



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE ADMIRALTY DIVISION

CLAIM NO. 2016 A00003

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

CONSOLIDATED WITH

CLAIM NO. 2017 A0006

BETWEEN	ELBURG SHIP MANAGMENT	CLAIMANT
AND	ENTERPRISE SHIPPING AGENCY	1ST DEFENDANT
AND	CAPITALEASE S.P.A	2ND DEFENDANT
AND	MOTOR SHIP TRADING FABRIZIA	3RD DEFENDANT

Admiralty – Ship arrested and ordered, sold – Application to vary Order – Whether under liberty to apply – Rule 26.17 – Whether Change in Circumstance Whether mortgagee to be put in possession – Whether effect of variation is to end arrest and sale by bailiff – Whether order interlocutory or final.

Vincent Chen and Makene Brown instructed by Chen Green and Co. for Jebmed S.R.L

Christian Desai and Amanda Montaque instructed by Myers Fletcher and Gordon for Capitalease S.P.A and Motor Ship Trading Fabrizia

Ana Gracie instructed by Rattray Patterson and Rattray for X/O Shipping A/S

Ramon Clayton instructed by Samuda and Johnson for Elburg Shipping Management.

Heard: 7th, 8th, 9th and 15th August, 2017

IN OPEN COURT

CORAM: BATTS, J.

[1] On the first morning of hearing I was informed that Ligabue S.P.A were represented on the record by Nunes Scholefield DeLeon and Co, and that they had been served but were not present. They have taken no active part in this hearing. Ms. Ana Gracie informed the court that Nunes Scholefield DeLeon and Co indicated to her they had no objection to Mr. Chen's application.

[2] These consolidated actions have not been re-titled. I will therefore refer to the parties by name. It is recommended that where, as here, there are several claimants in a consolidated action a decision is made whether to have a single instructing attorney and how the trial will be conducted. This ought to be done prior to the trial. Chaos may reign at trial if directions are not given. (See generally **Civil Procedure Volume 1 (The White Book) 2007, notes to Order 3.1.10-11**).

[3] This litigation concerns a ship, The Trading Fabrizia, which flies the flag of Malta. Jebmed S.R.L (hereinafter referred to as Jebmed) are mortgagees and the claimants who obtained an order for the arrest of the ship on the 30th October, 2016. The ship is owned by Capitalease S.P.A (hereinafter referred to as Capitalease). X/O Shipping S.P.A (hereinafter referred to as X/O) are interveners pursuant to an order dated the 23rd December, 2016. They claim an interest in respect of bunker C oil supplied to the ship. Ligabue S.P.A (hereinafter referred to as Ligabue) are interested parties. Elburg Ship Management is a claimant and are the agents for the former crew of the vessel whose claim is for wages due. They obtained an order for arrest prior to the consolidation of these actions. Enterprise Shipping Agency is alleged to be the agent of Capitalease and the ship.

[4] The matter has taken a rather unusual turn. Jebmed having successfully obtained orders for arrest and then for the sale of the ship, have now had a change of heart. They say, and it is not contested, that the vessel has been deregistered. They also say the vessel is not seaworthy. There is it seems some contest on that. In any event Jebmed (the mortgagee) wants to be given possession of the ship. It is their intention to do an assessment and if it suits their while, to transport the vessel to Malta and effect repairs and re-registration. In that state, they say, the vessel will fetch a higher price and be sure to discharge their mortgage as well as any other amounts due to them. The owners/mortgagors, Capitalease, oppose the application. They deny the vessel is in as bad a condition as Jebmed would have us believe. They wish the sale to be effected by the bailiff. They say that they have located an interested buyer at a price that

would suffice to discharge their debts. X/O and Elburg, also have concerns about the mortgagee's application.

[5] Prior to commencement I invited all parties to have a discussion. It seemed to me that if, as their counsel indicated, the mortgagee was prepared to discharge all other claims and put the vessel in better condition, prior to placing it on the market, it might be the best thing to do. The parties were however not able to arrive at an agreement and the hearing therefore commenced at 2:00pm.

[6] Jebmed's Notice of Application filed on the 17 July, 2017 seeks, pursuant to liberty to apply in the order of the Honourable Mrs. Justice Carol Edwards made on the 28th June, 2017, the following relief:

- a) A declaration that the Claimant is entitled to possession as mortgagee under the mortgage dated 6th day of May, 2016.
- b) The Claimant be given possession of M/V Trading Fabrizia (the ship) with costs related to compliance with this order being payable as a priority payment after bailiff's fees, costs and expenses upon release of the ship.
- c) Abridgment of time and for the court to hear the matter notwithstanding that it has been short served under the rules (Rule 26.11 (2) (c)).
- d) Permission for the mortgagee to itself bail the vessel by posting the appropriate security as ordered by her Ladyship Justice Carol

Edwards or to take such steps as are appropriate to bring about the release of the vessel and to bring the costs of so doing to account as monies due and payable under the mortgage by the mortgagor/defendant (Rule 70.11(4) (b) and (c) (i).

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

[7] The application references an order of my sister Justice Carol Edwards. In fact, and as will be elaborated upon later in this judgment, Justice Edwards made several orders in this matter. Mr. Chen, counsel for Jebmed submitted that he was in effect seeking a variation of Justice Edward's earlier order. He was doing so pursuant to liberty to apply or the court's powers to vary an order.

[8] I enquired whether this matter ought not to be placed before Justice Edwards. The parties indicated that enquires at the registry revealed that the learned judge was not available to hear the application this week. This I should say was consistent with information I received. Mr. Chen stated, and he was supported by Mr. Clayton (counsel for Elburg) on this, that he recalled that Justice Edwards had on the last occasion,

invited the parties to try to obtain an earlier date from the registry if possible. In these circumstances I continued with the hearing of the matter, although not without some misgiving.

[9] The orders made by Justice Edwards after a hearing on the 19th July, 2017 were as follows:

- a) Upon Notice of Application for an order for sale filed on the 1st June, 2017:
 - i. The application for sale is granted on condition.
 - ii. Provided that the defendant fails to provide alternate security in the amount of USD\$450,000.00, UAD\$139,000.00, USD\$778,497.79 and USD\$537,836.00 in the form of bonds, guarantees, payments into court or undertakings satisfactory to Jebmed S.R.L, Ligabue S.P.A, Elburg Ship Management and X/O Shipping A/S respectively, the Admiralty Bailiff is empowered to proceed to appraisalment and sale of the M/V “Trading Fabrizia” within 30 days of this order.
 - iii. Should the defendant comply with the conditions at (2) before the expiration of 30 days following upon the date of this order, the vessel shall be release (sic) from arrest.
 - iv. Liberty to apply.
 - v. Costs to the Claimant Jebmed S.R.L to be agreed or taxed.

- b) Upon Notice of Application for Case Management Orders heard on 19th July, 2017 it was ordered:
- i. Standard disclosure on or before 7th September, 2017.
 - ii. Inspection of documents disclosed on or before 21 September, 2017.
 - iii. Witness statements and expert reports to be filed and exchanged on or before 6th October, 2017.
 - iv. Listing questionnaires to be filed and exchanged on or before 5th October, 2017.
 - v. Pre-trial review is set for 18th October, 2017 at 2 pm for two (2) hours.
 - vi. Whatever applications the parties may need to make can be made at the pre-trial review.
 - vii. Trial by Judge alone in open court is set for the week of 13th November, 2017.
 - viii. Ordinary witnesses limited to three (3) and one (1) expert witness for each party.
 - ix. Each party to file and exchange its own statement of facts and issues on or before 13th October, 2017.
 - x. Notice of application for possession made by Jebmed S.R.L and Notice of Application for default judgment on the counter

claim made by the defendant (fixed for) 3rd October, 2017 for one (1) day.

- xi. Claimant's Jebmed S.R.L amended claim to stand as filed.
 - xii. Costs to be costs in the claim.
 - xiii. Claimants Jebmed S.R.L, attorneys-at-law to prepare file and serve orders.
- c) Upon Notice of Application by Jebmed to abridge the time for the court to hear the matter notwithstanding that it is short served heard on the 19th July 2017 ordered:
- i. Application to abridge time denied.
 - ii. Leave to appeal that order denied.
- d) Upon an application by Capitalease to strike out claim filed on the 19th May 2017 and Jebmed's application to amend the claim:
- i. The application to strike out was refused with costs to Jebmed.
 - ii. Permission to amend the claim was granted with costs to Capitalease.

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

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

- [11] Mr. Chen relied on written submissions filed on the 18th July, 2017. He relied also on affidavits of Makene Brown dated 2nd April 2017, 17 July 2017 and 24 July 2017. These affidavits allege several defaults by Capitlease. It is asserted that a court in Malta declared the right of Jebmed to take possession of the vessel among other things. The registration in Malta is closed and the vessel no longer has a flag. This it says has lowered the value of the vessel. It is alleged that the vessel's seaworthiness has deteriorated and that the worldwide activity in shipping has declined further adversely impacting any price that may be obtained at this time. That the vessel needs to be dry-docked and this cannot be done in Jamaica. It is intended to tow it to Malta to have that done. There is concern that as we are in the hurricane season, the vessel may not be able to move to safety if a hurricane threatens. The affidavits also speak of an effort to take possession which was resisted and/or refused. The affidavits assert that the vessel is undermanned and in the

event of an emergency requiring its removal, such as an approaching hurricane, there is insufficient crew on board to do that. It is said that it is uncertain whether the main engine can be started. A hearing in October as fixed by Edwards J, is too late as the expense will have increased by then. Possession is necessary if Jebmed is to obtain the necessary funding to pay the amount required to release the ship. The bailiff will only give Jebmed possession if the court so orders or directs.

- [12] Jebmed's affidavits also assert that Capitlease has made no payments or otherwise satisfied the conditions imposed by Edwards J. Jebmed's lawyers wrote to the bailiff requesting that he take no steps to sell pending the outcome of this application. The affidavits also speak to circumstances of alleged urgency. Paragraph 5 of the affidavit dated 24th July 2017 states:

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

- [13] It is in the context of these assertions of fact that Mr. Chen made his submissions. Jebmed, he submitted, is seeking to exercise the mortgagee's right to take possession. He relied on **Fisher and Lightwoods Law of Mortgage** 10th edition chapter 29, **Den Norske Bank ASA v. Acemex Management Company Limited [2003] EWCA Civ 1559** and **Silven Properties Limited v. Royal Bank of Scotland [2003] EWCA Civ 1409**. This right to possession he submitted existed even in

the absence of default if, for example the security was in danger, **The Manor [1907] P.D 339**. Mr. Chen references the findings of the court, see the judgment of C. Edwards J. **Jebmed SRL v Capitalease et al [2017] JMCC18** (unreported) delivered 28 June 2017 paragraph 83 (i) to (xii), as demonstrating that circumstances sufficient to support taking of possession exist. He referenced the mortgage which gives the usual right to possession and other remedies see Tab 4 of the Bundle filed 3rd August, 2017. Mr. Chen submitted that the arrest by the bailiff effected possession by the mortgagee, **Hals Vol. 93 (2008)** paragraph 330. The application if granted will in effect vary the earlier order of this court. Once his client took possession and returned with the ship to Malta, it would effectively end the arrest by this court. There already are proceedings in Malta concerning this matter and Mr. Chen submitted that those proceedings ended in his client's favour.

- [14] The mortgagee has a duty submitted Mr. Chen to ***“act in a reasonable way to get the best price reasonably obtainable”***. It is therefore in everyone's interest for the orders he sought to be made. He saw no prejudice to anyone. The owners had, notwithstanding several opportunities given by this court, failed to raise the bond necessary to have the ship released. The vessel was a potential danger in the harbour and also was itself in potential danger. Jebmed's interest is to preserve its security and enhance its value prior to any sale. All other arrestors or persons who registered a charge will have to be paid prior to the vessel's release or a bond paid. Jebmed will be in the shoe of the owners if the variation is allowed. Mr. Chen adverted to an affidavit, filed by Capitalease on the first morning of the hearing. That affidavit stated that

Capitalease had located a buyer for the ship who was prepared to pay US\$9,750,000 for it. Mr. Chen submitted that the documentation exhibited did not prove there was a sale. It was he said a “red herring” and put there to buy time. In any event the amount referenced is less than earlier estimates of the ship’s value. He did concede that on the face of it, the amount might suffice to pay the sums outstanding under the mortgage.

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

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

[17] As with Makene Brown, the affiant, Amanda Montague is an attorney-at-law associated with the firm representing the entity on whose behalf the affidavit is sworn. Both ladies are also announced as appearing in this matter. I must observe, that save in circumstances of great urgency or where the facts lie exclusively in the bosom of the attorney, it is an undesirable practice for attorneys-at-law to swear to affidavits in a

matter in which they appear. Even then it is the best practice for the attorney swearing such an affidavit to withdraw as counsel.

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

[19] The submissions on behalf of Capitalease rely primarily on some procedural issues. These may well have been taken as preliminary points. In the first place Mr. Desai points out that the application is expressed to be made pursuant to 'liberty to apply' granted in the order of Edwards J. However, Mr. Desai submits liberty to apply only allows the court to deal with matters related to the working out of the order,

Causwell v. Clacken SCCA 129 of 2002 unreported judgment 18th February, 2004. Insofar as the application was intending to vary the earlier orders of Edwards J, it was rule 26.1 (7) which was relevant. Variation is only allowed when there has been a change in circumstances or the court has been misled at the time the order was made, **Harley v Harley [2010] JMCA11** unreported judgment 23rd March 2010 paragraphs 40-41. There has, submitted Mr. Desai, been no change of circumstance nor was the court misled at the time the orders were made. The application, he submitted, is tantamount to an abuse of process. The arrest as well as the order for sale pendete lite were obtained at Jebmed's instance. Jebmed ought not to be allowed to blow hot and cold.

[20] Mr. Desai states further that insofar as declaratory relief is being asked for it cannot be granted at this stage of the proceedings. This is because summary judgment is unavailable in admiralty proceedings, CPR Rule 15.3 (e). The declaration as to possession will be a final remedy at this interlocutory stage. He pointed to the state of the pleadings and indicated that consequent on a recent amendment by Jebmed the pleadings were not yet closed. If the declaration was unavailable all the other orders would fail because the orders sought on the application were interdependent. He submitted that the application was not for an interlocutory remedy. This is because if granted, and Jebmed met the conditions they would be removing the ship from the jurisdiction of the court. If ultimately successful at trial Capitalsease will have lost the protection of the court in terms of its ability to recover on its counter claim, **Miller V Cruickshank [1986] 44WIR 319** – was cited. Alternatively, and in the event the court were to make the order, Jebmed

ought to be required to post a bond reflective of the residual value of the ship over and above the value of the mortgage.

[21] Mr. Desai took issue with what he said was an attempt by Jebmed to place its expenses and outgoings in priority over that of other claimants. The priorities asserted Mr. Desai were outlined in the Shipping Act section 89 (2). In any event as there was not yet a judgement against any party this court could not exercise the power contained in CPR rule 70.13 (4). He urged the court to refuse the application.

[22] X/O's counsel, Ms. Anna Gracie, agreed with the submission that an order for possession cannot be made under liberty to apply. She referred an authority treating with applications to vary which was not a consent order, see **Brown v Chambers [2011] JMCA16** unreported judgment 29th July 2011. Ms. Grace conceded however that that court was considering variation of a final order. She agreed that Jebmed's equity in the ship might be unprotected if the variation applied for was allowed.

[23] Mr. Clayton, (counsel for Elburg) indicated he had no instructions whether or not to oppose the application. He however opposed that part of the application which gave Jebmed's claim priority over his client's. His client had obtained an order for arrest and that ought not to be lifted unless his client's claim was paid.

[24] I allowed Mr. Chen some latitude in his reply. He said section 89 (2) of the Shipping Act applied to priorities after a forced sale. If given possession the sale by Jebmed would not be a forced sale. His client will have discharged all claimants just as the owner would be required to do in order to have the vessel released. As regards the procedural issues he said what was important was the intent or purpose of Edwards J's order. This, said he, was to clear the harbour. The variation he proposed would also achieve that purpose. It is another way of carrying out the order and therefore might be achieved pursuant to liberty to apply. In that regard Mr. Chen referred to the judgement of Peter Smith J in **Independent Trustee Services Limited v S.P Noble (2011) 2F LR174**. Mr. Chen asserted that the orders he sought were interim and pendent lite as the litigation could continue. The bonds in respect of the other claimants and creditors would be paid into court. He urged the court to do right by the mortgagee and this required that they be permitted to exercise their right under the contract to take possession of the ship. As regards the owner's equity the general law places a duty on the mortgagee to protect that. The court should not allow procedural issues to defeat the mortgagee's right as this would be contrary to the overriding objective CPR rule 1.1. Mr. Chen urged the court to distinguish the claim in rem from the claim in personam which he says were wrongly combined. There is, he said, an intended or pending application as regards that matter. Mr. Chen distinguished the cases cited on the power to vary on the basis that they were all dealing with consent orders.

[25] I allowed Mr. Desai to comment on the new case which Mr. Chen cited in the course of his reply. Mr. Desai pointed out that that case concerned a

court order and circumstances of fraud. It was not inconsistent with his own submissions.

[26] Ms. Gracie in her further brief comments suggested that if Mr. Chen's client needed access to the ship that could be granted. Mr. Chen however made it clear access would not suffice. His client wanted possession.

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

[28] Mr. Sherriah also found the ships generator to be working excellently. He expressed the opinion that in its present condition the vessel can remain

in the harbour for the next two (2) years if prevailing weather conditions continue.

- [29] Mr. Sherriah also explained the circumstances surrounding his failure to allow the mortgagees representatives on board the ship. He indicated that the mortgagee's representative was sent to be "in my care and protection". He was unclear as to what were his responsibilities in that regard were. He was, he said, also not put in funds in that regard or with regard to the cost of launch services to attend the ship. The other reason for not facilitating the visit to the vessel was that he was mindful **"that conflict might have arises having men from opposite sides habituating and/or occupying similar space on board the ship and not knowing who would be in charge of the day to day operations"**.
- [30] Finally Mr. Sherriah attached several photographs in colour of various parts of the vessel. The photographs do support his description of the appearance of the ship. No issue was taken with the contents of Mr. Sherriah's affidavit.
- [31] Having considered the evidence, the submissions and the authorities it is apparent that the application by Jebmed must fail.
- [32] The attempt to vary the order of the court pursuant to liberty to apply is with respect ingenious but unsound. The Jamaican Court of Appeal has stated that when a court gives liberty to apply it does not extend the power to vary. **"In the case of final order which embodies or evidences a real contract the court will not normally interfere. When, however, in the case of a final judgment or order the necessity for a subsequent application is foreseen, it is usual to insert in the judgment or order words expressly reserving liberty to**

any party to apply to the court for further directions. The insertion of “liberty to apply” does not enable the court to deal with matters which do not arise in the course of the working out of the judgment, except, possibly, on proof of a change of circumstances – see Cristel v Cristel (supra). A judgement or order is not rendered any less final because liberty to apply is expressly reserved” per Smith JA **Causwell v Clacken SCCA 129/2002** unreported judgment 18th February, 2004 paragraph 17. So it may be to clarify its meaning; or to treat with a circumstance not contemplated when the order was made and which affects how it is to be performed. In this case Jebmed wants to take responsibility for the sale of the vessel out of the hands of the admiralty bailiff, it is not necessary for the carrying out of the order. Liberty to Apply cannot be the avenue for such a variation.

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

- [34] A final judgment or order of the court is also rather difficult to vary. Peter Smith J. in **Independent Trustees Services Limited v G.P Noble**

Trustees [2011] FLR 174 has opened the door to a more flexible approach as it relates to the variation of final orders, at page 196 paragraph 101: ***“One of the main purposes of the CPR was to give the courts complete flexibility over the proceedings before them and this is an important ancillary tool. I can see nothing in the rule which justifies it not applying to final orders if appropriate according to the facts of the case”***. These circumstances must be extremely rare because litigants are not to re-litigate issues already determined particularly where the order is final. An interlocutory order which is not final and is not made by consent, may be more easily varied. This is because it is not final. The court may adjust, change or even revoke these orders upon good and sufficient cause being demonstrated, such as a material change of circumstances. **Harley v Harley** (cited above), or upon new material. See **Collier v Williams [2007] 1A11ER 991** and **Civil Procedure Rules Vol. 1 (The White Book) [2007] Note 3.1.9; per Dyson LJ at paragraph 120 of Collier:**

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

[35] The more relaxed position as it relates to variation of interlocutory orders does not assist Jebmed’s cause. No material change in circumstances has been shown nor has new material been placed before the court. In any event the proposed variation would likely do great injustice. This is because an Order for Sale pendent lite is intended to preserve the status

quo pending trial. Unless the owner was able to provide the bond, and therefore release the ship, it is to be sold. The proceeds of sale would be held by the court, net of course of the bailiff's expenses, and be dealt with in accordance with the decision of the court after trial. Justice Edwards's order is silent as to how the proceeds of sale were to be distributed. It was not necessary to so indicate because a sale pendent lite merely serves to convert the res into specie. It is primarily to prevent deterioration of a wasting asset. In its regard see the authorities referred to and discussed in **Jedmed SRL v Capitalsease SPA** [2016] JMISC232 unreported judgment 23.12.16 at paragraph 16 -20.

[36] Jebmed's application seeks, as Mr. Chen says, to substitute the mortgagee for the owner in Edward J's order and thereby give the mortgagee the right to secure the vessel's release by posting a bond. It does not take into account the fact that the litigation in this court concerns issues between Jebmed and Capitalsease. These issues include whether or not Jebmed lawfully exercised its powers as mortgagee among other things, see paragraphs 9, 10 and 11 of the Defence and paragraphs 14, 15 and 16 of the Counter Claim both filed on the 12th December, 2016. It is no part of my function to decide the merits of the claim which include legal and factual issues. It suffices at this stage to say that issue is joined. As matters now stand, if Capitalsease is successful on its Counter Claim and in its Defence the ship, or if it is sold by the bailiff, the entire proceeds of sale may be returned to Capitalsease. This is because the mortgagee will have been held to have wrongfully initiated the vessel's arrest. The mortgagee would also be liable in damages and for costs. These are issues yet to be determined.

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

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

[39] In summary therefore Jebmed has not pointed to any relevant change in circumstance since Edwards J's order was made. Further it is not appropriate for me to vary an order made pendente lite in a manner that would finally dispose of one or more of the issues to be tried, that is

whether the mortgagee had properly exercised the power to take possession. Issue has been joined as to whether the mortgagee's rights are correctly exercised. The mortgagee, Jebmed, invoked the power of this court both to arrest and later to obtain an order for sale pendente lite. Converting the res to specie will preserve the status quo insofar as the respective claims and counter claims are concerned as well as the possibility of recovery. If it is that Jebmed wishes to resile from the jurisdiction it invoked it may take the steps allowed in law to withdraw legal action and discharge the arrest. That however may have consequences. As to which I say no more.

[40] For the reason stated above on the 15th day of August 2017 I made the following orders:

1. The Notice of Application for Injunction and Order for Possession filed on the 17th July, 2017 by Jebmed is dismissed.
2. Costs to Capitalease, X/O and Elburg to be taxed if not agreed.
3. Leave to appeal granted if necessary.

David Batts
Puisne Judge
18th August, 2017