidavit of Norbert Hollack filed on the 16th September 2021. He was at the material time the master of the Vera D and states:

> *" 7. On the day in question I recall the pilot coming onboard the Vessel and advising that tugs would be used to assist with undocking operations.*
>
> *8. I was never advised or informed that the operations of the tug would be performed in accordance with the UK Standard Terms and Conditions (UKSTC). Further, I had no agreement with the tug or anyone else about the tug performing its operations in accordance with the UKSTC."*

[8] The affidavit of Natola Meredith,earlier referred to, was also relied upon by the Defendant in support of their application.She, is the director Towing Operations of the Company managing the 1st Defendant and, asserts that the Claimant was advised that the UKSTC terms were incorporated. At paragraph 4 (i) to (xvi) she outlines facts which go to support incorporation of UKSTC terms into the contract. At paragraph 5(i) to (v) she responds to the issue of forum conveniens.At paragraph 6 of her affidavit the opinion of counsel from Canada is referenced to support a position that the claim was not time barred at the time this claim commenced. Further that there may be other claims (in contract), available to the Claimant, which do not become time barred in Canada until February 5 2022. Finally this affidavit treats with another issue, raised by the Claimant, which is whether or not the Defendant's letter of undertaking waived any alleged right to Canada as the jurisdiction to litigate the issue.

[9] The parties each filed written submissions and authorities before me. They each also made oral submissions. I thank both counsel for the clarity and economy with which their respective arguments were presented. My decision not to restate each argument, or to recite the cases cited, is no reflection on the quality or utility of the

submissions. They have eased considerably, my deliberation and, the preparation of these reasons for judgment.

[10] Let me say at the outset that I am reluctant to decide, at this preliminary stage, whether or not the UKSTC terms are incorporated into the contract. This is a mixed question of law and fact. A further question as to whether there was an effective variation to the UKSTC in 2019, making Canada not the United Kingdom the jurisdiction for dispute resolution, is also one of mixed law and fact. Such questions may turn on whether the terms were brought to the attention of the contracting parties and, on the Defendant's case, the role of the shipping agent (in this case Lannaman & Morris). It seems to me,in this case, viva voce evidence as well as cross examination will be necessary before these questions can be resolved, see **Chin v Chin [2001]UKPC 7 (12th February 2001).** I also agree with the Claimant's submission that the striking out of a claim should only occur in a "*plain and obvious*" case, see **S&T Distributors et al v CIBC Jamaica Limited et al, SCCA 112/2004 (unreported) judgment delivered 31st July 2007 per Harris JA at page 29.**Given the conflicts **i**n the evidence before me this case cannot be so described**.**

[11] This will suffice to determine the main issue in the application.However if I am wrong, and the question of the incorporation of the UKSTC can be decided at this stage, it will not be determinative of the application. This is because both sides agree, correctly so, that the question of forum conveniens falls for consideration whether or not the UKSTC applies to the contract, see **Northern Sunshine Farms (Maritoba) Limited v CMA,CGM SA et al [2015] JMSC Civ 217 (unreported) judgment delivered 11th March 2015 by Bertram Linton J (Ag) at paragraphs 15 and 16.** The court still has a discretion, even if the parties have by contract agreed otherwise, to permit the matter to be litigated in Jamaica. It requires "*strong reasons*" to be shown and the burden lies on the party who wishes the claim to be heard at a place other than in the jurisdiction agreed.

[12] Therefore, assuming without deciding that the UKSPC terms apply, I will now consider whether Jamaica is the appropriate forum for the matter to be tried and whether there are strong reasons to allow this to occur. This approach to the issue is supported by an authority relied upon by both counsel in this case ,**Spiliada Maritime Corporation v Cansulex Limited [1986] 3 Aller 843,** a decision of the English House of Lords**.** Their Lordships stated the English common law on the question and the case is therefore of high persuasive authority.The leading judgment in the court's unanimous decision was delivered by Lord Goff, however, Lord Templeman had a very useful intervention. He said at page 846 d :

> *" Where the plaintiff is entitled to commence his action in this country,the court, applying the doctrine of forum non conveniens will only stay the action if the defendant satisfies the court that some other forum is more appropriate.Where the plaintiff can only commence his action with leave,the court,applying the doctrine of forum conveniens will only grant leave if the plaintiff satisfies the court that England is the most appropriate forum to try the action.**But whatever reasons may be advanced in favour of a foreign forum, the plaintiff will be allowed to pursue an action which the English court has jurisdiction to entertain if it would be unjust to the plaintiff to confine him to remedies elsewhere**"*(emphasis added)

[13] Assuming, without deciding, that the UKSPC terms apply in the manner the Defendant contends means the burden is on the Claimant to demonstrate that Jamaica is the most appropriate forum to try the action.Lord Goff ,although making it clear they were non-exhaustive, discussed the relevant considerations,and how they are to be applied, at pages 853 to 861 of the report. These considerations may be summarised as follows :

(a) The residence of the parties

(b)The connection of the events to the jurisdiction…

(c)The applicable law

(d) The possibility of other duplicating proceedings

(e) The evidence and its location

(f) Whether there are procedural advantages

(g) Whether there is any prejudice in using the other jurisdiction

(h) The overall justice of the case

[14] Counsel,although agreeing on the applicability of these considerations, naturally disagree on the effect of each and hence on the most appropriate forum. The question for this court is whether Jamaica is, in all the circumstances, the more appropriate forum for determination of this case.The burden of proof is on the Claimant if,as I assume without deciding, the jurisdiction clause of the UKSPC applies to the contract.

[15] Having considered the submissions, and the evidence, I am satisfied that justice in this case is best served by allowing this claim to proceed in Jamaica. In the first place the collision occurred here. It was between two vessels on the water neither of which was docked. An issue in the case concerns the fitness of the Tug which is also here in Jamaica.The crew of the Tug, being primary witnesses to the event, are mostly resident here. Secondly, the Tug is a Jamaican registered vessel. Presumably any levy necessary,if for example damages were to exceed the amount of the insurers undertaking, will be most conveniently done here. Thirdly, the evidence is clear that the survey done, on behalf of the Defendants, was done by a local firm of surveyors and hence again the expert evidence is here. Fourthly, I bear in mind that Canada is a common law jurisdiction. Its law and practice, as it relates to admiralty and civil procedures, are unlikely to be so different as to pose intractable problems for a Jamaican court.

[16] Finally, it is not an irrelevant consideration that, when I asked counsel for the Defendants what was the intended defence on the merits he was unable to say. He stated that was a matter for the lawyers in Canada. In this regard I cannot ignore the fact that the marine accident report, prepared by the captain of the Tug and dated February 6th 2019,(exhibit TS1 to the affidavit of Tom Sommerwerck

filed on the 28th July 2021), suggests that a mechanical fault on the Tug caused the collision. If this is so, and it is supported by the evidence of the Claimant's witness, (see paragraph 9 of the affidavit of Norbert Hollack filed on the 16th September 2021) , it suggests that the Defendants' effort to have the matter tried in Canada is either, a tactic to delay the inevitable or, a manoeuvre to gain some advantage having to do with the limitation of actions in Canada. In the course of submissions,and consistent with observations of Lord Goff in the **Spiliada Maritime** case cited above (at page 863 b to g of the report), I offered to stay proceedings if the Defendant would undertake not to rely on a limitation defence in Canada. Mr Desai politely refused the offer. I observe also that the opinion on Canadian law, exhibit NM 14 to the affidavit of Natola Meredith filed on the 1st September 2021,is not as didactic about the possibility of an alternate claim in contract as it is on the expiration of time to bring a claim in admiralty. It is not, in the circumstances of this case, appropriate to confer on the Defendants such a tactical advantage by refusing the Claimant permission to proceed with this action.

[17] The Claimant asserted that the UKSPC was not incorporated into the contract. It was not unreasonable ,in the circumstances of this case in which there is no signed written contract ,to so allege.It means that ,even if as I have assumed without deciding the UKSPC applies, it was not unreasonable to commence the claim in Jamaica. The Defendant will lose no advantage, related to the merits of the case or any with regard to limits on damages, as it is the Canadian law which will be applied in the event the trial court decides that the UKSPC is applicable. Jamaican courts are practiced in the law of admiralty, in the assessment of damages and, in the fair disposal of issues. The balance of justice for all the reasons stated above suggests that Jamaica is the appropriate forum and that the claim should be allowed to proceed.

[18] The Defendants also argued that the claim as filed was not a claim in rem against the ship because Form A1 was not used as required by Rule 70.3(2) of the Civil Procedure Rules (CPR).Further that the 3rd Defendant was not a party to the contract and, therefore, no cause of action exists against it. The claim therefore

ought to be dismissed. It is, I believe, too late in the day to successfully contend that a claim in rem cannot be brought in the same action as a claim in personam. I agree with the submissions of the Defendants on this issue. The substance and nature of the claim is not determined by the form used but by the facts asserted and the relief claimed.One need only read the Claimant's statement of case to appreciate that a claim in rem against the ship as well as claims in personam against the owners and the charterers are combined.I hold this to be permissible and hence it is inappropriate,for that reason, to strike out the claim,see **Jebmed SRL v Capitalese SPA Owners of M/V Trading Fabrizia et al [2017] JMCC Comm 22 (unreported) judgment of Edwards J delivered 19th July 2017 ;** section 3 of the **Administration of Justice Act (UK) of 1956** (the basis of applicability of some parts of that statute to Jamaica has been frequently stated by this court and need not be repeated here) ; and,**The Indian Endurance (No.2) ; Republic of India et al v India Steamship Co. Ltd [1997] 4 Aller 380.** In **Commandante Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192** a majority in the Federal Court of Australia although expressing disagreement with the House of Lords, that a claim in rem was a claim in personam and not a claim against the ship itself, did not doubt that both may be combined in the same action.

[19] In the result, therefore, the Notice of Application filed on the 26th May 2021 is dismissed with costs to the Claimant to be agreed or taxed.

David Batts
Puisne Judge