IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN ADMIRALTY DIVISION
CLAIM NO 2010 A 00002

BETWEEN	DYC FISHING LIMITED	CLAIMANT
AND	THE OWNERS OF MV DEVIN AND MV BRICE	DEFENDANTS

Mr. Ransford Braham, Mr. Christopher Dunkley and Miss Amanda Wong instructed by Livingston Alexander and Levy for the Claimant

Mr. Abraham Dabdoub and Dr. Raymond Clough instructed by Clough Long and Co. for the Defendant

Admiralty – Contract for harvesting conch – Advance said to have been given to outfit harvesting vessel – Contract said breached by harvester – Claim for damages for breach of contract - Claim brought in rem – Vessel arrested - Whether claim to be *in rem* or *in personam* – CPR rr. 70.2, 70.7

Civil Practice – Witness summons - Order for witness summons duces tecum to be issued in respect of interlocutory application – Order made on application made without notice – Whether evidence may be taken without being tendered by way of affidavit – CPR rr. 11.9, 33.2, 33.3

Civil Practice – Application for Summary Judgment – Claim that Defendant failed to perform terms of contract – Uncertainty as to the period covered by the claim – Uncertainty affecting proof of performance – Whether claim has any real prospect of success – Whether vessel should be released - CPR rr. 1.1, 15.2

BROOKS, J.

12, 26 August, 1, 8, 14, 15, 21, September, 1 and 8 October, 2010

In the present claim, DYC Fishing Ltd. has alleged that it had an agreement with the defendants to harvest conch on its behalf. The defendants are the respective owners of the motor vessels MV Devin and MV Brice and it is claimed that the vessels were integral to the agreement.

Mr. Stanley Mohammed is the owner of the Brice and a director of Clarendon Seafood Limited which owns the Devin. According to DYC, the defendants breached the agreement by failing to harvest the agreed quantity of conch and thereby caused DYC to suffer loss.

DYC has brought the claim *in rem*, in the admiralty division of this court, to recover damages for its alleged loss. In pursuance of its claim, it secured an order of this court for both vessels to be arrested. The defendants posted security to have the Brice released and have filed the present application for court orders that the warrant of arrest be set aside and that the claim be struck out.

The defendants contend that the claim, being for a breach of contract, should have been filed as an *in personam* action. They assert that DYC abused the process of this court by filing a claim *in rem*. Accordingly, the defendants contend, the vessels ought not to have been arrested. In addition, the defendants assert that DYC has no real prospect of succeeding on the claim because the documentation produced shows that there was no shortfall in the harvest for the period which is the subject of the claim. Accordingly the defendants ask that they be given summary judgment on the claim.

The issues to be decided are whether the claim is properly brought *in rem*, and if not, whether it should be struck out. If it has been properly filed,

the next issue to be decided is whether it is clear that it has no real prospect of success.

Preliminary issue

Before assessing the main issues however, it is first necessary to address an objection which was raised by Mr. Braham on behalf of DYC, at the commencement of the hearing. Learned counsel submitted that as this was an interlocutory hearing evidence ought only to be taken by way of affidavit, unless the court orders otherwise. The objection was taken because the defendants sought to have two officers of the Ministry of Agriculture sworn and produce for admission into evidence, documents forming part of the Ministry's records. The defendants assert that the documents are relevant to the issue.

Mr. Braham submitted that, as the defendants had secured the witness summonses as a result of an application made without notice, this was a classic case of ambush and the evidence ought not to be taken. He relied on rule 11.9 of the Civil Procedure Rules 2002 (the CPR) in support of his submissions.

Rule 11.9 speaks to evidence in support of applications for court orders and states as follows:

> "(1) The applicant need not give evidence in support of an application unless it is required by –

(a) a rule;
(b) a practice direction; or
(c) a court order.

(2) Evidence in support of an application must be contained in an affidavit unless –

(a) a rule;
(b) a practice direction; or
(c) a court order,

otherwise provides.

(Part 30 deals with affidavit evidence.)"

On Mr. Braham's submission, an order for witness summonses to be issued cannot be prayed in aid to circumvent the requirements of rule 11.9. He asserted that it is only after permission is obtained pursuant to rule 11.9 that a witness summons may be issued.

Mr. Dabdoub, for the defendants, submitted in response, that rule 11.9 cannot apply because the matter of witness summonses is covered by separate rules, namely, rules 33.2, 33.3 and 33.4 of the CPR. He pointed out that rule 33.3 allowed for an application for a witness summons to be made without notice. This procedure was aimed at ensuring the security of the documents. In any event, submitted Mr. Dabdoub, DYC's objection should not be entertained without an application made pursuant to rule 33.3 (5).

At the time that the objection was made, I over-ruled it. It was then and remains my view, that by granting the applications for the witness

summonses, this court had given permission for evidence in this application to be given other than by affidavit. I find that the order for the witness summons therefore constituted an order contemplated by rule 11.9 (2) (c).

It is unnecessary to quote the relevant rules in part 33 in full but it should be pointed out that rule 33.2 (1) stipulates:

> "(1) A witness summons is a document issued by the court requiring a witness to attend court or **in chambers** -
>
> (a) to give evidence; or
> (b) **to produce documents** to the court. (Emphasis supplied)

and that rule 33.2 (4) states:

> "(4) A witness summons may require a witness to produce documents to the court either on –
>
> (a) the date fixed for the trial or **the hearing of any application in the proceedings**; or
> (b) such other date as the court may direct. (Emphasis supplied)

In my view, these provisions make it clear that witness summonses may be ordered to have documents produced for interlocutory hearings. Rule 33.3 goes on to allow for the court to give permission for witness summonses to be issued in certain circumstances, including for the purposes of interlocutory hearings. The relevant portion of the rule states:

> "(2) A party must obtain permission from the court when that party wishes to have –
>
> (a) a witness summons issued less than 21 days before the date of the hearing; or

(b) a summons issued for a witness to attend court to give evidence or to produce documents
(i) on any date except the date fixed for the trial; or
(ii) **at any hearing except the trial**.

(3) An application for permission under paragraph (2) **may be made without notice** but must be supported by evidence on affidavit…." (Emphasis supplied)

The rule allows for these applications to be made without notice. It is also to be borne in mind that, quite often, witness summonses are required because the prospective witness is reluctant to attend court and/or to give evidence. In such circumstances, evidence by affidavit is unlikely to be forthcoming.

An examination of the court's file in the instant case shows that the application for the witness summonses was filed on July 23, 2010 and that it was supported by an affidavit. In both the application and the affidavit, it is made clear that the witnesses were required to produce documents which are relevant to the hearing of the present application. The court heard that application on the July 29, 2010 and granted it. In my view, that was an order within the contemplation of rule 11.9 (2) (c).

In those circumstances, and without it having been demonstrated to me that DYC would be prejudiced by the production of these official documents, I ordered that the witnesses who were summoned, be sworn and produce such documents that they had brought. I now turn to the main issue raised by this application.

Is the claim properly brought in rem?

The applicable legislation and procedural rules

A brief account of the modern history of the admiralty jurisdiction of this court will assist in understanding the jurisdiction by which such claims are filed. In 1890 The Colonial Courts of Admiralty Act (53 and 54 Vict.) ("the 1890 Act") established this court as a court of admiralty. That 1890 Act stipulated that the jurisdiction of the court would be, with certain exceptions, similar to the admiralty jurisdiction of the High Court of England. The 1890 Act is referred to in section 18 of the Judicature (Supreme Court) Act in connection with the powers and duties of the bailiff of the Admiralty Court. In 1893 the rules of the court, concerning the exercise of its admiralty jurisdiction, were approved by Her Majesty in Council (see The Jamaica Gazette of 13th April 1893). I shall refer to these rules hereafter as, "the 1893 rules". The 1893 rules were made pursuant to the authority given to the Chief Justice, by the legislature, for "framing Rules of Court to regulate the Procedure and Practice" of the Supreme Court.

Neither the 1890 Act nor the 1893 rules, stipulated which actions could be brought *in rem* and which *in personam*. That guidance was

provided by the practice of the Court of Vice-Admiralty in Jamaica, which existed prior to 1890.

The jurisdiction of the court was exercised according to those strictures, until 1962. Legislation passed in England after 1890, which did expand the admiralty jurisdiction in that country, was held not to be automatically applicable in its colonies. For example, in *DeOsca v The Lady D* (1961) 3 WIR 515, it was held that although legislation had been passed in England in 1925, (The Supreme Court of Judicature (Consolidation) Act), consolidating the legislation concerning the admiralty jurisdiction of the High Court of that country, that legislation did not have any effect on the Admiralty jurisdiction of this court.

In 1962, a change was effected when The Admiralty Jurisdiction (Jamaica) Order in Council 1962, came into effect (see Jamaica Gazette Supplement L.N. 141, dated May 31, 1962). The Order in Council extended the reach of the 1890 Act. It stipulated that the Admiralty jurisdiction of the High Court of England, as defined in the Administration of Justice Act, 1956, of the United Kingdom, ("the 1956 Act") with appropriate modifications, would, as of 29th March 1962, be the jurisdiction afforded to this court.

When the CPR came into force it made no mention of the 1890 Act, the 1893 Rules or the 1956 Act. With respect to that which had gone before, the preface to the CPR simply stated that "[a]ll rules of Court relating to the procedure in civil proceedings in the Supreme Court, save for those relating to insolvency (including winding up of Companies and bankruptcy), and matrimonial proceedings are hereby revoked".

It has been often stated that the CPR, being rules of procedure, cannot supersede an Act of Parliament. In that regard, section 29(d) of the Interpretation Act states that, "no regulation shall be inconsistent with the provisions of any Act". Nonetheless, the CPR, in part 70, provided the rules to govern the exercise of the admiralty jurisdiction of this court. Rule 70.2, in setting out a list of matters, which are to be dealt with as admiralty claims, duplicates, in large measure, the provisions of section 1(1) of the 1956 Act. That fact, does not, in my view, indicate an intention in its framers, to supersede the 1956 Act, which, by virtue of section 4 of the Jamaica (Constitution) Order in Council, 1962 was retained as a law in force in this country. It would seem, however, that the CPR would, properly, have revoked the 1893 rules, which were clearly rules of court.

Based on this brief history, it appears that the admiralty jurisdiction of this court is defined by the 1890 and 1956 Acts and given effect through the CPR in general and part 70 thereof, in particular.

The only other recent piece of legislation, which may affect the admiralty jurisdiction of this court, is the Shipping Act. I shall, later in this judgment, refer to certain sections of the Shipping Act which were cited by Mr. Dabdoub, who appeared on behalf of the defendants.

Analysis of the instant case

The following quotation from the second edition of *Shipping Law* by Simon Baughen is appropriate for the context in which the submissions have been made in the instant claim. The learned author states at page 360:

> "Claims *in rem* may only be brought before the Admiralty Court. However, not all claims within the jurisdiction of the Admiralty Court can be brought *in rem.* Therefore, in considering whether a particular claim can be brought *in rem*, a plaintiff will need first to ask whether its claim falls within the general jurisdiction of the Admiralty Court and then, if it does, whether it is the type of claim that may be brought *in rem."*

In seeking to answer these questions in the context of the instant case, it is first necessary to set out the relevant portions of DYC's Particulars of Claim. They are:

> "4. The Defendants are the owners and/or operators of the motor vessels MV Devin and MV Brice and the said motor vessels are registered in Jamaica.
>
> 5…
>
> 6. The Ministry of Agriculture on behalf of the Government of Jamaica issues quotas to persons in Jamaica for the harvesting of Conch. In

the 2006-2007 Conch fishing season the undermentioned quotas were issued to the persons mentioned hereunder:

Newport/Grace (Gordon Sharpe)	79,083.72 kilograms
Seafood & Ting Ltd (Donna Marie Roberts Cox)	77,734.31 kilograms
DYC Fishing Ltd (Frank Cox)	124,068.34 kilograms
Total	280,886.37 kilograms

7…

8. The season for harvesting Conch would usually run between January to July/August of the relevant year.

9. In or about 2006 the Claimant entered into an agreement with the Defendant whereby the Defendant agreed to harvest the quota [of conch] assigned to the Claimant…"

10. The Defendant was required to harvest 280,866.37 kilograms of Conch on behalf of the Claimant and the Claimant was required to pay the Defendant a fee for same.

11. In addition as part of the agreement between the Claimant and the Defendant, the Claimant advanced money to the Defendant to enable the Defendant to:

    (a) recruit fishermen in the Dominican Republic and obtain the required permission to harvest conch in Jamaican waters;
    (b) purchase/acquire equipment, fuel and supplies for the MV Devin and MV Brice.

12. The Defendant as part of the agreement agreed to use the MV Devin and MV Brice to transport the crew, fishermen and supplies to the relevant areas of Jamaican waters. The Conch would thereafter be harvested, stored on board the MV Devin and would then [be] transported to a Jamaican port for delivery to the Claimant.

13. The sums advanced were to be set off against any sum due from the Claimant to the Defendant after harvesting of the Conch was completed. The Claimant advanced to the Defendant the sum of United States Dollars $1,238,500.00 for the 2006-2007 Conch fishing season.

14. The Defendant in breach of the agreement between the Claimant and Defendant failed and/or neglected and/or refused to harvest the quantity of Conch set out hereunder:

Newport/Grace	18,056 kilograms
Seafood & Ting Ltd	22,280 kilograms

DYC Fishing Ltd 37,920 kilograms
Total 78,256 kilograms

15…

16. The Defendant's breach of the agreement in failing and/or neglecting and/or refusing to harvest 78,256 kilograms of Conch caused the Claimant to suffer loss and damage and incur expense…."

Mr. Dabdoub submitted that the agreement is to harvest a quota of conch. It is therefore, a consequential issue, raised only by implication, that there should be a carriage of goods. He submitted that the fact that the damages claimed are connected only with the harvesting and not the carriage of the conch, confirmed that the agreement is directly related only to the harvesting. Learned counsel submitted that the fact that the agreement did not state which vessel should be used to do the harvesting, reinforced the point that this should have been an *in personam* claim.

He also submitted that paragraph 11 of the particulars of claim did not lead to a claim *in rem*. He said that there was a distinction between supplying goods or materials to a ship (which properly gave rise to a claim *in rem*), and supplying money to the owners of the vessel on the understanding that they would purchase the requisite items. The latter scenario, Mr. Dabdoub submitted, only admitted a claim *in personam*.

It is the 1956 Act which guides claimants in deciding whether to bring a claim *in rem* or *in personam*. Paragraphs (h) and (m) of section 1 (1) of that Act seem to be relevant to the instant claim. Section 1 (1) states that

this court shall have jurisdiction to hear and determine questions and claims including:

> "*(h)* any claim **arising out of any agreement** relating to the carriage of goods in a ship or **to the use or hire of a ship**;" and,
>
> *(m)* any claim in respect of goods or materials supplied to a ship for her operation or maintenance;" (Emphasis supplied)

Rule 70.2 (i) and (m) of the CPR are expressed in identical terms to the paragraphs just quoted. Such matters, the rule states, "are to be dealt with as admiralty claims".

In addition to setting out the list of claims over which, this court would have supervision, in its admiralty jurisdiction, the 1956 Act goes on to provide the claims which may be brought *in rem*. For example, section 3(4) states as follows:

> "(4) In the case of any such claim as is mentioned in paragraphs (d) to (r) of subsection (1) of section one of this Act, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action *in personam* was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the Admiralty jurisdiction of the High Court…(whether the claim gives rise to a maritime lien on the ship or not) **be invoked by an action *in rem* against** –
>
> (i) **that ship**, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or
> (ii) any other ship which, at the time when the action is brought, is beneficially owned aforesaid. (Emphasis supplied)

Despite Mr. Dabdoub's submissions to the contrary, it is my view that the claim is properly brought as a claim *in rem*. It seems to me that this is a claim which arises out of an agreement relating to the use of a ship.

The submissions which Mr. Dabdoub has made were similar in substance to those made in the case of *The Lloyd Pacifico* [1995] 1 Lloyd's Rep. 55. In that case it was held that since there was no reference in a contract between the claimants and defendants as to which vessel would be used to transport containers belonging to the claimants, the claim did not arise out of an agreement relating to the carriage of goods in a ship. Additionally, that conclusion also resulted from the fact that the contract did not require the defendants to use their own vessels or even vessels chartered by them. It was therefore held that the claim was not an *in rem* claim and the defendants' vessel had been wrongly arrested.

The obvious difference, between *The Lloyd Pacifico* and the instant case, is that on DYC's claim, although the contract was not reduced to writing, the Devin and Brice were specifically mentioned as being the vessels to be equipped with fuel and supplies and to transport the crew, fishermen and supplies. Thereafter, the harvested conch was to be stored on board the Devin (see paragraph 12 of the Particulars of Claim). Mr. Dabdoub's submission, that there was no stipulation as to which vessel

would be used for the harvesting, seems to be an overly restrictive view of the alleged contract. It is my view, that the only reasonable conclusion to be drawn from the tasks, allegedly assigned to the vessels, is that one or both would be integral to the harvesting of the conch. I draw support, in reaching that conclusion, from the decision in *The Jade* [1976] 1 All ER 920.

In *The Jade,* a salvage tug 'the Rotesand', answered a distress call from a badly holed ship, 'the Erkowit'. While still at sea, the master of each ship signed a salvage agreement and in pursuance thereof, the Rotesand took the Erkowit in tow. Before reaching port, the tugmaster decided to beach the Erkowit in order to patch the hole. While on the beach, the Erkowit was exposed to heavy weather. The attempts at repairs failed and she was broken up by the waves. Both the Erkowit and her cargo were a total loss.

Separate claims were instituted by the owners of the Erkowit and the owners of the cargo. These claims were for alleged negligent performance of the salvage agreement. The claims were against sister ships of the Rotesand. "The Jade" was such a vessel and while she was in the jurisdiction of the High Court of England she was arrested pursuant to the said claims. The salvors contended that the High Court of England had no jurisdiction *in rem* in respect of the claims in that they did not fall within sections 1(1) of the 1956 Act.

The House of Lords, on the question of whether the Rotesand was identifiable as the ship, in connection with which the claims made in the action arose (or a sister ship thereof), took what, in my respectful view, was an eminently sensible approach. They inferred that it was the Rotesand which was to have been the instrument by which the salvors would have fulfilled their obligations. In looking at the circumstances of the signing of the contract, in the context of section 1(1) *(h)* of the 1956 Act, Lord Diplock, with whom the other members of the panel agreed, said at page 925 j,:

> "The only possible way in which the salvors could perform their contract was by taking the Erkowit in tow and using the tug that had been sent to the scene of the casualty for that very purpose – The Rotesand."

His Lordship continued at page 926 a:

> "I agree that in any ordinary meaning of those words [all proper steam and other assistance and labour] the salvage agreement was 'an agreement relating to the use of a ship', the Rotesand, for the purpose of salving the Erkowit and her cargo and bringing them to a place of safety..."

Their Lordships held that the words, "an agreement relating to the use of a ship", as drawn from paragraph *(h)* should be given a wide meaning. As a result, the claims were held to have been properly brought *in rem*.

Mr. Braham, on behalf of DYC, cited the case of *The Andrea Ursula*, *Drydock & Engineering Co. Ltd. v Beneficial Owners of Ship Andrea Ursula* [1971] 1 All ER 821, in support of his submission that section 3(4) of the 1956 Act made paragraph *(h)*, mentioned above, applicable to the instant

case. In *The Andrea Ursula*, Brandon, J., in the context of seeking to define the term "beneficial owner", as used in section 3(4) opined at page 826:

> "In other words 'beneficial owner' must be given a meaning which includes not only a demise charterer, but also any other person with similar complete possession and control who may thereby become liable on a claim within paras (*d*) to (*r*) of s 1(1) of the [1956] Act."

I accept that the interpretation of the term "beneficial owner of all shares", as applied in that case, is applicable here. I need not dilate on that matter, however, as it was not a ground of complaint raised by the defendants. Mr. Mohammed candidly declared to the court, the situation as to ownership of the vessels, which situation was outlined at the beginning of this judgment. There is no contest that he conducted all negotiations with DYC in respect of the vessels.

On the above reasoning, I find that the present claim is properly before the court as a claim *in rem* and that a warrant of arrest was properly issued thereunder.

Mr. Dabdoub had yet another string to his bow. He submitted that, at best, what DYC had was a maritime lien. He submitted that by sections 80 and 85 of the Shipping Act, a claim *in rem* should be filed within a year from the date of the cause of action, failing which the maritime lien would be extinguished. He cited section 86 of that Act to support a submission that although a claim could still be filed, it could not be filed as a claim *in rem*

but had to be filed as an *in personam* claim. Because of my view of the submissions I need not quote these sections.

Although Mr. Dabdoub made this submission against the background of sections 20 through 24 of the Supreme Court Act 1981 of England (which is not applicable in this jurisdiction), the essence of those sections dealing with the admiralty jurisdiction of that court, closely follows the format and content of sections 1 through 8 of the 1956 Act. In both Acts, the issue of maritime liens is only one of three areas in which the court has jurisdiction over claims *in rem*. In my view, the issue of maritime liens does not arise in the instant case. That issue does not affect my finding that the claim has been properly filed.

I now turn to the question of the prospects of success of the claim.

Does the claim have a real prospect of success?

The Law in relation to orders for summary judgment

The starting point for this analysis is part 15 of the CPR. Part 15 provides the guidance for assessing applications for summary judgment. Rule 15.2, which sets out the test to be applied in applications of this type, states in part:

> "The court may give summary judgment on the claim or on a particular issue if it considers that –

> (d) The claimant has no real prospect of succeeding on the claim or the issue…"

The burden of establishing that no such prospect exists, rests on the party seeking to have the claim struck out (see *E.D. & F. Man Liquid Products Ltd. v Patel and another* T.L.R. April 17, 2003 at page 224, [2003] EWCA Civ. 472).

It is often said that the court is not entitled to embark on a mini-trial when assessing the prospects of success of a party's case. If the case is based on a point of law which is obviously bound to fail, or after relatively short argument proved to be so, then summary judgment may be granted. If, however, there are arguable points of law or issues as to fact which, depending on the resolution, would affect the outcome, then summary judgment ought not to be granted (see *Swain v Hillman* [2001] 1 All ER 91) and *Munn v North West Water Ltd*. (2000) LTL 18/7/2000).

The instant case was heard over the course of several days for various reasons, but mostly concerning the accumulation of evidence. That fact requires a reminder concerning the scope of an inquiry concerning a grant of summary judgment. A quote from *Three Rivers District Council v Bank of England (No. 3)* [2001] UKHL 16; [2001] 2 All ER 513 gives some guidance. In dealing with that scope, at paragraph 95 of the judgment, Lord Hope of Craighead stated:

> "For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible….The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. **But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence**. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all." (Emphasis supplied)

Lord Hope of Craighead then addressed an exception to this general rule. He seemed to accept that a judge may undertake an enquiry into a complex matter where the judge:

> "…not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for the trial or the burden of the trial itself…" (paragraph 97)

Analysis

Against that background, it is my view that the defendants have, perhaps in an effort at completeness, made this application a very weighty, if not complex, matter. Five affidavits were filed in support of the application for summary judgment. Four affidavits on behalf of DYC, had to be considered. All those affidavits were in addition to the documentary evidence introduced by way of the witness summonses *duces tecum.*

The defendants sought to utilise a two-pronged attack against the claim. First they allege that the documentary evidence makes it clear that

DYC received its full quota of conch for the year 2006. The other criticism of the claim is that the accounts produced by DYC shows that there was no money outstanding from the defendants to DYC for either 2006 or 2007.

Other points were taken by the defendants such as whether DYC could purchase the quota of other entities to accumulate a total of 280,886.37kg. These points only served to raise points of dispute, which in my view, unnecessarily complicate the assessment of this aspect of the case.

A faithful adherence to the procedure concerning summary judgment requires a concentration on the matters raised by the particulars of claim. An examination of the statement of claim reveals that DYC has restricted its claim to the loss alleged to have resulted from a shortfall in the harvest. In my view, to determine whether this case can be dealt with by way of summary judgment requires the court to decide whether the evidence is clear concerning the quotas awarded and whether they were met by the various entities. If that evidence is clear and shows that the quotas were met then DYC's claim has no real prospect of success. If on the other hand, the evidence requires interpretation and/or is not conclusive that the quotas were met, then the claim is one to be properly tried in the conventional way with discovery and witnesses being cross-examined on oath.

What, therefore, were the quotas awarded to the various entities? The particulars of claim, although asserting that a conch season ran from January to July/August each year, curiously, spoke to quotas being issued for the 2006-2007 conch fishing season. The defendants quite properly attacked this anomaly. Mr. Braham, by way of explanation, pointed out that up to 2004, conch seasons did, in fact, straddle calendar years. In the face of that criticism, however, DYC sought to shift the goalpost. Although there was no application to amend the particulars of claim, DYC adduced evidence by affidavit admitting that the defendants did supply the quota for 2006, but that the shortfall was in respect of the 2007 quota.

At paragraph 9 of his affidavit sworn to on 28th June 2010, Mr. Frank Samuel Cox, on behalf of DYC stated:

> "That in response to paragraph 13 of the Mohammed Affidavit as referred to at paragraph 6 hereinabove, the year 2007 quotas were as follows:-
>
> a) Newport/Grace (Gordon Sharpe) (NFM) 80,517 kilograms
> b) Seafood & Ting Ltd (Donna Marie Roberts Cox) 65,585 kilograms
> c) DYC Fishing Ltd (Frank Cox) (Claimant) 143,923 kilograms
> Total 290,025 kilograms
>
> From which the Defendant supplied a shortfall of Conch product in the said amount of 78,256 kilograms as referred to at paragraph 21 of the First Affidavit [sworn to by Mr. Cox].

Mr. Cox did not seek to break down the shortfall for each entity, nor did he seek to explain how it was that the shortfall for 2007 was the identical figure which he had previously alleged was the shortfall for 2006. This

inadequately explained shift certainly causes me to "harbour doubts about the soundness of the pleading".

Nonetheless, Mr. Braham stressed the fact that the Particulars of Claim straddled 2006 and 2007. He sought to demonstrate that the events of 2006, which DYC originally claimed to be the cause of the 2006 shortfall, continued to adversely affect the defendants in 2007. It is not disputed that the Brice was being detained by government authorities for a portion of the 2007 conch season.

In seeking to identify whether this claim can be resolved by reference to the quotas, one must, examine the documentation to determine whether the quotas pleaded match either year. Mr. Mohammed, on behalf of the defendants exhibited copies of the relevant portions of applications for quotas for the year 2010 which were respectively submitted by Frank S. Cox and/or DYC Fishing Ltd., Donna Marie Roberts and/or Seafood & Ting International Ltd. and Newport Fish and Meats Ltd. The applications respectively set out the history in respect of quotas and quantities harvested for each company for each year between 1995 and 2010. The following data are extracted from those documents:

Company	Year	Quota Allocation (kg)	Total 50% Clean Conch Landed (kg)
Newport Fish and Meats Ltd.	2006	?	79,083
Seafood & Ting International Ltd	2006	77,740.00	77,740.00
DYC Fishing Ltd.	2006	124,000.00	124,000.00
	Totals-2006	?	280,823.00
Newport Fish and Meats Ltd.	2007	?	80,517
Seafood & Ting International Ltd	2007	65,584.98	43,400.00
DYC Fishing Ltd.	2007	143,923.21	106,000.00
	Totals - 2007	?	229,917

Despite the fact that witnesses produced documents from the Ministry of Agriculture, the gaps in the data as shown in the above table, were not filled. Additionally, a Ms. Peta-Ann Hutchinson, the Managing Director of Newport Fish and Meats Ltd. deposed that there was an error in the data contained in Newport's application for 2010. She asserted that there was indeed a shortfall in securing her company's quota for 2007. That shortfall she says amounted to 18,056 kilograms.

The result is that it does appear that the catch landed for 2007, for the companies mentioned in the table, was less than their quota for that year. In answer to this new position, the defendants, through Mr. Mohammed, deny that they had any contract with DYC to harvest conch for it in 2007. He

deposed that he had a contract with Newport/Grace and pursuant to that contract, delivered the harvested conch to DYC. In addition he insisted that he fulfilled the quota allocated to Newport Fish and Meats.

Mr. Mohammed sought to explain why there could have been no contract with DYC but in my view, his explanations and those of Mr. Cox and Ms. Hutchinson are matters to be dealt with at a trial. The resolution of the issues, raised by the particulars of claim (despite its uncertainties/ambiguities), not being patent on an examination of the documentary evidence, I am obliged to find that the claim cannot be said, at this stage, to have no real prospect of success. Accordingly the application for summary judgment must be refused.

That, however, I find, is not an end of the matter. The unsatisfactory state of DYC's case leads me to contemplate whether it is just to have the defendant's vessel remain under arrest, with the result that it is unable to earn them any income. Mr. Mohammed deposed that he earns his livelihood as a fisherman and asserts that the arrest of the vessels would cause him tremendous loss. This would be the result of being unable to harvest conch as he had contracted to do for another entity in the industry. The conch season for 2010 has, however, ended since this claim was filed. No evidence has been adduced concerning any alternate use of the, still

detained, Devin. There is, nonetheless, the matter of the maintenance of the vessel in the meantime.

The Devin is registered in Jamaica as is the company which owns it. Security is in place in the sum of US$150,000.00 in respect of the Bryce. A similar figure had been ordered, by Daye, J. to have been posted as security for the release of the Devin. Mr. Mohammed describes the arrest as "devastating financially", although he does not give any details to support that statement. Nonetheless, I find that this is a proper case in which to consider the application of rule 1.1 (2) (c) (iv) of the CPR, which states:

> "(2) Dealing justly with a case includes –
>
> …
>
> (c) dealing with it in ways which take into consideration -
>
> …
>
> (iv) the financial position of each party;"

The fact that the claim is in *rem* does not prevent me considering rule 1.1. Rule 70.1 (2) specifically states:

> "the other provisions of [the CPR] apply to Admiralty proceedings subject to the provisions of [Part 70]".

No provision in part 70 excludes the operation of rule 1.

Considering all of the above factors, relative to the financial impact on the defendants in the current status of this claim, I find that this is an appropriate case to allow the vessel to be released on the undertaking of Mr. Mohammed to produce and deliver it to the admiralty bailiff, if and when

ordered by the court. The costs of the bailiff to date, in respect of the Devin, are to be paid by DYC.

Costs

Deciding on who should bear the costs of this application has caused me some concern. The defendants have failed in their application but have revealed major flaws in DYC's case, as pleaded. In *Rudd v Crowne Fire Extinguisher Services Ltd. and others* (1989) 26 JLR 565, the Court of Appeal made no order as to costs when it found that an action, though weak, should be allowed to go to trial. There, the appeal, giving rise to the order, was allowed in part.

In the instant case, I am of the view that that would not be an appropriate order because the defendants have, in my view, caused the matter to take far longer than it need have been. In the circumstances I find that costs in this application should abide the determination of the claim and that in the event that the defendants are successful they should only receive two-thirds of the costs relevant to this application.

Conclusion

On the pleadings, the claim in the instant case arises out of an agreement relating to the use of a ship. Accordingly, sections 1(1) *(h)* and 3(4) of the Administration of Justice Act, 1956 of the United Kingdom

(which has force in Jamaica), and rule 70.2 *(i)* apply. The claim, as pleaded, is properly filed, as a claim *in rem*.

The application for summary judgment has revealed that there are some difficulties with DYC's case as pleaded. Despite those problems, the lack of precision and/or ambiguities in the particulars of claim allow for me to find, that it cannot be said that the claim has no real prospect of success. Those uncertainties however have led me to consider the financial impact on the defendants as permitted by rule 1.1 (2). The orders therefore are:

1. The application for summary judgment is refused;

2. The time for the Defendant to file and serve its defence is hereby extended to 1st November, 2010;

3. Upon Mr. Stanley Mohammed giving an undertaking on behalf of Clarendon Seafood Limited, to produce the MV Devin to the admiralty bailiff, if and when ordered by this court, the MV Devin shall be released to the said Clarendon Seafood Limited.

4. The costs of the admiralty bailiff, to the time of the release of the MV Devin, shall be borne by the Claimant.

5. Costs of the application are to abide the final determination of the claim. In the event that the Defendants are the successful party on that determination, they should only have two-thirds of the costs relative to this application. Such costs are to be taxed if not agreed.