[2017]JMCC Comm 22

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN ADMIRALTY

CLAIM NO. 2016 A00003

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

CONSOLIDATED WITH:

CLAIM NO. 2017 A00006

BETWEEN	**ELBURG SHIP MANAGEMENT**	**CLAIMANT**
AND	**ENTERPRISE SHIPPING AGENCY**	**DEFENDANT**
AND	**CAPITALEASE S.P.A OWNERS OF M/V TRADING FABRIZIA**	**2ND DEFENDANT**
AND	**MOTOR SHIP TRADING FABRIZIA**	**3RD DEFENDANT**

Vincent Chen and Makene Brown instructed by Chen Green and Company for the Claimant Jebmed S.R.L

Krishna Desai and Amanda Montague instructed by Myers Fletcher and Gordon for the defendant Capitalease S.P.A

Arlene Williams and Tavia Dunn instructed Nunes Schofield Deleon and Company for the interested party

Anna Gracie and Mathieu Beckford instructed by Rattray Patterson Rattray for the Intervener

Kwame Gordon and Ramon Clayton instructed by Samuda and Johnson for Elburg Ship Management

HEARD: 28 June and 19 July 2017

ADMIRALTY CLAIM-CLAIM IN REM AGAINST A SHIP-SHIP OWNERS ENTERING APPEARANCE-JUDGMENT ENTERED AGAINST SHIP OWNERS IN PERSONAM IN A FOREIGN JURISDICTION-SHIP OWNERS APPLYING TO SET ASIDE JUDGMENT ON GROUNDS OF RES JUDICATA AND ABUSE OF PROCESS OF THE COURT-WHETHER CLAIM SHOULD BE SET ASIDE

ADMIRALTY CLAIM-APPLICATION TO AMEND CLAIM-WHETHER AMENDMENT SHOULD BE REFUSED ON THE BASIS THAT CLAIM IS RES JUDICATA

EDWARDS, J

Background

[1] Jebmed S.R.L. (Jebmed) filed an action against Capitalease S.P.A. owners of M/V 'Trading Fabrizia' in the Maltese courts alleging breach of a mortgage agreement. Jebmed obtained from the Maltese Courts a European Enforcement order (EEO) for the sums claimed and a declaratory judgment that they were entitled to possession of the M/V 'Trading Fabrizia' the security for the mortgage. At the time this declaratory judgment was handed down in Malta the vessel was under arrest under the jurisdiction of the Jamaican courts. This was a fact recognised in the judgment of the Maltese court.

[2] The vessel had sailed into Jamaican waters and was arrested by Jebmed on the 30 October 2016. Jebmed filed a claim in rem in the Supreme Court of Jamaica which was served on the ship by the Admiralty Bailiff. That claim, which was commenced October 30, 2016, was for sums due and owing under the mortgage

agreement. Subsequently, Jebmed also applied for permission to amend the claim to include a claim for possession of the ship. That is one of the applications before me now.

[3] Since the arrest of the vessel there have been various applications made by several parties in the admiralty division in rem, resulting in two written judgments made by two separate judges in this division. The detailed facts of the case can be found in both judgments at [2017] JMCC Comm 18 and [2016] JMSC Civ 232.

[4] Attorneys for Capitalease filed Notice of Application for Court Orders on 19 May 2017, with supporting affidavit of Amanda Montague filed on the said date, to strike out the claim filed by Jebmed and for the vessel to be released from arrest. That is the other application presently before me. The grounds on which Capitalease sought the orders was that the claim was res judicata and was an abuse of the process of the court; that a claim having been brought in another jurisdiction and a result having been obtained, the claimant had no real grounds for continuing with the claim in this jurisdiction.

[5] Jebmed's application to amend its claim is vigorously opposed by Capitalease. Capitalease's application to strike out the claim is strenuously opposed by Jebmed. Both these applications were heard together and I reserved my decision for a later date. For the reasons given below, Capitalease's application to strike out the claim is refused and Jebmed's application for permission to amend the claim is granted.

Submissions of the applicant Capitalease in support of the application to strike out the claim

[6] Counsel Mr. Desai for Capitalease pointed this court to the affidavit of Trudy Ann Dixon-Frith, the former attorney for Jebmed, filed 29 March 2017 at paragraph 24 wherein it states that the matter was resjudicata based on the European Enforcement Order (EEO) secured in the Maltese Court by Jebmed. Mr. Desai

argued that it was based on this EEO and the claim of resjudicata that Jebmed had sought interim possession of the vessel and had resisted the application of the Admiralty Bailiff for the sale of the vessel *pendente lite,* filed 20 March 2017.

[7] Counsel argued that the application is grounded in Rule 26.3 (1) (b) which states that a claim may be struck out if it is an abuse of the process of the court and 26.3 (1) (c) which states that it may be struck out where it disclosed no real grounds for bringing the claim. Counsel also argued that the claimant was estopped from proceeding with the claim on the grounds of res judicata, as it's the same judgment sum obtained in the Maltese Court which was being pursued in this court.

[8] Counsel argued further, that allowing the claim to continue here when it was already adjudicated on in a foreign jurisdiction was not only repugnant to the overriding objective but was an abuse of the process of the court. Counsel also argued that a decision to allow the claim to continue could lead to conflicting decisions if the same facts and issues are considered by this court.

[9] Counsel noted that a speedy trial order had been made but the trial date had been vacated by the claimant.

Submissions of the respondent Jebmed in opposition to the application to strike out the claim

[10] Counsel Mr. Chen argued on behalf of Jebmed that the rule under which the applicant was proceeding to entreat the court to strike out the claim was a 'pleading rule'. In his attempt to explain what he meant by a 'pleading rule' counsel cited the case of **Gordon Stewart v John Issa** SCCA No. 16/2009 at paragraph 14 per Cooke JA. That rule, Mr. Chen says, 'limits' a claimant to the pleadings, which, he said, had to show that there was a cause of action.

[11] Counsel pointed out that the judgment being a foreign judgment could not be resjudicata here because no judgment was granted in this jurisdiction. Counsel argued that in this situation the claimant had a choice either to:

a) Sue on the foreign judgment as a contract; or

b) Sue on the cause of action which gave rise to the foreign judgment;

c) Register and enforce the judgment under the statutory provisions, if that was possible.

[12] Counsel pointed out that the EEO was a European Enforcement Order which was not enforceable as a judgment in this jurisdiction. Neither, he says, was the declaratory judgment handed down by the Maltese Court. Counsel noted that the claimant only had the first two (2) options available to it and it chose the second of those options.

[13] Counsel pointed the court to the statement made by Harrison JA in the case of **Richard Vasconcellos v Jamaica Steel Works Ltd and others** SCCA No. 01 of 2008 at paragraph 17 which counsel submitted is a correct statement of law. In that case Harrison JA observed that there was no statutory provision in Jamaican law for the reciprocal enforcement of foreign judgments between the State of Florida in the United States of America and Jamaica, such judgments have to be enforced at commonlaw as simple contracts for a debt. It was open to the claimant to sue either on the foreign judgment or on the original cause of action on which it was based. Harrison JA relied on the Halsbury Laws of England, 4thEdition, Volume 8 paragraphs 715 and 716 for support of that statement of the law.

[14] Counsel Mr. Chen also cited Halsbury's Laws of England Volume 19 (2011) paragraph 435 which in essence espoused the same principle. Relying on that authority as well, counsel also noted that it was not possible to bring an action in rem to enforce a foreign judgment in personam. Counsel further argued that in

relation to admiralty claims in rem, the jurisdiction is acquired from the presence of the ship and was different from the jurisdiction in personam.

[15] Counsel denied that Jebmed was forum shopping. Counsel pointed out that the claimant chose Malta to litigate its claims because it was the jurisdiction of the registration of the mortgage and it had jurisdiction to adjudicate over the meaning, status and rights of the mortgagor and mortgagee. In terms of the Italian Law clause in the agreement, counsel argued that it governed the contractual rights in personam between the contracting parties and did not affect any claim in rem.

[16] Counsel argued that there were two (2) different jurisdictions operating at the same time. The jurisdiction in personam and that in rem over the ship. Counsel submitted that the vessel having sailed into this jurisdiction, it is proper to litigate the facts before this court.

[17] Counsel also noted that the arrest of the vessel in Panama was a breach of the Mortgage and created a right in rem against the vessel. He stated that it is a matter of law that a claimant cannot include a claim in personam in an action in rem. Halsbury 5th edition. Counsel noted that the action in personam on the contract does exclude this court. However, counsel argued that the judgment in Malta is not resjudicata here as it has the right to sue on the judgment here or to plead the facts given rise to that judgment again, in this jurisdiction.

[18] Counsel demurred that it was an abuse of the process of the court to bring this claim in rem. Counsel submitted that the claim, being a claim based on the breach of the mortgage on a ship made in rem, the claimant was entitled to have it heard in this jurisdiction. Counsel argued that the claim disclosed several breaches of the mortgage and the ship having entered Jamaican waters and was arrested in this jurisdiction, there was a cause of action in rem against the ship.

[19] Counsel also submitted that resjudicata should not be a consideration when the court is considering rule 26.3 (1) (b) and/or (c). Res judicata, he submitted, was relevant only to prospect of success which was not relevant to this application. Estoppel, he submitted was also an irrelevant consideration under these rules. Counsel argued that under these rules the court is only constrained to consider whether the words used to establish the factual matrix in the pleadings are in fact established. If it is so established then the pleading ought not to be stuck out.

[20] Counsel argued that there is no basis for striking out the claim as it was not an abuse of the process of the court and Jebmed ought to be allowed to proceed.

The issue

[21] The only issue to be determined in this application is whether there is any basis to strike out the claim brought by Jebmed and release the ship from the arrest instigated by Jebmed. This is to be determined by the answer to three questions;

(a) whether the foreign judgments obtained by Jebmed against Capitalease can be enforced in this jurisdiction;

(b) whether the claimant is confined to enforcement of the judgment rather than bringing a fresh claim on the same cause of action; and

(c) whether the principles of res judicata and estoppel apply to any fresh action the claimant may wish to bring on the same cause of action in rem.

Disposition

[22] I will begin the discussion with the rule on which the applicant Capitalease relies to ground this application. Rule 26.3 (1) (b) and (c). The rule states;

> "(1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-

(a)…

(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim…

(d)..."

[23] The striking out of a party's statement of case is a draconian measure to be sparingly applied only in plain and obvious cases. See **S&T Distributors Limited and another v CIBC Jamaica Limited & another** SCCA No: 112/0, 4 per Harris JA at 29. In that case the particulars of claim, on the face of it, did not disclose a cause of action in negligence, where the claimant had sued in the tort of negligence. The claim was struck out at first instance under rule 23.3 1(c) a course of action which was upheld by the Court of Appeal.

[24] It is true that in the case of rule 23.3 1(c) the authorities suggests that any decision regarding whether a claim should be struck out should be made on the basis of a consideration of the contents of the statement of case. The court will have to consider whether the statement of case or the part to be struck out gives rise to a cause of action against the defendant which has a realistic prospect of success. See also **Sebol Limited and Another v Ken Tomlinson and Others** SCCA 115/2007 and **Stewart v Issa**. In that regard Mr. Chen is correct when he somewhat inelegantly refers to it as a "pleading rule". Different considerations apply to rule 26.3(1) (b).

[25] If a litigant, in filing a claim in the courts of the land, so makes use of all the processes and remedies available to him by law, he is not abusing the processes of the courts. In the case of rule 23(1) (b), in order to show that the claim was an abuse of the process of the court Capitalease would have to show that Jebmed, in bringing and continuing its claim in this jurisdiction, had an ulterior purpose to

gain a collateral advantage over and above the remedy the law allowed for its cause and that, but for that advantage which it seeks, it would not have begun this claim. See **Goldsmith v Sperrings Ltd** [1977] 2 ALL ER 566 at 574 where Lord Denning MR said:

> *"In a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end."*

[26] In my view, in this particular case, if Mr. Desai is correct, the claimant would be entitled to succeed whether I apply 23.1(b) or 23.(1) (c). The issue is whether Mr. Desai is correct that Jebmed is not entitled to re-litigate the matter in this jurisdiction by bringing a fresh claim against Capitalease for the same cause of action; for if the matter is res judicata, then not only will it be a possible abuse of the process of the court, there being no legitimate purpose for bringing a fresh claim but there would also be no reasonable grounds for bringing such a claim. It is a given that 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. This was recognised by Harris JA in **S&T Distributors Limited** at page 46. There are however, exceptions to this general rule.

[27] The question of whether Capitalease should succeed in this application largely depends on whether Mr. Chen is correct that Jebmed can re-litigate the matter in this jurisdiction for the same cause of action in rem. Jebmed holds two foreign judgments against Capitalease. A foreign judgement has no effect in this jurisdiction unless and until it is recognised and or enforced. Such a judgment cannot be directly executed. Such a judgment can, however, be recognised and

enforced at common law or by relevant statutory provisions if it meets certain criteria. It is enforceable at common law as a simple debt contract. See Halsbury Laws of England Vol. 8 paragraph 715.

[28] According to English common law, a foreign judgment in personam, given by a court having jurisdiction according to English conflict of law rules, may be enforced by action in England provided; it is (a) for a debt, or definite sum of money (b) it is not for taxes or penalty, and (c) it is final and conclusive. Some foreign judgments are not enforceable at common law in the local jurisdiction and may only be recognized, for example declaratory judgments or one dismissing a claim or a decree of divorce or nullity.

[29] The common law principle applicable in England is equally applicable in this jurisdiction and is aptly stated thus:

> *"At common law, a judgment creditor seeking to enforce a foreign judgment in England may bring an action on the foreign judgment. He may then apply for summary judgment on that claim on the ground that the defendant has no real prospect of defending the claim; and if the application is successful, the defendant will not be allowed to defend at all. The speed and simplicity of this procedure, coupled with the tendency of English judges narrowly to circumscribe the defences that may be pleaded to an action on a foreign judgment, mean that foreign judgments are in practice enforceable in England much more easily than they are in many civil law countries." (See Morris: The Conflict of Laws, David McLean and Kisch Beevers, (7th Edn) at 7-013.)*

[30] At common law too, it was always open to the claimant holding a foreign judgment to sue again in England on the same cause of action on which the foreign judgment was based, as there was no doctrine of merger of the original cause of action. See, volume 18 Halsbury Laws of England paragraph 716. The doctrine of merger was introduced by the Civil Jurisdiction and Judgments Act 1987, which effectively ended this right by statute. Now under English law only two (2) options remain; (a) to bring an action on the judgment debt or (b) to

register the foreign judgment if the relevant statute applies. In such an event there is no necessity to determine whether it was the same cause of action or not. However, there is no similar legislation introducing a doctrine of merger in this jurisdiction, therefore, there are still three options remaining.

[31] The statutory provisions relating to the recognition and enforcement of foreign judgments are limited in geographical scope and therefore, where the statutory provisions are inapplicable to a foreign jurisdiction, enforcement at common law is the only available procedure.

[32] In the instant case both counsel for the Jebmed and counsel for Capitalease appear to be in agreement that the judgment from Malta is neither recognizable nor enforceable under the Foreign Judgments (Reciprocal Enforcement) Act in this jurisdiction. However, it appears that the applicant accepts (having so submitted) that it is possible for foreign judgments to be enforced here at common law by bringing a claim to do so, if the relevant statutory provisions do not apply.

[33] However, a requirement for a foreign judgment to be enforceable at common law is that it must be a judgment for a money sum. In that regard the claimant was at liberty to apply to enforce the EEO in this jurisdiction by filing a Fixed Date Claim Form to do so. Such claim must be one in personam and the court must have jurisdiction in personam over the judgment debtor.

[34] Counsel Mr. Desai however, disagrees that Jebmed has the option to sue on the same facts which gave rise to the EEO, in a fresh claim before this jurisdiction. He claims that the matter is res judicata. I am afraid however, that this submission by Mr. Desai is misconceived. This is so because of three (3) propositions of law;

a. A foreign judgment in personam cannot be enforced in this jurisdiction in an action in rem;

b. The matter is not res judicata in this jurisdiction until the foreign judgment is recognized and enforced in this jurisdiction.

c. There is no doctrine of merger in this jurisdiction so that it is still open to the claimant to sue either on the foreign judgment or on the original cause of action on which it is based.

[35] For the first proposition see *Halsbury's Laws of England* Volume 19 [2011] 4 paragraph 435 and the case of **The City of Mecca** (1881) 6 P.D. 106 and **The "Sylt"** [1991] 1 Lloyd's Reports 240 at 244. For the second and third propositions see *Halsbury's Laws of England*, Volume 8 paragraph 716 and the case law discussed below.

[36] A foreign judgment in personam cannot be enforced at common law in an action in rem. See also Dicey, Morris & Collins: The Conflict of Laws, paragraph 14-025-14-026. In the case of **The City of Mecca**, an action was brought in rem against the Ship **'City of Mecca'** which was later arrested. The defendants applied to strike out the writ on the grounds of unlawful arrest and that the writ had been improperly issued. Action in personam had been taken in Lisbon against the captain and owners of the ship in their names and judgment had been entered for the claimants. The action in the English Court's was for enforcement of that judgment against the ship. It was held that the judgment was a judgment in personam and could not be enforced in rem against the ship, there being no judgment against the ship.

[37] Reference was made in **The City of Mecca** to the case of **The Bold Buccleigh** 7 Moo. P.C.C 269 where Sir John Jervis said:

> *"We have already explained that in our judgment a proceeding in rem differs from one in personam, and it follows that the two (2) suits being in their nature different, the pendency of the one cannot be pleaded in suspension of the other."*

[38] It therefore follows, that a court need not be swayed by the presence of personam litigation to stay a litigation in rem. So too, as the judgment in Malta for EEO was a judgment in personam, it could not be enforced here in this action in rem commenced against the ship. A separate action in personam against the owners to enforce the judgment would have to be instituted. However, in this case because the owners have appeared to defend the case on the merits, even though the claim was properly served on the res (the ship), the owners have submitted to the jurisdiction in personam of the court so that the court now has jurisdiction both in rem and in personam. At common law, in admiralty proceedings, the claim in rem is not merged with the in personam action and the two can continue side by side.

[39] Lush J writing in **City of Mecca** said:

> *"Now, upon the face of this judgment, there is not a word about a claim against the ship from beginning to end. It is well known that the owner of a vessel that has suffered by collision with another has two (2) remedies. He may bring an action against the captain or owner of the other vessel and recover damages or he may sue in the Court of Admiralty and make the ship pay."*

[40] This, case at bar as Mr. Chen says, is a matter brought in rem in a Court of Admiralty and he cannot enforce a judgment, given in personam in Malta against the owner of the ship, in this jurisdiction in an action in rem against the vessel.

[41] Although in **City of Mecca** the action was struck out the court did not rule out fresh litigation being brought but refused to hold the ship until then.

[42] Mr. Desai argues however, that this is a legacy position and is no longer good law. He insists the principle of res judicata would now apply. In this regard the judgement of the House of Lords in the **Republic of India v India Steamship Co.** [1998] HL AC 878 is instructive. This was an action in personam brought in India by the Indian Government for damage to cargo alone during carriage on the defendants' ship the 'India Grace'. Whilst that action was pending the claimants

brought action in England in rem in the Admiralty Court and served writ on the defendant's ship the 'Indian Endeavour'.

[43] The case on appeal to the House of Lords involved s. 34 of the Civil Jurisdiction and Judgments Act 1982 in England which provides:

> *"No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England or as the case may be, in Northern Ireland."*

[44] There is no corresponding provision in this jurisdiction. However in the **India Steamship** the issue was whether the owners could rely on s. 34 and whether the action in rem and the action in personam involved the same parties and the same cause of action. The Lords also considered whether the claim was barred by reason of the principle of res judicata but declined to express any view on that issue as being unnecessary to their decision.

[45] The House of Lords in its judgment referred to the decision of the Court of Appeal and affirmed that decision. In the Court of Appeal the well established rule at common law that a foreign judgment in favour of a plaintiff did not at common law constitute a bar against proceedings in England even if founded on the same cause of action, was recognised by that court. The rule therefore was that at common law a judgment in personam was no bar to an action in rem and *vice versa*. The court, however, accepted that s. 34 of the Civil Jurisdiction and Judgments Act 1982 abolished this common law right in England. The Court of Appeal therefore, was forced to hold that based on s.34, the claimants action in rem in the Admiralty Court was barred as a result of the action brought in India.

[46] The House of Lords dismissed the appeal and affirmed the judgment of the Court of Appeal. In deciding whether the action in rem and the action in personam

involved the same cause of action, the House of Lords held that the writ filed in the matter did not involve maritime liens but instead involved the enlarged Admiralty jurisdiction of the High Court. The Lords held that the jurisdiction being relied on was not the narrow jurisdiction involving maritime liens, but what was being relied on was section 20 (2) of the Supreme Court Act 1981 for *"(a) any claim for loss of or damage to goods carried in a ship."* Section21 (4) of that Act of 1981 provides for such claims to be brought in rem when the claim arises in connection with a ship, and the person who should be liable on the claim in an action in personam and at the time the cause of action arose, the owner, was in possession or in control of the ship. The House of Lords highlighted that this was the statutory basis on which the Indian Government invoked the jurisdiction of the Admiralty Court. The writ itself was directed to the owners of the ship as defendants and any other persons interested in her.

[47] After giving a historical perspective on the development of actions in rem in the Admiralty Courts, other than maritime liens, following the Judicature Acts in England in 1873 – the House of Lords concluded that the action in rem was an action against the owners of the ship. The Lords held therefore, that the claim brought in England was in respect of the same cause of action and in respect to the same parties as the claim in India, within the meaning of section 34. The claim, it was held, could not be allowed to proceed. Also of note is the fact that there was no res before court and no bail representing the res and the only guarantee before court was the defendant's personal liability and the plaintiff's were seeking a personam judgment. The House of Lords was also at pains to point out that its decision did not affect the rules governing maritime liens.

[48] In dealing with the purpose of section 34 of English Act, the House of Lords noted that it was meant to overcome the anomaly created by the fact that the common law doctrine of merger did not apply to foreign judgments. The court held that given the legislature's objective not to permit the same issue to be litigated afresh between the same parties, it would be wrong to permit an action

in rem to proceed despite a foreign judgment in personam obtained on the same cause of action.

[49] It is clear therefore that the law in England has undergone a metamorphosis with regard to the common law principles in reliance on the statutory provisions which exists there. In this case, there is no such legislative framework in this jurisdiction therefore the common law principles still apply. It follows therefore, that here,

(a) the common law doctrine of merger in English Common Law does not apply to foreign judgments;

(b) where the judgment is not enforceable or recognizable under any relevant legislation it must be enforced or recognized at common law;

(c) a foreign judgment in favour of the claimant is no bar to a subsequent claim in the local courts based on the same cause of action;

(d) at common law the claimant in this jurisdiction still retains the right to proceed either;

(i) By action to enforce the judgment; or

(ii) To sue on the case of action afresh.

See Dicey, Morris & Collins, The Conflict of Laws para 14-034 page 583 which states;

> *"A foreign judgment in favour of a claimant was at one time no bar to a subsequent action in England based on the original cause of action. But s. 34 of the 1982 Act provides that no proceedings may be brought by a person on a cause of action in respect of which a foreign judgment has been given in his favour in proceedings between the same parties, or their privies unless the judgment is not enforceable or entitled recognition in England. This displaces in part the rule of the common law that a foreign judgment does not extinguish the original cause of action in respect of which the judgment was given..."*

[50] Since therefore, the claim is one which is properly brought in this jurisdiction, it not being res judicata and it being properly pleaded, there is no basis on which

the court can exercise its discretion to strike out the claim for having not disclosed any "reasonable grounds for bringing...a claim." Neither can it be said that in bringing the claim Jebmed is 'unjustly harassing' Capitalease so as to amount to an abuse of process. That is sufficient to dispose of this application.

The application to amend the claim

[51] This takes me now to the Notice of Application for Court Orders with supporting affidavit of Makene Brown filed 31 May 2017, to amend the Claim Form and Particulars of Claim filed 30 October 2016. The amendment claims a right of possession and immediate possession of the M/V 'Trading Fabrizia' as a result of the breach of the terms of the mortgage. Jebmed is, therefore, now claiming possession of the vessel and to be permitted to "exercise its power of sale over the vessel in accordance with the laws of the republic of Malta which is the country of registration of the vessel". It also seeks an amendment to the claim in the alternative for the principal monetary sum outstanding and for interest on the outstanding sum to be as at the date of issue of the EEO. Amendments were sought to be made to the Particulars of Claim accordingly.

Submission by Jebmed for permission to amend

[52] Counsel Mr. Chen accepts that the application for permission is necessary, the application having been made after case management conference, and indeed after the pre-trial date had passed. See rule 20.4(2) of the Civil Procedure Rules 2002. Counsel however, submitted that the application was not made unduly late and that there was no prejudice to the defendant if the court grants the application. Counsel also argued that at the time the declaration was granted in Malta, Capitalease had caused the ship to sail into Jamaican waters and therefore, no order for possession could have been granted. He noted that it was the action of sailing into the Jamaican waters which gave jurisdiction to this court over the ship.

Submission of defendant in opposition to the application

[53] The defendant claimed that the amendment came too late in the day and that eight (8) months in the Admiralty Division is a long time. Counsel argued that the owners would be prejudiced if permission was granted to amend the claim because the amendment seeks to claim possession of the owner's vessel.

[54] With respect to the declaration of the right to possession obtained from the Maltese Court, counsel pointed to the fact that, although there was no order for possession, with regard to the issue of jurisdiction, it was the same parties, the same cause of action based on the same set of facts. Counsel further argued that the Maltese Court was appropriate and competent since the vessel and mortgage was registered in that jurisdiction.

[55] Counsel pointed out that the ship had already been deregistered from its flag and the claimant already had a judgment for a money sum and the declaratory judgment in Malta related to rights to possession. Counsel argued that the amendment in so far as it was seeking to re-litigate the issue in relation to rights and possession should not be allowed.

[56] Counsel submitted that the claimant only had two (2) options which were to;

(a) register the judgment under the Reciprocal and Foreign Judgment Act and CPR Part 72; or

(b) bring a claim by way of fixed date claim form and seek to enforce it in that way.

[57] Counsel also made the added point that based on the order for sale *pendente lite*, the reliefs being sought in the amendment cannot be achieved because the res would be gone. There is therefore, he opined, no utility in allowing the amendment.

[58] As regards the objection to the amendment in the figures in the proposed amendment to the claim, this, counsel noted, related to the issue of res judicata based on the existence of the EEO in favour of Jebmed.

Disposition

[59] The decision whether to grant permission to amend a claim and particulars of claim is usually made taking into account the overriding object. Amendments should be allowed to enable the real matter in controversy between the parties to be determined. Stuart Sime in 'A Practical Approach to Civil Procedure' Twelfth Edition page 217 at paragraph 15.01 states the general principle in this way;

> *"The underlying principle is that all amendments should be made which are necessary to ensure that the real question of controversy between the parties is determined, provided such amendments can be made without causing injustice to any other party."*

There can be no dispute that this is a correct statement of the principle of law governing the approach a judge should take in considering whether to exercise the discretion to permit an amendment to a party's statement of case.

[60] There is also a general principle that it is in the public interest to allow a party to deploy its real case provided it is relevant and has a real prospect of success. See Eady J in the case of **Cook v News Group Newspaper Ltd**. [2002] LTL 21/02 where a defendant was allowed to make substantial amendments to its defence five months before the trial. It is also the case that even if the proposed amendment should come very late in the day, on principle, permission should be granted allowing it to stand, if to do so would cause no injustice to the other side. The overriding objective requires careful consideration of the consequences of an amendment in terms of costs, delay and stress. See **Clarapede & Company v Commercial Union Association** (1883) 32 W.R 262 CA, per Brett MR. These principles are of "Universal and timeless validity"; per Neuberger J (as he then was) in **Charlesworth v Relay Roads Ltd.** [2000] 1 WLR 230. Finally Morrison

JA (as he then was) in **Gasoline Retailers of Jamaica Limited v Gasoline Retailers Association** [2015] JMCA Civ 23 at paragraph 41 stated:

> *"When a party seeks permission to amend a pleading, therefore, the critical consideration for the court is the overall justice of the case. If it is possible to allow the amendment without prejudice to the other side, then the court will generally lean in favour of granting it, bearing in mind the obvious desirability of all matters in controversy between the parties being brought forward and adjudicated in the same proceedings. But, even where there is a possibility of prejudice to the other side, the court will if at all possible seek to address this by way of an order for costs, or by some other means. Ultimately, these are matters for the court's discretion, the exercise of which will not lightly be interfered with by this court (Attorney general of Jamaica v John Mackay [2012] JMCA App 1…"*

[61] However, the permission to amend will be refused where the proposed amendment has no real prospect of success, will serve no useful purpose or where it is one wholly different from the original pleaded case and the amendment comes very late in the day.

[62] As stated previously the proposed amendment is to include a claim for possession of the vessel. What will be the effect if this amendment is granted? If the claim is successful Jebmed will be granted possession of the vessel as mortgagee. It already has a declaration bearing on its right to possess the vessel under the terms of the mortgage granted by the Maltese Court. Capitalease is already aware of this. They are therefore, not being taken by surprise with this proposed claim. Indeed, Jebmed has made at least two unsuccessful applications before this court for interim possession of the vessel. I am unable to see any additional prejudice to Capitalease over and above that which faces all defendants in every case, that is, the possibility of being the losing party in a claim.

[63] There was no argument that the proposed amendment had no real prospect of success. It was argued on the basis of res judicata and to a lesser extent estoppel and that it should therefore, not be allowed. I have already ruled for the reasons given that it is not res judicata. Neither is estoppel a real issue in this case. The declaratory judgment for possession granted in the Maltese court is not enforceable at common law or by any relevant statutory provisions in this jurisdiction. I would venture to say therefore, that Jebmed would of necessity have to bring a fresh claim for possession in this jurisdiction. The question is whether the amendment will place Capitalease in such a position that it cannot be compensated by way of costs. The answer is that it will not.

[64] As for the possibility that the ship may be sold *pendente lite* before the amended claim is heard, I can only say that is a risk Jebmed will have to take. In any event the alternative claim is for the sum due and owing, which if it wins, Jebmed will be entitled to recover from the proceeds of the sale of the ship.

[65] That is sufficient to dispose of this application also.

[66] I will therefore order that;

i) The Notice of Application for Court Orders filed 19 May 2017 to strike out the claimant's claim is refused. Costs of this application to Jebmed to be agreed or taxed.

ii) The Notice of Application for Court Orders filed 31 May 2017 for Permission to Amend the Claim is granted. Cost of this application to Capitalease to be agreed or taxed.