

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 86/2017

APPLICATION NO 155/2017

BETWEEN	JEBMED S. R. L.	APPLICANT
AND	CAPITALEASE S.P.A.	RESPONDENT
	OWNERS OF M/V TRADING FABRIZIA	
	X/O SHIPPING A/S	INTERVENOR
	LIGABUE S.P.A.	INTERESTED PARTY

CONSOLIDATED WITH

BETWEEN	ELBURG SHIP MANAGEMENT	CLAIMANT
AND	ENTERPRISE SHIPPING AGENCY	FIRST DEFENDANT
AND	CAPITALEASE S.P.A.	SECOND DEFENDANT
AND	MOTOR SHIP TRADING FABRIZIA	THIRD DEFENDANT

Vincent Chen and Makene Brown instructed by Chen, Green & Co for the Applicant

Krishna Desai and Miss Amanda Montague instructed by Myers, Fletcher & Gordon for the respondent

Miss Anna Gracie instructed by Rattray Patterson Rattray for the Intervenor, X/O Shipping A/S

Kwame Gordon and Ramon Clayton instructed by Samuda & Johnson for Elburg Ship Management

10 and 13 October 2017

IN CHAMBERS

MORRISON P

[1] On 10 October 2017, I heard submissions from counsel on an application by Jebmed S.R.L. (the applicant) for a stay pending appeal arising out of the judgment given by Batts J on 15 August 2017. On 13 October 2017, I dismissed the application, with costs to the Capitalease S.P.A. (the respondent), such costs to be taxed if not agreed. These are the promised reasons for this decision.

[2] The subject matter of this litigation is 'The Trading Fabrizia' ('the ship'), a ship which flies the flag of Malta. The ship is currently under arrest in Kingston Harbour, pursuant to an order for its arrest made by Batts J on 30 October 2016. The order for arrest was made at the instance of the applicant, which is the mortgagee of the ship. The respondent is the owner of the ship. The other parties named in the title of the consolidated actions include X/O Shipping A/S (the intervenor), which claims an interest in respect of fuel supplied to the ship, Ligabue S.P.A. (the interested party) and Elburg Ship Management (Elburg), agents of the former crew members of the ship, whose claim is for wages allegedly due to the crew.

[3] Starting with its arrest, the dispute between the applicant and the respondent concerning the fate of the ship has generated considerable activity in the Admiralty Division of the Supreme Court. Over a period of a mere seven months, it has already spawned four written judgments (two each by Batts J and Edwards J), and an order (by Laing J) in respect of which no written reasons were given. Nevertheless, for the

purposes of this application, the aspects of the litigation relevant this application may be briefly summarised as follows.

[4] In its capacity as mortgagee of the ship, the applicant sought and obtained the order for the arrest of the ship in respect of a debt of US\$699,046.38 allegedly due to it from the respondent. On 23 December 2016, Batts J declined to make the order for sale of the ship which was then sought by the applicant. However, he granted the respondent's application for the release of the ship, upon conditions which included the provision by the respondent of a satisfactory bond, guarantee or undertaking in respect of the debt claimed by the applicant.

[5] By an order made 18 April 2017, Laing J refused (i) the Admiralty Bailiff's application for sale of the ship; and (ii) the applicant's application for an order for interim possession of the ship.

[6] By an order made on 28 June 2017, Edwards J granted the applicant's renewed application for a judicial order for appraisal and sale of the ship. In assessing whether the order should be granted on this occasion, Edwards J considered the circumstances in which the previous applications for orders for sale by the applicant and the Admiralty Bailiff were refused by Batts J and Laing J respectively. Her conclusion was that, given the significant time which had elapsed since the arrest of the ship, and the fact that all ships arrested are subject to depreciation from ordinary wear and tear

and natural elements, it was now an appropriate time for the ship to be sold¹. Edwards J then went on to give detailed reasons for her decision, before making the following order:

- “1) The application for sale is granted on condition.
- 2) Provided that the defendant fails to provide alternate security in the amount of USD\$450,000.00, USD\$139,000.00, USD\$778,497.79 and USD\$537,836.00 in the form of bonds, guarantees, payments into court or undertaking satisfactory to Jebmed S.R.L., Liguabe S.P.A., Elburg Ship Management and XO Shipping A/S, respectively, the Admiralty Bailiff is empowered to proceed to appraisalment and sale of the M/V ‘Trading Fabrizia’ within 30 days of this order.
- 3) Should the defendant comply with the conditions at (2) before the expiration of 30 days following upon the date of this order, the vessel shall be released from arrest.
- 4) Liberty to apply.
- 5) Costs to the Claimant Jebmed S.R.L. to be agreed or taxed.”

[7] No appeal was filed against Edwards J’s order.

[8] By 17 July 2017, with some 11 days yet to run on the 30 day deadline given by Edwards J to the defendant to provide the appropriate security to prevent the sale of the ship, the applicant decided to take another tack. By an application filed on that date, the applicant sought, among other things, (i) a declaration that it was entitled to possession of the ship as mortgagee; (ii) an order that it be given possession of the

¹ [2017] JMCC Comm 18, para. [83]

ship; (iii) permission to itself bail the ship by posting the appropriate security as ordered by Edwards J; and (iv) an injunction to restrain the respondent from interfering with its taking of possession under the mortgage of the ship.

[9] This application came on for hearing before Batts J on 7 August 2017. Describing the matter as having taken “a rather unusual turn”, the learned judge observed that “[the applicant] having successfully obtained orders for arrest and then for the sale of the ship, [has] now had a change of heart”².

[10] However, Mr Vincent Chen for the applicant submitted that what was in effect being sought was a variation of Edwards J’s earlier order, pursuant to the liberty to apply provision of that order, or the court’s powers to vary in order. Among other things, Mr Chen submitted to Batts J that there had been a change in circumstances since the making of Edwards J’s order which warranted the granting of an order for possession of the ship to the applicant at this stage. Hardly surprisingly, the application was resisted by the respondent, Mr Krishna Desai submitting on its behalf that there had been no such change of circumstances and that the application was “tantamount to an abuse of process”³. Miss Anna Gracie for the intervenor joined Mr Desai in opposing the application, while Mr Clayton for Elburg indicated that he had no instructions whether or not to oppose the application (save in so far as it sought to give the applicant’s claim priority over that of his client).

² [2016] [sic] JMSC Civ.224, para.[4]

³ Para. [19]

[11] Batts J also had before him an unopposed and uncontradicted affidavit from the Admiralty Bailiff speaking to the current condition of the ship. The Admiralty Bailiff described the condition of the ship as generally “excellent and or pristine”⁴. He also expressed the opinion that “in its present condition the [ship] can remain in the harbour for the next two (2) years if prevailing weather conditions continue”⁵.

[12] Having reviewed the evidence, the submissions and the authorities, Batts J concluded that the application must fail, describing the attempt to vary the order under the liberty to apply provision as “ingenious but unsound”⁶. Batts J based himself on, among other things, the decision of this court in **Causwell v Clacken**⁷, in which Smith JA pointed out⁸ that “[t]he insertion of 'liberty to apply' does not enable the court to deal with matters which do not arise in the course of the working out of the judgment, except, possibly, on proof of a change of circumstances”. Batts J concluded as follows⁹:

“In summary therefore [sic] [the applicant] has not pointed to any relevant change in circumstance since Edwards J’s order was made. Further it is not appropriate for me to vary an order made pendente lite in a manner that would finally dispose of one or more of the issues to be tried, that is whether the mortgagee had properly exercised the power to take possession. Issue has been joined as to whether the mortgagee’s rights are correctly exercised. The mortgagee ... invoked the power of this court both to arrest and later to obtain an order for sale pendent lite. Converting the res to

⁴ Para. [27]

⁵ Para. [28]

⁶ Para. [32]

⁷ (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 129/2002, judgment delivered 18 February 2004

⁸ At para. 17

⁹ Para. [39]

specie will preserve the status quo in so far as the respective claims and counter claims are concerned as well as the possibility of recovery. If it is that the applicant wishes to resile be from the jurisdiction it invoked it may take the steps allowed in law to withdraw legal action and discharge the arrest. That however may have consequences. As to which I say no more.”

[13] By notice of appeal filed on 22 August 2017, pursuant to leave granted by the learned judge, the applicant challenges Batts J’s order on a number of grounds. By notice of application filed on the following day, 23 August 2017, the applicant also sought a stay of execution pending the hearing of the appeal in the following terms:

“... that ... the Order for Appraisalment and Sale made by the Honourable Mrs. [sic] Justice C. Edwards on the 28th day of June, 2017 be stayed until the determination of the appeal against the order of Mr. Justice D. Batts made on the 15th August 2017.”

[14] In an affidavit sworn to on behalf of the applicant on 23 August 2017, Mr Makene Brown, attorney-at-law, grounded the application as follows:

“... ”

3. The proposed appeal stands a reasonable prospect of success for the reasons set out in the Notice and Grounds of Appeal ...
4. The Admiralty Bailiff has indicated that he will take steps to engage ship brokers in London England and will engage in overseas advertising to expose the possible sale. These courses will cause costs to be incurred which might be unnecessary if the Appeal is successful.
5. Further, the Appellant has stated its intention to bail the Vessel and to tow it to Malta for dry docking to do

the necessary to have it re-registered and eventually sold in its own flag state of Malta.

6. If a stay of execution is not granted, any appeal (if successful) might be rendered ineffectual because:
 - (a) the sale by the Bailiff could take place before the appeal is finally disposed of;
 - (b) if this occurs the Vessel would no longer be under arrest and therefore no longer subject to the directions that are permitted on the Part 70 of the Civil Procedure Rule 2003 [sic] in which event the relief sought will become unavailable and this Honourable Court would be powerless; and
 - (c) if the Appeal is successful costs and expenses would have been incurred by the Bailiff in preparation for a sale which might never take place.”

[15] In his submissions in support of the application for a stay, Mr Chen concentrated on three main aspects of the grounds of appeal. First, he contended that Batts J’s decision to limit the scope of the liberty to apply order made by Edwards J to its traditional role of having to do only with the working out of the order was wrong. This was so, he submitted, because part 70 of the Civil Procedure Rules 2002 (CPR) created a special regime for the determination of admiralty claims and that in this context the phrase ‘liberty to apply’ carries a wider connotation, thus enabling multiple applications by different parties at any stage of the proceedings. Second, as mortgagee of the ship, the applicant is in a special position, thus engaging the well-known principle of **SSI**

(Cayman) Limited v International Marbella Club SA¹⁰, by virtue of which the only basis upon which a mortgagee can be restrained from exercising its powers of sale is if the mortgagor brings into court the amount of the debt claimed by the mortgagee. And third, that Batts J failed to appreciate that the very act of arresting the ship was an act of possession by the applicant, thereby giving the applicant a right to take actual possession of it.

[16] For these reasons, as well as others not specifically referred to, Mr Chen contended that the applicant had an appeal with a real prospect of success and that this was therefore an appropriate case for the grant of a stay.

[17] Again not surprisingly, Mr Desai, supported on this occasion by Mr Kwame Gordon for Elburg, opposed the application for a stay, essentially on the ground that, for the reasons given by him, Batts J had come to the correct conclusion and there was no reasonable prospect of success on appeal from his judgment.

[18] It is not in dispute that the jurisdiction of a single judge of the Court of Appeal to order a stay of execution is as set out in rule 2.11(1)(b) of the Court of Appeal Rules 2002 (CAR):

“2.11(1) A single judge may make orders –
(a) ...

¹⁰ (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 57/1986, judgment delivered 6 February 1987

(b) for a stay of execution on any judgment or order against which an appeal has been made pending the determination of the appeal;

..."

[19] Nor is it in dispute that, in order to obtain a stay, the applicant must show that it has an appeal with a good prospect of success and that the balance of hardship or justice favours the grant of a stay¹¹. An appeal with a good prospect of success is a threshold consideration and an applicant whose case does not satisfy this criterion is not entitled to a stay.

[20] Having reviewed the material and the submissions of counsel in this matter, I strongly inclined to the view that this application could not cross the threshold. It seemed to me that it would be difficult on appeal to successfully impugn the manner in which Batts J exercised his discretion in considering whether to vary the previous order of Edwards J.

[21] But, beyond that, it further seemed to me that the application was open to an even more fundamental objection. As has been seen, the power to order a stay given by rule 2.11(1)(b) explicitly relates to "a stay of execution on any judgment or order against which an appeal has been made". The subject of the appeal in this case is Batts J's order, which is not the order in respect of which the stay was sought. Instead, the stay asked for related to Edwards J's order, from which there has been no appeal. In

¹¹ See, for example, **Harold Brady v General Legal Council** [2017] JMCA App 25, per Straw JA (Ag) at para. [7]

these circumstances, I therefore considered that I had no power to grant the stay asked for by the applicant and dismissed the application. In the light of this outcome, Mr Chen, quite properly so, did not resist an order for costs in the respondent's favour.