



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020AD00001

BETWEEN	ASPHALT TRADER LTD	CLAIMANT
AND	WEST INDIES PETROLEUM LTD. (OWNERS OF M/V KOSTERBERG)	DEFENDANT

CLAIM NO. SU2020. AD00002

BETWEEN	WEST INDIES PETROLEUM LTD.	CLAIMANT
AND	ASPHALT TRADER LTD. (OWNERS OF M/T ASPHALT TRADER)	DEFENDANT

Admiralty Claims – Arbitration pending – Applications to Stay Proceedings – Section 11 Arbitration Act – Whether Court has an inherent power to stay – Vessel arrested – Security provided for release – Whether security is to be released.

Jerry Hamilton and Remone Foster instructed by Lightbourne & Hamilton for the Asphalt Trader Limited.

Krishna Desai and Amanda Montaque instructed by Myers Fletcher & Gordon for West Indies Petroleum Limited.

Clive Munroe for the Admiralty Bailiff.

Heard: 23rd and 31st July, 2020.

IN CHAMBERS: By ZOOM

Cor: Batts J.

- [1] The applications, in these unconsolidated claims, were heard together. It is convenient to do this because both claims concern the same factual scenario. Both applications are for the same relief and the evidence in each is very similar. The same party is the applicant in each case but the claimant in one action is the defendant in the other. In this judgment I will therefore reference each party by name.
- [2] The circumstances can be shortly stated. On the 1st June 2019 the parties entered into a charter-party agreement with respect to the motor tanker “Asphalt Trader”. That vessel was at all material times, owned by Asphalt Trader Ltd. and, chartered by West Indies Petroleum Ltd. The charter-party had an arbitration clause which provided for the resolution of disputes. In the course of the charter the vessel collided with a pier in Suriname. West Indies Petroleum Ltd alleges that, as the crew of the vessel was employed to the Asphalt Trader Ltd, it is vicariously liable for all consequential loss and damage. The Asphalt Trader Ltd, on the other hand, alleges that West Indies Petroleum Ltd is to blame for taking the vessel into an unsafe port. This would be in breach of a term of the charter-party. They therefore say that it is West Indies Petroleum Ltd. which is liable.
- [3] On the 4th day of May 2020 Asphalt Trader Ltd. commenced proceedings in Claim No. SU2020AD00001 against West Indies Petroleum Ltd. (Owners of M/V Kosterberg) and applied for the arrest of that vessel. The court issued an order for that vessel’s arrest on the same day. There were several interlocutory hearings, after which, the vessel was released by order of the court upon sufficient security being provided.
- [4] On the 17th May 2020 West Indies Petroleum Ltd. commenced proceedings in Claim No. SU2020AD00002 against Asphalt Trader Ltd (Owners of M/T Asphalt Trader). and applied for the arrest of the motor tanker “Asphalt Trader.” A warrant for the vessel’s arrest was issued on that date. There were several interlocutory hearings and the vessel was eventually released by order of the court upon sufficient security being provided.

- [5] Asphalt Trader Ltd. has now applied for a stay of both claims. In each case it wants the security to remain in place. The reason given, in the application for the stay in each case, is that there are pending arbitration proceedings. West Indies Petroleum Ltd. is resisting both applications and says that, notwithstanding the existence of an arbitration clause, this court ought to allow the actions to proceed to trial. They say further that, if a stay is to be granted, the security in Claim No. SU2020 AD00001 should be released, however, the security in SU2020AD00002 should remain in place.
- [6] The attorneys have helpfully provided full written submissions on the issues that arise. They made oral submissions which, by agreement, were limited to approximately one hour for each side. I am truly indebted to counsel for their efforts. However, for reasons of time and economy, I will not be repeating those submissions in this judgment. Suffice it to say that the reasons for my decision are greatly informed by the authorities cited.
- [7] It seems to me that the just and fair result, consistent with the law and practice in this jurisdiction, is to order a stay of each action. The security in each case is to be released provided only that the bailiff's fees, costs and charges are first paid, as to which the bailiff is to issue an affidavit of satisfaction prior to the release of the security. I make no order for the costs of the applications. My reasons for this decision may be shortly stated.
- [8] It is common ground, between the parties, that in this jurisdiction the court in Admiralty has no power, to order security for arbitration proceedings. Jamaica has not passed a statute with a provision equivalent to Section 26 of the Civil Jurisdiction and Judgments Act 1982 (UK). Our law is therefore that which pre-existed that Act. The pre-existing law is adequately summarised by Lord Justice Lloyd in the ***Bazias 3, The Bazias 4 [1993] 2 All ER 964 at 968 (d)***:

"I turn then to the central question, Section 26 of the 1982 Act, came into force on 1st November 1984. As to the pre-existing law, I start with a passage from the

judgment of Robert Goff LJ in the Andria [1984] 1 All ER 1126 at 1135, [1984] QB 477 at 490:

'However, on the law as it stands at present, the court's jurisdiction to arrest a ship in an action in rem should not be exercised for the purpose of providing security for an award which may be made in arbitration proceedings. That is simply because the purpose of the exercise of the jurisdiction is to provide security in respect of the action in rem, and not to provide security in some other proceedings e.g. arbitration proceedings.'

[9] It follows that the arrest of the vessel, in each case before me, was intended to secure the claim brought. It matters not that the affidavit, filed in support of the application, may have disclosed the existence of an arbitration clause or pending arbitration proceedings. It does not in all cases follow that, if such a claim is stayed to allow arbitration to occur, the arrested vessel or any security held must be released. This aspect I consider at paragraph 18 below.

[10] It is also common ground, between the parties, that the court has an inherent as well as a statutory jurisdiction to grant a stay of proceedings. A stay will necessarily follow any decision, pursuant to section 11 of the Arbitration Act, to refer parties to arbitration. Sections 11 and 12 of that Act provide:

"11 (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void; inoperative or incapable of being performed.

(2). Where an action referred to in subsection (1) has been brought, arbitration proceedings may nevertheless be commenced or continued, and an

award may be made, while the issue is pending before the court.

12. *It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.”*

These provisions reflect the policy of the legislature to facilitate, and indeed encourage, the resolution of disputes by arbitration. This policy position has been frequently stated. It was recently endorsed by the Caribbean Court of Justice, see ***Belize National Energy Ltd v Maranco Ltd [2015] CCJ 2 (AJ); [2016]2 LRC 23 at 31.***

- [11] Reference to arbitration, pursuant to Section 11 of the Arbitration Act, is only mandatory where the requesting party makes the request for arbitration “*not later than when submitting his first statement on the substance of the dispute.*” Asphalt Trader Ltd. is the requesting party. They are also the Claimant in SU2020AD00001. Manifestly therefore their first statement, on the substance of the dispute, was the claim which was filed. Neither the claim nor the application to arrest the vessel requested a referral to arbitration. A mandatory referral to arbitration, pursuant to Section 11, is therefore not permissible in that claim.
- [11] With respect to the application pursuant to Section 11, for SU2020AD00002, the position is similar. Asphalt Trader Ltd is the Defendant in that suit. Their first filing was an application, on 21st May 2020, for discharge of the warrant of arrest and, in the alternative, for aspects of the claim to be struck out. The affidavits in support went into the details of the claim, the defence and its merit. There was then no application for referral to arbitration.
- [12] If therefore a stay is to be granted it has to be pursuant to the court’s inherent power to stay proceedings. The power, being inherent, does not owe its existence to any statute. Various provisions in law recognize the power to stay, see Section 48(e) of the Judicature Supreme Court Act and Rules 26.1 (2) (e) and 70.16 of the Civil Procedure Rules 2002. When exercising this inherent power, to stay

proceedings, the court is motivated by the interests of justice. The court will therefore endeavour to do that which is fair, just and reasonable. The court must bear in mind the overriding objective and the desirability of matters being dealt with expeditiously, economically and fairly, see Rules 1.1 and 1.2 of the Civil Procedure Rules 2002.

[13] In opposing the applications for a stay counsel for West Indies Petroleum Ltd. relied on the case of ***Spiliada Maritime Corporation v Cansulex [1987]1 AC460***. He submitted that the question which was the most convenient forum for the resolution of the dispute was of great import. He urged that the relevant factors, in that regard, are all answered in favour of continuing the litigation in Jamaica. These I summarise as follows:

- a. Whether justice can be done in the other forum at “substantially less inconvenience or expense.”
- b. The availability of witnesses
- c. Avoiding multiplicity of proceedings
- d. Whether justice is available in the other jurisdiction or can only be obtained at excessive cost, delay or inconvenience
- e. The experience of the court in this jurisdiction
- f. Whether there is an experienced team of lawyers in this jurisdiction who have already prepared and contested a substantial part of the dispute in this jurisdiction and its effect on efficiency, expedition, economy and the promotion of an amicable resolution.

[14] It seems to me that even if, which is a matter of some doubt, all these factors favour West Indies Petroleum Ltd.’s position they are outweighed by the very existence of the charterparty. In other words, having agreed to arbitration in a particular place, the parties as commercial enterprises must have had most if not all those considerations in mind. Furthermore, the evidence is clear that, it was West Indies Petroleum Ltd. which first tried to initiate arbitration. I bear in mind also that the incident, the subject of the claim, did not take place in Jamaica. The Charterparty

was not entered into in Jamaica. Also, whereas the M/V “Kosterberg” is registered in Jamaica, the M/T “Asphalt Trader” is registered in Liberia. Jamaica’s connection to this dispute is that the vessels came here and were arrested. I bear in mind also, an assertion by Asphalt Trader Ltd.’s counsel, that the expert evidence before the court is from individuals who do not reside in the Caribbean or even in this hemisphere. It seems to me, given the technical advances in communication, that justice can be done as conveniently, and economically, elsewhere as here.

[15] It has been urged on me that Asphalt Trader Ltd was un-cooperative as regards arbitration. Furthermore, that, but for the claim and the arrest of their vessel, they may not have cooperated with the arbitration proceedings. I have reviewed the evidence and exhibits in this regard see, paragraphs 5-7 of the affidavit of John Levy filed on the 10th July 2020 and paragraphs 5-7 of the affidavit of Aristedis Moschopoulos (exhibit 1 to the affidavit of Remone Foster filed on the 13th July 2020). It appears to me that the representatives of the Asphalt Trader Ltd were endeavouring to have dialogue prior to embarking on arbitration, see in particular email dated 6th March 2020. It is true that Asphalt Trader Ltd initiated a Claim (SU2020AD00001) and arrested a vessel owned by West Indies Petroleum Ltd. even as the exchange of email was proceeding. This, in retrospect, may have been ill advised. It certainly delayed the process of agreeing an arbitrator and lead to West Indies Petroleum Ltd reacting in kind.

[16] The position now is that the parties have agreed upon an arbitrator. They have retained legal representatives in London to conduct the arbitration. The arbitrator has issued directions, deadlines are stipulated and the consequence of failure to meet deadlines outlined. In this regard I refer to an email from the arbitrator dated the 7th July 2020 21:06, exhibit AM 5 to the affidavit of Aristedis Moschopoulos (which is exhibit 1 to the affidavit of Remone Foster filed on the 13th July 2020).

[17] It is my decision, given the general policy of our courts to encourage alternative dispute resolution, given the clear provisions of the charterparty as to dispute

resolution by arbitration, given that steps towards arbitration were commenced prior to the initiation of litigation, given that these steps continued and are continuing, and given the limited connection to this jurisdiction of the issues, that the just, equitable, fair and convenient approach is to stay these proceedings pending arbitration.

- [18] The question then arises as to what is to happen to the arrest and the security which was provided in consequence of the arrest. As discussed at paragraph 8 above the court has no power to order security (or an arrest) in respect of pending arbitration proceedings. The general rule therefore is that, where proceedings are stayed to enable arbitration to occur, the security held is to be released. There is an exception to that rule. This was first articulated by Brandon J in the ***Rena K [1979] 1 All ER 397***. That case was cited with approval by the English Court of Appeal in ***the Beziars 3, the Beziars 4*** (see paragraph 8 above) and also in the ***Tuyuti [1984] 2 All ER 545 per Robert Goff LJ at 550 (g) to 551(d)***:

“It is necessary to turn to The Rena K itself to find a statement of that principle, and the basis on which it was formulated [Brandon J] continued ([1979] 1 All ER 397 at 415, [1979] QB 377 at 404-405):

‘If this distinction between choice of forum on the one hand and right to security on the other is recognised and given effect to in recognised jurisdiction clause cases and vexation cases, I cannot see any good reason why it should not equally be recognised and given effect to in arbitration cases, whether the grant of stay is discretionary under S. 4(1) of the 1950 Act, or, as in the present case mandatory under S1(1) of the 1975 Act ... The process by which property which has been lawfully arrested in an action in rem, can be released at the instance of the party interested in it, is the making by the court of an order for the issue of a release under RSC Order 75 r 13 (4) ... That rule, as I understand it, gives the court a discretion, when an application for an order for the issue of a release is made, whether to make such order or not. The discretion so given is, so far as the terms of the rule go, unfettered, but it must, like any other discretion be exercised judicially. There is nothing in Section 1(1) of

the 1975 Act which obliges the court, whenever it grants a stay of an action in rem in which security has been obtained to make an order for the unconditional release of such security. Nor did S 4 (2) of the 1950 Act, now repealed, impose any such obligation. That being so, I think that it is a matter for the discretion of the court, acting under the rule referred to above, what order it should make with regard to such security, and that the way in which it exercises that discretion must depend on the circumstances of each particular case. If, on the one hand, the case is one where in all probability the stay will be final and there will therefore never be any judgment in the action to be satisfied, the court should exercise its discretion by releasing the security unconditionally, as was done in the Golden Trader. If, on the other hand, the case is one where the stay may well not be final and there may well therefore still be a judgment in the action to be satisfied the court should exercise its discretion either by refusing to release the security at all or by only releasing it subject to a term that the defendants shall provide alternative security for payment of any award in the arbitration. On this view of the law it is necessary to consider, in relation to the facts of this particular case, whether in all probability the stay will be final and there will therefore never be any judgment in the action to be satisfied or whether the stay may well not be final and there may well therefore still be a judgment in the action to be satisfied.”

- [19] Applying the principle outlined above is not difficult given the evidence in this case. The arbitration is with respect to the same issues in the claims filed. To all intents and purposes the stay, to facilitate arbitration, will mean an end to the claim. West Indies Petroleum Ltd has put forward evidence of their assets and means which essentially relies on its ownership of the vessel arrested, see paragraphs 3,4 and 5 of the affidavit of Gerald Charles Chambers filed on 7th May 2020. It does appear that they have the wherewithal to honour any decision in the arbitration. As regards Asphalt Trading Ltd. their counsel makes a good point. It is not the arrested vessel which is to be released. In this case both parties provided sufficient security to secure each vessel's release. That fact they say suffices to establish, prima facie, that Asphalt Trader Ltd will be able to honour the arbitrator's award. I agree. A

party who has sufficient collateral to secure a Letter of Undertaking, or insurance to support it, is in all probability in a position to honour the arbitrator's award. In this case the amounts claimed are known and quantified. The security was fixed based upon the probable likely result in each case. The parties are unlikely to need further recourse to the claims filed. In neither claim is it therefore necessary to retain the security. Subject to the payment, of any fees and costs incurred by the Admiralty bailiff, the security provided in each case will be released.

[20] On the matter of the costs of these applications I am of the view that the honours have been evenly shared. The stay has been granted as requested by Asphalt Trader Ltd, however, the security has been released as articulated for by West Indies Petroleum Ltd. I will make no order for the costs of the applications. The costs to date of the claims call for separate consideration. I do not think that West Indies Petroleum Ltd should be required to pay the costs of the claim in SU2020AD00001 brought by Asphalt Trader Ltd. This is because that claim was initiated notwithstanding ongoing negotiations about arbitration to which, they say, they were never opposed. To initiate a claim and arrest in circumstances where the court has no jurisdiction to secure arbitration awards, and then to seek to stay the same claim pending arbitration, borders on an abuse of process. It seems to me that a condition of the grant of the stay must be that West Indies Petroleum Ltd be paid the costs incurred in the action to date such costs to be taxed or agreed. The costs of the other claim SU2020AD00002 can abide the result of arbitration.

[21] In the result my orders are as follows:

Claim SU 2020 AD 00001

1. Subject to compliance with paragraph 4, of this order, this action is stayed pending arbitration.
2. Subject to the payment of the Admiralty bailiff's fees and costs in accordance with paragraph 3 below the warrant of arrest is discharged and the security

provided, pursuant to the order made on the 20th day of May 2020, is released.

3. All fees and costs lawfully incurred by the Admiralty bailiff in this matter shall be paid or otherwise provided for prior to the release of the security and the Registrar of the Supreme Court shall certify this has been done upon receipt of an affidavit of satisfaction filed by the Admiralty bailiff.
4. Costs of the claim to date to be paid by the Claimant to the Defendant. Such costs to be taxed if not agreed.
5. No order for the costs of this application
6. Liberty to apply.

Claim SU2020 AD 00002

1. This action is stayed pending arbitration.
2. Subject to the payment of the Admiralty bailiff's fees and costs in accordance with paragraph 3 below the warrant of arrest is discharged and the security provided, pursuant to the order made on the 25th day of May 2020, is released.
3. All fees and costs lawfully incurred by the Admiralty bailiff in this matter shall be paid or otherwise provided for prior to the release of the security and the Registrar of the Supreme Court shall certify this has been done upon receipt of an affidavit of satisfaction filed by the Admiralty bailiff.
4. Costs of the Claim reserved.
5. No order for the costs of this application.
6. Liberty to Apply.

**David Batts
Puisne Judge.**