IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. A 0002/2011

BETWEEN	**MATCAM MARINE LIMITED**	**CLAIMANT**
AND	**MICHAEL MATALON**	**DEFENDANT**
	THE REGISTERED OWNER OF THE ORION WARRIOR (FORMERLY MATCAM 1)	

IN CHAMBERS

Denise Kitson, Mark Reynolds and Kashina Moore instructed by Grant Stewart Phillips and Co for the claimant

Gordon Robinson and Jerome Spencer instructed by Patterson Mair Hamilton for the defendant

ARREST OF VESSEL – ADMIRALTY JURISDICTION OF THE SUPREME COURT– WHETHER ARREST WITHIN JURISDICTION OF COURT – APPLICATION FOR RELEASE OF VESSEL - SECURITY FOR COSTS

September 22, 23, 30 and October 6, 2011

SYKES J

[1] Mr. Michael Matalon, the defendant, has made two applications. The first is to have the vessel Orion Warrior released from arrest. The second is to have security for costs from Matcam Marine Limited, the claimant ('Matcam'). The first

was dismissed; the second was granted. These are the reasons for the decisions.

The Background

[2] Matcam in a company registered in the Turks and Caicos Islands. Matcam is the combination of the names Matalon and Campbell. Mr. Matalon and Mr. Norman Campbell are shareholders in Matcam. The company was formed as the vehicle by which both men and a third shareholder, Mr. Robert D' Arceuil, would operate the vessel, Orion Warrior.

[3] The vessel was a burnt out wreck that was acquired by Mr. Matalon. He began to refurbish the vessel but the cost of doing so led him to consider getting another investor. The other investor was Mr. Campbell. The plan was that the vessel, a tug, would be operated providing tug boat services in the Caribbean region and beyond.

[4] There is no doubt that significant sums were spent on the vessel. There is a dispute over who spent how much and at what time. Mr. Matalon claims that Mr. Campbell did not keep his end of the bargain and felt that Mr. Campbell had not contributed sufficient capital in keeping with the agreement they made. On the other hand, Mr. Campbell is contending that Mr. Matalon did not spend as much money as Mr. Campbell did.

[5] Before the relationship between the two men deteriorated, the vessel was registered in the name of Matcam. It is the main asset of the company. Other than an allegation that Matcam holds US$32,000.00 in an account at a Jamaican

financial institution, there is no other asset said to be owned by Matcam. More will be said about this money when dealing the security for costs application.

[6] According to Mr. Matalon he was granted a power of attorney which he claims, among other things, empowered him to transfer the vessel to his name alone should it be the case that Mr. Campbell failed to invest the appropriate sums of money in the enterprise. Mr. Campbell says otherwise. Mr. Campbell says that the power of attorney was given to Mr. Matalon to enable him to act on behalf of the company in relation to the company and it would be ludicrous for the company to give Mr. Matalon the power of unilateral transfer to himself of the main asset of the company.

[7] Mr. Matalon, acted, he claims, under the power of attorney and transferred the vessel to his name alone. This precipitated an application by Mr. Campbell to the Supreme Court for a warrant to arrest the ship. The ship is now under arrest under this warrant. This is the context of the two applications mentioned in paragraph one. They will be dealt with separately. However before doing so it is important to settle this issue of the Admiralty jurisdiction of the Supreme Court of Jamaica.

Admiralty jurisdiction

[8] Strange as it may sound, Mr. Robinson raised doubts about the applicability of some provisions of the Administration of Justice Act 1956 (UK) to Jamaica despite two Supreme Court decisions which affirmed that the legislation does apply to Jamaica (see ***Citadelle Line S.A. v The Owners of Motor Vessel***

'Texana' (1996) 16 JLR 1; ***DYC Fishing Ltd v The Owners of MV Devin and MV Brice*** Claim No. 2010 A 00002 (delivered October 8, 2010)). Neither decision was challenged in the Court of Appeal. The decision of the Court of Appeal in ***Harpa Shipping & Chartering GMBH v Europe West-Indie Lijnen B.V.*** SCCA No 96/2008 (delivered March 27, 2009) dealt with the issue but to be fair to Mr. Robinson's submission, the court assumed the legislation applied without tracing the route to that conclusion. To that extent there does not seem to be a definitive decision from the Court of Appeal of Jamaica or the Judicial Committee of the Privy Council on the issue.

[9] To put this matter to rest once and for all, this court attempts to set out, clearly, the steps to the conclusion that sections 1, 3, 4, 6, 7 and 8 of the 1956 UK Act apply to Jamaica today. In 1880, the Judicature (Supreme Court) Act was passed. In section 4, the legislation combined all the existing courts in Jamaica in a single court known as the Supreme Court. Of the courts listed in section 4, there is no mention of a Court of Admiralty. This does not necessarily mean that no Admiralty jurisdiction existed in Jamaica. Section 18 of the Judicature (Supreme Court) Act makes reference to the appointment of a bailiff who was empowered to act under the court's Admiralty jurisdiction as well as under an Act styled The Colonial Courts of Vice-Admiralty Act of 1890. This Act, based on the research to date, is actually The Colonial Courts Admiralty Act of 1890. There is no reference to word 'Vice' in the title.

[10] Section 18 actually says the bailiff's 'powers and duties shall be limited to executing the process of the said Court [Supreme Court] in its Admiralty

Jurisdiction and to doing the various things which are by the United Kingdom Act styled The Colonial Courts of Vice-Admiralty Act, 1890 (53 and 54 Vic., Chap 27) or by any rules made under the provisions of the said Act are required to be done by the Bailiff of the said Court.' This would suggest that there was an Admiralty jurisdiction before the 1890 Act was passed and that the bailiff was expressly authorised to act under the Admiralty jurisdiction before the 1890 Act as well as under the 1890 Act.

[11] The view that an Admiralty jurisdiction existed in Jamaica before 1890 is supported by the historical record. From the material available, it is fair to say that Vice Admiralty Courts were established wherever British colonists settled. Initially, they dealt with piracy and disputes between merchants and seamen. It appears that Vice Admiralty Courts existed in Jamaica from at least the second half of the seventeenth century but certainly by the eighteenth century (Agnes Butterfield, *Notes on Records of The Supreme Court, The Court of Chancery and The Court of Vice Admiralty of Jamaica*, Historical Research 16: 88 – 99, 94 (1938)). In the second half of the seventeenth century and the early eighteenth, the courts were an important part of British imperial trade policy as manifested in the group of Acts which became known collectively as the Navigation Acts. These Acts were passed between 1660 and 1672. They were the Enumeration Act of 1660, the Staples Act of 1663, the Plantation Duty Act of 1672, were designed to restrict the trade of the British Colonies to Englishmen, English ports and English ships (Ronald Bacigal, *Putting The People Back Into The Fourth Amendment*, 62 Geo. Wash. L. Rev. 359, 365 – 367; Michael Craton, *Empire,*

Enslavement, And Freedom of the Caribbean, (1997) (Ian Randle Publishers, Kingston, Jamaica) ch. 5 pp. 104 – 116). The Vice Admiralty Courts were the forum for enforcement of these statutes.

[12] After the courts were established, a number of statutes were passed from time to time to address issues such as jurisdiction, practice, procedure and personnel of the courts. An example is The Vice Admiralty Court Act of 1863. It was passed by the Imperial Parliament as 'An Act to facilitate the Appointment of Vice Admirals and of Officers in Vice Admiralty Courts in Her Majesty's Possessions abroad, and to confirm the past Proceedings to extend the Jurisdiction, and to amend the Practice of those Courts.' Section 24 of Schedule A to the Act expressly extended the reforms to existing Vice Admiralty Courts and those courts were identified by naming the territory where they were. Jamaica is named in Schedule A. In other words, the 1863 Act, in respect of Jamaica, presupposes and assumes that there was already a Vice Admiralty Court in the island.

[13] However, it appears that the efforts at uniformity attempted by the 1863 Act were not regarded as satisfactory. Therefore the Imperial Parliament turned its attention to the issue once more. This is how The Colonial Courts of Admiralty Act of 1890 came about. The 1890 Act expressly repealed the 1863 Act. That uniformity and consistency with the practice and procedure of the High Court of Admiralty was the aim of the 1890 Act and is gleaned from the following provisions. Section 2 (1) and (2) reads:

(1) Every court of law in a British possession, which is for the time being declared in pursuance of this Act to be a court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the Governor is the sole judicial authority, the expression 'court of law' for the purposes of this section includes such Governor

(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.

[14] From these sections the following can be said. First, section 2 (1) was seeking to establish a Court of Admiralty where none existed. The subsection also made provision in the event that an existing court in a British possession was not

declared a Court of Admiralty, then any court having unlimited civil jurisdiction was to be the Court of Admiralty. Second section 2 (2) enabled a court of unlimited civil jurisdiction to exercise its powers from that jurisdiction in same manner when exercising Court of Admiralty jurisdiction. It should be known that the 1890 Act had exemptions from its application. These included British possessions that had a legislature of the kind defined in the Act and other named territories.

[15] At the time of the passage of this legislation, Jamaica was a British possession. Despite it being an Act of the Imperial Parliament and despite the fact that Jamaica was not listed among the possessions to which the Act did not apply, it seems that it did not in fact apply to Jamaica. There may have been a legislature as defined in the 1890 Act.

[16] In 1956, the Administration of Justice Act was passed in England. This legislation was made applicable to Jamaica by The Admiralty Jurisdiction (Jamaica) Order in Council, 1962 which came into force on March 29, 1962, five months before Jamaica became independent (see section 1 (2) of the Order). An Order in Council is a written instrument signed by the sovereign. An Order in Council, at that time, in theory, was an order having the full force of law which was issued by Her Majesty on the advice of the Privy Council. In practice, it was done on the advice of the British Cabinet. Acts of Parliament in England usually provide for the issuing of Orders in Council which set out the details of the administration of the particular legislation (see section 56 of the Administration of Justice Act, 1956).

[17] Section 2 of the Order reads:

> *The Colonial Courts of Admiralty Act, 1890 shall, in relation to the Supreme Court of Jamaica, have effect as if for the reference in subsection (2) of section two thereof to the Admiralty jurisdiction of the High Court of England there was substituted a reference to the Admiralty Jurisdiction of that court as defined by section one of the Administration of Justice Act, 1956, subject to the adaptations and modifications of the said section one that are specified in the First Schedule to this order.*

[18] This is quite a roundabout route but the provision is clear enough. It provides a two-step process to identifying the Admiralty jurisdiction of the Supreme Court of Jamaica. The first step is that section 2 (2) of the Colonial Courts of Admiralty Act of 1890 shall be read as if the Admiralty jurisdiction set out there was substituted with the Admiralty jurisdiction set out in section 1 of the 1956 Act. The second step is that this new reading of the 1890 Act applies to the Supreme Court of Jamaica. Section 1 of the 1956 Act (UK) sets out the Admiralty jurisdiction applicable to the Supreme Court of Jamaica. It states among other things that the Admiralty jurisdiction extends to 'any claim to the possession or ownership of a ship or to the ownership of any share therein' (section 1 (1) (a)). This dispute is about ownership and who has the immediate right to possession of the Orion Warrior and therefore falls squarely within the provision.

[19] The modification referred to in the 1962 Admiralty Order in Council states that the words 'and any other jurisdiction connected with ships and aircraft vested in the High Court apart from this section which is for the time being assigned by rules of court to the Probate, Divorce and Admiralty Division' appearing in section 1 (1) of the 1956 Act are to be deleted. Consequently those words of the 1956 Act do not apply to Jamaica. There are other modifications which are not material for present purposes and so will not be dealt with.

[20] Section 3 of the Order states:

> *The provisions of sections three, four, six, seven and eight of Part 1 of the Administration of Justice Act 1956 shall extend to Jamaica with the adaptations that are specified in Column II of the Second Schedule of this Order.*

[21] Thus sections three, four, six, seven and eight of Part 1 of the 1956 UK Act was applied to Jamaica before independence in August 1962. The Jamaica (Constitution) Order in Council 1962 has two schedules. The First Schedule lists the Orders in Council which were revoked by the Constitutional Order in Council of 1962. The Admiralty Jurisdiction (Jamaica) Order in Council is not in that First Schedule and therefore was not revoked at independence. No one has suggested that any Jamaican enactment has revoked or altered that Order in Council. Section 4 (1) of the Constitution Order in Council 1962 states that 'all laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or

repeal any such law) continue in force on and after that day.' Section 22 (2) of the Constitution Order of 1962 states that the 'provisions of section 1 of the Constitution shall apply for the purposes of interpreting this order as they apply for interpreting the Constitution.' Section 1 (1) of the Constitution says 'law' includes 'any instrument having the force of law and any unwritten rule of law.' The Jamaican Admiralty Order in Council of 1962 is an instrument having the force of law and it has continued in force without amendment or repeal.

[22] From all this, it is clear that Admiralty jurisdiction of the Supreme Court of Jamaica is grounded in section 2 (2) of the Colonial Court of Admiralty Act of 1890 as modified by section 1 of the Administration of Justice Act. The Admiralty Order in Council of 1962 also applied sections 3, 4, 6, 7 and 8 to Jamaica. No statute or any other law has repealed or altered these statutes or Order in Council in relation to Jamaica. The Supreme Court Act of 1981 (UK) has repealed section 1 and the entire Part 1 of the 1956 Act but that 1981 Act does not apply to Jamaica. Procedural rules for the exercise of Admiralty jurisdiction of the Supreme Court came into being in 1893. Those rules have now been repealed and replaced by Part 70 of the CPR. Let there be doubt no more.

[23] Section 3 (2) of the 1956 Act which now applies to Jamaica with the modification indicated by the 1962 Admiralty Order in Council, states that:

> *The Admiralty jurisdiction of Supreme Court of Jamaica may in the cases mentioned in paragraphs (a) to (c) and (s) of subsection (1) of*

this section one of this Act be invoked by an action in rem against the ship or property in question.

[24] The relevant text of section 1 (1) (a) of the 1956 Act is set out in paragraph 18 above. It was therefore appropriate for this claim to begin as an action in rem. An action in rem, as is well known, can be commenced with a warrant for the arrest of the ship.

The arrest

[25] Mr. Spencer submitted that under Part 70 of the CPR there is no power in the Supreme Court to issue a warrant to arrest a vessel on a without-notice application. He relied on rule 11.8 (1) and (2). The rules say that the general rule is that an application must give notice of the application to each respondent and that such an application without notice can only be made if the rules of court or a practice direction permits it.

[26] The short answer to this is that Part 17 which governs interim remedies is of general application. Rule 17.3 (2) makes explicit provision for the grant of interim relief without notice if there are good reasons for so doing. The warrant for the arrest of a vessel is an interim remedy and by definition falls within the rule. To put the matter beyond doubt, rule 70.1 (2) states that '[t]he other provisions of these Rules apply to Admiralty proceedings subject to the provisions of this Part.' There is nothing to suggest that Part 17 does not apply to Part 70 and no argument has been advanced that this is not the case.

[27] The Supreme Court indeed has the power to issue a warrant on an ex parte basis once the requirements of rule 70.7 are met. The ability to arrest a ship is a vital part of the court's admiralty jurisdiction. Ships, by their nature are very mobile and can easily slip out of the jurisdiction. This case is no exception. The fact that Mr. Matalon is resident in Jamaica is of no moment. The ship, as the evidence suggests, is seaworthy and has indeed left Jamaican waters from time to time. It is true that it has returned but what is to prevent it leaving and not returning? The usual condition for the vessel to be released is either by paying an appropriate sum or giving an undertaking to do so. Mr. Matalon has not proposed either. In these circumstances it would not be wise to release the vessel from arrest.

[28] Mr. Spencer submitted further that there was no reason to issue the warrant because there was no evidence that the vessel would be removed since it was already under arrest. He also referred to the merits of the case to support the proposition that the vessel ought not to be arrested.

[29] Matcam's claim is in no way linked to the warrant obtained by some other person. Matcam is entitled to pursue its claim independently and does not and ought not to rely on someone else's act to secure its interest. It would be quite imprudent if Matcam took the view that merely because some other person has arrested the ship it would not leave Jamaica waters. What if the ship owners and the person who arrested the ship came to terms without Matcam's knowledge?

[30] From what was said in the background to these applications it is clear that there are sharp disputes of fact which cannot be resolved by this court. These factual disputes will have to await the trial.

[31] Reference was made to the contents of the power of attorney in order to suggest that Mr. Matalon has an iron clad defence. To say the least, it would be quite remarkable if a company were to give a power of attorney to one shareholder and director to transfer, unilaterally, the company's sole asset without any express approval of the board of directors. Such a conclusion is, prima facie, so unusual that it calls for full examination at trial.

[32] For these reasons the application for release of the vessel is refused.

The security for costs

[33] Security for costs is not intended to be a litigation-suppressing device whereby a defendant can stifle a claim by asking for security for costs. It is intended to strike a reasonable balance between a defendant, who, by virtue of the claim brought by a claimant who is resident out of the jurisdiction or in a parlous financial condition, is forced to expend resources to defend the claim, on the one hand and a claimant's right of access to the courts on the other hand.

[34] Mrs. Kitson resisted this application but this court cannot accept her contention. Matcam is registered in the Turks and Caicos Islands. It is said that the vessel under arrest is its only asset. Apart from an assertion that it has US$32,000.00 in an account with a financial institution in Jamaica, there is no other known asset. This court says assertion because it would have been very helpful if Matcam had

produced recent (as in a few days before the hearing) documentation from the financial institution verifying that the sum allegedly held by it is indeed Matcam's. It would have further helped if it were known whether that sum is subject to any actual or potential claims by third parties. Mr. Spencer made the telling point that despite the fact that Mr. Campbell, on behalf of Matcam, has furnished more than one affidavit, on the question of the US$32,000.00, the information comes from an attorney at law who swears in his affidavit that what he has said about the money is what he was told by Mr. Campbell. All this without any supporting documentation.

[35] The position of Matcam stands in sharp contrast to the French company operating in England in the case of ***The Apollinaris Company's Trade Marks*** [1891] Ch D 1 where the company was not ordered to pay security for costs. The French company had (a) purchased a business in England for £12,000.00; (b) carried on business held under a lease of considerable value; (c) stock in trade valued at £12,000.00; (d) owned plant, horses and vans valued about £1200.00; (e) was owed book debts in the United Kingdom upward of £8000.00 and (f) bills and cash in hand and at bankers amounting to upwards of £1000.00.

[36] The arguments of counsel for the applicant for security for costs in ***The Apollinaris*** are interesting. He submitted that prima facie a company with its office abroad is liable to give security for costs. Fortunately, the Lord Halsbury LC strongly rebuffed the submission. His Lordship indicated that the rule relating to security for costs must be applied with common sense. While his Lordship accepted that 'anything may be got rid of and even land may be sold before the

day of execution' we 'must apply our common sense.' When one considers the 'amount of stock in trade possessed by [the company]; it is impossible to doubt, that their assets in this country will be found capable of answering any possible costs of the appeal, and therefore an order for security for costs ought not to be made.'

[37] As Mr. Gordon Robinson in reply to these authorities indicated, ***The Apollinaris*** case showed a company with substantial presence in England which made it unlikely that the company would abscond and evade any attempt to enforce a costs order. Unlike Matcam whose presence in Jamaica, to put it mildly, is not far above from a transient one. There is no evidence that it has any buildings and has really put down deep business roots in Jamaica.

[38] Mr. Matalon has put forward the figure of JMD$10,000,000.00 as the costs of this litigation. Matcam has said it is JMD$2,000,000.00. Mr. Matalon has put forward a fairly detailed estimated bill of costs indicating how he arrived at the figure. For example, the estimated bill of costs spoke to work actually undertaken as well as giving some idea of the hours involved. The work done included reviewing the claim and settling the defence; preparation for and attendance at a case management conference and complying with court orders. The estimate also referred to work to be done in the future such as preparation of witness statements, preparing for and attending pre-trial reviews and preparation for and attendance at the trial itself. It also speaks to scale of fees for senior and junior counsel as well as instructing attorney. By contrast, Matcam simply says, through its attorney, that based on experience it is the figure posited by it. It just spoke to

the scale of fees for counsel but has no indication of the hours involved. Neither did it indicate what was actually done nor the work to come.

[39] Mrs. Kitson submitted that all that is before court is two opinions. This is true but not all opinions are equal in value and weight. If one party has put forward enough detail to say why a particular figure is appropriate, at the very least the court would expect the challenger to put forward some effective reason for not accepting the proffered figure. Merely to say that experience suggests otherwise is no reason at all unless one goes further to break down the JMD$2,000,000.00 to show how it was arrived or to demonstrate why the other figure ought not to be accepted.

[40] Matcam has not suggested that it cannot pay the figure or that if the figure named by Mr. Matalon would prevent it from pursuing the claim. While it is true that the court has to make the order sought, it would be unreasonable not to accede to the application (see rule 24.3).

Disposition

[41] The application for the release from arrest of the vessel Orion Warrior is dismissed with costs to the claimant. The application for security for costs is granted with costs to the defendant. It is also ordered that Matcam provide the sum of JMD$10,000,000.00. This amount must either be paid into court or supported by a letter of undertaking from a solvent, reputable, licensed financial institution in Jamaica. Unless the claimant provides the security for costs within twenty four days of this order the claim is stayed for a further ninety days. If

security for costs is not provided in accordance with this order at the end of ninety days the claim is struck out.