[2022] JMSC Civ 224

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE ADMIRALTY DIVISION

CLAIM NO. SU2021AD00002

BETWEEN	**PETROJAM LIMITED**	**CLAIMANT**
AND	**SKRUNDA NAVIGATION INC OWNERS OF M/T "PILENTE"**	**DEFENDANT**
	AND	
BETWEEN	**SKRUNDA NAVIGATION INC OWNERS OF M/T "PILENTE"**	**DEFENDANT/ ANCILLARY CLAIMANT**
AND	**OCEAN J TOWING LIMITED**	**ANCILLARY DEFENDANT**

Maurice Manning K.C and Tavia Dunn instructed by Nunes, Scholefield, Deleon & Co. for the Claimant.

Emile Leiba and Chantal Bennett instructed by DunnCox for the Defendant/ Ancillary Claimant.

Amanda Montague instructed by Myers, Fletcher & Gordon for the Ancillary Defendant.

IN CHAMBERS

Heard: 14th October and 16th December 2022

In Admiralty- CPR 17.6(1)(d), 28.1(4), 28.6, 28.7, 34.2 - Interim Payment - Request for Further Information - Specific Disclosure - Litigation Privilege.

C. BARNABY, J

BACKGROUND

[1] On the 14th October 2022 I heard arguments on applications for orders compelling production of information and documents sought in Request for Further

Information, for specific disclosure and interim payment. A decision on those applications was reserved to 12th December 2022 but regrettably, are being delivered on the instant day. The delay is regretted.

THE PLEADINGS

[2] The primary claim sounds in negligence, in that, on or about the 30th April 2021 the M/T Piltene (the Vessel), under the control of the employees and/or servants and/or agents and/or charterers and/or assignees of the Defendant, negligently and/or carelessly "collided" into the Claimant's Main Dock while attempting to dock, causing damage. The Claimant alleges that it has suffered loss and incurred expense in consequence. Alternatively, the Claimant relies on the doctrine of *res ipsa loquitor.* Among other relief, the Claimant claims damages for negligence and special damages, the latter being particularised at USD $8,850,000.00 to include USD $1,600,000.00 for emergency repairs.

[3] While the Defendant admits that the Vessel came into "contact" with the Claimant's Main Dock, it denies that it was the result of its negligence, or that of its servants and/or agents. It contends that contact with the dock occurred in the ordinary course of berthing operations. The Claimant has therefore been put to proof that the berthing of the Vessel at the material time was outside of the ordinary course of operations of that nature. Further, that if it was outside of the ordinary course of berthing operations, the contact was due to the act of a third party, over which the Defendant had no control.

[4] The Defendant also says that the Vessel was under compulsory pilotage by a pilot licensed and assigned by a third party, the Port Authority of Jamaica (the Authority). It is alleged that the speed and approach of the Vessel was determined by the pilot assigned by the Authority and two tugboats which were at the Vessel's stern; and that the pilot and the two tugboats were responsible for the berthing of the Vessel. The Defendant therefore contends that the Vessel was not under the control of its employees and/or servants and/or agents and/or charterers at the time of contact. Should it be found that contact with the Claimant's Main Dock was due to negligence in berthing operations however, the Defendant says that the

negligence was of the operators of the tugboats which are owned by a third party. The Defendant says that either or both of the tugboats failed to act in accordance with the instructions of the pilot, resulting in part of the Vessel making contact with the Main Dock. Accordingly, it is contended that the doctrine of *res ipsa loquitor* is inapplicable.

[5] The Defendant also joins issue with the Claimant in respect of the condition of the Main Dock vis a vis acceptable levels of tolerance to withstand contact without causing damage to the dock; and the dock's capacity to accept vessels of the size and construction of the Defendant's vessel. The Claimant is also put to proof of its alleged loss and expense.

[6] The ancillary claim is made against the Ancillary Defendant, tugboat operators pursuant to section 80(d) of the **Shipping Act**. The Defendant/Ancillary Claimant seeks to be indemnified by the Ancillary Defendant against the Claimant's claim and costs of the action; or contribution to any sum which the Claimant may recover against it in the principal claim. It is contended that if the collision occurred in the manner which the Claimant alleges, which is not admitted by the Defendant/Ancillary Claimant, the collision, any loss and expense were wholly caused or materially contributed to by the acts/omissions of the servants or agents of the Ancillary Defendant who towed the Vessel into the Claimant's Main Dock; that the Ancillary Defendant breached the implied term of the contract between it and the Defendant/Ancillary Claimant that the tugboats would perform their duty using the requisite care and skill in order for the Vessel to safely dock; and further and in the alternative, that contact occurred as a result of the negligent operation and/or management of the tugboats which were under the control of the employees and/or servants and/or agents of the Ancillary Defendant.

[7] Broadly, it is the Ancillary Defendant's contention that the ancillary claim brought pursuant to section 80(d) of the **Shipping Act** is unsustainable as the section does not create any right to indemnity or contribution; that any right to indemnity or contribution in respect of the alleged incident would have to be contractual; and that there is no provision under its contract with the Defendant/Ancillary Claimant which creates any such right. Further, that in any event, the tugboats were not the

actual instruments which are alleged to have damaged the Claimant's Main Dock, so that section 80(d) is inapplicable.

[8] The allegations of negligence and breach of contract are denied by the Ancillary Defendant, and in doing so it says that it has no knowledge of a collision while towage services were being performed; that the manoeuvre which involved the tugboats proceeded and concluded successfully without incident; and that the captains of the tugboats exercised the requisite care and skill, and followed the instructions of the pilot of the Vessel.

CENTRAL ISSUES ON THE PRIMARY AND ANCILLARY CLAIMS

[9] There are a number of issues which will determine the parties' disputes. While not exhaustive, I regard the following as central to a fair disposition of the proceedings.

(i) The nature of the incident which is said to have given rise to the claim;

(ii) Whether the incident which gave rise to the claim is one which occurs in the ordinary course of berthing operations;

(iii) If the incident is one which occurs in the ordinary course of berthing operations, whether the condition of the Main Dock and its component parts and/or capacity at the time of the incident caused and/or contributed to the damage and loss the Claimant is alleged to have suffered;

(iv) Whether the Vessel was under the control of the Defendant, its employees and/or servants and/or agents and/or charterers of the time of the incident;

(v) If the incident is not one which occurs in the ordinary course of berthing operations, whether it was caused and/or contributed to by:

(a) the negligent operation and management of the Vessel by the Defendant, its employees and/or servants and/or agents and/or charterers; or

(b) the negligent operation and or management of the tugboats which were under the control of the employees and/or servants and/or agents of the Ancillary Defendant;

(vi) Whether the towage services provided to the Vessel by the Ancillary Defendant's tugboats were successfully concluded without incident;

(vii) Whether section 80(d) of the **Shipping Act** creates a right to indemnity or contribution, and if not, whether the contract between the Defendant/ Ancillary Claimant and the Ancillary Defendant creates a right to indemnity or contribution in respect of the incident which is the subject of the principal claim;

(viii) Whether section 80(d) of the **Shipping Act** applies to the dispute between the Defendant/ Ancillary Claimant and the Ancillary Defendant, where the latter's tugboats are not alleged to have damaged the Claimant's Main Dock;

(ix) Whether it was an implied term of the contract between the Defendant/Ancillary Claimant and the Ancillary Defendant that the latter would exercise due care and skill in order to dock the Vessel safely;

(x) The quantum of damages which may be payable as a result of the incident; and

(xi) The party or parties responsible for payment of damages which may be found to be due for damage to the Main Dock, and the extent of their responsibility.

THE APPLICATION FOR INTERIM PAYMENT

[10] By Notice of Application for Court Orders filed 13th April 2022 (the Claimant's Application), the Claimant requests an order that the Defendant makes an interim payment in the amount of **Two Hundred and Thirty-Two Million Dollars (J$232,000,000.00)** within fourteen (14) days of an order to that effect.

[11] The jurisdiction of the court to make an award for interim payment is not challenged, there is however a contest as to the appropriateness of its award in the circumstances of the case.

[12] Pursuant to CPR 17.6(1)(d),

> *The court may make an order for an interim payment **only if** –*
> *(d) except where paragraph (3) applies [it does not], it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs; …*

[13] In **Larson Higgins v MT Tajin** [2017] JMSC Civ 83 on which the Claimant and the Ancillary Defendant relies, Simmons J (as she then was), in considering an application for interim payment and ahead of concluding that a "mere" *prima facie* case is insufficient to warrant the grant of an order for such payment stated as follows.

> *[142] In the case of **GKN Group v Revenue and Customs Commissioners** [2012] 3 All ER 111, Aiken LJ in considering rule 25.7 of the Civil Procedure Rules (UK) (which is analogous to Part 17 of the CPR) stated as follows: -*
>
> > *"…In the case of an application for an interim payment order under r 25.7(1)(c), of course, the claimant has to satisfy the court on a balance of probabilities about an event that has not, in fact, occurred; …*
> >
> > *That leads on to the next and more important question: of what does the claimant have to satisfy the court? To which the answer is: that if the claim went to trial, the claimant would obtain judgment for a substantial amount of money from this defendant. Considering the wording without reference to any authority, it seems to me that the first thing the judge considering the interim payment application under para (c) has to do is put himself in the hypothetical situation of being the trial judge and then pose the question: would I be satisfied (to the civil standard) on the material before me that this claimant would obtain judgment for a substantial amount of money from this defendant.*
> >
> > *The second point is what precisely is meant by the court being satisfied that, if the claim went to trial, the Claimant "would obtain judgment for a substantial amount of money"? In my view this*

means that the court must be satisfied that if the claim were to go to trial then, on the material before the judge at the time of the application for an Interim Payment, the Claimant would actually succeed in his claim and furthermore that, as a result, he would actually obtain a substantial amount of money. The court has to be so satisfied on a balance of probabilities. The only difference between the exercise on the application for an Interim Payment and the actual trial is that the judge considering the application is looking at what would happen if there were to be a trial on the material he has before him, whereas a trial judge will have heard all the evidence that has been led at the trial, then will have decided what facts have been proved and so whether the Claimant has, in fact, succeeded. In the latter case, as Lord Hoffmann makes plain in Re B *([2008] AC 561 at 2) if a judge has to decide whether a fact happened, either it did or it did not: the law operates a "binary system" and there is no room for a finding that it might have happened. In my view the same is true in the case of an application under CPR Pt 25.7(1)(c).* ***The court must be satisfied (to the standard of a balance of probabilities) that the Claimant would in fact succeed on his claim and that he would in fact obtain a substantial amount of money. It is not enough if the court were to be satisfied (to the standard of a balance of probabilities) that it was "likely" that the Claimant would obtain judgment or that it was "likely" that he would obtain a substantial amount of money.***

Next there is the question of what is meant by "a substantial amount of money". In my view that phrase means a substantial, as opposed to a negligible, amount of money. However, that judgment has to be made in the context of the total claim made. What is a substantial amount of money in a case where there is a comparatively small claim may not be a substantial amount when the claim is for a much larger claim. It may be that in very small claims an Applicant could never satisfy the court that, even if it obtained judgment, the amount of money it would obtain would be "substantial". But that is not this case and each must be decided on its facts. [Emphasis supplied]

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

> *"…the conclusions that may be drawn and the principles stated in respect of an application under rule 17.6 (d) are these:*
>
> *(i) For a claimant to successfully apply for an interim payment, he/she must satisfy a court that he/she will likely win the case against the defendant.*
>
> *(ii) (ii) The standard by which that must be done is the civil standard (i.e. proof on a balance on probabilities), but such proof must be effected at the higher end of that scale.*
>
> *(iii) It is expected that such applications will only succeed where the claimant has a very strong claim and where his/her action is likely to be easy to establish. Establishing a "mere" prima facie case will not be enough.*
>
> *(iv) Where the competing contentions on the part of the claimant and the defendant are, on the pleadings, of equal weight, and nothing emerges at that stage to "tilt the balance", such an application will likely fail.*
>
> *(v) Even where the claimant might be able to establish a ground for the making of an interim payment, the court still retains a discretion in deciding whether or not such a payment should be made."*

[14] It is the submission of the Claimant that it is practically impossible for the Defendant to deny liability and that in the result, it will obtain judgment. This is on account that the Defendant has admitted that the Vessel came into "contact" with the Claimant's Main Dock which is a stationary fixture. It is submitted further, that even if the Defendant denies liability for the collision, the claim *"will still likely succeed against the Defendant because the scenario as described in these proceedings is a classic example of* res ipsa loquitor." It is said to be clear on the face of the pleadings that the incident the subject of the claim could not have occurred without negligence on the part of the Defendant.

[15] I am unable to share the Claimant's view of the pleadings or its conviction as to the outcome, should the claim proceed to trial.

[16] As demonstrated on the authorities cited by the parties - not all of which are necessary to be referenced here - in respect of the considerations for the court confronted with an application for interim payment where liability has not been admitted or otherwise established, the test in not that the claim is likely to succeed at trial. The court must be satisfied that it would in fact succeed and that the claimant would in fact obtain a substantial amount of money. The court must be satisfied on a balance of probabilities.

[17] In my view, the issues joined on the pleadings between the Claimant and the Defendant are more complex than the Claimant suggests. The joinder appears to me to raise substantial disputes of fact and of law, with the former requiring the advance and testing of technical and other evidence for their proper resolution as appropriate. Further, disputes in respect of request for information and for the specific disclosure of documents, which I will address below, are presently unsettled.

[18] In these circumstances I am not satisfied to the requisite standard that the Claimant would obtain judgment for a substantial amount of money from the Defendant were the matter to proceed to trial. Accordingly, I find that this is not an appropriate case for making an award for interim payment, certainly at this time, and the Claimant's application is accordingly refused.

REQUESTS FOR FURTHER INFORMATION AND SPECIFIC DISCLOSURE

[19] Pursuant to rule 34.2 of the CPR:

> *(1) Where a party does not give information which another party has requested under rule 34.1 within a reasonable time, the party who served the request may apply for an order compelling the other party to do so.*
> *(2) An order may not be made under this rule unless it is necessary in order to dispose fairly of the claim or to save costs.*

(3) When considering whether to make an order the court must have regard to -

(a) the likely benefit which will result if the information is given;

(b) the likely cost of giving it; and

(c) whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with the order.

[20] The power of the court to make an order compelling a party to comply with a request for information is in respect of information which is necessary to either fairly dispose of a claim or to save costs. The following opinion of Sir Thomas Bingham MR in **David John Hall v Sevalco Limited; William James Crompton v Sevalco Limited** (1996) the Times, 27 March 1996 which was quoted with approval by McDonald-Bishop JA in **Attorney General v BRL Limited and Village Resorts Limited** [2021] JMCA Civ 14, para. 87 is instructive.

"The guiding principle in this field must be … that interrogatories must be necessary either for disposing fairly of the cause or matter or for saving costs. ***Necessity is a stringent test. It cannot be necessary to interrogate to obtain information or admissions which are or are likely to be contained in pleadings****, medical reports,* ***discoverable documents or witness statements unless, exceptionally, a clear litigious purpose will be served by obtaining such information or admissions on affidavit. As a general statement we would agree with the statement in the Guide to Commercial Court Practice,*** *... that:*

"Suitable times to interrogate (if at all) will probably be after discovery and after exchange of witness statements."

[Emphasis added]

[21] In respect of the courts power to make orders for specific disclosure, rule 28.6 of the CPR provides thus.

(1) An order for specific disclosure is an order that a party must do one or more of the following things –

(a) disclose documents or classes of documents specified in the order; or

(b) carry out a search for documents to the extent stated in the order and disclose any documents located as a result of that search.

(2) An order for specific disclosure may be made on or without an application.

(3) An application for specific disclosure may be made without notice at a case management conference.

(4) An application for specific disclosure may identify documents -

(a) by describing the class to which they belong; or

(b) in any other manner.

(5) An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings.

[22] As to what is meant by "directly relevant" documents, as stated by McDonald-Bishop JA at para. 103 of the **BRL** case:

> *The fact that the documents "may" be relevant, or merely "relate" to an issue in dispute is not sufficient to render them specifically disclosable within the ambit of the CPR;* ***they must be 'directly relevant' as defined by the CPR****...*
>
> *[Emphasis added]*

[23] Pursuant to rule 28.1(4) a document is directly relevant only if the party with control of the document intends to rely on it; it tends to adversely affect the party's case; or it tends to support another party's case.

[24] Rule 28.7 of the CPR goes on to state that

(1) When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.

(2) It must have regard to-

(a) the likely benefits of specific disclosure;

(b) the likely cost of specific disclosure; and

(c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.

(3) Where, having regard to paragraph (2)(c), the court would otherwise refuse to make an order for specific disclosure, it may however make such an order on terms that the party seeking that order must pay the other party's costs of such disclosure in any event.

[25] Of the import and scope of the above rule, I adopt the observation of McDonald-Bishop JA at para. 109 of **BRL** that

> *Even if the documents were directly relevant within the legal sense of that term, that would not have been the end of the enquiry. The CPR makes it clear that a finding that documents are directly relevant does not end the enquiry as to whether an order for specific disclosure should be made. The matters stated in rule 28.7 must also be considered. Those matters involve a consideration of the benefits to be derived from disclosure. This rule embodies the concept of proportionality, which is comprised, in part, in the overriding objective… [i.e.] the real benefit to be gained from the disclosure of these documents in respect of time, costs and resources.*

The Defendant's Request for Information and for Specific Disclosure

[26] The Defendant pursuant to Request for Information dated 27th September 2021 sought additional information from the Claimant. By its Amended Notice of Application for Court Orders filed 11th October 2022 (the Defendant's Application), the Defendant/Ancillary Claimant requests an order to compel the Claimant to answer each request for information and for specific disclosure. Information in respect of some requests was supplied by the Claimant and disclosure made of some documents. In the result, it is only necessary to address those which remain the subject of dispute.

[27] Generally, it is the Defendant's contention that the documents sought by it are directly relevant as they support its case as well as that of the Defendant; and their disclosure is necessary in order to dispose fairly of the claim. The Claimant

contends that information and documents withheld by it do not meet the test of being directly relevant or necessary for the fair disposition of the claim.

[28] It is the Ancillary Defendant's position that all documents which are relevant to determining the dispute should be disclosed, including the documents sought by the parties to the principal claim. I will treat with the requests of the Claimant and Defendant in turn.

[29] The disputed requests are addressed below.

1. A copy of the "as built" drawings and the design and construction specifications (including but not limited to the design capacity, the berthing velocity and the design vessel displacement) for the original construction of the Main Dock.

[30] The Claimant has disclosed the Main Dock Damage Assessment Report dated 27th May 2021 (the CIVEX Report), the underwater video surveys which were conducted and the still photographs produced.

[31] In support of its request for disclosure under this head, the Defendant relies on the affidavit evidence of Mark Bell, who we are advised is a Maritime Civil Engineer instructed by the Defendant. As observed by the Claimant, Mr. Bell's qualifications have not been stated but he nevertheless purports to give opinion evidence. The Claimant argues that the court should not rely on the affidavit. While I appreciate the caution, in an effort to comprehensively address the appropriateness of the request for disclosure and to avoid further delay in the resolution of the issues joined on the applications, I will have some regard to what appears on the face of the affidavit.

[32] It is Mr. Bell's evidence that on his review of underwater video surveys of the alleged damage to the Main Dock, there were significant pre-existing damage and or serious construction anomalies to a number of fender piles which support fender Panels 1 and 2, which would have significantly reduced the capacity of the Fender Piles to function as intended and which would have significantly reduced the capacity of the dolphins; and that the pre-existing damage to piles which support

Panels 1 and 2 indicated that the concrete jackets surrounding the H-Piles were incorrectly designed and/or constructed. In the alternative, Mr. Bell says if the latter is not the case, it is his opinion that the fenders have been overloaded on more than one occasion prior to the incident which is the subject of the claim. In these premises he forms the view that the concrete jackets were not functioning as intended and would have needed repair notwithstanding the incident of which the Claimant complains.

[33] It is Mr. Bell's evidence that his conclusions that there was *significant pre-existing damage and or serious construction anomalies* are *"subject to an examination of the design of the fender panels and the fender piles [which he] verily believes [is that being requested and being withheld by the Claimant]."*

[34] If the Main Dock was already damaged and in need of repairs at the time of the incident as the Defendant contends, documents which speak to the condition of the dock at that time would properly be regarded as being directly relevant within the meaning of rule 28.1 (4)(b) and (c), in that they would tend to adversely affect the Claimant's case and support the Defendant's case. In respect of both the request for information and for specific disclosure, the court may only order that which is necessary to fairly dispose of the claim or to save costs.

[35] Drawing, design details and specification for the upgrade as well as details as to the make, model and rubber grade of the damaged fender were disclosed by the Claimant pursuant to request for information. The year of installation of the damaged fender though requested has not been stated in the reply to the request. That notwithstanding, the estimated age of existing fenders is set out at paragraphs 3.6 of the CIVEX Report which has been disclosed to the Defendant. It is expressly stated that the actual installation dates of the fenders are uncertain, but that the information on the supplier's catalogues and drawings would suggest that they have been installed for approximately twenty (20) years. It goes further at paragraph 3.7 to say that:

> *The significance of the effects of aging and oxidation of the rubber fenders over time is not necessarily documented in literature and there is no clear guideline on how the (sic) account for them, except where PIANC [that is*

the Permanent International Association of Navigation Congresses] suggests the useful life of fenders are typically around 20 to 30 years. The current fenders have been installed for just over 20 years (estimated) in a harsh environment. It was assumed that there is no maintenance activities geared at maintenance activities geared at maintaining the elastic properties of the fenders. It was thought necessary to reduce the capacity of the fenders by no more than 20% to account for cumulative damages over time from berthing and environmental forcing.

[36] The CIVEX Report also contains "Original Design Section of Dock Showing Concrete Panel and Supporting" Pile at paragraph 5.6 and "Dock Capacity Certificate" dated 26th June 2012, issued by Wallace Evans Jamaica Limited. The certificate includes a summary of the main rehabilitative works and the makers certified that:

… the Rehabilitation of Petrojam's Main Dock has a designed capacity of 46,234 DWT with a maximum displacement of 62,488 Ton with an existing draft of 11m. The main additional design parameters of the dock are as follows:

- *Length Overall: 228m*
- *Beam: 32.2m*
- *Maximum berthing angle: 5 degrees*
- *Lateral Berthing Speed: 0.15m/s (0.3Knots)*
- *Berthing Method: Quarter Point Berthing*

[37] Further, the Defendant - pursuant to a reply to request for a description of any damage to the Main Dock structure over the last ten (10) years, commencement of which would coincide with the rehabilitation of the Main Dock and the issue of the Dock Capacity Certificate in 2012 - is advised by the Claimant that there has been no damage to the said dock over the past ten (10) years.

[38] On the evidence before me, the Main Dock was constructed in 1963, some fifty-eight (58) years before the incident which has given rise to the claim. Further, the extensive upgrades made to the Claimant's Main Dock between 2010 and 2012, a time which is significantly more contemporaneous to the incident which is the subject of the claim, is not disputed by the Defendant. It is my view, in light of these

significant upgrades to the Main Dock, that the disclosure of the "as built" documents are neither directly relevant or necessary to dispose fairly of the claim or to save costs. Specific disclosure of them is accordingly refused. As to the complaint about the legibility of copies, the parties are at liberty to make arrangements for the production and supply of better copies.

5. A copy of the 2013 Petrojam Refinery Dock Capacity Assessment, authored by Mott McDonald to assess the "as-built" Dock Capacity as referred to in Section 3 of the Civex Report.

6. A copy of the Wallace Evans Jamaica Limited 2009 findings and/or other documentation as referred to in Section 3.2 of the Civex Report.

[39] The above requests may be conveniently dealt with together having regard to the similarity in the circumstances under which their existence was disclosed, and the use to which they have been put.

[40] The 2013 Matt McDonald (MM) Petrojam Refinery Dock Capacity Assessment was referenced by the authors of the CIVEX Report as the source of the information that "[t]*he Dock was constructed in 1963 with the capacity to dock vessel having 30,000DWT and 35,0000DWT",* which appears at section 3 of the CIVEX Report. If the MM report was limited to an assessment of "as built" capacity, for reasons which caused me to refuse the request relative to "as built" documents, I would refuse the requests under consideration. Neither its scope or use by CIVEX were so limited however. The authors of the CIVEX report go on to say as follows.

> *The MM 2013 supported by WEJL [Wallace Evans Jamaica Limited] 2009 shows that the Eastern Breasting dolphin was designed to take the initial berthing load. This is based on structural analysis carried out by Mott McDonald (MM) after upgrades in 2012. Final recommendations supports (sic) the certification of WEJL but with more details as it related to the berthing conditions for larger vessels. It indicates the berthing operations of the larger vessels should be controlled such that the fender reaction loads are limited. The maximum permissible loading on the structure (eastern and Western Dolphin) as shown in Table 3-1 for ease*

of reference. [Table 3-1 which was copied from MM 2013 report shows the maximum load that can be applied to the structure within the limits of safety.]

[41] This led the authors of the CIVEX Report to conclude that

> *The displacement of the MT Piltene Majuro (52,880 MT) was therefore within the operating load limits of the dock at the time of arrival and is required to have tug assistance to control the approach velocity and angle unto the Berth.*

[42] The conclusions by CIVEX as to displacement of the Vessel at the time of arrival and the requirement for assistance to berth aforesaid, are based on information and conclusions in the MM 2013 report and supported by the WEJL 2009. Consequently, if the Claimant intends to rely on the CIVEX report, the two reports which were the premise for one of its main conclusions would be directly relevant. The reports would also tend to adversely affect the Defendant's case and would be similarly regarded.

[43] I observe however that the Defendant's request is for the MM 2013 and WEJL 2009, which appears to be the reports in their entirety. I am not able to ascertain whether the scope of the reports extend beyond the authors' assessment of the Main Dock however, which is significant in circumstances where the evidence discloses that the Claimant has more than one dock. The dispute here is in respect of the Main Dock only so that only such aspects of the reports which concern that dock would be regarded as necessary for the fair disposal of the claim.

[44] On the primary claim, the Defendant joins issue with the Claimant as to the condition and the capacity of the Main Dock pre-collision vis a vis acceptable levels of tolerance to withstand contact without causing damage to the dock; and the dock's capacity to accept vessels of the size and construction of MT/Piltene. On the ancillary claim, issue is joined between the owners and operators of the tug boats engaged in the berthing of the Vessel, which assistance according to CIVEX, was required to control the approach velocity and angle unto the berth. On these bases, the MM 2013 and WEJL 2009 reports are not only directly relevant but necessary to facilitate the fair disposal of the claim. It is therefore appropriate to

order that so much of them which relate to the Main Dock be specifically disclosed by the Claimant.

8. Details of the condition assessment inspections and maintenance program carried out on the Main Dock and the damaged dolphin over the last 10 years.

[45] The Claimant has disclosed dock maintenance documents bearing dates between 25th October 2019 and February 2021 as being more contemporaneous to the date of the incident. It withholds the information sought in respect of the last ten (10) years on the ground that such disclosure is not necessary for the fair disposal of the claim.

[46] Allegations of negligence and contributory negligence are at the centre of the claim and the maintenance record for the Main Dock would be directly relevant in that it would tend to support or adversely affect the parties' cases. Whether the disclosure of ten (10) years of maintenance records is directly relevant to the state of repair of the Main Dock at the time of the incident in 2021 and necessary to dispose of the claim fairly however, is a different question. In the face of disclosure of maintenance records for a period more contemporaneous to the incident including in February 2021, mere months before the incident, I am not satisfied that maintenance records going back ten (10) years is directly relevant or necessary to fairly dispose of the claim. The request is accordingly refused.

9. Details of all products handled at the Petrojam Main Dock and the adjacent Dock over the last five years including the piping diagrams for the pipelines running to the Docks;

10. Details of all marine loading arms on the Petrojam Main Dock and the adjacent Dock as at April 30, 2021;

11. Details of the following costs which are referenced at paragraph 8 of the Particulars of Claim filed on May 4, 2021:

- ***the alleged Emergency Repairs;***

- ***the alleged Dock and Civil and Mechanical Repairs;***
- ***the alleged Cost for Business Interruption;***
- ***the alleged Standing Time incurred to avoid Business Interruption;***
- ***the alleged Extra Expenses incurred to Prevent Business Outage and other estimated costs;***

12. Details of any further estimated repair costs and the proposed repair schedule, including repair contact strategy;

1 (ii). The tender documents for the repair of Petrojam Main Dock. In particular, the invitation to bid, the bidding document, the summary of the evaluation of the bids and a copy of the successful bid which approved by the Public Procurement Commission on March 16, 2022;

1 (iii). A copy of the Engineer's estimate for repairs to the Petrojam Main Dock which informed the Bill of Quantities provided by the Claimant; and

1 (iv). A copy of the executed procurement contract for the repair of the Petrojam Main Dock.

[47] Generally, it is the Defendant's contention that the documents above are directly relevant and necessary for the assessment of alleged damages and loss. It is convenient to deal with them together.

[48] With respect to the requests for details of all products handled and of all marine loading arms, it is averred that disclosure is required to assess the reasonableness of any business interruption claims and measures taken by the Claimant to mitigate against or avoid such interruption. Business interruption and outage have been particularised as items of special damages in the Claimant's Particulars of Claim.

[49] In addition to estimated costs for business interruption and prevention of business outage, emergency repairs, dock and civil mechanical Repair, debris removal, engineering and project management fees and legal professional fees which are

being claimed as items of special damages, the Claimant also claims for loss of earnings, which is to be assessed, as a result of the damage to the dock.

[50] In the Amended Claimant's Reply for Request for Information filed 28th July 2022, the Claimant has disclosed documents relating to *"the estimate of costs incurred and/or to be incurred"* and has indicated that it will continue with searches to identify invoices for work rendered in respect of damage to its Main Dock; and that it will provide the proposed repair schedule after execution of the contract between itself and the contractor carrying out the works.

[51] The Claimant who alleges loss and damage is required to prove the same. In respect of special damages in particular, it is required to specifically plead and prove such items. As a result, such documents as the Claimant may have to prove its loss would undoubtedly be directly relevant.

[52] As to the necessity for specific disclosure, the observation in **Sevalco** which was cited with approval by the McDonald-Bishop JA in **BRL** bears repetition here.

> *Necessity is a stringent test. It cannot be necessary to interrogate to obtain information or admissions which are or are likely to be contained in pleadings, medical reports, discoverable documents or witness statements unless, exceptionally, a clear litigious purpose will be served by obtaining such information or admissions on affidavit…*

[53] While the parties are not prevented by the rules from requesting information, seeking orders compelling answers to such request and for specific disclosure at the time they have, I do not believe that specific disclosure of the documents sought by the Defendant under these heads and which have been withheld by the Claimant is necessary to dispose fairly of the claim.

[54] The Claimant having applied for interim payment, specific disclosure of documents which tend to support its contention that it would succeed on its claim and obtain a substantial amount of money would generally be regarded as disclosure serving a clear litigious purpose. Such disclosure would enable an assessment to be made on the amount of money the Claimant would obtain on the claim and what portion of that sum should be ordered as an interim payment. Having already determined

that an order for interim payment would not be appropriate, there is no clear litigious purpose which would be served by the Defendant obtaining such information or disclosure at this time. The requests for information made by the Defendant and for specific disclosure in respect of the matters at paragraphs 9, 10, 11 and 12 of the Request for Information and at paragraphs 1(ii), (iii) and (iv) of the Defendant's Application are therefore refused.

The Claimant's request for Specific Disclosure

2 (i). The Defendant's ship logs of all prevailing conditions affecting the M/T Piltene before and after the incident, including but not limited to the speed at which M/T Piltene was travelling at the time of the collision and the wind speed and direction at the time of the said collision and approach of the vessel;

2 (ii). Captain's Incident Report in respect of the collision with the Claimant's Main Dock on April 30, 2011(sic).

2 (iii) Report in respect of underwater and above ground inspection of the Main Dock conducted on July 23, 2021 together with photographs taken during the said inspection.

[55] The Defendant claims litigation privilege in respect of all three of the Claimant's requests for specific disclosure. With respect to the report of underwater and above ground inspection of the Main Dock, it is also said to be incomplete as the Defendant requires outstanding information requested from the Claimant in its Request for Further Information.

[56] In assessing the merit of the Defendant's contention that specific disclosure of the documents requested by the Claimant are being withheld on the basis that they are covered by litigation privilege, I find the decision of Sykes J (as he then was) in **Virginia McGowan Simmonds v Jamaica Co-Operative Credit Union League Limited** [2015] JMSC Civ 197 to be instructive.

[5] When it comes to reports prepared by third parties for any of the litigants the law rests has a firm (sic) principle in favour of disclosure. The test that has been developed in order to determine whether a report should be disclosed or withheld emphasises that the sole or dominant purpose for which a report is prepared should be for the purposes of litigation, actual or apprehended. If there are multiple purposes and none is dominant then the report has to be disclosed. Why? Because it would mean that there is no good reason to refuse disclosure provided that it is relevant to the case. All this was discussed in the House of Lords decision in ***Waugh v British Railways Board*** *[1980] AC 521 which has been adopted in Jamaica as the leading case in the area under consideration. In that case a collision occurred and a report was done. The claimant, the deceased's widow, sought disclosure of a joint internal report which incorporated witness statements. This report was done as a matter of practice. When the widow sought disclosure of the report, the defendant replied that it was privileged. The affidavit in support of the claim to legal professional privilege revealed that the report was done for two purposes: (a) to find out the causes of the collision and (b) for submission to the board's lawyers so that the board can be advised on any pending litigation.*

[57] Litigation privilege does not apply to every document which is prepared for the purpose of litigation. As observed by Lord Wilberforce in **Waugh** at pages 532-533

… On principle I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it: to carry the protection further into cases where that purpose was secondary or equal with another purpose would seem to be excessive, and unnecessary in the interest of encouraging truthful revelation. At the lowest such desirability of protection as exist in such cases is not strong enough to outweigh the need for all relevant documents to be made available.

… It appears to me that unless the purpose of submission to the legal adviser in view of litigation is at least the dominant purpose for which the

relevant document was prepared, the reasons which require privilege to be extended to it cannot apply. On the other hand to hold that the purpose, as above, must be the sole purpose would, apart from difficulties of proof, in my opinion, be too strict a requirement, and would confine the privilege too narrowly…

[58] Where litigation privilege is proffered as the basis for withholding disclosure, as stated by Lord Edmund-Davis in **Waugh**, "*it is for the party refusing disclosure to establish his right to refuse."*

Ship's Logs and Captain's Incident Report

[59] The Claimant seeks specific disclosure of the ship's logs which it says will usually give details of prevailing conditions affecting the Vessel, including but not limited to information on the speed at which the vessel was travelling, wind speed, wind direction, and the angle of the approach of the Vessel at the time of impact with the Main Dock. Having regard to the information which is usually contained such logs - contemporaneous, observable conditions which are present on the vessel's journey - actual or apprehended litigation does not appear to me to be the dominant purpose for their preparation. The Defendant does not dispute the existence of the ship's logs or the breadth of the request made by the Claimant, nor does it disclose the purpose or purposes for which the logs were produced. It merely avers that on the advice of its attorneys-at-law, it believes the logs are protected by litigation privilege. This is insufficient in my view to discharge the burden upon the Defendant to establish its right to refuse disclosure of the logs, particularly when I consider the information which usually contained in them. In consequence, I find that that ship's logs are not to be regarded as being covered by litigation privilege.

[60] The Captain's Incident Report is also requested to be specifically disclosed. It is averred that it will produce details of the events occurring on the ship during the course of berthing at the Main Dock. The Defendant does not dispute the existence of the report but it once again asserts litigation privilege without disclosing the purpose or purposes for which the report was produced. This appears to me to be report which is produced in contemporaneity with the incident and is an account of the incident which is prepared by the Captain of the Vessel. It appears to me that

this is a report which would be produced in the ordinary course and not necessarily or dominantly for the purpose of anticipated or actual litigation. In these circumstances something more than the blanket invocation of litigation privilege by the Defendant is required to establish that it has the right to refuse disclosure on the basis of the privilege. That something more not having been supplied and I accordingly find that the privilege should not attach.

[61] In light of the information recorded in the ship's logs and Captain's Incident Report, it is also my view that they are documents which would tend to either support or adversely affect the case of the Claimant and/or the Ancillary Defendant, and are therefore directly relevant, even if the Defendant does not intend to rely on them. Additionally, it is also my view that specific disclosure of them is necessary for the fair disposal of the claim, concerned as it is with the exercise of care and/or skill by the parties relative to the receipt and berthing of the Vessel at the Claimant's Main Dock, which is central to the determination of liability. It is therefore my view that an order for specific disclosure of the Ship's Logs and the Captain's Incident Report as requested by the Claimant is warranted.

Report on underwater and above ground inspection and photographs

[62] The Defendant's response to the Claimant's request for the specific disclosure of the report of its underwater and above ground inspection conducted on 23rd July 2021 and photographs taken is two-fold. They are that the report has not been completed because necessary information and documents requested from the Claimant have not been supplied to it, and in any event, that the documents requested are protected by litigation privilege and not subject to compulsory disclosure.

[63] The Claimant is now being ordered to give specific disclosure of so much of the Wallace Evans Jamaica Limited report 2009 and the Mott McDonald report 2013 which concern the Main Dock, which should enable the completion of the report on the Defendant's underwater and above ground inspection of the Main Dock conducted on 23rd July 2021 and the production of the photographs taken during the said inspection. That answers the first concern on the Defendant.

[64] As to the second ground for withholding disclosure, litigation having commenced in May 2021, it could not be said that the documents requested by the Claimant were not being prepared for the purpose of actual litigation. That notwithstanding, it is clear on the authorities that there is no presumption in favour litigation privilege, and that the party who refuses disclosure has the obligation to establish the right to refuse.

[65] Having regard to the issues joined, outside of preparation for submission to the legal advisers to the Defendant to enable them to give legal advice on the litigation, the report on the inspection and the photographs taken could be prepared to find out the cause of the incident, the nature of the damage to the Claimant's Main Dock and the repairs which would be required to make things right. In order to discharge the obligation to establish the right to refuse disclosure of the documents, the Defendant is required to demonstrate that the dominant purpose for their preparation is the litigation.

[66] The Defendant's evidence in support of withholding disclosure is that on advice of its Attorneys-at-Law, any inspection report or documentation derived from the inspection is protected by litigation privilege and not subject to compulsory disclosure. Although it has not stated the purpose or purposes for which such documents would or are to be produced, litigation having commenced prior to the underwater and above ground inspection, I have come to the view that the dominant purpose for preparing any report and documents derived from the inspection is the Defendant's preparation for the subsisting litigation. The Defendant's claim to litigation privilege in respect of documents derived from the inspection therefore succeeds and their specific disclosure refused in the result.

ORDER

[67] In light of the foregoing, it is ordered as follows.

1. The Claimant's application for interim payment is refused.

2. Specific disclosure of the following documents is to be made by the Claimant on or before 16th January 2023:
    a. So much of the Wallace Evans Jamaica Limited report 2009 which concerns the Main Dock; and
    b. So much of the Mott McDonald report 2013 which concerns the Main Dock.
3. Specific disclosure of the following documents is to be made by the Defendant on or before 16th January 2023:
    a. The Defendant's ship logs of all prevailing conditions affecting the M/T Piltene before and after the incident, including but not limited to the speed at which M/T Piltene was travelling at the time of the collision and the wind speed and direction at the time of the said collision and approach of the vessel; and
    b. The Captain's Incident Report in respect of the incident between the Claimant's Main Dock and the M/T Piltene on 30th April, 2021.
4. Save for the specific disclosures ordered at paragraphs 2 and 3 of this Order, the applications for request for information and for specific disclosure are refused.
5. Parties at liberty to apply for leave to appeal, if so advised.
6. Case Management Conference is fixed for 15th February 2023 at 10:00 am for two (2) hours.
7. Costs of the applications to be costs in the claim.
8. The Attorneys-at-Law for the Claimant are to prepare, file and serve this order.

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Carole Barnaby
Puisne Judge