IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN ADMIRALTY

CLAIM NO. A00003/2012

BETWEEN	**SOUTHERN RECYCLING L.L.C.**	**CLAIMANT**
AND	**AVRA TOWAGE BV (OWNERS OF THE TUG NORTH)**	**DEFENDANT**

IN CHAMBERS

Christopher Kelman and Krishna Desai instructed by Myers, Fletcher & Gordon for the Defendant/ Applicant

Emile Leiba and Damion Blair instructed by DunnCox for the Claimant/ Respondent

Ms. Alicia McIntosh instructed by the Director of State Proceedings, **Robert Collie** and **Ms. Marie Chambers** for the Cautioner, the National Resources Conservation Authority

Heard: May 8 &11, 2012

Admiralty - Accident occurring in maritime protected area - Alleged damage to reef - Arrest of vessel - Application for release of vessel from arrest - Discretion of court to order release – Considerations in the exercise of discretion - Conditions to be satisfied to obtain release – Appropriate form of security – sufficiency of security - CPR 70.11 (4)

McDONALD-BISHOP, J

[1] This concerns an application for court orders brought by Avra Towage BV (Owners of the Tug "North"), the defendant, for the release of their tug boat (hereinafter referred to as "the *Tug North"* or "the Tug") that was arrested by

order of this court on March 16, 2012. This arrest was instituted at the instance of Southern Recycling L.L.C., the claimant.

[2] This application is an off- shoot from a substantive claim in rem filed by the claimant against the defendant within the admiralty jurisdiction of this court on the same date of the Tug's arrest. The claimant claims against the defendant, among other things, damages for negligence by the *Tug North*, breach of contract and a maritime lien over the *Tug North* pursuant to the Shipping Act.

[3] This application is made by the defendant pursuant to the Civil Procedure Rules, 2002, (the CPR) rule 70.11 (4) (b). This rule empowers the court, upon the arrest of any property in a claim in rem, to order the release of such property from arrest on an application made by any party.

Background

[4] The pleadings in the parties' respective cases and the evidence proffered in relation to this application have revealed the following primary facts, which to a large extent, stand undisputed. The claimant is a company duly incorporated under the laws of Louisiana in the United States of America (USA). Its operations include a network of full service recycling facilities and it owns a motor vessel, the *"Oceanic Power"*. The defendant is a company duly incorporated in the Netherlands and offers, *inter alia*, a wide range of maritime services to include coastal and deep sea towage. It is the owner and operator of the *Tug North* which is registered in the Netherlands and is presently moored at the Kingston South Terminal Pier in Kingston.

[5] The dispute between the parties that has led to these proceedings arose from a Standard Voyage Towage Agreement entered into between the parties on or about February 8, 2012. Under this contract, the defendant contracted with the claimant to, among other things, engage the *Tug North* to pick up the *Oceanic Power* at Kingston and to move it to the mouth of the Mississippi River in Louisiana, USA.

[6] In accordance with the Agreement, on March 1, 2012, the *Tug North* departed from the port of Kingston with the *Oceanic Power* in tow. Shortly after departure, problems developed with the tow lines being used by the *Tug North* to tow the Oceanic power. This resulted in the beaching of the *Oceanic Power* in Jamaica's territorial waters in the vicinity of the Lime Cay which is within the Palisados- Port Royal Protected Area.

[7] The *Tug North* was detained by the Jamaican Maritime Authority pending an investigation. Before it could be released by the Maritime Authority, the claimant initiated its admiralty claim in rem against the defendant for damages allegedly resulting from the beaching of its vessel. On the same date of the filing of the claim, the claimant requested and secured by order of this court, a warrant of arrest to stop the departure of the *Tug North* from Jamaica. This is stated to be an attempt by the claimant to secure the payment of the debt it is claiming that the defendant owes to it resulting from the beaching of the *Oceanic Power*. The claimant also claims, as part of its relief, an indemnity from the defendant in response to any claim commenced against it as a result of the beaching of the vessel.

[8] On April 17, 2012, The Natural Resources Conservation Authority ("the NRCA") of Jamaica filed an admiralty claim against the claimant and the defendant, jointly and severally, for damages for negligence caused by the beaching of the *Oceanic Power* in the protected area of Jamaica's territorial water. Prior to the filing of the claim, and following on the arrest of the *Tug North,* the NRCA had also filed a request for caution against release of the vessel on April 5, 2012.

[9] It is in the light of the continuing arrest of the *Tug North* that the defendant now seeks an order for its release. The NRCA has undertaken to withdraw its caution against release following a Letter of Guarantee issued by the defendant's

insurers and is, therefore, not opposing this application for release of the Tug from arrest. The application is, however, contested by the claimant.

The defendant's case

[10] The defendant has set out its grounds for bringing the application and has relied on the two affidavits of Mr. Krishna Desai, attorney-at-Law, filed in these proceedings, to substantiate these grounds. The grounds and the main planks of the evidence in support of them may be summarized as follows:

(i) The continued arrest and loss of use of the *Tug North* has resulted in hardship to the defendant. The defendant has had to forego a number of commercial opportunities for voyages resulting in loss of business. There is now a potential six months bareboat charter for the defendant for work in Columbia that can be taken up if the *Tug North* is released. That would be additional income to be derived by the defendant that could go to assist in off-setting any damages that could be awarded against it.

(ii) In addition, other expenses and costs are being incurred on a daily basis resulting from the arrest. These include salaries and provision of supplies for the crew; maintenance and fuelling of the vessel and port fees.

(iii) The defendant is willing to give an undertaking to the claimant for an amount exceeding the value of the *Tug North*. According to a recent valuation report (as exhibited), the Tug has a value of two million one hundred thousand Euro (€2,100,100). The defendant has actually issued a Letter of Undertaking (LoU) with the claimant as addressee for the €2,100,100 so that the claimant will have security in lieu of the arrested vessel.

(iv) In order to obtain permission from the Jamaican Government to commence salvage and re-floating of the *Oceanic Power,* the claimant's insurers issued a LoU to the value of one million United States dollars (US$1,000,000.00) to the Government to cover

potential claims arising from pollution and or damage to natural resources. The defendant's insurers have presented their own LoU to the value of US$1,000,000 so that the claimant's insurers can have their LoU returned to them. This has actually been done and so the defendant has given a LoU to the Jamaican Government in relation to the NRCA's claim.

(v) In relation to the incident, there have been payments made by the defendants' insurers to the claimant in two instalments totalling US$1,146,370.

(vi) A number of attempts have been made to obtain the claimant's consent to release the Tug from arrest but the claimant has not consented.

The claimant's response

[11] While the claimant stands in objection to the release of the *Tug North,* its main bone of contention concerns the terms upon which the Tug should be released. The claimant's overriding concern is, therefore, not so much with the release, in principle, but more in relation to the form the security for release should take and the adequacy of such security in the light of its claim. The claimant has rejected the terms of the defendant's LoU as security for the claim on the grounds of insufficiency.

[12] In seeking to establish its objection to the release of the Tug on the terms proposed by the defendant, the claimant places reliance on the affidavit of Damion Blair, one of its legal representatives in these proceedings. The contending position of the claimant, as distilled from that evidence, may be summed up thus:

(i) The defendant's insurers for the Tug have issued a LoU for up to US$1,000,000 in favour of the Jamaican Government for possible reef damage. However, the Jamaican Government has not yet quantified its claim and it is, therefore, impossible for the claimant to know whether the LoU is sufficient to satisfy any and all damages and costs which may be

awarded against it in the NRCA's claim. It is open to the court to assess damage to the reef in a sum in excess of that offered in the defendant's insurer's LoU.

(ii) Pursuant to clause 12 of the Towage Agreement entered into by the parties, the defendant is contractually obliged to completely defend and indemnify the claimant for all claims arising out of the incident and to have the claimant named as an additional assured on its insurance policies. As such, the LoU offered is insufficient.

(iii) The defendant's insurers have only reimbursed the claimant the sum of US$1,146,370, to date, however, the claimant's expenses incurred to date stands at US$2,300,000 in costs associated with the grounding and salvaging of the *Oceanic Power*. There are also additional expenses being incurred, including the costs attendant on arrest. Furthermore, the claimant has been put on notice by the Jamaican Government that it intends to hold the claimant liable for all damage, if any, to the reef.

(iv) The claimant, therefore, seeks security for the release of the Tug as follows:

> *(a) An indemnity issued by Avra and Ship-owners Protection Limited to completely defend and indemnify Southern Recycling claimant for any and all claims arising out of this incident including, but not limited to any damages which may be awarded to the claimant the National Resources Conservation Authority in Claim No. A00004/2012, and to provide Southern Recycling with complete insurance coverage for all claims that have been made or could be made arising out of this incident, to wit, the Defendant/ Applicant will instruct its insurers to name the Claimant as an insured under its policy of insurance in respect of the incident which is the subject of the claim. The said indemnity will also state that the defendant and its insurers agree to the jurisdiction of the United States Courts to resolve any dispute concerning non-payment of the claimant's expenses and will not seek contribution from the claimant's insurers, Chubb in respect of*

> *any expenses incurred as a result of the grounding of the Oceanic Power and claimed (sic) which arise from the said grounding; and*
>
> *(b) The Defendant/ Applicant's insurers, Ship-owners P&I, will issue a Letter of Undertaking in the sum of One million Seven Hundred United States Dollars (US$1,700,000.00).*

[13] It is this demand on the part of the claimant that has led to a stalemate between the parties on the issue of the release of the Tug. The first issue I will seek to resolve, therefore, is whether the *Tug North* should be released from arrest.

Whether the Tug should be released

Submissions

[14] In putting forward the defendant's case for release of the Tug from arrest, Mr. Kelman referred to a passage in **Halsbury's Law of England**, 4th edition (Re-Issued), vol. 1 at paragraph 394, footnote 5 that states:

> "The court has a discretion to order release and may consider factors such as the convenience of the parties and the risk of the deterioration of the vessel."

[15] In seeking to cement the merits of the claimant's contention that the Tug should be released, Mr. Kelman relied on dicta from two English cases, **The Peggy** 165 ER 620 and **The Gay Tucan** [1966] 3 All ER 819. He relied on these cases not because the facts are similar to the case at bar (which they are not) but rather, as he pointed out, for the principles enunciated in them. Both cases cited were concerned with disputed ownership and the right to possession of the particular vessel in question. The common question between them was whether the vessels in question, having been arrested at the instance of one party, ought to continue in arrest or should be released on bail pending the determination of the case.

[16] The cases reveal that in “possession cases”, the earlier practice had been not to allow release on bail. However in both cases, after a review of earlier authorities on the subject, it was established that the court has discretion in the matter and so in those instances, the vessels were released on bail pending trial.

[17] This is how Cairns, J in **The Gay Tucan** indicated the status of the law on the question at the time (p. 820):

> “So it seems that the practice having at some date in the eighteenth century been against release on bail in possession cases…Now, in the light of those authorities both sides before me have agreed that there is a discretion in the matter and I do not think it can be said that the authorities establish any very clear basis on which the discretion should be exercised. Clearly one ought to take into account, if the vessel is a trading vessel, the fact that the defendants would be deprived of the use of the vessel for trading and the earnings therefrom if the vessel remains under arrest…That does not apply to this vessel which is a pleasure craft, but I suppose it is right to take into account that the first defendant, Mr. Appleby, will be deprived of the use of the vessel—everybody will be deprived of the use of the vessel - for its proper purpose, that of pleasure, while it remains under arrest and that is undesirable, even in the case of pleasure craft, that it should remain idle longer than necessary.”

[18] His Lordship went on further to usefully point out:

> “Another matter to be taken into account is whether, if the vessel is released on bail, there is likely to be a greater deterioration than if the vessel remains under arrest….
> On the whole, I do not think it can be said that the risk of deterioration is substantially greater if the vessel is released than if she remains under arrest and I think there is substance in what is said by counsel for the first defendant that if the plaintiff gets bail (at the amount representing the present value of the vessel) he will be in at least as good a position, probably in a better position, than if his security consisted of the vessel itself remaining under arrest. For these

> reasons, I think the vessel should be released on bail."

[19] Sir William Scott in the earlier case, **The Peggy,** in coming to a decision that the vessel in that case should also be released on bail, made the following observations**:**

> "Is there any inconvenience sustained by the other party from this proceeding? I see none; on the contrary, there is a fund provided to answer his demand, which is not liable to deterioration. If this method had not been pursued, the ship must have been left in the custody of the Marshal, at a heavy expense, without any accruing profits, and at an increasing diminution of value. The Court has, therefore, in acceding so far, done what seemed best for the purposes of justice and for the ultimate advantage of the parties…"

[20] Having distilled the relevant principles from those authorities, Mr. Kelman further submitted that the circumstances established by the defendant's evidence do favour release of the Tug on the bases highlighted in the cases. I have provided a synopsis of his arguments as follows:

(i) The defendant is willing to provide security in excess of the value of the Tug in the form of a LoU. Such security is not liable to deterioration and so provides even better security than that arising from a continuation of the arrest of the Tug.

(ii) The defendant has co-operated fully with both the claimant and the NRCA. In light of this co-operation, the NRCA is not opposing the application for release of the Tug.

(iii) The hardship being incurred by the defendant as a consequence of the arrest has placed the defendant at a manifest disadvantage without any real corresponding benefit to the claimant. This is not in the interest of justice as, in the meantime, the defendant is suffering a real economic inconvenience in being deprived of the use of the Tug as a trading vessel.

(iv) The position of the claimant as stated in its affidavit is manifestly unreasonable and discloses an intention to use the process of this

court in a way, and for a purpose for which, it was never intended. By seeking the indefinite arrest of a trading vessel, while simultaneously refusing to accept a LoU more valuable than the vessel itself, the claimant is not using the arrest for its proper and legitimate purpose of obtaining security. Rather, the machinery of the court is being used for vexation and oppression holding a trading vessel hostage to secure an unreasonable demand for the indemnification of, as yet, an unquantified claim.

(v) The claimant will not be placed in a more advantageous position by a refusal of an order for release; rather it will be worse off by holding a deteriorating asset.

(vi) The defendant has issued a LoU for Euro 2,100,000 exceeding both the amount sought by the claimant and the Tug itself. The simple issue is that continuation of the arrest of the Tug does not secure for the claimant security for the full extent of its claim.

[21] Mr. Leiba, in his response on behalf of the claimant, duly pointed out that he had no issue with the authorities relied on by the claimant and that he accepts the position that the court has a discretion in the matter to release the vessel. He, however, advanced the claimant's position by relying on primarily two authorities. In this regard, he pointed out a statement in **Halsbury's Laws of England,** 4th edition, (2001 Reissue) vol. 1, para. 389, to the following effect:

> "The usual step following an acknowledgement of service in a claim *in rem* is for the owner of the property arrested to procure its release by giving security for the claimant's claim. This may be done either (1) by paying the amount of the claimant's claim into court; (2) by providing security in a sufficient amount; or (3) by furnishing a guarantee acceptable to the claimant. The third method is the most common in practice."

[22] Also, relying on the English authority, **The Moschanthy** [1971] Lloyd's Law Reports 37, Mr. Lieba submitted that what the court has to determine is the form and amount of the security to be given for the release of the Tug. In **The**

Moschanthy the dispute surrounded a vessel arrested as a lien for freight belonging to the plaintiff that was detained by the defendants for non-payment. The vessel was released against a security of £35,000 pound, the plaintiff having earlier asked for a security of £45,000 on the grounds that he reasonably expected to make a 100% profit on the goods. The defendants moved to set aside the proceedings or to stay the proceedings on several grounds one relevant one being that the security given was excessive.

[23] Mr. Justice Brandon in evaluating that ground as to whether the security was excessive had this to say at page 44:

> "The principle to be applied is, in my view, as follows: The plaintiff is entitled to sufficient security to cover the amount of his claim with interest and costs on the basis of his reasonably arguable best case. His best case on amount is that he is entitled to recover in substance (though not in form) the sound arrived value of the goods to him less the freight due. He puts it at about £45,000 less about £4000. The question is whether this best case is reasonably arguable or not…"

[24] Following on this principle, Mr Leiba submitted that when one applies the principles cited from Halsbury's and **The Moschanthy**, the claimant is entitled to security predicated on its "reasonably arguable best case". He maintained that the claimant's reasonably arguable best case would put sufficient security higher than what is being offered by the defendant's insurers given what had already been paid to the claimant and the fact that damages is at large in the absence of any quantification by the NRCA in its claim. He argued that on the claimant's reasonably arguable best case, security should be set at a potentially high figure somewhere in the region of US$4,500,000 if the court rejects that an indemnity as proposed by the claimant should also be given as part of the security.

[25] Mr. Kelman in response to this argument sought to undermine the claimant's reliance on **The Moschanthy** by arguing that the case offers no support for a refusal of release pending a LoU in respect of the entire claim. In

his view, the facts and issues of both cases are dissimilar and so **The Moschanthy** is not of much assistance to the claimant. He contended that since the claimant's claim is unquantified with no particulars been furnished and considering the additional payments already made by the defendant, the LoU issued is sufficient security at this stage. In his view, at a later stage when the claim is quantified, the claimant can apply for further security.

Analysis and findings

[26] I have taken into account all the evidence and submissions advanced by both sides in my deliberations on the issues at hand. However, I do not propose to recite all that has been urged on me. I must point out though that in coming to my decision, I have borne in mind all the evidence and everything stated by way of submissions.

[27] I will commence my analysis of the issue as to whether the Tug should be released by stating that there is a dearth of authorities on the issue from this jurisdiction. There is no question that the court has the power to grant the relief being sought for the release of the arrested vessel. It is settled law that the jurisdiction of this court does extend to admiralty proceedings pursuant to the **Administration of Justice Act (1956) (UK)** which became applicable in our law by virtue of the **Admiralty Jurisdiction (Jamaica) Order in Council, 1962.** (For a more detailed discussion of the subject see the decision of our Court of Appeal in **Citadelle Line S.A. v. the Owners of a Motor Vessel Texana** (1996) 16 JLR 1 and the unreported judgment of Sykes, J in **Matcam Marine Limited v. Michael Matalon (the Registered owner of the Orion Warrior (Formerly Matcam 1)** delivered October 6, 2011.)

[28] The CPR 70.11 that deals with the question of arrest and release of vessels in proceedings of this nature has, as its legislative base, the statutory provisions that originated in the UK in the Act of 1956. It is, therefore, not disputed that the power to release the vessel in question from arrest does reside

in this court. The material question concerns the parameters within which such a power ought to be exercised.

[29] The UK, since the Act of 1956, has managed to develop a body of law, through statutory changes, rules of court and practice directions, that serves to offer much guidance in admiralty proceedings. While our CPR has managed to move our jurisdiction a bit further than what obtained before, we are not close to an effective codification of the practice and procedure governing the area. So while part 70 does make provisions for the release of a vessel arrested, it has not gone far enough to lay down considerations that should be applied in the exercise of the power and it seems from my research that there are no practice directions to guide us in this regards.

[30] Given this state of affairs, I have found it useful to accept the cases from the UK as well as the practice and procedure in those courts (in so far as they are relevant) as being of high persuasive value. Of course, I have followed the lead of the UK cases with the caveat in mind that legislative provisions in the UK (that do not exist here) will affect the extent to which certain authorities may be relevant to our jurisdiction.

[31] That having been said, I will now state that in determining whether the *Tug North* should be released from arrest, I have chosen as an apt starting point the overriding objective set out in rule 1.1 of our CPR. The CPR makes it clear that in interpreting any rule or exercising any power under a rule, the court must give effect to the overriding objective which is to deal with the case justly.

[32] In giving effect to the overriding objective to deal with the case justly and by so doing to do justice between the parties, I have accepted from the very outset the submissions of Mr. Kelman that the court could be guided by the principles enunciated in **The Peggy** and **The Gay Tucan** and as restated in **Halsbury's Laws of England** at paragraph 394 (supra). I accept, therefore, as a sound principle of law that the court in exercising its discretion under rule 70.11

(4) to direct release of a vessel from arrest should consider the convenience of the parties, the risk of deterioration of the vessel and any potential risk of diminution in its value.

[33] Bearing these principles in mind and upon examining the evidence given by both parties in relation to the arrest of the *Tug North*, I do form the view that the defendant stands to lose more than the claimant from a continued arrest of the vessel. The Tug is a commercial vessel engaged in money earning and profit making ventures. It is not a pleasure boat. There are, therefore, financial repercussions from the continued arrest that could prove adverse to the defendant's interest.

[34] In fact, with a high risk of deterioration of the vessel coupled with the concomitant diminution in its value, I cannot see what the claimant would materially gain from its continued detention. This is particularly evident in light of the fact that other, and, indeed, better alternate means of security do exist which could serve to be more beneficial to the interest of both parties. As far as I see it, there is also the risk of other irremediable losses accruing to the defendant without any corresponding benefit to be derived by the claimant from continued arrest of the vessel. It seems clear to me that nothing useful could be gained from continued arrest of the Tug. In borrowing the words of Cairn, LJ in **The Gay Tucan,** I would say that it is undesirable that the Tug should remain idle for longer than is necessary.

[35] Arguing on the basis of analogous considerations relevant to the grant of an interim injunction, I conclude that the balance of convenience certainly lies in a return of the vessel to the defendant, of course, subject to appropriate conditions that could secure the most just results for both parties. In my view, the return of the Tug, on terms, would cause the least irremediable harm to both parties. I am, therefore, prepared to order its release on condition.

The form the security for release should take

[36] The ultimate issue that now arises for resolution is the terms upon which release of he Tug should be allowed. In evaluating the best options available in allowing the release of the Tug on terms, I have commenced my analysis with the forms of security options available. In the passage relied on by the claimant from **Halsbury's Laws of England**, at paragraph 389, it is stated that the owner of a property arrested, in order to procure its release, may (1) pay the amount of the claimant's claim into court; (2) provide security in a sufficient amount; or (3) furnish a guarantee acceptable to the claimant. Of the three methods, the third is said to be the most common in practice.

[37] It is noted also that while bail may be provided as a form of security for release, in the UK, it has become a rarity following the introduction of the CPR. As such, while that option could still be pursued, it is said that it is more likely that the modern and flexible undertaking to the court would be adopted. The provision of bail as s security is a formal proceeding whereby sureties give an undertaking to the court that they will pay the amount for which the defendant is adjudged liable if the defendant fails to do so.

[38] Similar sentiments are expressed in the **Civil Procedure White Book 2010** volume 2 at paragraph 2D-51, where it is stated:

> "The owner may obtain the consent of the arresting party to the release by giving security to his satisfaction There are many forms of security accepted but in almost all cases the arresting party is satisfied with a guarantee or undertaking given out of court e.g. by the Defendant's P & I Club or by a Bank or insurance company. Payment into court is sometimes used. Bail by bond is now a rarity."

[39] In relation to the provision of security by way of guarantee or undertaking, at paragraph 396 of **Halsbury's Laws of England**, 4th edition, reissue vol. 1, it is noted:

> "A guarantee or undertaking by a bank, insurance company, protection and indemnity association, or

> other guarantor satisfactory to the claimant, to pay any amount found to be due from the defendant and not paid by him is, in practice, usually accepted in lieu of bail or payment into court. The terms of such guarantees are agreed between the parties and no formal procedure is involved. Since the guarantor gives no undertaking to the court, the enforcement of the liability could only be by way of a substantive claim upon the contract of guarantee. In other respects, the effect of acceptance of a guarantee appears to be the same as the effect of giving bail."

[40] Having considered the nature of the claim and the circumstances of the case, I do endorse the position that the provision of bail by means of bond or payment of a sum of money into court would not at all be the most appropriate course to adopt. I conclude that an undertaking or guarantee offered by way of security would be more appropriate in keeping with the modern and more flexible approach.

[41] Within this context, the defendant, through its insurers, by letter dated April 27, 2012 offered an undertaking or guarantee to the claimant to pay the sum of €2,100,100. This was expressed to be "as damages, interest and costs upon judgment been entered against the defendant or as may be agreed between the parties on the claim." This sum, when converted, would be as counsel on both sides agreed, somewhere in the region of US$ 2,700,000.

[42] The insurers, however, in making the offer had stipulated that the guarantee shall not exceed that sum offered and furthermore, that the guarantee would be reduced by a deduction of any sums already paid or to be paid to the claimant. It means then that with the sum of already paid to the claimants, the guarantee would now stand at less than € 2,100,000 (US$2,700,000).

[43] It is in the light of this, that the claimant is contending that what is offered as security is insufficient. Its contention is that the sum is inadequate for two reasons. Firstly, it is not sufficient in the light of the expenses it has already incurred as a result of the grounding and salvage amounting to US$2,300,000

with additional expenses accruing as a result of the arrest. Secondly, the sum offered is insufficient because the claimant could be held liable to the NRCA and would be required to satisfy such damages as awarded by the court. Those damages have not yet been quantified and so the likely liability to the NRCA is currently not known. As such, it is not in a position to say that the guarantee of US$1,000,000 offered by the defendant's insurers to the Jamaican government to cover the claim of the NRCA is sufficient. It is for these reasons that the claimant has proposed, as an acceptable form of security, an indemnity from the defendants in the terms proposed coupled with a guarantee from the insurers for US$1,700,000.

[44] Upon assessing the claimant's demand against the backdrop of the parties' respective statements of case and the issues that arise for resolution, it seems to me that an indemnity in the terms requested would be rather inappropriate. I say this for the following reasons. The demand for an indemnity in the terms proposed by the claimant seems, substantially, to be an effort on the part of the claimant to get the defendant to perform its obligations in accordance with clause 12 of the Standard Voyage Towage Agreement. However, this is the same contract which is in issue between the parties on the claim and that involves the question as to the parties' rights and obligations under clause 12.

[45] The defendant in its defence has denied negligence or breach of contract on its part and has put the claimant to strict proof of damages. Further, it is relying on clause 11 of the Agreement for its full terms and effect. That clause exempts liability of the defendant and their insurers from certain consequential damages "arising out of or in any way connected with the Towage Agreement." In fact, the defendant has gone further to deny that the claimant is entitled to any relief being sought on its claim which include an indemnity. There are thus serious areas of dispute between the parties on the issue of causation of the grounding of the *Oceanic Power* and they are also poles apart on the issue of damages both as to fact and quantum.

[46] The claimant, therefore, in setting such a term for indemnity as a condition for release, would, in effect, be seeking to exact from the defendant at this interlocutory stage of the proceedings the performance of a term of the contract that is in issue on the substantive claim. In other words, if the indemnity were to be granted, it would have the effect of granting to the claimant one of the reliefs being sought in its claim without evidence and mature consideration of the issues in dispute.

[47] It is my respectful view that any order for security that would have the effect of disposing of an aspect of the claim in favour of one party on a disputed issue at this stage of the proceedings would not be in keeping with the overriding objective to deal with the case justly. This is so, particularly, in view of the fact that pleadings are not yet closed, there has been no disclosure of material documents and there is no indication as to the quality of the potential evidence to be relied on by the parties in support of their respective cases.

[48] The request for a security in the form of an indemnity seems out of line with established authorities as to the form a security for the release of a vessel usually takes. In any event, the Agreement between the parties contains a clause providing for an indemnity from the defendant in certain circumstances which the claimant, I am sure, will be seeking to invoke at the trial of the substantive claim. The question as to whether it is entitled to such an indemnity is a matter to be determined on the substantive claim and so is a matter that is best left to be resolved by the trial judge.

[49] It seems to me that the claimant could never, in any way, be prejudiced at this stage if an indemnity is not granted because an indemnity stands to be obtained as part of its final remedy at the end of the case if it succeeds in proving its claim. So, the question as to the grant of an indemnity by the defendant should be left for determination when the merits of each party's case can be better investigated. Accordingly, I will not accede to the claimant's request that

an indemnity in any form be granted as part of the security for release. I will accept an undertaking or guarantee.

The sufficiency of the security

[50] The claimant's main bone of contention is that what is offered by the defendant by way of guarantee is insufficient. Mr. Leiba submitted that if the grant of the indemnity being sought by way of security is not considered appropriate by the court, then a security in the region of US$4,500,000 would be sufficient.

[51] In considering the claimant's position on the matter, I am guided by the principle expounded in the White Book 2010, at paragraph 2D-50 as extracted from **The Moschanthy** (the authority on which the claimant itself relies). It reads:

> "The power to exact security must not be used oppressively; where there is a genuine dispute or discussion about the exact amount, the party seeking security ought to put his cards fairly on the table and explain to the other party or his solicitors the grounds on which he claims to exercise this strong power: *The Moschanthy* [1971] 1 Lloyd's Rep. 37, at 46-47).

[52] It stands to reason, then, that the claimant in arguing (as it is correct in doing) that it is "entitled to sufficient security to cover the amount of its claim with interest and costs on the basis of its best reasonable arguable case" must "fairly put its cards on the table and show the grounds on which it claims to exercise this power of strength."

[53] In looking at what the claimant has posited as its reasonably arguable best case, I have noted that there is no material before the court at this stage, (which is expected in the absence of disclosure and witness statements) that could reveal even a slight chance of the claimant succeeding on the claim or, indeed, the defendant succeeding on its defence. The prospect of success of either case is not readily discernible. Therefore, the bargaining strength of the claimant in asking for a higher security cannot be derived from the relative strength of its case. Indeed, the claimant has not taken it from this perspective at all.

[54] The only attempt of the defendant in putting forward a case for a greater security is what is put forward as expenses incurred to date (US$2,300,000), additional expenses accruing and the possibility of an award against it in favour of the NRCA which cannot be quantified at this stage. It is on these bases, that it contends that the sum being offered as security by the defendant's insurers is not sufficient.

[55] The fact of the matter is that where the proceedings are at this stage, the aspect of the case that involves unliquidated damages cannot be assessed with any degree of certainty to say what damages are likely to be awarded if the claimant should succeed on its claim. Furthermore, the aspects of the claim that would involve special damages, which are required to be strictly pleaded and proved, have not been pleaded and substantiated in any useful and material way. Again, this is understandable because of the urgency with which the claim was initiated in order to secure the arrest of the Tug. It means there is the likelihood of further amendments to the claim to take account of these matters. At this point, we are therefore "shooting in the dark" both on the issues of liability and damages.

[56] It is evident from the pleadings that a dispute not only on liability but on the fact and quantum of damages also looms large between the parties. What then is the claimant's reasonably arguable best case in all the circumstances? In **The Moschanthy** the claim in question admitted more readily of easier mathematical assessment since damages could be arrived at by reference to the value of the goods and expected profits. In the instant case, in relation to the claimant's assertion that it has already incurred expenses to the tune of US$2,300,000 and that there are others being incurred, there is nothing substantiating and corroborating this assertion.

[57] In **The Moschanthy**, similar difficulties confronted the court when the only evidence of what the plaintiff expected to make as profit came from his sworn evidence alone with no supporting evidence. This was the subject of much

argument from the defendants. They argued that the court ought not to regard the plaintiff as having shown an arguable case in favour of a high value because it was unlikely that profit on resale would be as high as 100% and that the profit to be realized, if any, was highly speculative.

[58] Justice Brandon's response to this was as follows:

> "I feel the force of these arguments. The difficulty is, however, these are interlocutory proceedings and the Court cannot try the case in them. It may be that the plaintiff could at trial, produce independent evidence to corroborate his figure, and the fact that he has not done so at this stage ought not to result in his being denied the opportunity later. Apart from this, the defendants adduced no evidence to contradict the plaintiff's evidence as to value and Counsel for them did not adopt my suggestion that, if he challenged the plaintiff's estimate as wholly excessive, he should cross-examine the plaintiff on his affidavits."

[59] Following the trail of this reasoning, I am prepared to say that in so far as the assertion that expenses amounting to US$2,300,000 have already been incurred, the claimant could well plead and prove this at trial. There is no evidence from the defendant to refute it. This aspect of the claim is not taken as being speculative and so can be taken as part of the claimant's reasonably arguable best case.

[60] In so far as the other additional expenses are concerned, the position is slightly different. The expenses have not been sufficiently specified or particularized in the sworn evidence so that even an estimated value is placed before the court. In other words, there is no likely quantum alluded to by the claimant in its evidence in relation to them. At least, in **The Moschanthy,** a figure was proffered by the plaintiff *on evidence* (for emphasis) for the consideration of the court and which the court could use to assist it in determining whether the security being requested was excessive. I have no such assistance in this case in so far as the additional expenses allegedly resulting from arrest are concerned.

[61] In continuing to look at what is the claimant's arguable best case on amount, I have considered the NRCA's claim against the parties in which damages could be awarded against the claimant. The NRCA's claim seems to be, substantially, a claim for unliquidated damages. No item has yet been pleaded for special damages. As such, there is no indication whatsoever as to the quantum of damages the NRCA is likely to recover if it succeeds on its claim. With no assistance, whatsoever, the court is only left to speculate.

[62] What the available evidence does reveal in relation to this aspect of the claimant's contention is that the defendant, through its insurers, has given a letter of guarantee to the Jamaican government in the value of US$1,000,000. In the absence of any sum pleaded by the NRCA as to any component of the damages being claimed, it is difficult to say whether this sum is sufficient or not. It could be more than sufficient; it might not be. Everything is speculative.

[63] What is worthy of note is that the Jamaican Government has accepted the guarantee in that sum and has agreed to the release of the Tug on the strength of it. While the government's acceptance of the sum is not conclusive of its sufficiency as a security, it does, however, lend itself to a conclusion that the Jamaican Government, whose interest is affected, has regarded it as a reasonable offer. In the light of that, I am not provided with a basis to say the offer from the defendant's insurers to pay the Government the sum proposed, in the event the NRCA succeeds on its claim, is patently insufficient and/or obviously unreasonable.

[64] In this regard too I am compelled to say, that the claimant's insurers had themselves previously offered the same sum in a letter of guarantee to the Jamaican Government. This was eventually returned by the Government upon the defendant's insurers issuing a LoU on the defendant's behalf. The fact that the claimant's insurer's offered the same sum is taken to mean that they too had viewed it as a reasonable pre-estimate of the likely damages to be awarded on

the NRCA's claim. My view is that if the claimant's insurers were prepared to make the same offer to the Jamaican Government as is made by the defendant's insurers, it cannot now be argued by them that the same sum is insufficient as security to meet that aspect of the claim.

[65] It seems safe to conclude that while the claimant is arguing that the sum being offered is not sufficient, it has not demonstrated by evidence at this stage that security in the region of US$4,500,000, as suggested by Mr. Leiba, is justifiable. This has no cogent evidential basis to anchor it.

[66] In seeking to arrive at a just position as I am obliged to do, I have taken into account that there has been a conscious and reasonable effort on the part of the defendant to co-operate with all parties concerned arising out of the grounding of the *Oceanic Power.* The defendant has made overtures both to the claimant and to the Jamaican Government by the offer of undertakings from its insurers. This is all done in the context of claims that remain, up to now, insufficiently particularized and unsubstantiated in so far as matters pertaining to the items and quantum of damages are concerned.

[67] To continue the arrest of the Tug in such circumstances and on the ground that the security being offered by the defendant is insufficient, without any proper bases by which insufficiency can be properly measured, seems somewhat oppressive. This is particularly so in circumstances where no liability is admitted and the fact and quantum of damages are in issue. The provision of security for the release of the Tug must accord with principles of fairness and justice. It must strike a comfortable balance between the competing interests of the parties involved if the court is to give effect to the overriding objective to deal with the case justly.

[68] Mr. Leiba has placed the sum to be fixed as security at US$4, 500, 000. I have seriously considered this suggestion but I find that I cannot accept it. I find the sum proposed to be excessive having taken into account several variables

including the following: the evidence put forward by the parties against the background of their respective statements of case; the market value of the Tug itself; the acceptance by the Jamaican Government of the defendant's insurer's undertaking of US$1,000,000; payment out to the claimant by the defendant's insurers and the highly speculative nature of some components of the damages likely to be awarded in the event liability is established against the defendant on both claims. The best I can do in all the circumstances is to give an educated guess and to come up with a figure as reasonable security as a matter of a mere approximation.

CONCLUSION

[69] Taking into account all the variables and the preponderables, and making allowance for the sum of US$1,146,370 already paid to the claimant, I am of the view that on the claimant's reasonably arguable best case, a security in the amount of US$2,500,000 to cover damages, as well as interest and costs, seems reasonably sufficient for the release of the *Tug North*.

[70] I have arrived at the above figure by allowing (i) a further US$1,300,000 for the specified expenses relating to the grounding and salvage of the *Oceanic Power* (having taken into account the sum already paid); (ii) an approximation of US$500,000 for the additional expenses not specified; and (iii) the remainder, US$700,000, to cover additional damages (on the NRCA's claim), interest and costs. I have taken into account the LoU given by the defendant to the Jamaican Government as part of the security being offered in respect of the NRCA's unspecified claim.

[71] Taking into account also the fact that the NRCA (the cautioner) has now filed the withdrawal of its caution against release from arrest, I have seen it fit to grant the order for release of the *Tug North* on the defendant's Notice of Application for Court Orders upon the terms set out below.

Order

(1) The *Tug North*, now being held pursuant to warrant of arrest issued on March 16, 2012, IS TO BE RELEASED FROM ARREST upon the defendants, its owners, furnishing to the claimant a Letter of Guarantee or Undertaking from their insurers, Ship Owners Protection Limited and /or any other approved bank, insurer, or financial institution, located within the jurisdiction or outside the jurisdiction, for the sum of US$2,500,000 exclusive of any sums already paid to the claimant.

(2) Costs of this application shall be costs in the claim.

(3) Liberty to apply.