[2017] JMCA Civ 45

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 86/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**JEBMED S R L**	**APPELLANT**
AND	**CAPITALEASE S P A OWNERS OF M/V TRADING FABRIZIA**	**RESPONDENT**
AND	**X/O SHIPPING A/S**	**INTERVENOR**
AND	**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**

Written submissions filed by Chen Green & Co for the appellant

Written submissions filed by Myers, Fletcher & Gordon for the respondent

23 October, 10 November and 20 December 2017

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2(3) of the Court of Appeal Rules 2002)

PHILLIPS JA

[1] I have read in draft the reasons for judgment of my sister Straw JA (Ag). I agree with her reasoning and conclusion and have nothing useful to add.

P WILLIAMS JA

[2] I too have read the draft reasons for judgment of my sister Straw JA (Ag) and agree with her reasoning and conclusion. I have nothing to add.

STRAW JA (AG)

[3] This is an appeal from the orders of Batts J that were made on 15 August 2017. On 10 November 2017 the court, in the presence of counsel, handed down its decision in this appeal from the orders of Batts J in the following terms:

> "1. Appeal dismissed.
>
> 2. The orders of the Honourable Mr Justice Batts dated 15 August 2017 are affirmed.
>
> 3. Costs of the procedural appeal to the respondent, Capitalease SPA Owners of M/V Trading Fabriza and to the claimant, Elburg Ship Management to be taxed, if not agreed."

Our reasons for that decision are set out below.

[4] The relevant background has been set out succinctly in the judgment of Morrison P in **Jebmed SRL v Capitalease SPA owners of M/V Trading Fabrizia et al**

consolidated with Elburg Ship Management v Enterprise Shipping Agency et al [2017] JMCA App 29, given in consideration of an application by the appellant for a stay of execution of the orders of Edwards J. The relevant paragraphs, [2] to [6], which includes the orders of Edwards J, are set out below:

> "[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 to 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 appraisement 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 sold. 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 undertakings satisfactory to Jebmed S.R.L., Ligabue S.P.A., Elburg Ship Management and XO Shipping A/S, respectively, the Admiralty Bailiff is empowered to proceed to appraisement 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.' "

[5] No appeal was filed against the judgment of Edwards J. She had also considered two other applications subsequent to her judgment in the above-mentioned matter. Firstly, an application filed by the respondent on 19 May 2017 to strike out the appellant's claim and for the release of the vessel from arrest. This was argued on the basis that the claim was *res judicata* as the appellant had brought a claim in another jurisdiction (Malta) and had obtained a favourable result. The second was filed by the appellant on 31 May 2017, requesting permission to amend its claim to include a claim for possession of the ship. Edwards J refused the application of the respondents and granted permission to the appellant to amend the claim in a separate judgment dated 19 July 2017.

[6] On 17 July 2017, the appellant in this matter, Jebmed SRL, filed a notice of application for court orders for possession of the said ship. This application was heard by Batts J on 7, 8, 9, and 15 August 2017. The orders which were sought are set out below:

> "1) A declaration that the Claimant is entitled to Possession as Mortgagee under the Mortgage dated 6th day of May 2016;
>
> 2) The Claimant be given possession of M/V 'Trading Fabrizia' ('the Ship') with costs related to compliance with this order being payable as a priority payment after Bailiff's fees, costs and expenses upon release of the ship;
>
> 3) Abridgement of time and for the court to hear the matter notwithstanding that it has been short served under the Rules (Rule 26.1(2)(c));

4) Permission for the mortgagee, to itself bail the vessel by posting the appropriate security as ordered by her Ladyship Mrs Carole Edwards [sic] or to take such other steps as are appropriate to bring about the release of the vessel and to bring the costs of so doing to account as monies due and payable under the mortgage by the mortgagor/defendant (Rule 70.11(4) (b) and (c) (i));

5) An injunction to restrain the defendant, its servants and/or agents from interfering with the Claimant's taking possession under the mortgage of the Ship, M/V 'Trading Fabrizia'. That such order be endorsed with a penal notice pursuant to Rule 53.3(b) of the Civil Procedure Rules (2002) against the Company and/or its agents and any third party who should disobey the order (Rule 17.1(a) and 17.2(1))."

[7] In the submissions before Batts J, counsel for the appellant argued that the application was essentially to vary the orders of Edwards J under the provision of 'liberty to apply'. Batts J refused the application by the appellant to vary the order of Edwards J made on 28 June 2017 and gave leave to appeal. The grounds of appeal are set out below:

"a) The Court proceeded as though it was determining the matter of possession as a preliminary issue and heard arguments and reviewed facts and authorities in furtherance of the process.

b) The Court has ignored or has not had due regard to the factual and legal position that the appellant had actual possession of the vessel pursuant to the terms of the mortgage and deed of covenant upon the arrest of the vessel by the appellant mortgagee and the Court was being asked to permit the taking of physical possession without a breach of the peace.

c) The Learned Judge erred in law when he found that the Court does not have the power to vary the

interlocutory order for sake of the Court under the liberty to apply order of his sister Justice C. Edwards.

d) The Court failed to take into consideration that the purpose of the order made by Edwards J on 28th June 2017, was to clear the harbour of the ship and the application was an effort to further this purpose enabling the appellant to itself bail the vessel after it had possession. The variation sought was in furtherance of this purpose.

e) The Court misunderstood the variation which was to vary the order to enable the achievement of its purpose by permitting the appellant to do that which the respondent would not or could not do.

f) The Learned Judge erred in finding that the claimant's Jebmed S.R.L., application would have resulted in a summary judgment despite the claimant not applying for summary judgment, but, for the Court to determine the issue of possession, *in limine*, under Part 26.1 (7) of the Civil Procedure Rules (2002).

g) The Learned Judge failed to appreciate that the preliminary application for possession and the application for the variation of the order was to accommodate the purpose to give effect to the Appellant's existing legal possession.

h) The Trial Judge has interpreted and applied the procedural rule incorrectly and overridden the substantive rights of the Appellant.

i) That the Learned Judge erred when he failed to exercise his discretion to vary the order for sale.

j) That the Learned Judge erred in his consideration of Security for Cost for the Defendant."

[8] In determining this appeal, the court is embarking on a review of the learned judge's decision to determine if he made any errors in law or misinterpreted the facts in the exercise of his discretion, or if the decision was so aberrant that it is deemed 'demonstrably wrong'. See **Hadmor Productions Ltd and others v Hamilton and**

others [1982]1 All ER 1042 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1.

[9] Based on the grounds of appeal filed, there are two issues to be determined by this court. These will be considered as set out below.

> Issue 1: Did the learned judge err in his ruling by refusing to treat with the appellant's application pursuant to the provision of liberty to apply?
>
> Issue 2: Did the learned judge misunderstand the application and fail to give due regard to the factual and legal position of the appellant as mortgagee?

Issue 1: Did the learned judge err in his ruling by refusing to treat with the appellant's application pursuant to the provision of liberty to apply?

Submissions for the appellant

[10] Counsel has submitted that Part 70.8 of the Civil Procedure Rules (2002) (the CPR), which permits the court to give "[d]irections as to property under arrest", would entitle it to apply to vary any order made while the property is under arrest and further, that such an application for variation of an existing order without an appeal is permissible under 'liberty to apply'. Part 70 of the CPR deals with admiralty claims. The relevant sections of rule 70.8 are set out below:

> "(1) The bailiff may at any time apply to the court for directions with regard to any property under arrest.

(2) The bailiff may, and if the court so directs must, give notice of an application under paragraph (1) to any or all of the persons referred to in paragraph (3).

(3) The bailiff must send by post a copy of any order made on an application under paragraph (1) to all persons who, in relation to the property under arrest, have -

(a) entered a caution which is still in force;

(b) caused a warrant for the arrest of the property to be executed by the bailiff;

(c) acknowledged issue or service of the claim form in any claim in which the property is under arrest; or

(d) intervened in any claim in which the property is under arrest.

(4) A person other than the bailiff may apply for directions under this rule.

(5) ...

(6) ..."

[11] Counsel contends that the appellant should be allowed to make an application to vary the orders of Edwards J since she granted 'liberty to apply' in her judgement ordering the sale of the ship if the respondent failed to put up the requisite security. (see paragraph [2] of Edwards J's order set out in paragragh [3] of this judgment).

[12] At paragraphs [16] to [18] and [21] of his submissions, counsel stated;

> "[16] The words 'liberty to apply' must be understood in the context of the nature and effect of the order being made. The orders relate to the management and disposal of the vessel *pendent lite*. None of them are final orders and that is the reason that when Edwards J makes an order which in effect contradicts or overrides the orders made by Batts J

> and Laing J there is no issue about variation. It is prescribed by the rules themselves and is in furtherance of those rules which is to deal with the vessel pending litigation.
>
> [17] In the context of the first order made by Batts J liberty to apply must mean 'permission to make further applications under rule 70.8'. He has dismissed the application for appraisement and sale and given permission to the respondent to post security as he has determined. There is nothing further to be worked out to give effect to that order. This leaves room for the same applicant, by the Admiralty Bailiff or any other party, to renew the application for appraisement and sale.
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> [18] Batts J misunderstood the meaning and effect of Part 70 of the CPR. It is a special part that deals with actions *in rem*. Those actions involve the management and disposal of *the res* pending the substantive hearing and at a later time the hearing of the substantive issues which is the trial of the issues between the parties, will take place to determine the rights and obligations of the parties and to finally dispose of the action.
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> …
>
> [21] The learned trial judge failed to appreciate that he was only acting at the first level, to dispose of the *res* and then to require the proceeds, if it is sold, to be brought into court. He also failed to appreciate that the security could be posted to secure the release of the Vessel, in which event the security would stand in the stead of the Vessel, the *res*, to await the resolution of the substantive issues. Final disposition of the disputes would not and could not be attained at this stage."

[13] Counsel relies on **Independent Trustee Services Ltd v GP Noble** [2010] EWHC 3275 (Ch), a case emanating from the High Court of Justice Chancery Division of the United Kingdom, in support of his submissions.

Submissions for the respondents and for Elburg Ship Management

[14] Both counsel have vehemently resisted the appellant's submissions in relation to the use of the provision of 'liberty to apply'. Both counsel also relied on the authorities of **Cristel v Cristel** [1951] 2 All ER 574, **Harley v Harley** [2010] JMCA Civ 11, and **Causewell & another v Clacken & another** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 129/2002, judgment delivered on 18 February 2004**.** It was submitted that the 'liberty to apply' provision does not enable the court to deal with matters which do not arise in the course of working out of the judgment, or to vary the terms of the order, except, possibly on proof of change of circumstances. Counsel for the respondent submitted that the appellant would have had to prove that there was some change in the circumstances of the ship between the time the appellant prosecuted its application for sale *pendente lite* in June 2016, and 17 July 2017, when it lodged its application under 'liberty to apply'. No such credible evidence was placed before Batts J. Counsel for Elburg Ship Management also relied on **Independent Trustee Services** in support of the submission that the only other circumstance that would allow for a variation as sought, is where it can be shown that Edwards J was misled in some way, whether innocently or otherwise, as to the correct factual position before her. Both counsel therefore distinguished the case of **Independent Trustee Services** from the factual circumstances under consideration.

[15] Counsel for the respondent further submitted that the appellant has interpreted 'liberty to apply" to relate to permission to make further applications under rule 70.8 He contends that an application for possession of the vessel is not a 'direction as to

property under arrest' as provided for under rule 70.8. Counsel for Elburg Ship Management also referred the court to rule 70.13, and in particular, rule 70.13(1) which allows applications for an order for the survey, appraisement or sale of a ship to be made in a claim in *rem* at any stage and submits that to grant the application as sought by the appellant would result in a summary judgment which is strictly prohibited by rule 15.3(e) of the CPR in relation to admiralty proceedings in *rem.*

Analysis in relation to 'liberty to apply'

[16] This court has already determined the scope of the provision of 'liberty to apply' in **Causewell & anor v Clacken** where Smith JA, in considering the scope of the court's jurisdiction to vary a consent order, stated as follows at page 17:

> "In the case of a final order which embodies or evidences a real contract, as said before, the court will not normally interfere with it. Where, however, in the case of a final judgment or order the necessity for a subsequent application is foreseen, it is usual to insert in the judgment or order words expressly reserving liberty to any party to apply to the court for further directions. The 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 or to vary the terms of the order except, possibly, on proof of change of circumstances – see **Cristel v Cristel** (supra). A judgement or order is not rendered any less final because liberty to apply is expressly reserved."

[17] Phillips JA, in **Capital Solutions Ltd v Terryon Walsh & The Administrator General of Jamaica & Karlene Bisnott** [2010] JMCA App 4, also considered the extent to which the provision of 'liberty to apply' can be used. She reiterated the law as decided in **Cristel v Cristel** at paragraph [64] of the judgment. She stated as follows:

"[64] Counsel for the respondent relied on the case of **Cristel v Cristel**, in support of his contention that the facts of the case before me did not fall within the scope and ambit of the phrase 'liberty to apply'. The facts of **Cristel v Cristel** were that a husband who had deserted his wife had obtained an order for possession of the matrimonial home, which his wife occupied, and which he wished to sell with vacant possession, and which order was made by agreement and suspended until he provided suitable alternative accommodation in the form of a two or three bedroom house or bungalow. The order gave 'liberty to apply' and so when the husband located a two bedroom flat, he applied to the Master to vary the order to read 'or flat' which the Master refused and which Devlin J, on appeal, referred back to the Master to decide whether the flat was suitable other accommodation. On appeal by the wife, it was held:

> 'that the word 'liberty to apply' referred prima facie to the working out of the actual terms of the master's order. That the word 'house' did not cover a flat, and the insertion of the words 'or flat' would amount to a variation of the order; and in the absence of any change of circumstances the judge had no power to vary the order of the master.'

L.J. Somervell had this to say:

'Prima facie, 'Liberty to apply' is expressed, and if not expressed will be implied, where the order drawn up is one which requires working out, and the working out involves matters on which it may be necessary to obtain the decision of the court. Prima facie, certainly, it does not entitle people to come and ask that the order itself shall be varied.' He concluded that the words, 'liberty to apply' in his opinion referred to the working out of the actual terms of the order.'

L.J. Denning stated:

'But when there is no change of circumstances, I do not think that the court can alter or vary the agreement of the parties under the 'liberty to apply'. It can only do what is necessary to carry the agreement into effect.'

L.J. Hodson stated:

> 'The words 'liberty to apply' in their context add nothing to the order, which, of itself, required something further to be done for it to be worked out. Therefore without the existence of those words, it would have been open to the husband to come to the court and show that he had provided suitable alternative accommodation in the form of a two or three bedroom house or bungalow; but, for the reasons which have been given by Somervell, L.J. I am of opinion that it is not open to him to come and ask the court to alter the agreement by adding the words 'or flat' to the description of the accommodation contained in the order'."

[18] In **Harley**, Harris JA examined rule 26.1(7) of the CPR which empowers a court to vary or revoke an order it has made. She considered the conditions that would entitle a judge to revoke an order made by another judge exercising parallel jurisdiction. At paragraphs [39] and [40] of that judgment, she stated as follows:

> "[39] ..... The case of **Mair v Mitchell and Others** SCCA 123/08 delivered in February 2009, affords guidance as to the principles which the court ought to employ in dealing with an application under rule 26.1 (7). In that case Smith J.A., in considering the question as to the power of the Court to vary an order under rule 26.1(7), relied on the ratio decidendi as enunciated by Patten J, in **Lloyd's Investment (Scandinavia) Limited v Ager-Harrisen** [2003] EWHC 1740. Patten J, in dealing with an application to vary an order under Part 3.1 (7) of the English CPR, at paragraph 11 said:
>
> > Although this is not to be an exhaustive definition of the circumstances in which the power under CPR Part 3.1 (7) is exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether, innocently or otherwise, as to the correct factual position before him.

> [40] Smith J.A. in adopting the ratio pronounced by Patten J, said:
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> > 'Although Patten J. was dealing with an application to vary the conditions attached to an order setting aside a default judgment and not one to vary a procedural regime, as in the instant case, I am of the view, that the reason for his decision represents a correct statement of the principle of law applicable to the exercise of the judge's discretion, under Rule 26.1(7) of the CPR. Indeed this principle was approved by the English Court of Appeal in **Collier v Williams** (supra)'."

[19] Harris JA, then concluded at paragraph [41] that a court would only revisit a previous order if the applicant seeking to revoke that order, shows some change of circumstances or demonstrates that a judge who made an earlier order had been misled.

[20] In **Independent Trustee Services**, Peter Smith J examined the equivalent rule, CPR 3.1(7), to our 26.1(7) and quoted at paragraph [92], a judgment of the Court of Appeal, **Collier v Williams** [2006] EWCA Civ 20, where Patten J's judgment in **Lloyds Investment (Scandinavia) Limited v Ager-Harrisen** [2003] EWHC 1740 (Ch) was cited. In **Collier**, the Court of Appeal endorsed the approach by Patten J. In Peter Smith J's analysis of the Court of Appeal authorities, he stated at paragraph [100] that there was nothing in those decisions which suggests that the rule to vary or revoke should be cut down so as to be completely inapplicable to any final order. He did conclude, however, as follows:

> "…That is not to say that a final order can be set aside by a judge willy-nilly. It is a matter of discretion to be exercised according to the particular circumstances of the case. That,

> in my mind, is all that the Court of Appeal judges to which I have referred say when they support Patten J's judgment. They say in effect as regards final orders it would be *hardly ever* appropriate to set aside a final order."

[21] Peter Smith J did review the factual circumstances before him in order to determine whether he should revisit his earlier determination as at the time he made the order, the applicant's potential interest had been overlooked. He concluded that he would not do so.

[22] This case does not advance the merits of the appellant's submissions to any material extent. As Peter Smith J opined, there may be appropriate circumstances existing which may justify a court's review of a final order. This court, however, has set out the parameters to be considered whether an applicant is proceeding under rule 26.1(7) of the CPR or under the provision of 'liberty to apply'. Batts J applied his mind to whether or not there were circumstances existing that would allow an order to be varied under rule 26.1(7) of the CPR in addition to his consideration of the provision of liberty to apply. He considered all the evidential circumstances placed before him before concluding that there was no basis for him to exercise his discretion to vary the order as sought under this provision. The learned judge did a thorough analysis which is evident in his reasons for judgment. Paragraphs [10] to [12], [15], [16], [18], [27], [28], [31] and [32] to [35] of his judgment are set out below:

> "[10] In this application the Claimant seeks to raise matters treated with in one way or another by the earlier orders of Edwards J. Mr. Chen admits that he is trying to vary an order. I asked him whether the orders he sought were interlocutory or final. He said it would be final in some respects as he would be seeking a possessory order on

behalf of the mortgagee. I further enquired whether there would be evidential conflicts and would cross-examination of witnesses be necessary. All parties indicated they saw no need for cross-examination as to the extent the evidence may differ it [sic] was immaterial. Finally as a preliminary matter I enquired of the bailiff. A message was received that he had car trouble and could not be in court that day. He did attend in person on the following day (9th April 2017). At my request the bailiff filed an affidavit detailing the condition of the vessel and the steps taken so far in execution of Edwards J's order. Having perused the affidavit all parties indicated they had no need to cross-examine the bailiff.

[11] Mr Chen relied on written submissions filed on the 18th July, 2017. He relied also on affidavits of Makene Brown dated 2nd April 2017, 17 July 2017 and 24 July 2017. These affidavits allege several defaults by Capitalease. It is asserted that a court in Malta declared the right of Jebmed to take possession of the vessel among other things. The registration in Malta is closed and the vessel no longer has a flag. This it says has lowered the value of the vessel. It is alleged that the vessel's seaworthiness has deteriorated and that the worldwide activity in shipping has declined further adversely impacting any price that may be obtained at this time. That the vessel needs to be dry-docked and this cannot be done in Jamaica. It is intended to tow it to Malta to have that done. There is concern that as we are in the hurricane season, the vessel may not be able to move to safety if a hurricane threatens. The affidavits also speak of an effort to take possession which was resisted and/or refused. The affidavits assert that the vessel is undermanned and in the event of an emergency requiring its removal, such as an approaching hurricane, there is insufficient crew on board to do that. It is said that it is uncertain whether the main engine can be started. A hearing in October as fixed by Edwards J, is too late as the expense will have increased by then. Possession is necessary if Jebmed is to obtain the necessary funding to pay the amount required to release the ship. The bailiff will only give Jebmed possession if the court so orders or directs.

[12] Jebmed's affidavits also assert that Capitalease had made no payments or otherwise satisfied the conditions

imposed by Edwards J. Jebmed's lawyers wrote to the bailiff requesting that he take no steps to sell pending the outcome of this application. The affidavits also speak to circumstances of alleged urgency. Paragraph 5 of the affidavit dated 24th July 2017 states:

> 'The Claimant/Mortgagee wishes to be permitted to stand in the shoes of the Defendant/Mortgagor to comply with the conditions stated in the order and to do the acts necessary to procure that the vessel is not sold at public auction in its present condition.'

…

[15] Mr. Chen submitted that there had been a change in circumstance since the making of the order, that being the de-registration of the ship in Malta. It is also one reason Jebmed seeks to take possession as a registered vessel would fetch a higher price.

[16] In answer to these submissions Mr. Desai, Counsel for Capitalease, handed to the court a document entitled 'Defendant's speaking note/skeleton submission to resist application for possession'. He relied also on the affidavit of Amanda Montaque dated and filed on the 8th April 2017.

…

[18] Ms. Montaque's affidavit asserts that it is her client's position that any circumstance of default under the mortgage was due to the conduct of Jebmed. She states also that on the 5th June 2017, at the commencement of the hearing of the application for sale pendente lite, both parties brought to the court's attention that the ship had been de-registered. The affidavit outlines several areas of Ms. Brown's affidavit with respect to which her "instructions" are inconsistent such as: the number of crew members on board; the adequacy of that number; that hull cleaning is available in Jamaica; and that dry-docking is not necessary; and as to the condition of the ship. The affidavit asserts that evidence of Hull and Machinery Insurance had been provided. She also asserts that 'the owners of the ship have secured a sale'. Email dated 7th April 2017 is attached in support of that assertion. An exchange of correspondence

between Mr. V. Chen, Myers Fletcher and Gordon and the bailiff was attached in support of a narrative of events concerning the ships papers. These papers she says were returned to the bailiff.

…

[27] The admiralty bailiff as I said earlier, filed an affidavit in respect of which all parties indicated no cross-examination was required. In his affidavit dated 10th August, 2017 Mr. Sherriah stated that he visited the vessel on the 9th August 2017. He described the conditions of the ship as **'excellent and/or pristine except for the bilge and sludge which are to be extracted from the vessel as soon as possible'**. He has engaged the service of a contractor to offload the bilge and sludge. That contractor is having difficulty procuring the necessary insurance, save for that, all is in place for its removal. Mr. Sherriah states that if necessary, the vessel can sail on its own steam '**given the necessary time for the usual preparation to be made in starting the engine of the size used by ships in the class such as the MV Trading Fabrizia as well as fuelling of the ship with adequate amount of bunker to make the trip'**. This information he said was gleaned from the ship's Captain, Palmer Posquale.

[28] Mr. Sherriah also found the ship's generator to be working excellently. He expressed the opinion that in its present condition the vessel can remain in the harbour for the next two (2) years if prevailing weather conditions continue.

…

[31] Having considered the evidence, the submissions and the authorities it is apparent that the application by Jebmed must fail.

[32] The attempt to vary the order of the court pursuant to liberty to apply is with respect ingenious but unsound. The Jamaican Court of Appeal has stated that when a court gives liberty to apply it does not extend the power to vary. '**In the case of a final order which embodies or evidences a real contract the court will not normally interfere. When, however, in the case of a final judgment or**

order the necessity for a subsequent application is foreseen, it is usual to insert in the judgment or order words expressly reserving liberty to any party to apply to the court for further directions. The 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 – see Cristel v Cristel (supra). A judgment or order is not rendered any less final because liberty to apply is expressly reserved' per Smith JA **Causwell v Clacken** SCCA 129/2002 unreported judgment 18th February, 2004 paragraph 17. So it may be to clarify its meaning; or to treat with a circumstance not contemplated when the order was made and which affects how it is to be performed. In this case Jebmed wants to take responsibility for the sale of the vessel out of the hands of the admiralty bailiff, it is not necessary for the carrying out of the order. Liberty to Apply cannot be the avenue for such a variation.

[33] If this court were to treat with the application as one to vary an order pursuant to rule 26.1 (7) of the Civil Procedure Rules, the question emerges whether and under what circumstances variation is allowed. It is apparent why courts restrict variation of consent orders. In most instances a consent order reflects an agreement between the parties. In the law of contract variation unilaterally is not easily achieved. The cases show that unless there is misrepresentation, fraud or common fundamental mistake (the same grounds on which variation of contract may be obtained) a Court will not vary a consent order **Causwell v Clacken** (cited above) at page 16.

[34] A final judgment or order of the court is also rather difficult to vary. Peter Smith J. in **Independent Trustee Services Limited v G.P. Noble** [2011] FLR 174 has opened the door to a more flexible approach as it relates to the variation of final orders, at page 196 paragraph 101: ***'One of the main purposes of the CPR was to give the courts complete flexibility over the proceedings before them and this is an important ancillary tool. I can see nothing in the rule which justifies it not applying to final orders if appropriate according to the facts of the case'***. These circumstances must be extremely rare because litigants are not to re-litigate issues

already determined particularly where the order is final. The court may adjust, change or even revoke these orders upon good and sufficient cause being demonstrated, such as a material change of circumstances. **Harley v Harley** (cited above), or upon new material. See **Collier v Williams** [2007] 1 All ER 991 and **Civil Procedure Rules Vol. 1 (The White Book) [2007] Note 3.1.9; per Dyson LJ at paragraph 120 of Collier:**

> *'In short, therefore, the jurisdiction to vary or revoke an order under CPR 3.1 (7) should not normally be exercised unless the applicant is able to place material before the court, whether in the form of evidence or argument, which was not placed before the court on the earlier occasion.'*

[35] The more relaxed position as it relates to variation of interlocutory orders does not assist Jebmed's cause. No material change in circumstances has been shown nor has new material been placed before the court. In any event the proposed variation would likely do great injustice. This is because an Order for Sale pendent lite is intended to preserve the status quo pending trial. Unless the owner was able to provide the bond, and therefore release the ship, it is to be sold. The proceeds of sale would be held by the court, net of course of the bailiff's expenses, and be dealt with in accordance with the decision of the court after trial. Justice Edwards's order is silent as to how the proceeds of sale were to be distributed. It was not necessary to so indicate because a sale pendent lite merely serves to convert the res into specie. It is primarily to prevent deterioration of a wasting asset. In its regard see the authorities referred to and discussed in **Jedmed SRL v Capitalease SPA** [2016] JMSC232 unreported judgment 23.12.16 at paragraph 16-20."

[23] Batts J concluded that there was no evidence presented to suggest that there had been a change of circumstances or that the variation sought could be classified as necessary to give effect to the orders of Edwards J. Based on the evidential circumstances that were before Batts J, it could also not be argued that Edwards J was

misled in any way so as to necessitate a review of her orders. Batts J properly considered the issues before him and there is no basis for this court to interfere with his findings on this point. This ground of appeal therefore fails.

Issue 2

Did the learned trial judge misunderstand the application and fail to give due regard to the factual and legal position of the appellant as mortgagee?

Submissions for the appellant

[24] Counsel argued that the appellant has actual physical possession of the ship as the ship's mortgagee, by virtue of the warrant of arrest, and that this possession carries with it the legal obligation of a mortgagee in possession. He referred the court to **Den Norske Bank ASA v Acemex Management Company Ltd** [2003] EWCA Civ 1559, paragraph [23], and Halsbury's Laws of England, Shipping and Maritime Law, Volume 93, (2008)-Mortgagee's Rights and Powers, paragraph [330] which is set out below:

> "330. Mortgagee's right to possession:
>
> The chief right of a mortgagee of a ship, or of a majority of shares in a ship, is the right in proper circumstances to take possession. This he may do even before any part of the mortgage debt is due if his security is being impaired in some material way.
>
> Possession may be either actual or constructive. Actual possession may be taken either by putting a person in possession without the assistance of the court, or by the arrest of the ship in a mortgagee's action. To obtain constructive possession the mortgagee must clearly indicate his intention to assume the rights of ownership."

[25] Counsel contended that the appellant was merely asking permission to take physical possession with the assistance of the court, to avoid a breach of the peace,

since the mortgagor had expressed an intention to resist. He argued therefore that the learned judge was not being asked to vary the order of Edwards J so as to defeat it, but to permit the mortgagee to stand in the shoes of the mortgagor and thereafter to confirm the order to sell on the conditions stated by Edwards J. He submitted that this should also have been considered in light of the failure of the respondent to bail the vessel and within the context of what is permissible based on rule 70.8, which allowed multiple applications for directions since the ship was under arrest.

Submissions for the respondent

[26] Counsel submitted that any such declaratory relief would in effect be a summary judgment in the appellant's favour. This was also argued by counsel for Elburg Ship Management, as indicated at paragraph [14] of this judgment. He asked the court to consider that declaratory relief has already been sought by way of an amended admiralty claim form in *rem* and amended particulars of claim in *rem* filed on 30 October 2016 for a debt, that the trial is set for 13 November 2017, and that the appellant has not sought to take any steps to enforce the Maltese judgment in this court's jurisdiction (which, in any event, it could not, as there is no reciprocal agreement between the two jurisdictions). In that event, although the appellant has couched its application for possession and injunction as an interim remedy under Part 17 of the CPR, the granting of any such relief would be giving the appellant, at the interlocutory stage, the substantive relief it seeks in the claim itself and would dispose of the appellant's action. See **Miller and Another v Cruickshank** [1986] 44 WIR 319.

[27] Counsel also submitted that the court should endeavour to avoid injustice, the *status quo* should be preserved and the court ought not to make an order in relation to the *res* that it cannot enforce (**Amber Size and Chemical Company Limited v Menzel** [1913] 2 Ch 239). He contended that Batts J rightly considered the effect on the respondent if the court allowed the appellant to sail the ship out of Jamaica, as expressed to be the intention, if they obtained the possession sought.

Analysis

[28] It is to be noted that the filed amended admiralty claim form does not form part of the record of appeal. However, as indicated earlier, Edwards J did grant permission for the claim to be amended in relation to an order for possession. It is necessary for this court to consider the history and pleadings that have been previously set out and that would have been before Batts J in order to determine whether he erred in law by refusing to award possession of the ship to the appellant. The learned judge stated thus at paragraphs [36] to [39] of his judgment:

> "[36] Jebmed's application seeks, as Mr. Chen says, to substitute the mortgagee for the owner in Edward J's order and thereby give the mortgagee the right to secure the vessel's release by posting a bond. It does not take into account the fact that the litigation in this court concerns issues between Jebmed and Capitalease. These issues include whether or not Jebmed lawfully exercised its powers as mortgagee among other things, see paragraphs 9, 10 and 11 of the Defence and paragraphs 14, 15 and 16 of the Counter Claim both filed on the 12th December, 2016. It is no part of my function to decide the merits of the claim which include legal and factual issues. It suffices at this stage to say that issue is joined. As matters now stand, if Capitalease is successful on its Counter Claim and in its Defence the ship, or if it is sold by the bailiff, the entire

proceeds of sale may be returned to Capitalease. This is because the mortgagee will have been held to have wrongfully initiated the vessel's arrest. The mortgagee would also be liable in damages and for costs. These are issues yet to be determined.

[37] Jebmed's variation of Edward J's order will give to the mortgagee the option of leaving the jurisdiction with the ship. There will be no allowance given for the situation of Capitalease in the event Capitalease is successful at trial. If the order for variation is granted, insofar as the ship is concerned, Jebmed will be in the same position it would have been in had there been no arrest, save that this court will have delivered the vessel into its hands and granted it permission to exercise powers of sale as mortgagee. In effect I would be deciding that Jebmed's calling of the mortgage and exercise of mortgagee's power to sell was lawful. I would be deciding the issues joined prior to trial and without a trial. That cannot be right. The variation would convert that aspect of the interlocutory order into a final order.

[38] I agree with Mr. Desai that the only way an order for possession, can be made at this stage, given the issues joined in this litigation, is for the order to provide for a bond with respect to Capitalease's equity in the vessel and its counterclaim. That would be the only way that the order could truly be considered a variation to the order pendente lite and continue to have that character. I am not however minded to impose such a term. In the first place Jebmed has not asked for that, possibly because it would not be in their economic interests. Secondly the evidence does not allow for any fair assessment of Capitalease's equity in the vessel. The estimates of value vary greatly and the bailiff has not yet done his own appraisal.

[39] In summary therefore Jebmed 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, Jebmed, invoked the power of this court both to arrest and

> later to obtain an order for sale pendente lite. Converting the res to specie will preserve the status quo insofar as the respective claims and counter claims are concerned as well as the possibility of recovery. If it is that Jebmed wishes to resile 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."

[29] Batts J's consideration of the matter reveals that that he did not misunderstand the legal position of the appellant. The nature of the order sought could not properly have been granted at that stage of the proceedings. The learned judge was correct in his conclusion that the proposed variation would result in a great injustice as the order for sale *pendent lite* is intended to preserve the *status quo* pending trial. He was also correct when he made the finding that the issue of whether the ship had been lawfully arrested arose on the pleadings and ought therefore to be dealt with at trial.

[30] The respondent contended that the arrest of the ship is unlawful and has counterclaimed for damages. So, while in law, the mortgagee may be considered to be in actual possession based on its arrest of the ship, whether it is so justified in taking possession, in the particular circumstances of this case, is a matter for the trial court. As Edwards J stated, at paragraph [51] of her judgment, the purpose of arresting a vessel in an action in *rem*, that is, an action against the vessel, is to obtain security for the satisfaction of any judgment which may be obtained. Apart from the appellant, there are other parties in the action that have interests in securing a monetary judgment against the respondent. There is no basis therefore to interfere with Batts J's discretion in the refusal of the orders sought by the appellant. Unless the parties are able to settle the matter, they must proceed to trial. In the meantime, if the ship is sold

by the bailiff as ordered by Edwards J, the rights of all the parties will be properly protected as provided by rule 70.13 of the CPR. This ground of appeal is therefore without merit.

[31] Counsel for the appellant had filed a further ground of appeal in relation to the trial judge's 'consideration of security for costs for the defendant' (see paragraph 7(j) of this judgment). Counsel's submission on this ground is directed to Batts J's observations at paragraph [38] of his judgment (set out at paragraph [27] above) in relation to the circumstances in which he might have been persuaded to grant the appellant's application for possession. Batts J opined that an order would have to be made to provide for a bond with respect to the respondent's equity in the vessel and its counterclaim.

[32] This is not an issue that could be termed as 'security for costs'. In any event, no such application was before the learned judge and no order for security for costs was granted so as to be considered a ground of appeal. In relation to the observations made by Batts J, no orders were made on the point. This court does not consider it necessary to the determination of this appeal to treat with this issue.

Conclusion

[33] It is for these reasons that this court made the orders as set out in paragragh [3] above.