IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016A00002

BETWEEN	**LARSON HIGGINS**	**CLAIMANT**
AND	**MT TAJIN**	**DEFENDANT**

IN CHAMBERS

Mr. Sundiata Gibbs and Ms. Shanique Scott instructed by Hylton Powell for the claimant

Mr. Krishna Desai and Mr. Jahmar Clarke instructed by Myers Fletcher & Gordon for the defendant

February 22, March 14 and June 2, 2017

Admiralty Law - Admiralty Jurisdiction of the Supreme Court – Whether claim for personal injuries properly brought in rem.
Interim Payment - Claim brought in rem - Civil Procedure Rules, 2002 part 17 Marine Insurance - Protection and Indemnity Club

SIMMONS J

[1] This is an application by the claimant Mr. Larson Higgins for an interim payment in the sum of eleven million seven hundred and eighty six thousand four hundred and fifty eight dollars and eighty seven cents ($11,786,458.87).

[2] The application is based on the following grounds:-

(i) That if the case went to trial, he would obtain judgment against the defendant for a substantial sum;

(ii) The injuries, medical expenses incurred and the loss of income suffered by him as a result of the accident has

resulted in hardship and has severely reduced his ability to meet his monthly expenses; and

(iii) The defendant is insured and in any event, its owner has resources that would enable it to make the interim payment.

[3] The application is supported by the affidavit of the claimant which gives his account of the accident and provides details of his expenses and loss of income.

Background

[4] On May 27, 2016 the claimant, a navy diver, filed an admiralty claim form in rem seeking, among other reliefs, damages for negligence. In the amended particulars of claim filed he states that he was hired to conduct an anti-narcotic hull search and underwater video of the defendant ship which was docked at the Petrojam loading dock situated at 96 Marcus Garvey Drive, Kingston 15.

[5] According to the claimant, on May 28, 2015 at about 4:15 pm he dove beneath the ship to perform his tasks and whilst carrying out those tasks a member of the defendant's crew started its engines. This resulted in him being struck in the chest by the propeller blades.

[6] The particulars of negligence alleged against the defendant and its crew are as follows:-

(a) failing to ensure that all engines were shut down and tagged out while the claimant was conducting the hull search;
(b) failing to ensure that the hull search was finished before attempting to depart from its berth; and
(c) failing to take all necessary steps to ensure the complete safety to divers.

[7] The particulars of the claimant's injuries are stated to be:-

(a) Haemo-pneumothorax;
(b) Multiple rib fractures;
(c) Contusions to chest and abdomen;
(d) Liver laceration;

(e) Severe blood loss

(f) Hypoxia;

(g) Atelectatic bands within right middle lung zone and dependent lung changes; and

(h) Post-traumatic stress

[8] The defence which was filed on November 29, 2016 indicates that, TTM Division Maritima S.A. de C.V are the owners of the defendant. It is also signed by Luis Ocejo the Chief Marine Operations Director of that entity.

[9] The defendant in its defence states that a local ship's agent, Maritime and Transport Services Limited (MTSL) was hired to make all the necessary arrangements for the defendant while it was in port. That entity it is said, arranged for an anti-narcotic hull inspection to be done by Diving and Security Solutions Limited (DSSL), which in turn, employed the claimant.

[10] It is stated that on the day in question Mr. Christopher Yee Sing, a representative of DSSL, went to the general office where the defendant's Master was engaged in completing documentation necessary for its departure from the port. It was admitted that the Master signed the diving advisory form presented to him by Mr. Yee Sing in which it was requested that the motor tanker take certain steps in advance of the dive being conducted. This was done in the presence of MTSL's Boarding Officer.

[11] The defendant has also stated that whilst it was aware that the claimant conducted the dive, it did not know the time when the dive commenced. It was however admitted that it conducted tests of the main engine between the hours of 16:40 and 16:48 which is the normal procedure when departing port for a sea voyage.

[12] It was contended that the accident occurred as a result of the claimant's negligence. The particulars of negligence as alleged are that the claimant conducted the dive without:-

(i) appropriate certification for the dive;

(ii) any support diver in the water;

(iii) any system to communicate with the surface;

(iv) adhering to a safe distance from the ship propeller.

[13] It was further averred that DSSL caused or contributed to the accident as it failed to provide a safe system of work, a safe place of work, and to otherwise ensure that it was safe for the claimant to do the dive.

[14] In light of these allegations, the defendant filed an ancillary claim form on November 29, 2016 naming DSSL as the ancillary defendant. It has sought an indemnity for or contribution towards any judgment which may be awarded in favour of the claimant. A defence to the ancillary claim was filed on February 6, 2017.

Claimant's Submissions

[15] Mr. Gibbs commenced his submissions by outlining the purpose of interim payments. In doing so he relied on the following passage from the text **A Practical Approach to Civil Procedure**, 9th edition by Stuart Sime:-

> *"Orders for interim payments] are likely to be made in claims where it appears that the claimant will achieve at least some success, and where it would be unjust to delay, until after the trial, payment of the money to which the claimant appears to be entitled. The purpose behind this procedure is to alleviate the hardship that may otherwise be suffered by claimants who may have to wait substantial periods of time before they recover any damages in respect of wrongs they may have suffered."*

[16] Counsel also referred to rule 17.6 of the ***Civil Procedure Rules*** (***CPR***) which stipulates the conditions which must be satisfied before an order for interim payment is granted. The claimant's application relies on rule 17.6(1)(d) of the ***CPR*** which provides:-

> *"The court may make an order for an interim payment only if it is satisfied that…if the claim went to trial the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs"*

[17] Mr. Gibbs submitted that when considering applications under this rule the court is required to conduct a two stage test. Firstly, it must be determined whether the claimant is likely to obtain judgment for a substantial sum and secondly, whether the circumstances warrant an exercise of its discretion to order the payment and if so, in what proportion.

[18] Reference was made to ***Shanning International Limited v George Wimpey International Limited*** [1989] 1 WLR 981 in support of that submission. Mr. Gibbs stated that in that case Glidewell LJ confirmed the two stage test and added that at each stage the judge hearing an interim payment application should also consider the strength of any claim for a set-off, counterclaim or allegation of contributory negligence.

[19] It was submitted that the claimant's claim is very strong and it is very likely that the court would award him substantial damages if the claim were to go to trial. It was argued that although the defendant has denied the particulars of negligence outlined in the particulars of claim, it later makes admissions in its defence which are consistent with those particulars. Mr. Gibbs directed the court's attention to paragraph seven (7) of the defence which indicates that a member of the defendant's crew performed an engine test between 16:40 and 16:48 hours. He stated that since there is no dispute that the hull search was ongoing at that time, the defendant's admission that the crew performed an engine test lends credence to the claimant's allegation that its crew was negligent.

[20] Counsel also pointed out that the defendant also stated that testing the main engine was normal procedure when departing port for a sea voyage. He argued that this statement is consistent with the claimant's allegation that the crew did

not ensure that the hull search was finished before trying to depart from the berth.

[21] Mr. Gibbs submitted that the statements made in the defence amount to admissions to the very particulars that the claimant would need to establish at trial in order to succeed. It was further submitted that even if the defendant had not made these admissions and had put the claimant to proof the claim would still be likely to succeed because the scenario as described in the pleadings is a classic case of *res ipsa loquitur*. He stated that the incident, on the face of the pleadings could not have occurred without negligence on the part of the ship's crew.

[22] Counsel also relied on ***Scott v London and St. Katherine Company*** [1861-73] All ER Rep 346 in support of his submissions. Particular emphasis was placed on the following portion of the judgment of Erle CJ:

> *"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."*

[23] Mr. Gibbs submitted that these elements exist in the present case as the defendant's crew (including its master) was in control of its engines. The master was informed of the impending search and signed the dive advisory form that set out the safeguards to be followed. The crew also hoisted the alfa flag to let everyone know that a dive was ongoing (this was requested by the dive advisory form).

[24] Counsel argued therefore that the crew knew or ought to have known that a dive was taking place and a diver was in the water. He said that in those

circumstances, turning on the propellers of the ship points to negligence on the part of the defendant's crew.

[25] Mr. Gibbs submitted that if the court is satisfied that the defendant is likely to be found liable for negligence the next step is for it to consider whether the likely damages would be substantial. Counsel stated that the claimant has been examined by several medical professionals two of whom specialise in the treatment of diving injuries. Both doctors have indicated that based on their examinations of the claimant they are not willing to certify him fit to dive. The possibility of scars on the claimant's lungs was indicated and it was stated that this could compromise the claimant's lung function when underwater and that could be quite risky.

[26] In light of the prognoses, Counsel submitted that the claimant is likely to recover between forty million dollars ($40,000,000.00) and sixty million dollars ($60,000,000.00) at trial. That sum, it was submitted, will likely be comprised of the following heads of damages:

(a) *Medical costs and other out of pocket expenses*
(b) *Pre-trial loss of earnings*
(c) *Lost contract*
(d) *Loss of future earnings*
(e) *Pain and suffering*
(f) *Handicap on the labour market*

[27] It was submitted that the claimant's medical and out of pocket expenses amounted to one million two hundred and thirty two thousand four hundred and fifty eight dollars and eighty seven cents ($1,232,458.87).

[28] It was brought to the court's attention that DSSL confirmed in writing that the claimant performed an average of eight (8) hull inspections and one (1) hull cleaning per month before the accident. Some of the documents exhibited to the claimant's affidavit indicate that in 2015 the claimant earned an average of two

hundred and seventy one thousand six hundred and sixty dollars ($271,660.00) each month for commercial diving. The claimant also earned an average of two hundred and nine thousand six hundred dollars ($209,600.00) per month from teaching students to dive. Counsel stated that since the accident the claimant has not been receiving such sums and his pre-trial loss of earnings from May 28, 2015 to January 28, 2017 was assessed to be nine million six hundred and twenty five thousand two hundred dollars ($9,625,200.00). It was submitted that it is likely that an assessment court will find that the claimant is entitled to these sums.

[29] The court was also informed that the Port Authority of Jamaica has confirmed that the claimant lost United States seven thousand two hundred dollars (US$7,200.00) because of his inability to complete his contract with that entity. Using an exchange rate of $129.00 JMD to $1.00 USD the sum was assessed to be Jamaican nine hundred and twenty eight thousand eight hundred dollars (J$928,800.00) and it was submitted that it is likely that an assessment court will also award this sum as special damages.

[30] Counsel submitted that whilst the claimant has not lost his job with the Jamaica Defence Force (JDF) he can longer earn money from commercial diving or teaching persons to dive which were the activities from which he earned the majority of his income before the incident. It was submitted that for loss of future earnings the multiplicand/multiplier method is best. He stated that since the claimant's annual earnings would amount to four million three hundred and thirty one thousand three hundred and forty dollars ($4,331,340.00) and an appropriate multiplier would be eleven. When that multiplier is used it is the likely that an award of approximately forty seven million six hundred and forty four thousand seven hundred and forty dollars ($47,644,740.00) would be made under that head.

[31] With respect to damages for pain and suffering, Counsel relied on the cases of ***Pellington v Bowen*** (unreported), Supreme Court, Jamaica, Suit No CLP-036 of

2001, judgment delivered 18 July 2002 and ***Hall-Graham v Lumsden & Williams*** (unreported), Supreme Court, Jamaica, Suit No G 140 of 2000, judgment delivered 18 July 2002. In both cases the claimants suffered fractured ribs with haemothorax. Counsel pointed out that in ***Pellington*** the court awarded three hundred and ninety thousand dollars ($390,000.00) which updates to one million four hundred and seventy one thousand three hundred and fifty three dollars ($1,471,353.00). In ***Hall-Graham*** the court awarded eight hundred and fifty thousand dollars which updates to three million two hundred and six thousand seven hundred and ninety five dollars ($3,206,795.00). Mr. Gibbs submitted that a court would likely award somewhere between one million four hundred thousand dollars ($1,400,000.00) and three million dollars ($3,000,000.00) for loss of amenities.

[32] It was also submitted that as a result of his injuries the claimant is now less competitive in the labour market. Within the JDF itself he is less likely to be promoted within his division (the Coast Guard). It was further submitted that his diminished physical fitness has also reduced the possibility of him competing with his peers to obtain a promotion. Counsel indicated that it is anticipated that the assessment court will compensate the claimant for this loss of earning capacity and it is further anticipated that the court will use a lump sum method for handicap on the labour market. It was submitted that the assessment is likely to be one million dollars ($1,000,000.00).

[33] Counsel argued that although the defendant has alleged that the claimant was contributorily negligent, that would not affect its liability. He opined that it simply means that depending on the extent to which the claimant may have contributed to the damage he suffered the award of damages may be reduced. He referred to section 3(1) of the ***Law Reform (Contributory Negligence) Act*** as authority for that submission.

[34] He also argued that a defendant claiming contributory negligence must prove two things in order to have his liability reduced. It must be proved that:-

> *(1)* The claimant failed to take reasonable steps in his own interest; and
> *(2)* The loss he suffered was a foreseeable result of that failure.

[35] Mr. Gibbs contended that the defendant is not likely to meet either of these two requirements; however, even if it did, any contributory negligence would have been insignificant and the major portion of the liability would still rest with the defendant.

[36] Counsel submitted that the allegation that the claimant contributed to his injuries because he did not have the appropriate certification is completely without merit as the claimant has been trained to do hull searches by both the JDF as well as the United States Navy. In addition, the defendant has not indicated what certification is more appropriate than those provided by those institutions. He argued that even if the defendant is correct that the claimant was not properly certified, the absence of certification was the cause of his injuries.

[37] Mr. Gibbs stated that in order to succeed on a contributory negligence claim one must identify an omission or an act on the part of the claimant that results in a foreseeable injury and the defendant's critique of the claimant's resume does not satisfy this requirement. Counsel also stated that a similar argument can be made in response to the allegations that there was no support diver in the water and no system to communicate with the surface. Counsel argued that these allegations can be described as failures to take certain precautions and to be successful the defendant needs to show that these "failures" contributed to the injuries the claimant suffered. It was argued that the absence of another diver did not cause the claimant's injuries and the presence of one would not have reduced the risk of the claimant being struck by the propeller and communicating with the surface would not have protected the claimant from the propeller.

[38] Mr. Gibbs also stated that the authorities indicate that where a claimant's failure to take particular safety precautions would have made no difference to whether the injury would have occurred, the court should not reduce the defendant's

liability. The case of ***Froom et al v Butcher*** [1975] 3 All ER 520 was cited in support of this submission. He stated that in that case Lord Denning explained that if taking a particular precaution would have no effect either way the claimant should recover in full.

[39] It was further submitted that the allegation that the claimant was contributorily negligent because he was too close to the propeller flies in the face of the purpose of an anti-narcotic search. It was argued that being close to the propeller was inevitable as it was an integral part of what the claimant was hired to do. The claimant was required to be very close to the ship's hull as the objective was to search obscure parts of the ship.

[40] Counsel pointed out that the defendant has filed an ancillary claim in which it has alleged that it was DSSL's negligence that caused the claimant's injuries. Mr. Gibbs argued that such a proposition is misconceived. He submitted that even if the defendant succeeded in its ancillary claim the defendant will merely be entitled to a contribution or indemnity against DSSL and this would not in any way affect the substantial award of damages that would be awarded to the claimant at trial or the circumstances which warrant the court exercising its discretion to award an interim payment.

[41] It was submitted that the circumstances of the case warrant the making of an interim payment. The claimant's affidavit evidence indicates that he is suffering hardship and will continue to do so if the interim payment is not made.

[42] Counsel pointed out that the claimant is seeking an interim payment of eleven million seven hundred and eighty six thousand four hundred and fifty eight dollars and eighty seven cents ($11,786,458.87). He stated that this sum represents a combination of his out of pocket expenses, the sums lost from the incomplete contract with the Port Authority of Jamaica and his pre-trial loss of income. It was submitted that the sum requested is a proportionate sum and is no more than necessary to alleviate the hardship the claimant now faces.

[43] Finally, Counsel stated that the unchallenged affidavit evidence is that the defendant is insured by a protection and indemnity club. Therefore, it was urged upon this court to exercise its discretion and make an order for an interim payment.

Defendant's Submissions

[44] Counsel for the defendant, Mr. Krishna Desai, argued that the application for an interim payment should be refused. He stated that under rule 17.6 (1)(d) of the ***CPR*** the court is tasked with evaluating what would happen if the matter went to trial and must be satisfied that the claimant would obtain judgment against the defendant for a substantial amount of money or for costs.

[45] Mr. Desai stated that the court must consider the state of the matter now and what it will be before the trial court. He pointed out that the defendant has made an ancillary claim against DSSL and the relief sought from that company is an indemnity or a contribution based in part on the dive company's failure to provide a safe system of work for the claimant. Counsel further pointed out that the ancillary claim form indicates that DSSL is the proper tortfeasor and ought to be made a party to the claim.

[46] Counsel also stated that Part 19 of the ***CPR*** provides that a claimant can add a new defendant to the proceedings without permission at any time before the Case Management Conference (CMC) by filing an amended claim form and particulars of claim. Mr. Desai indicated that no CMC has been held in this matter and that although the claimant filed an amended particulars of claim, he did not add DSSL to the claim.

[47] He also pointed out that in its defence to the ancillary claim, despite a statement from the claimant indicating otherwise, DSSL admitted that it was the claimant's employer and admitted that its CEO was in charge of the two man dive team.

[48] Mr. Desai stated that the common law duty of care owed by an employer to an employee is to take reasonable care for their safety and includes a duty to provide a competent staff of men, adequate plant and equipment, a proper system of working with effective supervision and a safe place of work. Counsel emphasised that by operation of law an employer owes a duty, which cannot be delegated, to provide a safe system of work for its employees. He relied on the case of ***McDermid v Nash Dredging Reclamation Co Ltd*** [1987] 2 All ER 878 in support of that submission.

[49] Counsel argued that since the claimant omitted to add DSSL to the claim and the defendant cannot add a party without an order of the court at or after the CMC, DSSL has not yet been added to the claim as a second defendant.

[50] It was contended that at the trial, the court will be tasked with assessing any liability and the contribution to any sum, if at all, on the part of the ship (the claim in rem), the diver (the defence which pleads contributory negligence) and the dive company (the ancillary claim and any order to add the dive company as the second defendant).

[51] Counsel further submitted that the court in its determination of this application must consider whether there will be more than one defendant at the trial that these defendants will be the ship and DSSL, in the circumstances, it was submitted that the court cannot be satisfied on a balance of probabilities that the outcome at trial would be that the claimant would obtain judgment from the defendant. He relied on the case of ***Victor Chang v Minott Services & Derrick Brown*** (unreported), Supreme Court, Jamaica Claim No 2003HCV0210, judgment delivered 25 March 2004, in support of that submission.

[52] Mr. Desai also argued that the claim having been brought “in rem” falls within the realm of the court’s admiralty jurisdiction and rule 15.3 (e) of the ***CPR*** provides that summary judgment is not available in admiralty matters.

[53] He stated that in the text ***A Practical Approach to Civil Procedure***, 9th edition by Stuart Sime, the learned author states that the test which is to be applied in applications for summary judgment and applications for interim payments is similar.

[54] It was submitted that the assessment that the court is asked to make in an application for interim payment is for all practical purposes, a summary judgment exercise albeit without making a finding of liability at an interlocutory stage. Counsel submitted that any grant of an order for interim payment in an admiralty matter would therefore be inconsistent with the ***CPR***.

[55] Mr. Desai also directed the court's attention to rule 17.6 (2) of the ***CPR*** and to the claimant's affidavit which states that the defendant is a member of a "protection and indemnity club". Counsel argued that it was wrongly concluded that this satisfies the requirement in the ***CPR*** for a defendant against whom an order for interim payment is made to be insured. It was submitted that 'indemnity' is different from 'insurance'. It was further submitted that, members of Protection and Indemnity Clubs are usually subject to the "pay to be paid" rule. This in effect means that a member may only claim reimbursement from the club if he has been held liable and has paid the claim. Counsel relied on the 2nd edition of the text **Maritime Law** edited by Professor Yvonne Baatz in support of that assertion.

[56] It was submitted that the making of an order for interim payment is not a finding of liability and therefore no indemnity is available to the member under the "pay to be paid" rule. Counsel argued that making an order against an uninsured defendant is in contravention of the ***CPR*** and against the policy underlying the rule. He stated that the defendant in this case could not claim an indemnity as there has been no finding in respect of liability at this stage of the proceedings. It was submitted that on the claimant's own evidence the defendant is not insured in respect of the claim.

[57] Counsel stated that the claim has been brought “in rem” claim and such an action is only available under the admiralty jurisdiction and is against the ship or ships of named or unnamed defendants. It was submitted that the defendant is not capable of being “a person” in the scheme of Part 17 of the ***CPR*** and in particular rule 17.6(2)(c). Counsel also submitted that there is no evidence to satisfy the court in relation to the requirements of rule 17.6(2)(c). That rule speaks to judgment being obtained for damages to be assessed. Mr. Desai also stated that due to the operation of law the ship owner is a separate legal entity from Groupo TMM which the claimant identifies in his affidavit as having enough assets to satisfy any judgment that may be awarded against the defendant.

[58] Mr. Desai submitted therefore that the claimant has not presented any evidence capable of satisfying the court that the defendant has the means and resources to make an interim payment.

[59] Counsel cited rule 17.6(3)(b) of the ***CPR*** and argued that there will be two defendants at trial and rule 17.6 is not satisfied in relation to DSSL as there is no evidence as to the means of DSSL or whether the claim against DSSL is covered by insurance or if DSSL is a public authority.

[60] In closing, it was submitted that the claimant has the burden to prove the matters on a balance of probabilities and he has failed to do so. In the circumstances he said, the court ought not to grant any order for an interim payment.

Claimant’s Response

[61] Mr. Gibbs stated that while the correctness of the principles expressed in ***McDermid v Nash Dredging and Reclamation Co Ltd*** [1987] 2 All ER 878 is accepted, the defendant has misinterpreted the implications of the principles espoused in the case on the present circumstances. Counsel stated that in that case the plaintiff was a deckhand who was injured by the negligence of the captain of a tugboat on which he was working. The plaintiff sued his employer. The employer did not own the tug boat on which the plaintiff was injured, its

parent company did. The parent company was also the employer of the negligent captain. Counsel stated that Lord Hailsham merely pointed out that the defendant could not escape liability by arguing that it had delegated its duty to an independent contractor who failed to perform it properly. Counsel further stated that Lord Hailsham did not suggest that the captain was absolved of liability for his negligence.

[62] It was submitted that even if the defendant successfully convinces the trial judge that DSSL was the claimant's employer and that it breached the duty of care owed to him that would not affect the claimant's right to damages against the ship whose master and crew breached their own duty of care.

[63] Mr. Gibbs argued that the test the court must consider for the purpose of this application is not whether there is another tortfeasor who may have breached its duty of care (whether delegable or non-delegable); the test is whether the court would award substantial damages against the tortfeasor whom the claimant has chosen to sue.

[64] Counsel submitted that it must be borne in mind that summary judgment applications and interim payment applications are in fact different because a summary judgment application is a final determination of the matter whereas an order for an interim payment is not.

[65] With respect to the claimant's claim of lack of proof of insurance, Mr. Gibbs pointed out that the excerpts from the text relied on by the defendant are found in a chapter titled "Marine Insurance" with a subheading "Protection and Indemnity Insurance" which strongly suggests that the coverage that the clubs provide is a type of insurance.

[66] Counsel argued that the "pay to be paid" rule is merely a clause that many (but not necessarily all) clubs have in their rules. That clause he said, makes the indemnity conditional upon the member first discharging the relevant liabilities and expenses he has incurred. It was submitted that the inclusion of a "pay to be

paid" rule does not make the coverage provided by a club any less an insurance contract. It was also pointed out that the defendant has not filed any affidavit evidence to show that the rules of its club include such a "pay to be paid" clause.

DISCUSSION

[67] The issues in this matter are:-

(i) Whether the claim has been properly brought in rem;

(ii) If so, whether an interim payment can be made in admiralty proceedings;

(iii) If so, whether this is an appropriate case to order an interim payment.

The Admiralty Jurisdiction of the Supreme Court

[68] The court's admiralty jurisdiction is based on the 1956 ***Administration of Justice Act*** (UK) and ***The Admiralty Jurisdiction (Jamaica) Order in Council, 1962*** (jointly referred to as ***the* Act*).*** Part 70 of the ***Civil Procedure Rules 2002*** deals with the procedural aspects of the exercise of that jurisdiction.

[69] In ***Matcam Marine Limitedv Michael Matalon (The Registered Owner of the Orion Warrior (formerly Matcam 1))***, (unreported) Supreme Court, Jamaica, Claim No 2011A0002, judgment delivered 6 October 2011, Sykes J conducted an in depth examination of the history of the admiralty jurisdiction of this court. The learned judge said:-

> *"Strange as it may sound, Mr. Robinson raised doubts about the applicability of some provisions of the Administration of Justice Act 1956 (UK) to Jamaica despite two Supreme Court decisions which affirmed that the legislation does apply to Jamaica…To put this matter to rest once and for all, this court attempts to set out, clearly, the steps to the conclusion that*

> *sections 1, 3, 4, 6, 7 and 8 of the 1956 UK Act apply to Jamaica today."*[1]

[70] Further in his judgment, he stated as follows:-

> *"In 1956, the Administration of Justice Act was passed in England. This legislation was made applicable to Jamaica by The Admiralty Jurisdiction (Jamaica) Order in Council, 1962 which came into force on March 29, 1962, five months before Jamaica became independent (see section 1 (2) of the Order). An Order in Council is a written instrument signed by the sovereign. An Order in Council, at that time, in theory, was an order having the full force of law which was issued by Her Majesty on the advice of the Privy Council. In practice, it was done on the advice of the British Cabinet. Acts of Parliament in England usually provide for the issuing of Orders in Council which set out the details of the administration of the particular legislation (see section 56 of the Administration of Justice Act, 1956)…Section 1 of the 1956 Act (UK) sets out the Admiralty jurisdiction applicable to the Supreme Court of Jamaica."*[2]

[71] He continued:-

> *"Thus sections three, four, six, seven and eight of Part 1 of the 1956 UK Act was applied to Jamaica before independence in August 1962. The Jamaica (Constitution) Order in Council 1962 has two schedules. The First Schedule lists the Orders in Council which were revoked by the Constitutional Order in Council of 1962. The Admiralty Jurisdiction (Jamaica) Order in Council is not in that First Schedule and therefore was not revoked at independence. No one has suggested that any Jamaican enactment has revoked or altered that Order in Council. Section 4 (1) of the Constitution Order in Council 1962 states that 'all laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law)*

---

[1]Paragraph 8
[2]Paragraph 16

> *continue in force on and after that day.' Section 22 (2) of the Constitution Order of 1962 states that the 'provisions of section 1 of the Constitution shall apply for the purposes of interpreting this order as they apply for interpreting the Constitution.' Section 1 (1) of the Constitution says 'law' includes 'any instrument having the force of law and any unwritten rule of law.' The Jamaican Admiralty Order in Council of 1962 is an instrument having the force of law and it has continued in force without amendment or repeal.*
>
> *From all this, it is clear that Admiralty jurisdiction of the Supreme Court of Jamaica is grounded in section 2 (2) of the Colonial Court of Admiralty Act of 1890 as modified by section 1 of the Administration of Justice Act. The Admiralty Order in Council of 1962 also applied sections 3, 4, 6, 7 and 8 to Jamaica. No statute or any other law has repealed or altered these statutes or Order in Council in relation to Jamaica. The Supreme Court Act of 1981 (UK) has repealed section 1 and the entire Part 1 of the 1956 Act but that 1981 Act does not apply to Jamaica. Procedural rules for the exercise of Admiralty jurisdiction of the Supreme Court came into being in 1893. Those rules have now been repealed and replaced by Part 70 of the CPR. Let there be doubt no more."*[3]

[72] That understanding of the admiralty jurisdiction of this court was also expressed by Cooke JA in ***HarpaShipping &Chartering GMBH v Europe West-Indie Lijnen B.V.*** (unreported), Court of Appeal, Jamaica, SCCA No 96/2008, judgment delivered 27 March 2009 and by Brooks J (as he then was) in ***DYC Fishing Limited v Owners of MV Devin and MV Brice*** (unreported), Supreme Court, Jamaica, Claim No. 2010A00002, judgment delivered 8 October 2010.

The nature of an action in rem versus an action in personam

---

[3]Paragraphs 21 and 22

[73] A claim *in personam* is one which is made against the person or the company which is the beneficial owner of the ship in question. On the other hand, a claim that is made *in rem*, is against the ship itself or its cargo or freight.

[74] In the text **Williams and Bruce's Admiralty Practice**,3rd edition, by the Honourable Mr. Justice Bruce and Charles Fuhr Jemmett, the learned authors said:-

> *"Admiralty proceedings may be in rem or in personam. By proceedings in rem the property in relation to which the claim has arisen, or the proceeds of such property when in Court, can be proceeded against, and made available to answer the claim. This method of proceeding is peculiar to Courts exercising Admiralty jurisdiction, and generally it is in order to avail themselves of the advantages thus afforded that suitors resort to their jurisdiction. But in cases where the plaintiff does not desire to proceed against the property, the method of proceeding in personam may be resorted to."* [4]

[75] In ***Castrique v Imrie***(1870) LR 4 HL 414 Blackburn J said:

> *"We may observe that the words as to an action being in rem or in personam and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the last few words quoted from the Story. We think the inquiry is first, whether the subject-matter was so situated as to be within the lawful control of the state under the authority of which the court sits; and, secondly, whether the sovereign authority of that state has conferred on the court the jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction.* ***If these conditions are fulfilled, the adjudication is conclusive against all the world.*** *In the case of Cammell v*

---

[4]Page 249

> *Sewell 5 H. & N. 746…a more general principle was laid down, viz, that "if personal property is disposed of in a manner binding according to the law of that country where it is, that disposition is binding everywhere." This we think, as a general rule is correct, though no doubt it may be open to exceptions and qualifications, and it may very well be said that the rule commonly expressed by English lawyers, that* ***a judgment in rem is binding everywhere, is in truth but a branch of that more general principle****."*

[My emphasis]

[76] An action *in rem* has been described as having three functions[5]. They are:-

(i) to obtain security for the claim;
(ii) to invoke the court's jurisdiction in respect of the merits of the claim; and
(iii) to crystallize a claimant's right in rem against the subject property upon issue of the claim, where it is not a true *in rem* claim.

[77] Based on the foregoing, where the claim has been filed *in rem* the claimant can proceed against the ship even if there a change in its ownership. An action *in personam* on the other hand is generally only binding on the parties to the litigation and not the ship.

Is the claim properly brought "in rem"?

[78] Section 3 (1) of ***the Act***, deals with the types of claims that may be dealt with under the admiralty jurisdiction of the Supreme Court. It states in part:-

> *"The Admiralty jurisdiction of the Supreme Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims-*

[5]Mandaraka-Sheppard, Modern Admiralty Law, page 75

(a) any claim to the possession or ownership of a ship or to the ownership of any share therein;…

(f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship…"

[79] Rule 70.2 of the ***CPR*** which largely mirrors the above section also sets out the jurisdiction of the court. It states, in part:-

"The following claims, questions and proceedings, namely-

(a) Any claim to the possession or ownership of a ship…..;

(f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or the wrongful act, neglect or default of-

(i) the charterers or persons in possession or control of a ship; or

(ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of a ship or in the loading, carriage or disembarkation of persons on, in or from the ship;

In relation to-

> *(i) All ships or aircraft whether of Jamaica or not and whether registered or not and wherever the residence or domicile of their owners may be;…"*

[80] Section 3 (1) of ***the Act*** provides that the court's jurisdiction in all claims arising under section 1 (1) of ***the Act***, subject tothose mentioned in the subsequent sections, may be invoked by an action in personam.

[81] Where actions in rem are concerned, Section 3 (2) and (4) of ***the Act***, states:-

> *"(2)The Admiralty jurisdiction of Supreme Court of Jamaica may in the cases mentioned in* ***paragraphs (a) to (c) and (s) of subsection (1) of section one of this Act be invoked by an action in rem against the ship or property in question***
>
> *(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 of Jamaica may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against-*
>
> *(a) 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*
>
> *(b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid."*
>
> [My emphasis]

[82] The claim in this matter, being one for personal injuries does not fall within section 1 (a), (b), (c) or (s). It appears to fall squarely within the provisions of paragraph (f) and should without more, be brought by an action in personam.

[83] There are however, exceptions to the above provision. Section 3(4) of ***the Act*** sets out the circumstances in which the court's jurisdiction *in rem* may be invoked in relation to matters which would ordinarily be the subject of an action *in personam*. It states:-

> *"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 of Jamaica may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against-*
>
> *(a) 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*
>
> *(b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid."*

[84] It should be noted that the above section only applies where the owner, charterer or person in possession is the beneficial owner of the ship. The claimant has not sought to invoke the court's jurisdiction by reliance on the provisions of section 3(4).

[85] In this matter, an acknowledgment of service and a defence have been filed. The address of the defendant is stated to be TMM Division Maritima S.A. de C.V., Av. De la Cuspide 4755, Col. Parques del Predegal, 14010 Tlalpan, Mexico City, Mexico. The Defence has been signed by Luis Ocejo who is stated to be the Chief Marine Operations Director of TMM Division Maritima S.A. de C.V. owners of MT TAJIN.

[86] The question now arises is whether the defendant can at this stage challenge the jurisdiction of the court.

[87] In ***The Norglimt ocedure***[1988] 2 All ER 531 at 544 Hobhouse J said:-

*"**Unless and until anyone appears to defend an action in rem, the action proceeds solely as an action in rem and any judgment given is solely a judgment given against the res. It is determinative and conclusive as against all the world in respect of the rights in the res but does not create any rights that are enforceable in personam**. An action in rem may be defended by anyone who has a legitimate interest in resisting the plaintiff's claim on the res. Such a person may be the owner of the res but equally it may be someone who has a different interest in the res which does not amount to ownership, or again it may be simply someone who also has a claim in rem against the res and is competing with the plaintiff for a right to the security of a res of an inadequate value to satisfy all the claims that are being made on it. It will also be appreciated both from what I have said and from a general understanding of the law of maritime liens that the owner or other person defending the action may be under no personal liability to the plaintiff.*

In the present case it is alleged that the owners of the Nordglimt are under a personal liability to the plaintiffs, but that is not part of the essential character of an action in rem as such. Unless and until a person liable in personam chooses to defend an action in rem, the action in rem will not give rise to any determination as against such person of any personal liability on his part, nor will it give rise to any judgment which is enforceable in personam against any such person.

The consequence of this is that in my judgment on the correct interpretation of art 21 of the 1968 convention, ***an Admiralty action in rem is not at the time of its inception an action between the same parties as an action in personam. It will only become an action between the same parties when and if a shipowner, liable in personam, chooses to appear in the action and defend it. It is from that moment, and not before, that the action first acquires the character of an action between the plaintiff and the shipowner; it will also be appreciated that it only acquires that character as the result of an act***

> ***of the shipowner,*** *and that such a consequence does not inevitably follow from the act of the plaintiff in starting the action in rem."*

Similarly in ***The Maciej Rataj (sub nom The Tatry)*** [1992] EWCA Civ J0605-11, Neill LJ stated:-

> *"**I am satisfied from a consideration of the authorities that after an acknowledgement of service has been given an action in rem then continues as a hybrid. The action becomes in personam but it does not lose its previous character of being an action in rem**. I should refer to a short passage in the speech of Lord Brandon in* August 8 *[1983] 2 AC 450 at 456:*
>
> *'By the law of England, once a defendant in an Admiralty action in rem has entered an appearance in such action [under the present practice this means 'has acknowledged service'], he has submitted himself personally to the jurisdiction of the English Admiralty Court, and the result of that is that, from then on, the action continues against him not only as an action in rem but also as an action in personam: (* The Gemma *, [1899] P 285, 292 per A L. Smith L.J."*
>
> *I should also refer to the judgment of Mr. Justice Hobhouse in The Nordglimt [1988] QB 183 , where he said at 203:*
>
> *'…proceedings in rem to which the shipowner has entered an appearance, although they can continue as proceedings in personam, are not deprived of their character as proceedings in rem and can still give rise to a judgment in rem against the res."*
>
> *Further support for the view that an action instituted in rem retains its in rem nature in part, even after an acknowledgement of service has been given is provided by the rule that an unsatisfied judgment in personam is no bar to proceedings in rem (The Cella [1888] 13 P.D. 82 , 85 per Sir James Hannen P.)"*

[My emphasis]

[88] The court in ***The Indian Endurance (No 2); Republic of India and another v India Steamship Co Ltd*** [1997] 4 All ER 380 went even further. In that case Lord Steyn made the following observations:-

> *"Admiralty practitioners and judges used the concept that the ship is a defendant in an action in rem, as a means of defending and extending the jurisdiction of the High court of Admiralty. An enlarged view was taken of what constitutes a maritime lien. The personification theory flourished. But this struggle for power was ended by the Judicature Acts.*
>
> *In the nineteenth century it was believed that an admiralty action could only be brought in respect of a maritime lien: The Bold Buccleugh7 Moore 267 (P.C., 1851). By statute actions in rem were subsequently permitted in new categories. But only after the Judicature Acts was it established that the new categories did not involve maritime liens: HenrichBjörn (1886) 11 App. Cas. 270. While the action in rem was still confined to maritime liens, courts sometimes ascribed personality to a ship. The ship was regarded as both the source and limit of liability. The ship herself was the "wrongdoer." After the Judicature Acts the personification theory fell into decline.*
>
> *The interaction, and cumulative effect, of a number of factors contributed to the decline of this theory. First, there is the factor, already noted, that actions in rem were permitted in new categories which did not involve maritime liens. It became less easy to personify the ship as the real defendant. Secondly, before 1873 actions in rem were commenced by a form of writ which did not name the owners of the ship as defendants. By 1883 the modern form of process, which named the owners as defendants, had evolved. This development made it easier to regard an action in rem as an action against the owners of the vessel. An argument that the procedural changes brought about no change in substance was expressly rejected by Jeune J. in The Dictator [1892] P. 304, at 307…*

Thirdly, until the Judicature Acts, it was not possible to combine an action in rem with an action in personam in the Admiralty. ***Since The Dictator was decided in 1892 the law has been that once the owners enter an appearance (or in modern phraseology when they acknowledge issue of the writ) there are two parallel actions: an action in personam and an action in rem. From that moment the owners are defendants in the action in personam.*** *This development militated against the personification theory. It became implausible to say that the owners are the defendants in the action in personam but the ship is the defendant in the action in rem or, alternatively, as counsel for the Indian Government suggested, there is no defendant in the action in rem. Fourthly judges, steeped in Admiralty history with its civilian roots, tended to be more sympathetic to the personification theory than judges trained in the common law. At appellate level common law judges tended to take the robust view that a ship is an inanimate thing, incapable of making contracts and committing torts, and devoid of legal personality. In authoritative judgments common law judges eschewed the mystique of the personification theory.*

The personification theory gave way to a more realistic view of the nature of actions in rem. This development took place in the context of the changes which I have sketched. The breakthrough came in The Dictator [1892] P. 304.

The historical analysis in The Dictator has been criticised: Wiswall, The Development of Admiralty Jurisdiction and Practice since 1800, 1970, Chapter 6. On the other hand the foremost historian of Admiralty history has supported it: Select Pleas in the Court of Admiralty, ed., by R.E. Marsden for the Selden Society, 1894, 1xx1--1xx11. The Dictator was followed and endorsed by the Court of Appeal in The Gemma [1899] P 285. It is true that a few years later, in The Burns [1907] P. 137, at 149, Fletcher Moulton L.J. appeared in effect to be repudiating the procedural theory by saying that "the action in rem is an action against the ship" and by acknowledging only that "the action indirectly affects them

> *(the owners)": 149. That observation was made on a point of statutory construction and did not reflect the reasoning of the majority. The reasoning in the The Dictator prevailed. In The Tervaete [1922] P. 259, Scrutton L.J. said that it was established that an action in rem was not based upon the wrongdoing of the ship personified as an offender but was a means of bringing the owner of the ship to meet this personal liability by seizing his property: 270. Atkin L.J. expressed a similar view: at 274. See also The Jupiter [1924] P. 236. In The Cristina [1938] A.C. 485 the House of Lords unambiguously rejected the personification theory, and adopted the realist view that in an action in rem the owners were the defendants.*
>
> ***The procedural theory stripped away the form and revealed that in substance the owners were parties to the action in rem****…"*
>
> [My emphasis]

[89] In sum, it was held that an action *in rem* against a ship was in reality an action against its owners. This decision has been met with a fair amount of criticism and has been rejected by the Full Court of the Federal Court of Australia in ***Comandate Marine Corp v Pan Australia Shipping Pty Ltd*** [2006] FCAFC 192.

[90] Page 3 of the defence in this matter states:

> *"The Defendant,* ***TMM DIVISION MARITIMA S.A de C.V****, owners of* ***MT Tajin****, certifies that all the facts set out in this Defence are true to the best of its knowledge, information and belief"*

[91] The document is signed by Luis Ocejo who is stated to be the Chief Marine Operations Director TMM DIVISION MARITIMA S.A de C.V. It would therefore not be inaccurate in my view to say that the owners of the defendant have '*entered an appearance*' in this matter.

[92] If the principle enunciated in ***The Norglimt*** (supra) and ***The Maciej Rataj (sub nom The Tatry)*** (supra) is applied, the filing of the acknowledgment of service and the defence clearly indicate that the defendant has submitted to the jurisdiction of the court and the action can continue as proceedings in personam.

[93] I am however mindful of the decision of our Court of Appeal in ***Harpa Shipping & Chartering GMBH & Co. Kg Europe West-Indie Lijne B.V. and another*** (supra). In that case the court stated its position in respect of the admiralty jurisdiction *in personam* and *in rem*. Cooke J.A said:-

> *"Section 3 of the Act is concerned with the mode of exercise of Admiralty Jurisdiction. Section 3(1) provides that all questions or claims set out in Section 1(1)(a)-(s) may be invoked by an action in personam. Section 3(2) and (3) pertain to circumstances in which an action in rem may be invoked in respect of "questions or claims" enumerated in Section 1(1)(a)-(s).* ***Paragraphs specified (a)-(c) and (s). Paragraph (h) (supra) was specifically excluded. It is my view, that this exclusion is of telling effect****. I cannot perceive how the appellant's claim for unpaid freight within the Slot Charter Agreement can be other than:-*
>
> *"(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"*
>
> ***As already said, any claim falling within the parameter of Section 1(1)(h) is not subject to an action in rem****."*
>
> [My emphasis]

[94] In that case, the issue was whether a claim for unpaid freight was properly brought as an action in rem. At first instance, R. Anderson J held that there was no evidential basis for the action to proceed in rem and the order for the arrest of the first defendant's container was accordingly set aside. The critical issue was whether the court had the jurisdiction to proceed with the matter as filed.

[95] In this matter, there has been no challenge to the court's jurisdiction to try the claim. However, the issue of jurisdiction has been raised in respect of whether an application for interim payment can be entertained in an action brought in rem. *Is this an appropriate case for the grant of an order for interim payment?*

[96] Awards of Interim payments have been described as being intended to *"tide over plaintiffs who have lost earnings and incurred medical and other expenses while the slow process of litigation unwinds".*[6] There is however no requirement for a claimant to prove need.[7]It is a payment on account of the compensation the claimant is likely to be awarded by the court.

[97] Rule 17.6(1)(d) of the ***CPR*** sets out the circumstances in which the court may an order for interim payment. It states:-

> *"The court may make an order for an interim payment only if:-*
>
> *except where paragraph (3) applies, it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs;"*

[98] This is subject to rule 17.6(2) which states:-

> *"In addition, in a claim for personal injuries the court may make an order for the interim payment of damages only if the defendant is-*
>
> *(a) insured in respect of the claim;*
>
> *(b) a public authority; or*
>
> *(c) a person whose means and resources are such as to enable that person to make the interim payment."*

---

[6]McGregor on Damages 16th ed. para. 1527
[7]Stringman v McCardle [1994] 1 W.L.R. 1653

[99] Mr. Desai, in opposing the application argued that the court must be mindful that the defendant has made an ancillary claim against DSSL claiming a contribution or indemnity in the event that it is found liable. He stated that DSSL is in fact, the proper tortfeasor but has not been added as a party to the action by the claimant. He argued that in such circumstances the position of the parties may change significantly at the trial.

[100] Respectfully, I am not persuaded by Counsel's argument. The question that must be asked and answered is whether if the claim went to trial the claimant would obtain judgment against the defendant for a substantial amount of money or costs.

[101] Simply put, regardless of the defendant's belief as to liability, does the claimant have a strong case against the defendant whom he has chosen to sue?

[102] The defendant has not denied being presented with the dive advisory form. This form was signed by the master and it indicated that divers would be conducting a dive and inspection of the vessel at 16:15 hrs (4:15 p.m.). The form also requested that certain steps be taken in advance of the dive being conducted but does not state how long the dive would last.

[103] The defence also indicates that the defendant was aware that after the presentation of the dive advisory form to the captain that the claimant went underwater. It has however been stated that the defendant did not know what time the claimant commenced the dive.

[104] The defendant in its defence does not admit or deny that one of its propeller blades spun and hit the claimant and has said that it does not know what happened. The defendant does however admit that between the hours of 16:40 (4:40 p.m.) and 16:48 (4:48 p.m.) it conducted tests of the main engine. This, it said, was a normal procedure when departing port for a sea voyage.

[105] Save and except for the fact that the claimant says that it was around 4:35 pm that a member of the crew started the engine while he was still conducting the search, the defence does not, in my view, launch a robust attack on the claimant's allegations. Having admitted that it was aware that the diver went underwater it seems to me that it would have been necessary to ascertain his whereabouts before conducting the engine test.

[106] On the material before me, I am satisfied that the defendant having been presented with the dive advisory form owed a duty of care to the claimant. Furthermore, since it has admitted that the engine was turned on and there is no statement in the defence that this occurred after the relevant persons were satisfied that the claimant had emerged from the water, it may also be said that it is highly likely that at trial the court will find that there was a breach of that duty.

[107] Having regard to the foregoing, it is my view that the claimant is likely to succeed in his action against the defendant. However, that is not the end of the matter. In order to obtain an order for interim payment the claimant must satisfy the court that the judgment will be for a substantial sum.

Judgment for a substantial amount of money or costs

[108] The claimant must prove, on a balance of probabilities, that he would obtain judgment for a substantial amount of money or for costs.

[109] Rule 17.5(5) of the ***CPR*** stipulates that the affidavit in support of the application must, among other things, state the claimant's assessment of the amount of damages or other monetary judgment that is likely to be awarded.

[110] The claimant's affidavit sworn February 1, 2017 indicates in paragraph 42 that damages will likely be assessed for more than twenty million dollars ($20,000,000.00).

[111] Paragraph 22 of that affidavit indicates that the sum of one million two hundred and thirty two thousand four hundred and fifty eight dollars and eighty seven

cents ($1,232,458.87) was incurred for medical expenses. Receipts have been exhibited in to order to substantiate that sum and I am satisfied that that sum was spent by the claimant.

[112] In paragraph 30 of said affidavit the claimant's earnings are outlined and various documents exhibited confirm the figures presented to the court. The letter from DSSL indicates that the claimant on average performed eight (8) anti narcotic dives and one (1) hull cleaning per month. He was paid United States three hundred dollars (US$300.00) for each dive and United States five hundred dollars (US$500.00) for the hull cleaning. He would therefore earn approximately United States two thousand nine hundred dollars (US$2,900.00) per month from DSSL.

[113] The claimant also exhibited copies of receipts issued by him for commercial diving and teaching. Based on those receipts his average monthly earnings for commercial diving was two hundred and seventy one thousand six hundred and sixty dollars ($271,660.00) and two hundred and nine thousand and six hundred dollars ($209,600.00) for teaching prior to the accident. The claimant has been unable to engage in these activities since the accident.

[114] Based on the above figures he could have earned four million one hundred and ninety two thousand dollars ($4,192,000.00) from teaching and $5,433,200.00 from diving for the period May 28, 2015 to January 28, 2017. The total figure would be nine million six hundred and twenty five thousand two hundred dollars ($9,625,200.00).

[115] Paragraphs 28 and 29 convey that the claimant had entered into a contract with the Port Authority of Jamaica and has been unable to complete his contract due to his injuries. A letter dated January 20, 2016 was exhibited to this effect. That letter also indicated at that time that the claimant was likely to lose earnings of at least United States seven thousand two hundred dollars (US $7,200.00). I accept that figure

[116] Based on the affidavit evidence, it appears that the sum of nine million six hundred and twenty five thousand two hundred dollars (9,625,200.00) is likely to be awarded for loss of earnings.

[117] Where future loss of earnings is concerned, it was submitted that based on the claimant's age (31) a multiplier of 11 would be appropriate. Mr. Gibbs submitted that based on the sums earned for commercial diving and teaching, the claimant's net annual income would be approximately four million three hundred and thirty one thousand three hundred and forty dollars ($4,331,340.00). Based on the multiplier his future loss of earnings were likely to be assessed in the region of forty seven million six hundred and forty four thousand seven hundred and forty dollars ($47,644,740.00).

[118] Where general damages for pain and suffering and loss of amenities is concerned Mr. Gibbs relied on the cases of ***Pellington v Bowen*** unreported, Supreme Court Suit No. C.L. 2001/P036, judgment delivered 18 July 2002 and ***Hall-Graham v Lumsden and Williams*** unreported, Supreme Court Suit No. C.L. 2000/G 140, judgment delivered 18 July 2002. He submitted that based on those cases the award under this head would be somewhere between one million four hundred thousand dollars ($1,400,000.00) and three million dollars ($3,000,000.00).

[119] Based on the foregoing, I have concluded that the claimant would obtain judgment for a substantial sum.

[120] I am however mindful of the provisions of rule 17.6(5) which states:-

> *"The court must take into account-*
>
> *(a) contributory negligence (where applicable); and*
>
> *(b) any relevant set-off or counterclaim."*

[121] I am persuaded by Mr. Gibbs' arguments regarding the issue of contributory negligence. The dive advisory form implicitly indicated which actions could

threaten a diver's safety. In the defence it is admitted that, in preparation for departure, an engine test was done. The defence also reveals awareness that a diver went underwater, yet it is silent as to whether the diver's position was ascertained before conducting such tests. On the facts of the case, it is my view that even if the claimant is deemed contributorily negligent, it would not result in a substantial reduction in damages.

[122] Part 17 of the ***CPR*** does not indicate that, in making an order for an interim payment a court must consider ancillary claims.

[123] Rule 17.6(3) of the ***CPR*** indicates that in claims for damages for personal injuries where there are two or more defendants the court may make an order against any defendant if certain conditions have been satisfied. In this case, there is only one defendant. If DSSL is joined to the claim it would be an ancillary defendant."

[124] In ***McDermid v Nash Dredging and Reclamation Co Ltd*** (supra) the plaintiff was employed by the defendants as a deckhand. In the course of his employment he worked on board a tug owned by a Dutch company and under the control of a captain employed by the Dutch company. The plaintiff's work included untying ropes mooring the tug fore and aft to a dredger. The system used by the captain was that when the plaintiff had untied the ropes and it was safe for the captain to move the tug the plaintiff would give a double knock with his hand on the wheelhouse. At the time in question the plaintiff had untied the aft rope but was still in the course of untying the forward rope when the captain, without waiting for the plaintiff's signal, put the engine of the tug hard astern. As a result, the rope snaked round the plaintiff's leg causing him serious injury. The plaintiff brought an action against the defendants for damages for negligence.

[125] The House of Lords held that that the defendants owed the plaintiff a duty of care to devise a safe system of work for him and to see that that system was operated. The court also held that the defendants' duty of care was non-delegable in the sense that they were personally liable for its performance and

could not escape their liability if it was delegated and not properly performed. Accordingly, although they had delegated the performance of their duty of care to the captain, they could not avoid their own liability to the plaintiff.

[126] In the above case, the claimant chose to sue his employer, Nash Dredging and Reclamation Co. Ltd. and not the ship's captain who was allegedly negligent. The ship's captain was employed by the parent company of the defendant. Mr. Gibbs indicated that in that case, the court stated that the employer could not escape liability on the basis that it had delegated responsibility to an independent contractor. I am satisfied that in the instant case, whatever the view may be as to the liability of the claimant's employer, it does not efface the duty of care owed by the defendant to the claimant. I am also mindful that if a defendant has been sued and does not believe he is responsible then he is not without recourse.

[127] Where there are multiple potential defendants, the claimant will have to ask himself, "whom should I sue"? This answer will be determined by considering and balancing a number of factors including potential legal liability, the extent of the injury or damage sustained by the claimant, whether the defendant is insured, costs implications, and any other factors particular to the case. He may proceed against one or he may proceed against more than one. Within the bounds of the law, the choice is his and the court must determine whether the defendant(s) he has chosen should be held responsible. (See ***Hays plc v Hartley*** [2010] EWHC 1068 (QB) para 26)

[128] In ***Victor Chang*** (supra) the claimant while travelling along East Kings House Road in the early morning collided in the back of a truck. The driver had experienced mechanical difficulties and as a result of this the truck was left in a stationary position on the roadway. The claimant sustained personal injuries and sued the driver and the owner of the vehicle for damages. The claimant alleged that the truck was parked in a dark area on East Kings House Road without any lights or rear lights on. The defendants stated that the truck was parked in a well lit area at a point where the road was straight with no visual impediments.

[129] Straw J examined some authorities which came to very different conclusions. In one case it was held that a lorry driver was negligent in leaving an unlit obstruction which was a danger to oncoming traffic. In another case it was held that the mere fact that an unlit vehicle is found at night on a road is not sufficient to constitute nuisance; there must also be some fault on the part of the person responsible for the vehicle. It was accepted that the presence of an unlit vehicle on a dark road at night is prima facie evidence of negligence but on the particular facts, it was held that no danger was presented by the presence of the defendant's motor car. In the other cases, the claimants were deemed contributorily negligent. Given the state of the law, Straw J did not grant an order for an interim payment.

[130] Each case must be decided upon its own facts and on the facts in ***Victor Chang*** the learned judge was not satisfied that the claimant would obtain judgment against the defendant(s) for a substantial amount of money or for costs. ***Victor Chang*** was a case that, in my judgment, fell squarely within the ambit of 'competing contentions on the part of the claimant and the defendant which, on the pleadings, are of equal weight, and nothing emerged at that stage of the proceedings to "tilt the balance",' (See ***Phyllis Anderson v Windell Rankine*** below). This case, in my view, does not assist the defendant.

Is the defendant insured?

[131] Mr. Desai submitted that the defendant is a member of a Protection and Indemnity Club and is therefore not truly insured in the manner contemplated by the ***CPR.*** He indicated that the defendant was subject to the "pay to be paid" rule was only entitled to be indemnified after its liability was established. He argued that in the present circumstances, it could not make a claim if the order is granted as there has been no finding of liability.

[132] In the text **Southampton on Shipping Law** by the Institute of Maritime Law, on page 337, it is stated:

> *"6. PROTECTION AND INDEMNITY INSURANCE: P&I CLUBS*
>
> *(a) Introduction*
>
> *P & I Clubs provide third party liability insurance for shipowners. The modern Protection and Indemnity Associations (P&I Clubs) are the descendants of the mutual protection clubs and indemnity clubs, which were founded by British shipowners in the nineteenth century in reaction to changes in the legislation affecting their third party liabilities and to the perceived failure of marine insurance companies and marine underwriters satisfactorily to respond to their needs. The distinction between protection and indemnity risks is today largely academic, but originally, protection covered liabilities to personnel and for damage to property, while indemnity covered liabilities to cargo owners under a contract of carriage. Today most shipowners still obtain their third party insurance cover from P&I clubs although it is possible to insure with other underwriters, usually for a fixed premium and with generally lower limits of cover than those offered by the clubs. Two of the features which distinguish P&I Clubs from other insurers are that they are controlled or governed by their shipowner members, which ensure their members a measure of flexibility, and that they are run on a non-profit making or mutual basis, making them economically attractive."*

[133] Similarly, in Bennett, ***The Law of Marine Insurance*** the learned author stated:-

> *"While the essence of protection and indemnity (P. & I.) cover is insurance against third party liability, it is axiomatic that P. & I. Cover operates as indemnity not liability insurance. Whereas the risks covered comprise a wide range of third party liabilities, all P. & I. Club rules contain a 'pay first' or 'pay to be paid', clause by virtue of which the club's liability is restricted to reimbursing the member in respect of sums paid to third parties in respect of covered liabilities...*

> *P. & I. Insurance is designed to provide comprehensive mutual* cover *of liabilities incidental to the ownership and operation of ships."*

[134] The manner in which Protection and Indemnity Clubs operate was also dealt with in Lowry & Rawlings, ***Insurance Law: Doctrines & Principles.*** The learned authors state as follows:-

> *"It is common practice for shipowners to enter their ships in Protection and Indemnity Associations (p and i clubs) in order to obtain wider cover than that generally afforded by ordinary marine insurance policies. By entering a ship in a p and i club the shipowner becomes a member of that club. These clubs operate on a system of mutual insurance under which the successful claim of one member is paid out of the contributions of, and calls made on, all the club's members including the insured; each member is thus both an insurer and insured. It is standard practice for the rules of such clubs to contain a 'pay to be paid' provision whereby it is a condition precedent to the insurer's liability to indemnify the insured, that the latter should first discharge liability to third parties".*[8]

[135] Mr. Desai relied on the following extract from the text Baatz, **Maritime Law** 2nd Ed when addressing the "pay to be paid" rule:-

> *"On occasion the clubs, entirely without prejudice to their right to invoke the "pay to be paid" rule, may be prepared to advance funds before the member has settled a claim. This procedure is likely to be considered in personal injury cases and obviously applies where a club guarantee has been given. Where particularly large sums of money are involved in a settlement it may make practical sense for the club to provide funds rather than requiring the member to do so."*[9]

---

[8]Page 283
[9]Page 534

[136] This extract in my view indicates that the “pay to be paid” rule may be quite flexible in its operation.

[137] The flexibility of P. & I. Clubs in matters involving personal injury was also discussed in ***Firma C-Trade SA v Newcastle Protection and Indemnity Association; The Fanti; Socony Mobil Oil Co Inc and others v West of England Ship Owners Mutual Insurance Association (London) Ltd; The Padre Island*** [1990] 2 All ER 705. In that case Lord Goff of Chieveley said:-

> *“ There may conceivably be cases in which there is loss of life or personal injury, arising from default on the part of shipowners or their employees, in which insolvency of the shipowners could have the effect that a P & I club in which the relevant ship was entered could, in theory, decline to make payment direct to the injured party or his next of kin. Your Lordships were informed that, in such a case, the directors of one, if not both, of the clubs in the present litigation waive the condition of prior payment; indeed, it is not to be forgotten that the directors of P & I clubs are themselves shipowners, who are capable of having regard to the wider interests of their industry. Not a single example was given to your Lordships of an individual claimant in such a case being defeated by a club invoking the condition of prior payment. Manifestly, P & I clubs did not incorporate the condition of prior payment in their rules for the purpose of defeating the application of the 1930 Act, since the condition was a regular feature of P & I club rules long before 1930. Moreover, it seems highly unlikely that other liability insurers would (if they were free to do so) incorporate any such condition in their policies for that purpose, because to do so would be likely to render their insurance policies less marketable in a competitive world.”*[10]

[10]Page 720

[138] Mr. Desai argued that if the order for interim payment is made against the defendant who is uninsured that would be contrary to the provisions of the ***CPR*** and be at variance with the policy underlying the rule.

[139] The aim of insurance is to shift the risk from the insured to the insurer. Insurance contracts have therefore been described as contracts of indemnity. Part 17 of the ***CPR*** necessitates the balancing of competing interests; the needs of the claimant and the protection of a defendant from financial ruin. There is no dispute that the defendant is a member of the protection and indemnity club. Based on the definitions in the various texts, it is in my view, insured. The case of ***Firma C-Trade SA v Newcastle Protection and Indemnity Association; The Fanti; Socony Mobil Oil Co Inc and others v West of England Ship Owners Mutual Insurance Association (London) Ltd; The Padre Island*** (supra) demonstrates that Protection and Indemnity Clubs are flexible in their approach and are not likely to invoke the *"condition of prior payment".* Having arrived at that conclusion I need not consider whether the defendant is a person with means and resources.

Summary judgment applications and interim payment applications

[140] Mr. Desai argued that applications for interim payments in admiralty matters should be treated in the same way as applications for summary judgment as the test which is to be applied is quite similar. He submitted that since rule 15.3(e) of the ***CPR*** provides that summary judgment is not available in admiralty matters, an order for an interim payment in the instant case would be inconsistent with the ***CPR***.

[141] Mr. Gibbs countered by stating that it must be borne in mind that the applications are in fact different because an order for summary judgment signifies the end of the matter. He submitted by contrast an order for interim payment is interlocutory in nature as the matter will continue to trial.

[142] In the case of ***GKN Group v Revenue and Customs Commissioners*** [2012] 3 All ER 111, Aiken LJ in considering rule 25.7 of the ***Civil Procedure Rules*** (UK) (which is analogous to Part 17 of the ***CPR***) stated as follows:-

> *"…In the case of an application for an interim payment order under r 25.7(1)(c), of course, the claimant has to satisfy the court on a balance of probabilities about an event that has not, in fact, occurred;…*
>
> *That leads on to the next and more important question: of what does the claimant have to satisfy the court? To which the answer is: that if the claim went to trial, the claimant would obtain judgment for a substantial amount of money from this defendant. Considering the wording without reference to any authority, it seems to me that the first thing the judge considering the interim payment application under para (c) has to do is put himself in the hypothetical situation of being the trial judge and then pose the question: would I be satisfied (to the civil standard) on the material before me that this claimant would obtain judgment for a substantial amount of money from this defendant.*
>
> *The second point is what precisely is meant by the court being satisfied that, if the claim went to trial, the Claimant "would obtain judgment for a substantial amount of money"? In my view this means that the court must be satisfied that if the claim were to go to trial then, on the material before the judge at the time of the application for an Interim Payment, the Claimant would actually succeed in his claim and furthermore that, as a result, he would actually obtain a substantial amount of money. The court has to be so satisfied on a balance of probabilities. The only difference between the exercise on the application for an Interim Payment and the actual trial is that the judge considering the application is looking at what would happen if there were to be a trial on the material he has before him, whereas a trial judge will have heard all the evidence that has been led at the trial, then will have decided what facts have been proved and so whether the Claimant has, in fact, succeeded. In the latter case, as Lord Hoffmann makes plain in Re B ([2008] AC 561 at 2) if a judge has to decide whether a fact happened, either it did or it*

> *did not: the law operates a "binary system" and there is no room for a finding that it might have happened. In my view the same is true in the case of an application under CPR Pt 25.7(1)(c).* ***The court must be satisfied (to the standard of a balance of probabilities) that the Claimant would in fact succeed on his claim and that he would in fact obtain a substantial amount of money. It is not enough if the court were to be satisfied (to the standard of a balance of probabilities) that it was "likely" that the Claimant would obtain judgment or that it was "likely" that he would obtain a substantial amount of money****.*
>
> *Next there is the question of what is meant by "a substantial amount of money". In my view that phrase means a substantial, as opposed to a negligible, amount of money. However, that judgment has to be made in the context of the total claim made. What is a substantial amount of money in a case where there is a comparatively small claim may not be a substantial amount when the claim is for a much larger claim. It may be that in very small claims an Applicant could never satisfy the court that, even if it obtained judgment, the amount of money it would obtain would be "substantial". But that is not this case and each must be decided on its facts.*
>
> [My emphasis]

[143] In ***Phyllis Anderson v Windell Rankine*** (unreported), Supreme Court, Jamaica, Claim No 2006HCV05105, judgment delivered 10 December 2008, F. Williams J (Ag) (as he then was) said:

> *"…the conclusions that may be drawn and the principles stated in respect of an application under rule 17.6 (d) are these:*
>
> *(i) For a claimant to successfully apply for an interim payment, he/she must satisfy a court that he/she will likely win the case against the defendant.*
>
> *(ii) The standard by which that must be done is the civil standard (i.e proof on a balance on probabilities), but*

such proof must be effected at the higher end of that scale.

(iii) It is expected that such applications will only succeed where the claimant has a very strong claim and where his/her action is likely to be easy to establish. Establishing a "mere" prima facie case will not be enough.

(iv) Where the competing contentions on the part of the claimant and the defendant are, on the pleadings, of equal weight, and nothing emerges at that stage to "tilt the balance", such an application will likely fail.

(v) Even where the claimant might be able to establish a ground for the making of an interim payment, the court still retains a discretion in deciding whether or not such a payment should be made."

[144] The foregoing cases reveal that a "mere" prima facie case will not be enough to warrant the grant of the order for interim payment. Therefore, the similarity with the test for summary judgment applications is striking. A judge before whom a summary judgment application is brought is tasked with deciding whether the claimant has no real prospect of succeeding on the claim or issue or whether the defendant has no real prospect of successfully defending the claim or issue.

[145] Though I am mindful of Mr. Gibb's submissions regarding the difference, I am of the view that Mr. Desai's argument is not without merit.

[146] That being said, I must point out that Counsel has overlooked the fact that admiralty proceedings may be brought either *in rem* or *in personam*. Rule 15.3(e) of the ***CPR*** does not indicate that summary judgment is not available in admiralty proceedings generally but it indicates that summary judgment is not available in admiralty proceedings *in rem*. Having found that the owners of the defendant have submitted to the jurisdiction of the court and that as a consequence the matter will proceed as an action *in personam* and *in rem*it is my view that an order for an interim payment can be made.

Amount

[147] Rule 17. 6 (4) of the ***CPR*** states:

> *"The court must not order an interim payment of more than a reasonable proportion of the likely amount of final judgment."*

[148] This rule requires the court to adopt a cautious approach in order to avoid overpaying a claimant. This was recognised in ***Schott Kern Ltd v Bentley and Others*** [1991] 1 QB 61, 74B**.**byNeill LJ. The principle was summarized by Smith L J in ***Stringman v McArdle*** as follows:-

> *"Therefore what the court is concerned with in fixing the quantum is that it does not exceed a reasonable proportion of the damages which in the opinion of the court are likely to be recovered".*[11]

[149] Based on the foregoing, I am of the view that an interim payment in the sum of ten million eight hundred and fifty seven thousand six hundred and fifty eight dollars and eighty seven cents ($10,857,658.87) is appropriate.

[150] In the circumstances it is ordered that:-

(i) An interim payment in the sum of $10,857,658.87 be made to the claimant;

(ii) The said sum is to be paid into a joint account in the names of Hylton Powell and Myers, Fletcher and Gordon on or before the 9th August 2017;

(iii) The defendant has leave to appeal;

(iv) In the event that the defendant fails to file its appeal within fourteen days of the date of this order, the said sum shall be paid to the claimant's attorneys-at-law.

---

[11][I9941 PIQR 230.