IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE ADMIRALTY DIVISION

CLAIM NO. SU2022AD00003

BETWEEN	**THE PORT AUTHORITY OF JAMAICA**	**CLAIMANT**
AND	**KINETIC SHIPPING PTE LIMITED (OWNERS OF THE M/V MARTIME GRACIOUS)**	**DEFENDANT/ ANCILLARY CLAIMANT**
	PORTSIDE TOWING LIMITED (OWNERS OF M/T ANCILLARY "ALFRED LINTON" and M/ T "HARVEY LONG")	**ANCILLARY DEFENDANT**

Admiralty – Pilotage Act- Ancillary proceedings – Whether claim in rem – Vessel under tow – Collision with pier – Whether pilot of tug can be liable- Whether tugs lawfully arrested - Whether application to arrest ought to have been served – Whether duty to give full disclosure- Whether ex-parte order for arrest to be set aside- Whether and how much security for costs to be paid.

Krishna Desai and Amanda Montague instructed by Myers Fletcher & Gordon for the Claimant (Port Authority of Jamaica).

Emile Leiba, Chantal Bennett and Alison Mitchell instructed by Dunn Cox for the Defendant/Ancillary Claimant (Kinetic Shipping PTE Limited owner of MV Maritime Gracious)

Aon Stewart instructed by Knight Junor Samuels for the Ancillary Defendant (Portside Towing Limited owner of M/T "Alfred Linton" and M/T "Harvey Long")

Heard: September 29, 2023 and October 6, 2023.

IN CHAMBERS: By video conference

BATTS, J

[1] The orders outlined at paragraph 26 of this judgment were made on the 6th October 2023. I promised then to give reasons in writing at a later date. I now do so.

[2] By way of an Amended Notice of Application, filed on the 1st June 2023, the Ancillary Defendant Portside Towing Limited (which I will hereafter refer to as Portside) seeks to have an order for the arrest of their tugs set aside. Portside in the same application seeks to have security for costs ordered against the Ancillary Claimant, Kinetic Shipping PTE Limited (hereafter referred to as Kinetic). The vessels are no longer under arrest having been released by an order of the court made on the 21st February 2023. This application relates to the initial arrest made in the absence of Portside which also wants damages for the period of that arrest.

[3] The circumstances under which the vessels belonging to Portside were arrested can be shortly stated and are not in dispute. On the 29th July 2022, a vessel owned by Kinetic (being the "M/V Maritime Gracious"), collided with a pier owned by the Port Authority of Jamaica (hereafter referred to as the Port Authority). The collision occurred at a time when Kinetic's vessel was being towed by two tugs owned by Portside. On the 30th July 2022, the Port Authority commenced an admiralty claim in rem against Kinetic and obtained an Order for their vessel's arrest. On the 1st April 2022 the court released Kinetic's vessel after an acceptable letter of undertaking was issued. A Defence was filed by Kinetic and a Reply to Defence filed by the Port Authority. On the 11th November 2022, Kinetic filed an Ancillary Claim Form in Rem against Portside which was superseded on the 2nd February 2023 by an Amended Ancillary Claim Form in Rem. On that date Kinetic applied for an order to arrest two vessels owned by Portside being the M/T Alfred Linton and the M/T Harvey Long. Portside had already filed its Amended Defence to the Ancillary Claim on the 29th December 2022.

[4] On the 3rd February 2023 on an ex-parte application by Kinetic, an order was made for the arrest of the two tugs owned by Portside. On the 6th February 2023 the Order was varied to permit the two vessels to sail and carry out tugging operations within Jamaican waters. On the 21st February 2023, a consent Order was made releasing Portside's two vessels from arrest because an acceptable undertaking was provided. On the 13th March 2023, Portside filed a Defence to the Amended Ancillary Claim Form in Rem and Particulars of Claim. Portside in its defence among other things, denies that the Ancillary Claim is a claim in Rem. Liability in personam is also denied.

[5] The Notice of Application filed on 1st June 2023, and mentioned in Para. 1 above, was thereafter filed. The orders applied for were as follows:

a) *"The Warrant of arrest dated 3rd February 2023 is hereby set aside and discharged;*

b) *Orders numbered (1) and (2) made [by] (sic) the Honourable Mrs. Justice C. Brown Beckford on the 21st February 2023 are set aside.*

c) *The M/T Alfred Linton and M/T Harvey Long owned by Portside Towing limited being presently under arrest at the Port Rhoades (Discovery Bay) and Montego Bay Cruise and Cargo Terminal pursuant to a Warrant of Arrest dated 3rd February 2023 be released unconditionally.*

d) *The Ancillary Claimant is ordered to provide security for costs to the Ancillary Defendant in the amount of $8,900,000.00 or such amount as the Court deems just.*

e) *Costs to the Ancillary Defendant*

f) *Such further and or other Orders as the Court deems fit."*

It is alleged in the grounds of the Notice of Application that the court had no jurisdiction to arrest the vessels as the Ancillary Claim was not an admirably claim in rem. It is further contended that the arrest was obtained *mala fides* or *crassa negligentia* and also that there was a failure to give full disclosure. The application for security for costs is grounded in the fact that Kinetic resides outside of Jamaica and has no assets in Jamaica. On the 8th June and again on the 17th July, the application was adjourned for the filing of affidavits and written submissions.

[6] When the matter came on for hearing on the 29th September 2023 written submissions on behalf of all parties were before the court. The Claimant filed submissions, at the invitation of the Court, on the question whether or not there is a claim in rem disclosed on the Ancillary Claim. Each party was also afforded time to make oral submissions. I am indeed grateful for the industry displayed by all counsel in this matter. In this judgment I will not reproduce these arguments in full. It suffices to summarise and, wHere necessary, adopt or distinguish authorities relied upon in order to explain my decision. In this regard, I formed the view in the course of submissions that the question whether or not the arrest of the tugs was properly made is an issue best resolved after trial. Having reviewed the authorities, I remain of the same persuasion. As regards the matter of security for costs there was no real contest save as to the amount.

[7] Mr. Stewart, for Portside, submitted that the arrest was mala fides or crassa negligentia because:

a) The warrant was issued although there was no real risk of the tugs leaving Jamaican waters.

b) The warrant of arrest was applied for 7 months after the claim was filed and 3 months after the Ancillary Claim was filed.

c) Evidence that the vessels "*may traverse outside of Jamaican waters*" was insufficient.

d) The tugs are an essential service

e) The failure to give notice of the application to arrest was unreasonable and not in keeping with the overriding objective.

[8] Portside complains also that there was a failure, at the ex parte application, to make full and frank disclosure of:

a) The fact that the tugs have been performing tugging services for the last 10 years exclusively within Jamaican waters.

b) The tugs have never left Jamaican waters since their date of purchase.

c) There was never a risk the tug would leave Jamaican waters and their position is monitored by Automatic Identification Systems transponders.

d) The tugs required custom clearance.

e) It is not usual for tugboats to sail out of this jurisdiction.

[9] On the question whether the Ancillary Claim constitutes an admiralty claim in rem Portside was satisfied to rely on the submission filed by counsel for the Port Authority. On the question of security for costs, counsel relied upon **Matcam Marine Limited v Michael Matalon (the registered owner of the Orion Warrior (formally Matcam 1) Claim No. A 0002/2011(unreported judgment dated 6th October 2011)** in support of a submission that security for costs can be ordered in Admiralty claims.

[10] Mr. Leiba, for Kinetic, submitted that a claim in rem may be brought where there is damage done by a ship, damage received by a ship, claims for towage, and where there is a maritime lien or charge against a ship. Further, since Kinetic's vessel was being towed by Portside's tugs while under compulsory pilotage within the port the case is one concerning damage done by a ship. In other words, but for the negligent operation of the tugs there would have been no collision between Kinetic's vessel and the pier. Therefore, the damage was caused by the tugs. Furthermore, damage was done to Kinetic's vessel as a result of the negligent operation of the tugs and Mr. Leiba submitted that this was a claim for towage

since his client's vessel was being towed. On the matter of security for costs Mr. Leiba submitted that in the circumstances of this case it was not just to make the order having regard to the strength of his client's case. He also submitted that the amount of security claimed was exorbitant. Mr. Leiba further urged that an error did not amount to mala fides sufficient to result in the setting aside of an arrest. He submitted that neither malice nor gross negligence was to be implied. He denied that there was material non-disclosure of any fact known by his client. Finally, he submitted that, as the issue had not yet been tried, the question at this stage was whether the facts alleged, if proven, amounted to a claim in rem. It was he said, the act of negligence of Portside's tugs which caused the collision.

[11] Mr. Desai for the Port Authority submitted that as section 29 of the Pilotage Act makes the master of a vessel under pilotage *"answerable for any loss or damage*" it is the master of the vessel, not the pilot, who remains answerable for the navigation and management of the ship. This applies even when it is being towed as the master gives instructions to the tugs. This he said was also the position at common law and he relied on **The Niobe (1888) 13 PD55**. There was, he submitted, *"nothing to suggest that the navigation and management of the M/V Maritime Gracious shifted to the tugs for any maritime lien to attach to the tugs."*

[12] Mr. Desai cited several authorities to the effect that for a claim in rem where reliance is placed on Section 80 (d) of the Shipping Act the damage must be caused by the ship herself. The ship must be the active cause or as stated by Lord Justice Bowen in the **Vera Cruz (No. 2) (1884) 9 PD 96 @ 101.** *"Done by a ship means done by those in charge of a ship with the ship as the noxious instrument."* Counsel cited other authorities, one or two of which I will refer to later in this judgment.

[13] This court has on previous occasions outlined the circumstances under which the Administration of Justice Act (UK) 1956 (4 & 5 Eliz 2 Ch 46) applies to Jamaica, see **West Indies Petroleum v Asphalt Trader Limited (Owners of M/T Asphalt Trader) [2020] JMCC Comm13 (unreported delivered 10th July 2020) @**

Paragraph 16 and the authorities therein cited. On the facts of this case, for the issue between Kinetic and Portside to be the subject of a claim in rem regard must be had to one or other of subsections (d), (e), or (k) of section (1) (i) of the Administration of Justice Act 1956 (UK). These read as follows:

> (d) any claim for damage done by a ship
>
> (e) any claim for damage received by a ship
>
> (k) any claim in the nature of towage in respect of a ship or an aircraft.

I immediately discount subsection (k) because although the vessel was being towed this is not a claim "*in the nature of towage*". Towage refers to the fees or charges for the service and has been so recognized judicially, see discussion in **Simon Rainey The Law of Tug and Tow and Offshore Contracts 4th edition at para 14.25**. The question therefore is whether this claim falls within (d) or (e) being either damage done by a ship or damage received by a ship.

[14] In this regard I do not agree with Mr. Desai that a vessel under tow or pilotage, can never have a claim in rem against the tow. Nor do I agree that on the facts of this case, it cannot be said there is no causal relationship between the act of the tug and the damage claimed. In **John Currie (Owner of SS Easdale v McKnight's Executors (Mortgagees of SS Dunlossit) (1896-97) HL Session Cases Series IV Vol XXIV 1** the crew of the Dunlossit illegally cut the cables of the "Easdale" to allow their vessel to put out to sea as bad weather approached. The Easdale was thereby set adrift and was damaged. The Easdale's owners obtained judgment against the owners of the Dunlossit but in order to obtain priority of its claim sought a maritime lien premised on it being a claim in rem. The court held it was not because the Dunlossit had not been the cause of the damage. As per the Lord Chancellor:

> At p. 2 *"But there seems to me to be no connection between the damage to the "Easdale" and any act or thing done by the "Dunlossit". That the act was done in order to enable the Dunlossit to start does not make it an act of the Dunlossit. That it was done by the crew of the Dunlossit does not make it an act of the*

> *Dunlossit; and the phrase that it must be the fault of the ship itself is not a mere figurative expression, but it imports, in my opinion, that the ship against which a maritime lien for damages is claimed is the instrument of mischief, and that in order to establish the liability of the ship itself to the maritime lien claimed some act of navigation of the ship itself should whether mediately or immediately be the cause of the damage."*

Lord Watson, in the same case, stated:

> At page 5
>
> *"I think it is of essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manoeuvre of the ship to which it attaches"*

Lord Herschell is even clearer:

> At page 6: -
>
> *"In the Admiralty Court in England a maritime lien has frequently been enforced, in cases of collision, against the vessel which was in fault, but no case could be cited which was at all similar to the present one. In all the cases referred to the damage had been caused either by a collision with the vessel which was to blame, or by that vessel having driven the other into collision with some third vessel or object. The doctrine was originally asserted in cases of damage by collision with the vessel which was declared subject to the lien. It has since been applied in cases in which the damage did not result from a collision with the vessel in fault, but in which, owing to the night navigation of that vessel, the injured ship was driven into collision with some other vessel or object. I express no opinion upon the point, but the ground of the decision was in all cases this, that the vessel on which the lien was enforced had, in maritime language, done the damage. Here the Dunlossit did no damage."*

[15] It is therefore clear to me that at common law there need not be actual physical contact with the claimant's vessel craft or pier. A claim in rem is possible against

the vessel which, by its manner of navigation or its action or inaction, caused the damage. Causation is a matter of fact to be determined at trial. However, in this case we have the provisions of the Pilotage Act to consider. Section 29 provides:

> *"The owner or master of a ship navigating in any pilotage area shall be answerable for any loss or damage caused by the ship or by any fault of the navigation of the ship in the same manner as he would if navigating in a non-pilotage area in Jamaican territorial waters."*

I agree with Mr. Desai's submission that the Act contemplates that the master, even when the vessel is under compulsory pilotage, remains responsible for the navigation and management of his ship.

[16] In the case at bar, however, there are allegations that the collision was caused by the fact among other things that the tug was "*underpowered*," see para 10 of the Amended Ancillary Admiralty Claim Form filed on the 2nd February 2023. This it is alleged occurred because one of the tugs ceased towing without notice to the master of Kinetic's vessel. It is also alleged that the tugs were not seaworthy, see particular (a) to para 10 of the Amended Ancillary Admiralty Claim Form, and that there was a failure to properly operate the tugs among other things, see particulars (b) and (c) of para 10 of the said document.

[17] I do not accept that Section 29 of the Pilotage Act bars the possibility, in all circumstances, of a claim by the vessel being towed against the tug. The purpose of section 29 is to ensure that parties have recourse to the vessel which directly caused damage. It is consistent with the position at common law and harkens back to a time when pilots were "*volunteers.*" They were not employees of the state or the ship's master and hence no one was vicariously responsible for any damage caused by their negligence. The statute served to provide a remedy to third parties (and port authorities) against the owner of the vessel which was under pilotage, see generally **Oceangas (Gibralter) Ltd v Port of London Authority (The Cavendish) [1993] Vol 2 Lloyd's Rep**. **292 @ 294-295**.

[18] The position nowadays is more nuanced. In the first place one wonders, if the intention is to absolutely preclude the possibility of liability in the pilot (or the tug), why insert sections 33 and 34 in the Pilotage Act. These sections limit the liability of the pilot:

> *"33. (1) Every person to whom a pilot's licence is granted shall execute a bond for such amount and in such form as the Authority may prescribe, with a view to the limitation of his liability for neglect or want of skill.*
>
> *(2) The liability for neglect or want of skill of a pilot who has executed a bond as required by subsection (1) of this section shall be limited to-*
>
> *(a) the amount of the bond; plus (b) the amount*
>
> *(b) the amount of the pilotage charges payable to the Authority in respect of the services being rendered by the pilot when he became so liable.*
>
> *(3) Any bond given by a pilot by virtue of subsection (1) shall not be liable to stamp duty or other government tax and a pilot shall not be called upon to pay any expense in relation to the bond other than the premiums for obtaining or renewing the same.*
>
> *34. Where any proceedings are taken against a pilot for any neglect or want of skill in respect of which his liability is limited as provided by section 33, and other claims are made or apprehended in respect of the same neglect or want of skill, the court in which the proceedings are taken may determine the amount of the pilot's liability, and, upon payment by the pilot of that amount into court, the court may-*

(a) distribute that amount rateably among the several claimants;

(b) stay any proceedings pending in any other court in relation to the same matter; and

(c) subject to any regulations, proceed in such manner as it thinks fit as to-

(i) making persons interested parties to the proceedings;

(ii) the exclusion of any claims not instituted within the prescribed time;

(iii) requiring security from the pilot; and

(iv) payment of any costs the court thinks just."

[19] I see no jurisprudential hurdle in a situation in which by law the master/owner of a vessel remains liable for damage done by his vessel while under pilotage or tug but, at the same time, is entitled to seek an indemnity for such damage from the pilot or tug. Such a scenario is easier to contemplate where the pilot or tug is privately owned and is not a servant or agent of the relevant port authority. However, it need not be so limited. Parliament could have granted an absolute immunity but did not. I am fortified in this view by two authorities helpfully cited to me by Mr. Desai. One is **The Niobe ((1888) PD Vol XIII p. 55**. In that case, it was decided that when the tug collided with another vessel, the vessel being towed by the tug was liable. The Lord President (Sir James Hannen) decided, as is accurately recorded in the headnote, that,

> *"The owners of the vessel in tow were liable. Under an ordinary contract of towage, the vessel in tow has control over the tug, and is therefore liable for the wrongful acts of the latter, unless they are done so*

> *suddenly as to prevent the vessel in tow from controlling them."*

This case is not authority for a proposition that the tug can never be held responsible. Indeed, the Lord President stated at page 60:

> *"If it had been shown that the Flying Serpent had by some sudden manoeuvre, which those on board the Niobe could not control, brought about the collision, I should have held the Niobe blameless. Thus, in the Stormcock, (4 Asp. Mar L.C. 410) I held the tug to be responsible, because the tug which was originally steering a safe course so suddenly departed from it that the tow could not check her or follow without striking another vessel. I think that the same result would follow in a river towage in like circumstances. But in the present case, the action of the Flying Serpent was not sudden, and might have been prevented by those on board the Niobe, it they had done their duty."*

[20] In the other case also brought to my attention by Mr. Desai, the Federal Court of Australia came to a similar conclusion in more modern times, see **Elbe Shipping S.A. v Giant Marine Shipping SA (being the owners of the Ship "Global Peace" and Adsteam Harbour PTY Limited [2008] FCA 1135 (NSD 124 of 2006 judgment delivered 5th April 2008 by Dowsett J)**. In that case the vessel "Global Peace" was berthing with the help of a Tug owned by Adstream. The tug collided with "Global Peace" and caused oil to escape. That oil went on to damage other vessels one of which was owned by the claimant (Elbe). It was alleged among other things that the tug was unfit for the job. The tug owners admitted liability. The matter concerned motions for judgment against the ship "Global Peace" or its owners among other things. The court declined to enter summary judgment because it did not necessarily follow that the master of the ship being towed was liable for the negligence of the tug. This was so neither under the contract nor at law. Each case, the learned judge held, depends on its particular facts which in turn of course depended on the evidence. At paragraphs 34 to 37 the learned judge discusses the Niobe and stated:

> *"37. The case is authority for the proposition that the master of the tow must accept responsibility and direct the tug appropriately. It does not follow from that decision that the tow will be responsible for actions by the tug over which it has no control."*

At paragraphs 38 and 39 the learned judge cites from authorities which establish that there is no general rule of law that the vessel being towed is liable for the acts of the tug and concluded:

> *"40. There is no general rule that the tow is liable for damage done by the tug. I am not persuaded that the plaintiffs would probably have succeeded had the actions gone to trial."*

[21] It follows therefore that I cannot at this stage determine there is no arguable or valid claim in rem against Portside. The allegations in the Amended Ancillary Claim suffice to support such a claim involving as it does acts of negligence by the tug, alleged defects in the tug, and the allegation that one tug was withdrawn from the operation. It will be a matter of evidence at trial to determine whether these sufficed by their suddenness or otherwise to separate the responsibility of the ship owner which would otherwise exist. There is in the claim for an indemnity a claim for the damage directly suffered by Kinetics' vessel and the same conclusion would also apply. I therefore decline at this stage to say there is no claim in rem on the Ancillary Claim. Such a determination is best made after a trial of the matter.

[22] The Ancillary Defendant (Portside) also seeks to have the order for arrest set aside because of the Ancillary Claimant's failure to make material disclosures and to serve notice of the application. The duty to make full disclosure on ex parte applications is well known and has been reiterated in this Court, see **Port Kaiser Terminal SA v Rusal Alpart Jamaica (A Partnership) [2016] JMCC Comm CD 10 (judgment delivered 7th April 2016) @ paragraphs 19-20**. In admiralty claims, though not any less applicable, the situation may be ameliorated because often attorneys or parties only have hours to prepare and file in order to prevent vessels

leaving port. No such situation exists in this case as the Ancillary Claim was filed on the 11th November 2022. An Ancillary Defence was filed on the 29th December 2022. These facts were disclosed to the Court at the ex parte hearing. Mr. Aon Stewart for Portside put forward several matters related to the tugs and their operational limits and restrictions. However, there is no evidence to suggest that Kinetic was aware of them at the time of the application vis: that the tugs had performed exclusively in Jamaican waters for the previous 10 years, that the tugs had never left Jamaican waters, that they required certain "clearances" before leaving Jamaican waters, or that it is not usual for tugboats to sail on the high seas unless being relocated. I therefore decline to set aside the ex parte order for arrest on the basis of these nondisclosures.

[23] I do however agree with Mr. Stewart's submission that an ex parte application was unwarranted and even unreasonable. This is because Portside already had attorneys on record at the time the application was made. It was also made some three months after the Ancillary Claim had been filed and served. Any fear of a sudden escape by the tugs leaving Jamaican waters was unreasonable. However, the fact that Portside had filed a Defence to the Ancillary Claim and therefore that they were represented was a matter of record and therefore known to the court at the ex parte hearing. So this is not a question of a failure to disclose. It involves my concluding not just that the application by way of ex parte notice was unreasonable but that my sister colleague erred in granting that ex parte order for arrest.

[24] I venture to say that applications to set aside an order should if possible, be listed before the judge who made that order. It is therefore with some hesitation and I daresay regret that I so find. I will however not grant the order setting aside the order for arrest because the arrest was modified at an inter parties hearing presumably with the consent of both parties. Parties ought not, except in occasions of great urgency, or if there is reason to believe service of the application may negate the order sought, proceed ex parte where attorneys are on record in the proceedings. At minimum a notice should have been given on the morning of the

hearing. I will reflect my displeasure, at the failure to give notice, by an award of costs against the Ancillary Claimant.

[25] On the matter of security for costs, I agree that it is warranted. Kinetic resides outside the jurisdiction and has no known assets here. I have perused the draft bill of costs, exhibit BS1 to the affidavit of Bert Samuels filed on the 1st June 2023 and note that it is interim and although only reflective of work done to date amounts to $8,883,352.10. I have also considered Kinetic's draft interim points of dispute exhibit No. 1 to the affidavit of Nicolas Cover filed on the 28th June 2034. Their proposed amount is $1,198,184.20. It seems to me that security for costs should relate to the costs of the action both past and anticipated. A draft bill for work already done is not particularly helpful. Questions such as how many days of trial are anticipated have not been answered by the draft bill. In assessing a reasonable amount for security, I agree with Mr. Leiba that provision for two senior counsel is inappropriate. In this matter therefore, I will do the best I can, based on my experience in these matters. The matter involves three parties, a Claim, and an Ancillary Claim. It can be anticipated that there will be expert witnesses called not only on the question of navigation/control of Kinetic's ship and the Portside tugs but also on the matter of damage to the Port Authority's pier. Considerable costs have already been incurred on interlocutory applications and one can anticipate more at the case management conference to come. Therefore, assuming at least 5 days of trial, in all the circumstances I assess a reasonable amount as security for the costs of the Ancillary Claim at $5 million.

[26] My orders are as follows:

1. Application to set aside warrant of arrest, after an ex parte application, on the 3rd February 2023 is refused

2. The Ancillary Claimant is ordered to provide security for costs to the Ancillary Defendant in the amount of $5 million dollars either by lodgement of that amount into a joint interest-bearing account at a registered financial institution in the joint names of the

attorneys representing both parties to the ancillary claim or, by a payment into court.

3. The security for costs as aforesaid shall be provided on or before the 6th day of November 2023 failing which the Ancillary Claim will be stayed.

4. 60% of the costs of this application to the Ancillary Defendant against the Ancillary Claimant. [I awarded 60% of the costs because, although the Ancillary Defendant achieved success on the application for security for costs, the Ancillary Claimant succeeded on the point which took most of the court's time and deliberations. However, the failure to serve the ex-parte application was unreasonable and wrong. This cost award is intended to reflect the court's disapproval].

5. Formal Order to be prepared, filed and served by attorneys for the Ancillary Defendant.

David Batts
Puisne Judge