[2021] JMCA Civ 44

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2020CV00052

BETWEEN	**CAPITALEASE SPA (PREVIOUS OWNERS OF THE M/V TRADING FABRIZIA)**	**APPELLANT**
AND	**JEBMED SRL**	**RESPONDENT**
AND	**BLUEFIN MARINE LIMITED (CURRENT OWNERS OF THE M/V BRIGHT STAR FORMERLY THE M/V TRADING FABRIZIA)**	**INTERESTED PARTY**

Krishna Desai and Miss Amanda Montague instructed by Myers, Fletcher & Gordon for the appellant

Makene Brown instructed by Chen, Green & Co for the respondent

Remone Foster instructed by Foster Galloway for the interested party

9 and 10 March, 8 October 2021

SINCLAIR-HAYNES JA

[1] I have read, in draft, the judgment of my sister V Harris JA. I agree with her reasoning and conclusion and have nothing to add.

V HARRIS JA

Introduction

[2] This is an appeal from the judgment of Simmons J (as she then was) ('the learned judge'), who, on 3 July 2020, while presiding in the Admiralty Division of the Supreme Court, refused the application of the appellant, Capitalease SPA ('Capitalease') for the return of the sum of US$1,000,000.00, which is being held by the court to satisfy a claim in rem filed by the respondent, Jebmed SRL ('Jebmed'). The learned judge also directed that "the issue of costs should be reserved until the determination of the matter".

[3] Jebmed and Capitalease are companies incorporated under the laws of Italy. Jebmed instituted proceedings in Jamaica to recover a debt allegedly owed to it by Capitalease under a mortgage agreement, which was secured by the Motor Vessel Trading Fabrizia ('the vessel') owned by Capitalease. Consequent upon a successful application by Jebmed, in the course of the proceedings, the vessel was sold by auction to the interested party, Bluefin Marine Limited ('Bluefin') and renamed Motor Vessel Bright Star. The proceeds of the sale were paid into court to satisfy several claims against Capitalease, including that of Jebmed. Bluefin then sailed the vessel to Malta.

[4] A claim was then filed by Jebmed in Malta, in respect of the same mortgage debt. As a result of that claim, Jebmed obtained an order from the Maltese court to arrest the vessel. To secure its release, Bluefin paid the debt claimed, but has been unsuccessful in challenging the arrest of the vessel at every tier of the Maltese courts. Accordingly, Jebmed is at liberty to withdraw that payment in satisfaction of its claim. It is against that background that Capitalease sought to have the balance of the proceeds of the sale in the amount of US$1,000,000.00, held in the court below to satisfy the debt claimed by Jebmed ('the fund'), returned to it. Of importance is the fact that the substantive claim in rem, filed in this jurisdiction, has not yet been determined.

[5] This appeal, therefore, is primarily concerned with whether the learned judge correctly exercised her discretion when she refused Capitalease's application for the return of the fund.

Background

[6] The dispute between the parties has produced extensive litigation in the past five years and, up to this point, realised numerous orders, six written judgments from the court below and two written judgments from this court. It is, therefore, necessary, to provide a comprehensive synopsis of the relevant aspects of the litigation so that the events that led up to this appeal are fully understood.

[7] On 5 May 2016, Jebmed and Capitalease entered into a Master Agreement. That agreement, among other things, granted Jebmed a first preferred mortgage in the amount of US$900,000.00, which was secured by the vessel, a commercial bulk carrier registered in Malta. In return, Jebmed provided Capitalease with financial credit and commercial management of the vessel. The mortgage was supported by a Deed of Covenants dated 11 May 2016, which provided that in the event of a default, Jebmed could enforce its security against the vessel.

[8] On Jebmed's case, such a default did occur. It was alleged that Capitalease breached the mortgage agreement by failing to procure the relevant insurance for the vessel and further that an invoice in the amount of US$699,046.38 for services rendered remained unpaid. As a result, Jebmed filed an admiralty claim in rem in the court below on 30 October 2016, to recover, among other things, the sum of US$699,046.38 plus compound interest at the rate of 8% per annum due to it as a result of Capitalease's alleged default under the Master Agreement and Deed of Covenants. On that same day, Jebmed obtained a warrant to arrest the vessel, which was then moored in Kingston. Capitalease, in response, filed an amended defence denying the debt claimed, as well as a counterclaim which sought damages for breach of contract, the unlawful arrest of the vessel, loss of profits and damage to its reputation.

[9] After Jebmed initiated proceedings, four more claims were filed against Capitalease. Several interim applications and orders relating to the vessel were made in the court below. On 28 June 2017, Edwards J (as she then was) granted Jebmed's renewed application for the sale of the vessel *pendente lite* (which means pending litigation), on condition that should Capitalease fail to provide, within 30 days of that order, alternative security in specified amounts satisfactory to Jebmed and the other creditors with claims against the vessel, the vessel was to be appraised and sold. However, the vessel was to be released from arrest once Capitalease provided the stipulated security. On 19 July 2017, Edwards J, on Jebmed's application, made an order amending the admiralty claim in rem for the increased sum of US$831,044.46.

[10] It is perhaps useful to indicate, at this point, that after the claim in rem was filed in the Supreme Court and while the ship was under arrest in Jamaica, Jebmed filed an action against Capitalease in the Maltese courts alleging a breach of the same mortgage. On 6 March 2017, Jebmed obtained from the Maltese courts a European Enforcement Order ('EEO') (enforceable only in European Union member states) for the sums claimed, as well as a declaratory judgment that they were entitled to possession of the vessel.

[11] Capitalease failed to satisfy the specified conditions ordered by Edwards J on 28 June 2017. As a result, on 9 January 2018, the vessel was sold by public auction to Bluefin for US$10,300,000.00, free from encumbrances. By court order dated 28 February 2018, the Admiralty bailiffs' fees as well as the costs and expenses of the arrest, auction and subsequent sale (including a claim filed by Maritime and Transport Services Limited) were duly satisfied from the proceeds of the sale. On 5 March 2018, Edwards J made an order that the balance of the proceeds of sale was to be paid into various accounts to secure the remaining claims, namely:

i. US$3,000,000.00 to satisfy Jebmed's claim;

ii. US$1,790,000.00 to satisfy claims by Elburg Ship Management (claim no 2017 A 00006), X/O Shipping A/S (claim no 2016 A 00005), and Ligabue SPA (claim no 2016 A 00004), apportioned in the amounts of US$850,000.00, US$800,000.00 and US$140,000.00, respectively; and

iii. US$4,847,188.88 with US$2,847,188.88 of that amount to be held by Capitalease's attorneys-at-law, while the remaining US$2,000,000.00 was to be returned to Capitalease once all the claims were satisfied.

[12] The claims filed by Elburg Ship Management, X/O Shipping A/S, and Ligabue SPA ('the latter claims') were subsequently determined by consent, discontinuance or adjudication. Thereafter, several orders were made for the return to Capitalease of the residue of the sale proceeds held in the accounts. In particular, further to an application by Capitalease, Edwards J on 22 October 2018, ordered the return of US$2,000,000.00 to Capitalease from the US$3,000,000.00 which was initially held to satisfy Jebmed's claim. Accordingly, Jebmed's claim is now secured only by the remaining US$1,000,000.00 which represents the fund.

[13] As mentioned earlier, after the sale of the vessel to Bluefin, it was arrested in Malta by Jebmed, under an executive warrant of arrest in respect of the same mortgage debt owed by Capitalease. Bluefin paid €779,346.61 (approximately US$910,000.00) to the First Hall Civil Court of Malta as security for the release of the vessel and filed an action for a declaration that the warrant of arrest was illegal and/or void under Maltese law. Bluefin unsuccessfully challenged the executive warrant of arrest up to the Maltese Court of Appeal. In a written judgment, dated 8 February 2019, that court dismissed Bluefin's appeal on the grounds that:

a) the enforcement of the Maltese mortgage in Jamaica had to await judicial determination;

b) Jebmed did not have an immediate right to the proceeds of sale as it would have under Maltese law; and

c) the money paid into court in Jamaica to safeguard Jebmed's interest was an insufficient basis to revoke the warrant because this did not guarantee priority in relation to any other creditors.

[14] In light of Bluefin's position that Jebmed had successfully enforced its debt against the vessel even after it had been sold free from encumbrances, Bluefin sought, and was successful in its application, on 29 August 2019, to be added as an interested party in Jebmed's claim in this jurisdiction.

[15] On 8 July 2019, pursuant to the "liberty to apply" provision in Edwards J's order dated 5 March 2018, sections 89(2)(c) & (d) and 89(3) of the Shipping Act ('the Act'), as well as rule 70.13(9) of the Civil Procedure Rules 2002 ('CPR'), Capitalease applied for an order that, among other things, "[t]he sum of US$1,000,000.00, which is part of the fund of US$3,000,000.00 being held by Myers, Fletcher & Gordon and Chen Green & Co, in a US dollar interest-bearing account with account number 067727827 at the National Commercial Bank by Order of Edwards J made on March 5, 2018, together with any interest accrued thereon be returned to Capitalease SPA". The application was made on the basis that that sum was the "residue" of the proceeds of sale. On 3 July 2020, the learned judge issued a written judgment refusing that application and granted leave to appeal.

The learned judge's decision

[16] Upon hearing the parties' submissions concerning Capitalease's application for the return of the fund, and after considering the relevant law and authorities, the learned judge took the view that the payment of the fund to Capitalease would amount to a summary determination of the claim, which had not been adjudicated, settled or discontinued.

[17] While acknowledging that Jebmed had taken steps to access the security paid by Bluefin in the Maltese court, the learned judge found that the fund could not be properly classified as "residue" until the claim in this jurisdiction was determined. In doing so, she relied on the Oxford Dictionary's definition of "residue" as "a small part of something after the main part has gone or been taken".

[18] She also concluded that although the mortgage terms were clear and it was unlikely that Jebmed would receive an award in excess of the secured amount of US$900,000.00, if the fund was returned to Capitalease, it would defeat the purpose of the claim as well as the consequent arrest and judicial sale of the vessel. The learned judge further concluded that if Capitalease's application were to be granted, the court would be indicating that the claim has no real prospect of success. On that point, she relied on Part 15.3(e) of the CPR which provides that summary judgment is not available for admiralty claims in rem. The learned judge also directed that the fund which Capitalease has sought to obtain should remain in court until the claim was either disposed of by trial, settlement or its withdrawal.

The appeal

[19] Dissatisfied with the learned judge's decision, Capitalease filed its notice and grounds of appeal on 17 July 2020. The 11 grounds argued are:

> "(i) The learned Judge failed to have regard to **Section 89(2)(d)** of the **Shipping Act** [which] provides that the residue of the proceeds shall be paid to the immediately previous owner and it shall be freely transferrable.
>
> (ii) The learned Judge contradicted her own ruling in **Jebmed et al v Capitalease [2019] JMSC Civ 174 (unreported judgment of Simmons J dated August 29, 2019)** where she held that:
>
> > *'The [Shipping Act] indicates that once the persons referred to in section 89 (2) have been paid, the residue of the proceeds is to be paid*

to the immediate previous owner. In the present context, that would be Capitalease.'

All the persons in section 89(2) have been paid (see para 52 of the Judgment), yet the learned Judge did not return the residue of the proceeds of sale to Capitalease.

(iii) The learned Judge failed to have due regard to, or properly consider, the issue of double recovery. Save for the error at paragraph 9 of the Judgment, the learned Judge accurately sets out the background of the matter at paragraphs 1-10 of her judgment. The learned Judge then recounts the submissions made on behalf of Capitalease that Bluefin has paid sums in satisfaction of Jebmed's claim in Malta and that Jebmed is entitled to withdraw the sums in Malta, thereby satisfying its claim in respect of the Mortgage dated May 11, 2016 (the 'Mortgage') (see paras 18-21 & 49 of the Judgment). However, the learned Judge does not make a ruling on the issue of double recovery or consider it in her discussion which starts at paragraph 52.

(iv) The issue of double recovery is the crux of the application and it is a grave error for the learned Judge not to consider it in her ruling. Written submissions were handed to the Judge and the parties by Capitalease on this point, in which Capitalease submitted that:

'14. It is undisputed that the claim in Jamaica between Jebmed and Capitalease pursuant to the Mortgage has not been decided on the merits, or at all. Trial dates were set in the matter but vacated due to various interlocutory applications and appeals thereof. As it stands now, the funds held in court, which represent the res, have not been found to be due to either Jebmed or Capitalease.

15. Notwithstanding this pending issue in Jamaica, Jebmed obtained an Executive Warrant of Arrest pursuant to which the ship was arrested in Malta, after the sale to Bluefin. Security of €779,346.61 (approximately US$900,000) was paid into the First

Hall of the Civil Court of Malta, by Bluefin to secure the release of the vessel. The Executive Warrant of Arrest was issued pursuant to Jebmed's claim in Malta that is [sic] was owed sums under the Mortgage Agreement dated May 11, 2016, the same Mortgage Agreement upon which Jebmed sued in Jamaica.

16. Bluefin challenged the Executive Warrant of Arrest all the way to the Maltese Court of Appeal, which challenges were unsuccessful. There is no further right of appeal, according to Tonio Grech.

17. Marlon Borg in his Affidavit conceded that Jebmed is entitled to the funds held in Malta and has 'initiated the administrative process required for the withdrawal of the funds' in Malta.

18. Jebmed's claim pursuant to the Mortgage of a maximum of US$900,000 is therefore not only secured by US$1,000,000 held in Jamaica, but €779,346.61 (approximately US$900,000) held in Malta, which Jebmed is entitled to withdraw and has taken steps to do so.

…

*21. The Mortgage claim having been satisfied in Malta, it is submitted that the accepted principle of law applies that Jebmed is not entitled in its claim for damages to "double recovery" or recovery more than its loss (**Jameson and another and Central Electricity Generating Board [2000] 1 A. C. 455**).'*

(v) The learned Judge failed to give a conclusion on the central and significant issue of double recovery. If the learned Judge gave due regard to this issue, the ruling would have been different as Jebmed's claim is clearly satisfied in Malta and the learned Judge even accepted this at paragraph 61 of the Judgment.

(vi) The learned Judge failed to consider, or give a ruling, on the issue of *res judicata*. It was submitted by Capitalease at paragraphs 22 to 32 of its written submissions that Jebmed's 'unfortunate' (per

Simmons J in ***[Jebmed et al v Capitalease [2019] JMSC Civ 174 (unreported judgment of Simmons J dated August 29, 2019)*** course of action in pursuing its claim both in Jamaica and in Malta has resulted in parallel proceedings in Jamaica and in Malta concerning the entitlement to Jebmed's recovery under the Mortgage. The learned Judge failed to consider the determinative issue that Jebmed's failure to prosecute its claim in Jamaica and the judgments of the Maltese court, which are final and binding on Jebmed, render the issue of payment to Jebmed under the Mortgage *res judicata* for the purposes of the Jamaican courts, and therefore any funds held as security for Jebmed's claim in Jamaica should be returned.

(vii) The learned Judge based her entire ruling on the point that summary judgment is not available in admiralty proceedings in rem (see paras 60-63 of the Judgment). However, the learned judge erred in holding that the withdrawal of the funds would amount to summary determination of the claim. The funds are security for the claim and do not ground the claim itself. The claim in rem must be grounded by the **Administration of Justice Act** ('AJA') (See the discussion at paragraphs 17 and 18 of the judgment of Batts J in ***Jebmed SRL v Capitalese*** *[sic]* ***SPA owners of M/V Trading Fabrizia et al [2016] JM SCCiv*** *[sic]* ***232*** **(unreported judgment delivered 23rd December 2016)**, and also, per Sykes J (as he then was), in ***Matcam Marine Ltd v Michael Matalon (registered owner of the 'Orion Warrior' formally 'Matcam 1') Claim No 0002/2011*** **(unreported judgment delivered 6th October 2011))**. The AJA entitles Jebmed to bring a claim under the Mortgage, which it has done. It is undisputed that the ship was sold by virtue of forced/judicial sale and was sold free of encumbrances pursuant to section 89(1) of the Shipping Act. Now that the vessel has been sold in pursuance of Jebmed's mortgage claim, the remaining issue is the payment out of the proceeds of sale. Jebmed's claim is not protected under section 89 of the **Shipping Act** and therefore

there is no reason to continue to hold the fund as security for its claim. The funds can be paid out and Jebmed's Mortgage claim persist, albeit without security.

(viii) If Jebmed is successful on its claim, it can recover through ordinary enforcement methods. There is no law, rule or practice direction which mandates that the Court should hold funds from the proceeds of sale of a ship as security for a creditor's claim, merely because the opposing party does not have assets within the jurisdiction.

(ix) The learned Judge's ruling that the release of the funds would indicate that the court has concluded that the claim has no real prospect of success and as such amount to a summary determination of the claim (paragraph 63 of the Judgment) is incorrect. The fund represents the ship. If the ship had not been sold, the only matter for the Court to determine would be how much Capitalease should pay as security for Jebmed's claim to release the ship from arrest. The Jamaican courts (see ***West Indies Petroleum Limited Asphalt Trader Limited (Owners of M/T Asphalt Trader) [2020 JMCC Comm 13 (unreported judgment of Batts J dated July 10, 2020)*** have applied the test in **The Gulf Venture** [1984] 2 Lloyd's Rep 445 to determine the quantum of security to be paid to release a ship from arrest, which is stated as follows:

> *'When plaintiffs are entitled to keep a ship under arrest until her owners provide security for their claim, that security must be for such sum of money as represents their reasonably arguable best case, including interest, and their costs of the action.'*

The Court therefore has to determine, on Jebmed's 'reasonably arguable best case' how much security should be held for its claim. The Hon. Mr. Justice Batts in ***Jebmed SRL v Capitalease SPA [2016] JMSC Civ 232 (unreported judgment of Batts J dated December 23, 2016)*** previously conducted this analysis and held in December 2016 that

US$450,000 should be paid as security for Jebmed's claim.

It is therefore possible for the Court to consider a party's reasonably arguable best case in order to determine the amount of security for the claim, without summarily determining the matter.

(x) It is of course the Appellant's contention that the entire fund should be returned to Capitalease, without more, as the fund represents the residue of the proceeds of sale of the Vessel and there are no Claimants under the Shipping Act which are left to be satisfied. But even if the Court should determine that security should be held for Jemed's [sic] claim (which we submit would be improper), then the Court ought to have considered Jebmed's best arguable case to determine the amount of this security.

The learned Judge did not determine, or properly consider Jebmed's best arguable case. It is the Appellant's contention that Jebmed's reasonably arguable best case at this point is for $0, as its claim pursuant to the Mortgage has been satisfied by the monies paid by Bluefin in Malta (again the learned Judge did not give due regard to the double recovery or res judicata issues).

If the Court does not agree that Jebmed's best arguable case is $0, then Jebmed's best arguable case, is a maximum of US$450,000 as determined by His Hon. Mr Justice Batts in December 2016 when he ordered this amount as security for release from arrest after reviewing the documents and evidence in support of Jebmed's claim.

If the Court also does not agree that Jebmed's best arguable case is US$450,000, then at least US$100,000 of the US$1,000,000 held should be returned to Capitalease, as Justice Simmons held in the Judgment, and it is indisputable that the Mortgage only secures US$900,000, including interest and costs.

(xi) The learned Judge erred in finding at paragraph 62 of the Judgment that *'In this matter, the remaining sum, in my view can only be properly classified as 'residue' if the claim between the parties was at an end'*. The residue is sums which remain from the proceeds of sale of the vessel, after the claims in section 89 of the **Shipping Act** have been satisfied. On March 5, 2018, the Hon. Ms Justice C Edwards, as she then was, ordered the creation of various accounts to satisfy the various claims against the Vessel. Capitalease then successfully applied on several occasions for payments of residue to be made to it from these respective accounts. The following sums have been returned to Capitalease from the proceeds of sale of the Vessel:

(i) US$2,000,000.00 on March 5, 2018 by Order of The Hon. Ms Justice C Edwards, as she then was.

(ii) Pursuant to Order of The Hon. Ms Justice C Edwards, as she then was on March 15, 2018, the residue in account number 067727835 at NCB after the satisfaction of Elburg Ship Management's claim (*Claim No 2017 A 00006*) - claim for crew wages, X/O Shipping's A/S's claim (*Claim No 2016 A 00005*) - claim for bunkers and Ligabue S.P.A.'s claim (*Claim No 2016 A 00004*) - claim for supplies of food and chemicals to the vessel.

(iii) US$2,847,188.88 on May 20, 2018 by Order of The Hon. Ms Justice C Edwards, as she then was.

It is incorrect to say the existence of Jebmed's claim (which is not protected under section 89 of the **Shipping Act**) prevents the remaining sums held in Court from being paid out as 'residue'." (Bold and italics as in the original)

[20] Capitalease is seeking the following orders on the appeal:

"(i) The appeal is allowed.

(ii) The sum of US$1,000,000, which is part of the fund of US$3,000,000 being held by Myers, Fletcher & Gordon and

Chen Green & Co, in a US dollar interest bearing account with account number 067727827 at the National Commercial Bank by Order of Edwards J made on March 5, 2018, together with any interest accrued thereon is to be immediately returned to Capitalease SPA.

(iii) Costs of the proceedings in the court below are awarded to the Appellant, to be taxed if not agreed.

(iv) Costs of the Appeal to the Appellant to be taxed if not agreed."

The relevant law

[21] In support of its application, Capitalease sought to rely on sections 89(2)(c), (d) and 89(3) of the Act as well as rule 70.13(9) of the CPR. Those provisions are outlined below:

"89. – (1) …

(2) In the event of a forced sale of a ship, the proceeds of sale shall be distributed as follows -

(a) …

(b) …

(c) the balance of the proceeds shall then be distributed among-

(i) the holders of maritime liens securing any claim under section 80(a);

(ii) the holders of mortgages registered under this Act;

(iii) the holders of maritime liens securing any claim under section 80(b), (c) and (d);

(iv) the holders of rights under section 84;

(v) the holders of other preferential rights

in accordance with the provisions of this Part, to the extent necessary to satisfy the respective claims;

(d) upon satisfaction of all claimants referred to in paragraphs (a), (b) and (c), the residue of the proceeds shall be paid to the immediately previous owner and it shall be freely transferable.

(3) The proceeds of a forced sale shall be made available promptly and shall be freely transferable."

"70.13 (1) …

(9) Payment out of the proceeds of sale will be made only to judgment creditors and -

(a) in accordance with the determination of priorities; or

(b) as the court orders."

Issues

[22] The overarching complaint of Capitalease in this appeal is that the learned judge erred in refusing its application for the return of the fund being held by order of the court below to satisfy Jebmed's claim. The grounds of appeal, many of which overlap, challenge several of the learned judge's findings of fact and law. The issues which arise on those grounds, though closely related, can be distinguished as follows:

A. Whether the fund held as security for Jebmed's claim qualifies as "residue of the proceeds" under section 89 of the Act and if returned to Capitalease would amount to a summary determination of the claim in rem (grounds i, ii, vii, viii, ix, x, xi) ('the residue issue').

B. Whether retaining the fund as security for Jebmed's claim would amount to double recovery (grounds iii, iv, v) ('the double recovery issue').

C. Whether Jebmed's claim in rem in this jurisdiction is *res judicata* (ground vi) ('the *res judicata* issue').

[23] Counsel for the parties have filed submissions in support of their respective positions, which have proven to be instrumental to the determination of the issues. I wish to thank them for their industry and the assistance they have provided. I also wish to assure the parties that all their submissions have been duly considered.

Discussion

[24] As expressed earlier, this court is required to determine whether the learned judge erred in the exercise of her discretion by refusing to return the fund to Capitalease. It is well settled, and the parties agree, that to succeed Capitalease must demonstrate that the learned judge either misdirected herself on the applicable legal principles or misinterpreted the facts, or that her decision was "so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it" (see **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042 and **Attorney General of Jamaica v John Mackay** [2012] JMCA App 1). To determine whether or not the learned judge correctly exercised her discretion, the issues raised by the grounds of appeal will now be considered.

The residue issue (grounds i, ii, vii, viii, ix, x and xi)

[25] The learned judge's finding that the fund did not qualify as residue, was rooted in the fact that Jebmed's claim in this jurisdiction has not yet been determined. As noted earlier, she also held that an order returning the fund to Capitalease would be akin to a summary determination of the matter, which was not allowed in Admiralty proceedings.

[26] Upon the determination of the latter claims in March 2018, for sums less than the amount reserved, the court below, correctly, in my own view, ordered that the remaining balance in the respective accounts, which included any interest that had accrued, formed part of the residue of the sale proceeds and was to be paid to

Capitalease. The sums of US$2,000,000.00 and US$2,847,188.88 were also returned to Capitalease on 5 March 2018 and 30 May 2018, respectively.

[27] Counsel for Capitalease relied on the return of those sums in support of its argument that the fund should also be regarded as residue and be paid over to Capitalease. Counsel was also emboldened by the fact that an order was made on 22 October 2018, for the return of US$2,000,000.00 of the original US$3,000,000.00 that was paid into court to secure Jebmed's claim. The distinction, however, is that the monies remaining in the various accounts were not deemed to be residue until the relevant claims were either satisfied, discontinued or adjudged by the court.

[28] It is noted that despite the fund, Jebmed has not pursued the prosecution of its claim against Capitalease in the court below, and neither has Capitalease made an application to strike out the claim for want of prosecution. However, its concurrent claim against the vessel in Malta for the same mortgage debt has been fully adjudicated, and Jebmed is entitled to withdraw Bluefin's payment for the release of the vessel. Capitalease has relied on that payment to substantiate its assertion that Jebmed's claim in rem has been satisfied. It is within this context, that counsel for Capitalease has contended that further to section 89(2)(d) of the Act, all creditors have been satisfied and as such the fund should be regarded as residue and be immediately paid to Capitalease, the previous owner.

[29] Counsel for Jebmed, on the other hand, asserted that Capitalease has failed to establish that the fund represents the residue of the proceeds of sale. That fund, it was submitted, represents the *res* (the vessel) in Jebmed's action in rem and should be treated as such. In support of that contention, counsel relied on the dicta of Batts J in **Jebmed SRL v Capitalease SPA et al** [2017] JMSC Civ 225. The learned judge, counsel submitted, was correct in concluding that until the substantive claim and counterclaim are determined by either trial, settlement or withdrawal, the proceeds of the sale should remain in court.

[30] I do not agree with counsel for Capitalease that the learned judge contradicted herself in refusing the application in light of her acknowledgement of section 89(2)(d) of the Act. The proper application of that section to the circumstances of this case is contingent on whether all of the relevant claims against Capitalease have in fact been satisfied. Although Jebmed successfully claimed payment for the mortgage debt in Malta, the learned judge, was clearly cognizant that before she could find that all claims against Capitalease have been satisfied, there would first need to be a determination of whether the satisfaction of Jebmed's claim in Malta was tantamount to the satisfaction of its claim in this jurisdiction. Accordingly, in considering the application for the return of the fund, the learned judge ultimately held that for the fund to be regarded as residue, Jebmed's claim in this jurisdiction would need to be determined, whether by its disposal or adjudication. That finding cannot be faulted.

[31] The learned judge further held that if she were to return the fund to Capitalease, she would effectively be declaring that Jebmed has no real prospect of succeeding on its claim. Such a finding would amount to a summary determination of Jebmed's claim (see rule 15.2(a) of the CPR), and as she correctly observed, summary determinations are not available for admiralty proceedings in rem (see rule 15.3(e) of the CPR).

[32] It was contended by counsel for Capitalease, however, that even if the fund was returned, it would not amount to a summary determination because Jebmed's mortgage claim would persist, albeit without security. The fund was security for the claim, counsel argued, it did not ground the claim itself since a claim in rem must be grounded by the Administration of Justice Act ('AJA'). In support of this argument, reliance was placed on the judgment of Batts J in **Jebmed SRL v Capitalease SPA et al** [2016] JMSC Civ 232, as well as the judgment of Sykes J (as he then was), in **Matcam Marine Ltd v Michael Matalon (registered owner of the "Orion Warrior" formally "Matcam 1")** (unreported) Supreme Court, Jamaica, Claim No A 0002/2011, judgment delivered 6 October 2011.

[33] Counsel further argued that there is no law, rule or practice direction which mandates that the court should hold money from the proceeds of the sale of a ship as security for a creditor's claim, merely because the opposing party does not have assets within the jurisdiction. If Jebmed's claim in the court below is successful, it was submitted, it could recover through ordinary enforcement methods.

[34] Jebmed, on the other hand, submitted that the court should maintain the status quo between the parties since there is no satisfaction of the judgment on its claim. Counsel submitted that the court would be sacrificing its jurisdiction in this matter if it were to return the residue to Capitalease as an interlocutory relief. It was Jebmed's position that the residue represents the conversion of the *res* into *specie,* and to return the fund to Capitalease would be akin to the court allowing "Capitalease to sail the vessel out of Jamaica, as expressed to be the intention, if they had obtained the possession sought".

[35] Counsel for Jebmed referred to the decision of this court in **Jebmed SRL v Capitalease SPA et al** [2017] JMCA Civ 45, which affirmed Edwards J's statement, on the purpose of the *res* in an action in rem:

> "… As Edwards J stated, at paragraph [51] of her judgment, the purpose of arresting a vessel in an action in *rem*, that is, an action against the vessel, is to obtain security for the satisfaction of any judgment which may be obtained. …"

[36] Counsel for Bluefin, in opposing the appeal, submitted that there continue to be several triable issues before the court below and that if the fund is returned to Capitalease then it would effectively end the matter, and Jebmed and Capitalease would be unduly enriched. Bluefin, it was submitted, is "out of pocket" and put in the unfavourable position of intervening in these proceedings due to the unconscionable actions of Jebmed in arresting a vessel sold under Jamaican law free of liens, mortgages and encumbrances, and misrepresenting to the Maltese courts the state of the matter in Jamaica.

[37] As already stated, Jebmed's claim against Capitalease in the court below is further to the purported breach of their mortgage agreement and the consequential debt. The court below recognized Jebmed's right to enforce the security under the mortgage by granting the warrant for the arrest of the vessel and subsequently ordering its sale. As provided for in rule 70.13 (6) of the CPR, the proceeds of that sale were duly paid into court to safeguard Jebmed's claim, and its right under the mortgage was transferred from the vessel to the proceeds of the sale.

[38] Indeed, there is no law, rule or practice direction that mandates that the court should hold funds from the proceeds of the sale of the vessel as security for the creditor's claim, but, such an order is always at the discretion of the court. It is also correct that the fund does not ground the claim itself. However, it was the opinion of the court below that the circumstances of this claim necessitated the provision of a safeguard. Additionally, Capitalease did not appeal the order made by Edwards J on 5 March 2018 to secure Jebmed's claim.

[39] I agree with Jebmed that the return of the fund to Capitalease would be akin to releasing the vessel. Capitalease is a foreign company with no assets in this jurisdiction and its impecuniosity was pellucid on its failure to provide the court with the requisite security to release the vessel. This was duly observed by Edwards J in her judgment of 28 June 2017 regarding Jebmed's renewed application for an order for the sale of the vessel *pendente lite*. The order allowing the sale of the vessel was made in light of one of her findings that it was a "wasted asset and in danger of depreciating while at anchorage". The fund is the safeguard for Jebmed's claim in circumstances where Capitalease has proven to be incapable of otherwise satisfying the claim. Therefore, I am of the view that the return of the fund could insinuate that Jebmed has no realistic prospect of succeeding and as such, there is no longer a need to safeguard its claim.

[40] Counsel for Capitalease argued that if the vessel was not sold, the only matter for the court to determine would be how much Capitalease should pay as security for Jebmed's claim to release the ship from arrest. Reference was made to the test in **The**

Gulf Venture [1984] 2 Lloyd's Rep 445 to determine the quantum of security to be paid to release a ship from arrest, which was applied in **West Indies Petroleum Limited v Asphalt Trader Limited (Owners of M/T Asphalt Trader)** [2020] JMCC Comm 25.

[41] It was argued that if this court is minded to maintain security for Jebmed's claim, the value of that security should be determined based on Jebmed's "reasonably arguable best case". It was Capitalease's position that Jebmed's reasonably arguable best case was US$0.00 since its claim under the mortgage had already been satisfied by the monies paid by Bluefin in Malta.

[42] Alternatively, it was submitted that Jebmed's best arguable case, is a maximum of US$450,000.00, as was determined by Batts J in **Jebmed SRL v Capitalease SPA**. If this court does not agree that Jebmed's best arguable case is US$450,000.00, it was contended that at least US$100,000.00 of the fund should be returned to Capitalease, in accordance with the learned judge's finding that the mortgage only secured US$900,000.00 including interest and costs.

[43] Having agreed with the learned judge that the fund did not qualify as residue and its return to Capitalease would have the effect of summarily determining the claim, which is not allowed in admiralty claims in rem, the next question for our determination is whether the fund (or some of it) can be returned. The test in **The Gulf Venture** states:

> "When plaintiffs are entitled to keep a ship under arrest until her owners provide security for their claim, that security must be for such sum of money as represents their reasonably arguable best case, including interest, and their costs of the action."

[44] The learned judge held that Jebmed's claim at its highest would not exceed US$900,000.00 which was the sum secured by the mortgage. Batts J in his December 2016 judgment, having considered that US$250,000.00 for severance costs claimed was

unlikely to succeed at trial, ordered that any bond to be stipulated as a condition for the release of the vessel ought not to take that amount into account. Accordingly, he ordered Capitalease to provide security or an undertaking in the amount of US$450,000.00 along with proof of acquired insurance for the conditional release of the vessel in addition to the amount that was owing to X/O Shipping A/S.

[45] Under the mortgage, Jebmed agreed to advance US$450,000.00 to assist Capitalease with the commercial operation of the vessel. It was agreed that the total secured amount of US$900,000.00 encapsulates that advance plus the repayment of a further amount of US$450,000.00. The mortgage was validly executed and registered to secure the repayment of the secured amount of US$900,000 "and of all other sums for the time being and from time to time owing by [Capitalease] to [Jebmed] whether by way of principal, interest, costs, expenses or otherwise including all sums due or to become due to [Jebmed] under the Master Agreement and this Deed" (see clause IV Deed of Covenants).

[46] In its amended claim in rem, Jebmed sought possession of the vessel and permission to exercise its power of sale in accordance with the laws of Malta. Alternatively, the relief sought was the payment of the principal sum of US$831,044.46 and interest outstanding on that sum at the date of issue of the EEO (7 March 2017) and further interest at the rate of 8% per annum until payment. If unsuccessful in those claims, the alternative relief was for damages for breach of contract and interest on those damages at the rate of 6% per annum from the date of the judgment. Costs of the action and attorney's costs were also claimed. Taking all of this into account, coupled with the length of time that has elapsed since the commencement of the claim, it would seem to me that it is quite possible that Jebmed's total claim, inclusive of interest and costs, could well exceed US$900,000.00.

[47] Therefore, I am of the view that it is for the trial judge to embark upon an assessment of the merits of the claim and determine the amount of damages, interest and costs, if any, to be awarded to Jebmed. Accordingly, the decision of the learned

judge not to release the fund to Capitalease in all the circumstances cannot be disturbed. Grounds i, ii, vii, viii, ix, x and xi, therefore, fail.

The double recovery issue (grounds iii, iv and v)

[48] The principle of double recovery is entrenched in legal practice and procedure worldwide. It mandates that a plaintiff should not recover damages for the same loss more than once. In the opinion of counsel for Capitalease, this was a valid issue for the learned judge's consideration since Jebmed's successful claim in Malta, meant that the pursuit of their claim in this jurisdiction could result in double recovery. The learned judge, it was submitted, failed to rule on this issue or consider it in her discussion, despite her acknowledgement of the payment of the mortgage debt in Malta. In support of its contention that Jebmed is not entitled to recover more than its loss, counsel relied on **Jameson and another v Central Electricity Generating Board** [2000] 1 AC 455 ('**Jameson v Central Electricity Generating Board**').

[49] Reference was made to Capitalease's written submissions in the application below, specifically, submissions numbered 14 to 18, and 21 as cited in the grounds reproduced at para. [19] on which they also sought to rely in this appeal.

[50] Jebmed's position in relation to this issue was that the learned judge could not conclude, on the facts before her, that its successful claim against Bluefin in Malta could lead to double recovery of its claim in this jurisdiction. Reliance was placed on the case of **Gardner and Another v Marsh & Parsons (A Firm) and Another** [1997] 1 WLR 489, which it was contended, gave a clear example of "double recovery".

[51] Counsel also submitted that Jebmed is entitled to recover the damages caused to it by Capitalease's breach of the mortgage deed and for keeping it out of possession of the vessel. Furthermore, it was argued, there was no reason or justice in setting off what Jebmed had entitled itself to in pursuing its interests in the vessel in Malta, and against an unconnected third party to the agreement between it and Capitalease.

[52] It was submitted by counsel for Bluefin that the monies paid into the Maltese court have not been paid over to Jebmed and as such any argument of double recovery is defeated. The decision in Malta cannot be easily enforced in Jamaica, counsel contended, so it is open to the court in this jurisdiction to decide on the merits of the claim.

[53] The primary purpose of awarding damages in claims for breach of contract is to place the non-breaching party in the position it would have been in had the contract been performed. It is unchallenged that Jebmed's claim both in Malta and in the court below is pursuant to Capitalease's purported breach of their Master Agreement and Deed of Covenants. Capitalease has, however, denied the breach as well as the debt claimed, and has also filed a counterclaim against Jebmed. Accordingly, the question of liability is a live issue to be determined upon the hearing of the substantive claim. In Malta, however, the Court of Appeal upheld Jebmed's executive warrant of arrest, which ultimately entitled it to the monies paid into court by Bluefin to secure the release of the vessel. It is on that basis that Capitalease has argued that if the court below orders that the fund is paid out to Jebmed, that order would offend the principle against double recovery.

[54] In the case of **Jameson v Central Electricity Generating Board**, a decision of the House of Lords, on which Capitalease relied, it was held that once a plaintiff's claim is satisfied by one of several tortfeasors, his cause of action for damages is extinguished against all of them. The facts of that case are distinguishable from the present case. The plaintiff, in that case, were the executors of the estate of Jameson, the deceased, who was exposed to asbestos at various premises at which he had been employed, including that of the defendant. Before his death, the deceased agreed to accept £80,000.00 from his former employer in "full and final settlement and satisfaction of all the causes of action in respect of which the plaintiff claimed in the statement of claim" for negligence and/or breach of statutory duty. The agreed settlement sum, which was significantly less than the full value of his claim, was not

paid until after he died. The plaintiff initiated proceedings on behalf of the deceased's widow for loss of dependency.

[55] Lord Hope of Craighead in delivering the judgment of the court, noted that the plaintiff had a separate cause of action against each tortfeasor for the same loss. However, once a plaintiff's loss has been satisfied by one tortfeasor then his cause of action for damages would be extinguished against all of them. He referred to Lord Atkin's statement in **Clark v Urquhart** [1930] AC 28, in which he said, "damage is an essential part of the cause of action and if already satisfied by one of the alleged tortfeasors the cause of action is destroyed".

[56] The dictum of Lord Nicholls of Birkenhead in **Tang Man Sit (Personal Representatives of) v Capacious Investments Ltd** [1996] AC 514, was also cited with approval:

> "…Lord Nicholls of Birkenhead discussed the limitations on a plaintiff's freedom to sue successively two or more persons who are liable to him concurrently. He explained the point this way:
>
> > 'A third limitation is that **a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss**. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff thereafter bringing an action against another who is also liable, but it does operate to reduce the amount recoverable in the second action. **However, once a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he might have and which he might have pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. The principle of full satisfaction prevents double recovery.**' " (Emphasis supplied)

[57] The learned Law Lord also observed that a claim for damages is a claim for an unliquidated sum of money. He distinguished claims that are settled by an agreement

from claims adjudicated upon by the court. Once the unliquidated sum is fixed by a judgment of the court against any one of the concurrent tortfeasors, then upon the judgment being satisfied the claim for damages would be fully satisfied, he held.

[58] The case at bar is not concerned with concurrent tortfeasors, but rather concurrent claims pursuant to the same cause of action. Additionally, the claim in rem in this jurisdiction is against Capitalease as the owners of the vessel, whereas the claim in rem in Malta was against the vessel itself. Nevertheless, the principle stated above is applicable. An award of damages in Jebmed's claim would seek to restore Jebmed to the position it would have been in had the contract been fulfilled. Jebmed cannot recover more than its loss, where the loss claimed has already been fully satisfied. The question, therefore, is whether in accepting the payment in the Maltese court pursuant to the executive arrest of the vessel, the debt/loss claimed under the breach of the mortgage agreement, has been fully satisfied.

[59] It is the argument of counsel for Capitalease, that there is little room for dispute as it relates to the amount of damages that could be awarded to cover Jebmed's purported loss. In its amended claim in rem, Jebmed is seeking, among other things, to recover the sum of US$831,044.46 plus interest outstanding on that sum at the date of the issue of the EEO and further interest at the rate of 8% per annum until payment. The learned judge opined that Jebmed's claim taken at its highest would not exceed the total secured amount under the mortgage of US$900,000.00 inclusive of interest and costs. If this is so then, there would be some validity to the argument that Jebmed's loss arising from Capitalease's breach has been fully satisfied.

[60] I am of the view, however, that the issues in the claim require a proper determination. It is the trial judge who would have to embark upon an assessment of Jebmed's claim to ascertain the amount of damages, if any, that is due to it, before the question of whether Jebmed's loss has been fully satisfied, can be answered. The court's assessment would also necessitate a review of the cause of action and issues

tried in Malta in order to ascertain whether the claim in this jurisdiction has been extinguished.

[61] In my judgment, the issue of double recovery as raised before the learned judge and this court is best explored before the trial judge, who will be better positioned to make a proper assessment having heard all the relevant evidence and submissions on the matter. The trial judge will also need to consider Bluefin's position (now an interested party in the proceedings), depending on any evidence adduced concerning Jebmed's approach to the security currently being held by the Maltese court, to determine, at the end of the day, where the justice of the case lies. These are factual and legal issues for a trial judge to determine.

[62] Therefore, on the facts before her, the learned judge was not obliged to consider the issue of double recovery. Rule 70.13(9)(b) provides that payment out of the proceeds of sale will be made only to judgment creditors in accordance with court orders. Although based on the Maltese appellate court's decision, Jebmed is entitled to the monies held in the Maltese court, it has no such entitlement to the fund without a court order from this jurisdiction. Therefore, the learned judge's refusal of the application simply meant that the court would retain the fund until the determination of the claim, and as such the assertion that double recovery is in issue is premature. I agree that the fund is to remain in court as security for Jebmed's claim until a court order emanating from the substantive claim says otherwise. I, therefore, find that there is no merit in grounds iii, iv, and v.

The *res judicata* issue (ground vi)

[63] The learned judge described Jebmed's course of action in pursuing its claim both in Jamaica and Malta as "unfortunate" since it resulted in parallel proceedings concerning Jebmed's entitlement to recover under the mortgage. Counsel for Capitalease took the view, however, that the learned judge's observation was insufficient as she failed to consider the issue of *res judicata*.

[64] The doctrine of *res judicata* was succinctly addressed by the learned authors of Halsbury's Laws of England, 2020, Volume 12A, para. 1568, in which they stated:

> "…res judicata provides that, where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot be reopened by parties bound by the decision, save on appeal.
>
> …
>
> The purpose of the principle of res judicata is to support the good administration of justice in the interests of the public and the parties by preventing abusive and duplicative litigation, and its twin principles are often expressed as being the public interest that the courts should not be clogged by re-determinations of the same disputes; and the private interest that it is unjust for a man to be vexed twice with litigation on the same subject matter…"

[65] In the case of **Arnold and others v National Westminster Bank plc** ('**Arnold v National Westminster**') 1991 2 AC 93, a decision of the House of Lords, it was held that:

> "Both logic and principle support the approach that the judicial determination of an entire cause of action is in fact the determination of every issue which is fundamental to establishing the entire cause of action."

[66] Jebmed's claim against Capitalease in this jurisdiction preceded its claim against the vessel in Malta. The principle of *res judicata* generally seeks to prevent the initiation of proceedings pertaining to a cause of action and issues which have already been determined by a court of competent jurisdiction. However, it can also be applied with respect to whether a claim could be continued. It is undisputed that Jebmed's successful claim in Malta was pursuant to the same mortgage breach which grounded its claim in the court below. The clear difference, however, was that the Maltese claim was against the vessel which had been sold to Bluefin. It was Capitalease's position, therefore, that upon Jebmed receiving a favourable judgment from the Maltese court which is final and binding, it rendered Jebmed's claim under the mortgage in the court

below *res judicata*. In which case, it was no longer necessary to retain the fund since Jebmed could not succeed twice on the same claim.

[67] Jebmed's counsel, on the other hand, submitted that the action in rem in this jurisdiction cannot be deemed *res judicata* since it was properly brought and pleaded. In support of that submission, reliance was placed on Edwards J's dictum on the law of *res judicata* in her judgment delivered 19 July 2017 in the court below, **Jebmed SRL v Capitalease SPA et al** [2017] JMCC Comm 22, in particular, paras. [47] to [50].

[68] Bluefin contended that Jebmed misled the Maltese court that the court below failed to give regard to Jebmed's mortgage claim. A finding that the claim is *res judicata* would, therefore, undermine and misrepresent the steps taken by the court below to preserve Jebmed's claim by ordering that the fund be maintained in an interest-bearing account held by the parties' attorneys-at-law.

[69] Edwards J in her 19 July 2017 judgment said at para. [26]:

> "…the processes of the court should not be abused by re-litigating a matter which has already been decided by a court of competent jurisdiction and in which judgment can be enforced against the losing party. See generally **Henderson v Henderson** [1843] 3 Hare 100. In such a case, a court may strike out the second action as an abuse of the process of the court. …"

[70] Having considered the parties' submissions in this regard as well as the legal principles relating to *res judicata*, I find that the learned judge was not obliged to address this issue as it was not relevant to the application before her. *Res judicata* contemplates that when a court has made a determination on the questions of law and fact in a given cause of action, the parties should be restrained from subsequently raising that cause of action. This is especially so because Jebmed's judgment in rem binds the whole world.

[71] There are two main tenets under *res judicata*, namely, cause of action estoppel and issue estoppel. The former is relevant to the facts of this case. In **Arnold v National West Minster**, Lord Keith of Kinkel had this to say:

> "Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment."

[72] In **Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3)** [1969] 3 All ER 897, it was held by Buckley J that in order to establish cause of action estoppel, the following criteria must be shown: (i) that there has already been a judicial decision by a competent court or tribunal; (ii) that the decision was of a final character; (iii) that the decision relates to the same question as that sought to be put in issue by the plea in respect of which the estoppel is claimed; and (4) the decision must have been between the same parties or their privies as the parties between whom the question is sought to be put in issue.

[73] It is a natural requirement, therefore, that for a judge to consider if a claim is *res judicata*, evidence must be put before the court to enable it to deliberate the aforementioned criteria. Whereas the cause of action and subject matter of both claims are seemingly identical, the court is yet to embark on an assessment that warrants the conclusion that the claim in this jurisdiction is *res judicata*. In this case, as mentioned earlier, the parties to the claim are different. The proceedings in this jurisdiction are against Capitalease as owners of the vessel, while in Malta, the claim in rem was against the vessel. While Bluefin has been joined as an interested party to the domestic proceedings, this was done after the arrest of the vessel in Malta, and Bluefin, not being a privy of Capitalease, had to pay the security to release the vessel.

[74] It is important to note that the main issue before the Maltese Court of Appeal was the fact that Jamaica does not have reciprocal enforcement of judgments from

Malta, and so the mortgage was simply proof of credit. Jebmed would have to engage the domestic courts by either suing on the foreign judgment as a contract or on the cause of action which gave rise to the foreign judgment (per Harrison JA in **Richard Vasconcellos v Jamaica Steel Works Ltd and others** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 1/2008, judgment delivered 18 December 2009, at para. 17). It was held that the Maltese mortgage was an executive title, the effect of which was not recognized in this jurisdiction. Accordingly, the sale of the vessel did not in their view annul the mortgage, and as such the rights granted to Jebmed under the mortgage did not pass from the vessel to the proceeds of the sale. These findings were notwithstanding the Maltese court's acknowledgement of the fund held in this jurisdiction to safeguard the claim. It is for that reason that the Maltese Court of Appeal held that Jebmed was entitled to recover the monies paid into the Maltese court by Bluefin for the release of the vessel.

[75] The learned judge was, therefore, not obliged to consider or find that the claim was *res judicata*. The issues for her consideration under the application for the return of the fund, were disparate from the issues that would have been considered by the Maltese court, as well as those that would be considered when the claim is being heard. In light of the fact that the claim has not yet been determined on its merits, it was not open to the learned judge to find that the claim was *res judicata.* For the above reasons, ground vi also fails.

Conclusion

[76] For the reasons I have sought to explain, I would dismiss the appeal with costs to Jebmed and Bluefin to be agreed or taxed.

DUNBAR GREEN JA (AG)

[77] I too have read the draft judgment of my sister V Harris JA. I agree with her reasoning and conclusion and have nothing useful to add.

SINCLAIR-HAYNES JA

ORDER

1. The appeal is dismissed.
2. Costs to the respondent Jebmed and the interested party Bluefin to be agreed or taxed.