

COMMONWEALTH OF THE BAHAMAS

2022/COM/adm/00012 & 00013

IN THE SUPREME COURT

2022/COM/adm/FP/00006 & 00007

Commercial Division

BETWEEN

**IN THE MATTER of the Admiralty Action in Rem against the
"M.V. CRYSTAL SYMPHONY"**

**IN THE MATTER of the Admiralty Action in Rem against the
"M.V. CYRSTAL SERENITY"**

AND

DNB BANK ASA

Plaintiff

AND

**THE OWNERS AND PARTIES INTERESTED
IN THE MOTOR VESSEL "CRYSTAL SYMPHONY"**

AND

**THE OWNERS AND PARTIES INTERESTED
IN THE MOTOR VESSEL "CRYSTAL SERENITY"**

Defendant

APPEARANCES: Ms. Wynsome Carey and Mr. Darzhon Rolle on behalf for the
Plaintiff

Ms. Luana Ingraham of on behalf of the Office of the Attorney
General

Mr. Samuel Brown on behalf of SMS International Shore
Operations US Inc.

Mrs. Lena Bonaby on behalf of Nassau Cruise Port Limited and
GPH Antigua Limited

HEARING DATE: 20th January 2023

BEFORE: The Honourable Mr. Justice Andrew Forbes

DECISION

FORBES, J

BACKGROUND

1. By way of a brief factual background, on the 4th February, 2022 the motor vessels “Crystal Symphony” and “Crystal Serenity” were arrested in Freeport, Grand Bahama at the instance of Peninsula Petroleum Far East PTE. Ltd. in two actions (2022/COM/ adm/0008 and 2022/COM/adm/0009). On the 24th February, 2022 the vessels having been released by Peninsula, were again arrested, this time by the Plaintiff herein pursuant to warrants of ship arrest issued in its own two actions (2022/COM/adm/0012 and 2022/COM/adm/0013). In March, 2022, Orders for the Appraisalment and Sale of the vessels were made in the Plaintiff’s actions. By June, 2022 both vessels were sold for US\$25,000,000.00 and US\$103,000,000.00 respectively and the proceeds of sale deposited into a joint bank account pursuant to the terms of that Order. Creditors were given notice by an advertisement by the Admiralty Marshal on the Trade Winds website in accordance with the Order that “any person with a claim against the Vessel or the proceeds of sale thereof, upon which he intends to proceed to judgment, should do so before the expiry of the period of 30 days...”

2. In the meantime, at different stages, the various claimants took steps to participate in these proceedings, most of them as Intervenors. By the 5th August, 2022, the Plaintiff obtained Judgment in Default. On the 27th September, 2022, the Plaintiff filed an application by Notice of Motion for an Order for the determination of priority of payments to the Claimants against the proceeds of sale of the subject vessels and for the payment out of the amounts found due to the various Claimants. On the 17th November 2022 the Plaintiff and a number of interested parties appeared before Madam Justice Ntshonda Tynes (Ag.) and a Ruling was subsequently delivered. As a result of the said Ruling an Order for the Determination of Priorities and payment was executed and filed on the 17th January 2023.
3. On the 5th December 2022 the Plaintiff filed a Notice of Motion for the Admiralty Marshal's Objection to Value Added Tax ("VAT") pursuant to Order 67, Rule 12 and Order 67, Rule 28 of the Rules of the Supreme Court (hereinafter referred to as "RSC") or the Court's inherent jurisdiction. The Plaintiff by its Notice of Motion seeks the following relief:- (i) that the Admiralty Marshal (hereafter referred to as the Marshal) do within 14 days lodge with the Comptroller of Value Added Tax an objection in the form as annexed hereto ("the Marshal's Objection") to the Notice of Assessment dated 20th October 2022 issued in connection with this Honourable Court's sale of the Vessels herein; (ii) that the Admiralty Marshal do within 14 days make available for inspection by the Plaintiff his VAT registration documentation, his VAT return in respect of this Court sale and all correspondence (including emails and WhatsApp messages) he sent and received on the subject of his alleged VAT liability in these matters; (iii) the

costs and expenses incurred by the Admiralty Marshal in lodging the Marshal's objection and in complying with the Orders be paid out of the proceeds of the sale and form part of the Admiralty Marshal's costs and expenses in these actions; (iv) costs and expenses of and incidental to the application be the Plaintiff in any event and be taxed and paid from the proceeds of sale of the Vessel in priority to all claims against the proceeds of sale except for the Admiralty Marshal's costs and expenses in these proceedings; (v) the time for the Marshal's Objection be extended if necessary; (vi) such further orders as the Court may deem just and (vii) there be liberty to apply. In addition to the Plaintiff's Notice of Motion, the Plaintiff also included VAT Form No. 61 entitled "Notice of Objection" addressed to the Comptroller of VAT and set out the grounds of objection to the said Notice of Assessment. The Plaintiff's application was supported by the second Affidavit of Shenique R. Hanna filed on the 9th December 2022 and a Certificate of Urgency filed on the 19th December 2022.

4. The Plaintiff appeared before the Court on the said hearing date along with the Intervenors and the Office of the Attorney General (hereinafter referred to as "the OAG") who advised the Court that they appeared on behalf of the Comptroller of VAT and Admiralty the Marshal.
5. The Plaintiff relies on its Skeleton Arguments filed on the 17th, 19th and 27th January, 2023. The Court having had the opportunity to read the material and hearing from Counsel indicated its intention to render a decision and does so now.

THE PLAINTIFF'S APPLICATION

Submissions

6. The Plaintiff's submissions center around the proposition that the Admiralty Marshal ought to and should have objected to the Notice of Assessment made by the Department of Inland Revenue ("DIR") on the 20th October, 2022. Plaintiff Counsel submits that due to the substantial amount at stake and the objections made by it, the issue of whether the VAT assessment is correct in law should be open for determination in accordance with the procedures prescribed by the VAT legislation; and secondly that the DIR filed an application for an Order that the amount assessed be paid from the proceeds of sale to the detriment of the creditors. The Court at this juncture has not had sight of the same. The Plaintiff submits that Order 75, Rule 12(3) of the English Rules of the Supreme Court makes explicit provision for a party to apply to the Court so that the party can give directions to the Marshal. Further, that British Shipping Laws represented the practice in the Admiralty Courts prior to the introduction of Order, 75, Rule 12 of the English Rules.
7. The Plaintiff also refers the Court to Order 67, Rule 28 of the RSC in support of the relief sought by this application, i.e. that the Marshal produce certain documents relevant to his alleged VAT liability. The Plaintiff submits that the Marshal occupies the positions of an officer of the Court and a Government employee and was in a delicate situation when presented with the Assessment. Additionally, in its Further Written Submissions, the Plaintiff submits that the Court as an Admiralty Court has inherent jurisdiction whereby it can give directions to its officer and agent, i.e. the Admiralty Marshal.

ANALYSIS

The Law

8. Order 67, Rule 12 and 28 of the RSC provides:-

“12. (1) The marshal may at any time apply to the Court for directions with respect to property under arrest in an action and may, or, if the Court so directs, shall, give notice of the application to any or all of the parties to every action against the property.

(2) The marshal shall send a copy of any order made under paragraph (1) to all the parties to every action against the property to which the order relates.

...

28. Without prejudice to its powers under Order 29, rules 2 and 3, and Order 35, rule 5, the Court may, on the application of any party, make an order for the inspection by the assessors (if the action is tried with assessors), or by any party or witness, of any ship or other property, whether real or personal, the inspection of which may be necessary or desirable for the purpose of obtaining full information or evidence in connection with any issue in the action.”

DISCUSSION

Objection to Notice of Assessment

9. The essence of the submissions given by the Plaintiff is that the Admiralty Marshal ought to object to the Notice of Assessment made by the DIR on the 20th October, 2022. Further, Plaintiff Counsel submits that given the considerable amount at stake the Plaintiff stands to lose the issue of whether

the VAT assessment is correct in law should be open for determination in accordance with the procedures prescribed by Parliament and such an objection would facilitate this.

10. According to Section 70 of the Supreme Court Act an Admiralty Marshal is appointed to the Court in its admiralty jurisdiction by The Governor General acting in accordance with the advice of the Public Service Commission. It is not disputed by the Plaintiff that the Admiralty Marshal was duly appointed in the said role. In understanding the submissions made by the Plaintiff, the Plaintiff essentially accepts that Order 67, Rule 12 of the RSC only provides for the Marshal to make application for the Court's direction in relation to property under arrest but the rule in England (Order 75, Rule 12(3) of the Supreme Court Practice, 1999 ("the White Book") extends this provision further and provides that other persons other than the Marshal could apply for directions to be given to the Marshal. Moreover, the Plaintiff has sought to ask the Court to invoke its inherent jurisdiction to make an Order in their favor to then give directions to the Marshal as what they submit the English Admiralty Rules and in accordance with British Shipping Laws makes provisions to do so. The Plaintiff cited the case of **Bain, Gomez & Co. (a Firm) v. The Attorney General of the Commonwealth of the Bahamas and Captain Anthony Allens (in his capacity as) Admiralty Marshal of the Supreme Court (2008) 4 BHS J No 24 and Court of Appeal No. 46 of 2007** in support of this submission.

11. The language of Order 67, Rule 12 of the RSC is discretionary as it provides for the Admiralty Marshal to seek directions for the Court if he/she so wishes ("may at any time apply to the Court for directions") and as such the burden

rests on the Admiralty Marshal and not the other way around as Plaintiff Counsel has asserted.

12. Additionally, while the Plaintiff has asked the Court to invoke its inherent jurisdiction for the application before it, the Court wishes to offer some commentary on this often used phrase “**inherent jurisdiction**” and borrows the observations of Lord Diplock in the case of **Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corpn (1981) AC 909 at 977.** Lord Diplock stated “*it would be conducive to clarity if the use of the expressions inherent power and inherent jurisdiction of the High Court were confined to the doing by the Court of acts which it needs must have power to do in order to maintain its character as a court of justice.*” Further the comments of Lord Justice Mummery in **Tombstone Ltd v. Raja [2009 1 WLR 1143]** where he said as follows: “*The Jurisdiction of the Court which is comprised within the term inherent is that which enables it to fulfil, properly and effectively, its role as a court. However, the term inherent jurisdiction is not in contradistinction to the jurisdiction of the court exercisable at common law or conferred by Statute or rules of court and a claim should be dealt with in accordance with the rules rather than by exercising the court’s inherent jurisdiction where the subject matter of the claim is governed by those rules.*” Additionally to put an even finer point in **Al Rawi v. Security Service [2011] 1 AER 1** where it was stated as follows: “*Even in an area which is not the subject of Statute or statutory procedural rules, the court’s inherent jurisdiction to regulate how proceedings should be conducted is limited because (subject to certain established and limited exceptions) the court cannot exercise its power in such a way as will deny parties their fundamental common law right to*

participate in the proceedings in accordance with the common law principles of natural justice and open justice.”

13. Having considered the submissions of the Plaintiff the Court is satisfied that there are both statutory and procedural rules in place that are adequate to address the issues raised and find that it will not invoke its inherent jurisdiction nor will it give directions to the Admiralty Marshal as it relates to an objection to the said Notice of Assessment.

Inspection by Plaintiff of Admiralty Marshal

14. In the Plaintiff's Notice of Motion they seek an Order that the Admiralty Marshal within 14 days make available for inspection by the Plaintiff (i) his VAT registration documentation; (ii) his VAT return in respect of the Court sale and (iii) all correspondence (including emails and Whatsapp messages) he has sent and received on the subject of his alleged VAT liability in this matter.

15. The Plaintiff has submitted that the Admiralty Marshal occupies the position as a Court Officer and a Government Employee (a Defence Force Officer) and was in a delicate situation when presented with the Assessment; that the Admiralty Marshal is being advised by the same attorneys that represent the Department of Inland Revenue; that it appears that although the Department of Inland Revenue's Assessment is directed to the Marshal, the Admiralty Marshal's employers were effectively telling him that he must seek payment of the assessed VAT on their behalf from the proceeds of sale, which proceeds would otherwise be paid to the Bank.

16. As the Court understands the submissions made by Plaintiff Counsel the Admiralty Marshal has been in a conflicted position as he holds the office of Admiralty Marshal and as Senior Commodore on the Royal Bahamas Defence Force, a government body. However, the Plaintiff has not adduced any evidence in support of the assertion or allegation that the Admiralty Marshal's employers somehow advised him to accept the Notice of Assessment and seek payment of VAT on the judicial sale in an attempt to deprive the Plaintiff of what they deem as the full proceeds to be paid to them. Additionally, the Plaintiff has not provided to this Court any authorities in support of their submission that this Court should compel the Admiralty Marshal to produce the items requested at paragraph 2 of its Notice of Motion. The Court cannot move on bare assertions but with credible evidence and authorities placed before it.

17. Therefore, the Plaintiff has not satisfied the Court that it should compel the Admiralty Marshal to produce the items in paragraph 2 of its Notice of Motion for inspection.

Intervening of the Office of the Attorney General

18. During the hearing, the Court asked Counsel for the Office of the Attorney General ("OAG") to provide their reason for their appearance. Counsel for the OAG advised the Court that they appeared on behalf of the Department of Inland Revenue and the Admiralty Marshal. The submissions of Counsel for the OAG were mainly centered on the statutory authority of the VAT Comptroller; that the said judicial sales of the vessels amounted to a taxable activity under the VAT legislation; that the VAT legislation provides its own

procedure for disputing the Notice of Assessment and that the Plaintiff does not have any standing to object the said Notice as the VAT legislation provides that the person who was served with the Notice can only object and that person was the Admiralty Marshal. However, it appears that while Plaintiff Counsel and Counsel for the OAG advised that a Memorandum and Notice of Appearance was filed on its behalf, the Court has not had sight of the same.

19. Following questions from the Court, the parties were asked to address the legal grounds on which the OAG can intervene on the application before it. Counsel for the Office of the Attorney General submits that the Comptroller as head of the VAT department determined that the sale of the said vessels was a taxable activity for which VAT was due and owing; that the VAT Department and/or the Department of Inland Revenue falls within the ambit of the Ministry of Finance and is a government department of agency. Further, they submit that the Crown Proceedings Act, (Section 12(1)) provides that civil proceedings by or against the Crown shall be instituted by or against the Attorney General and that their intervention is to act on behalf of the Comptroller in the collection of the VAT revenue from the sale. Further, Counsel for the OAG for the most part submits that the reason for their intervention on behalf of the Admiralty Marshal is that the VAT Act is no respecter of persons as it relates to separation of powers; that the Admiralty Marshal is an officer of the Court and is statutorily appointed to act in the Admiralty jurisdiction and in the case of the sale of shipping vessels and refers the Court to Section 70 of the Supreme Court Act. Counsel also submitted that the parties had previously demonstrated that the Admiralty

Marshall is a taxable person by way of the VAT Act and that VAT is payable on every taxable supply of goods in The Bahamas by a taxable person.

20. Plaintiff Counsel objects to the appearance by Counsel for the OAG and submitted that only the Defendant owners can enter an appearance to an action without leave (**See British Shipping Laws, Vol. 1, Admiralty Practice at paragraph 295**) and that mere interested parties must apply for leave to intervene and referred the Court to Order 67, Rule 17 (1) and (2) of the RSC. Therefore they submit that the OAG did not apply nor obtain leave to intervene but instead filed appearances without leave and as such the “appearances” are irregular. Further, that as an intervener they do not have standing to raise issues not material to the protection of their interests in the rest and cannot set up defences which the Defendants themselves could not have set up. **See British Shipping Laws, Vol. 1, Admiralty Practice at paragraph 311.** Plaintiff Counsel also submits that the Admiralty Marshal is an officer of the Court and therefore does not require representation and it is inappropriate for him to be represented by the OAG in circumstances where the said Office also represents the DIR.

21. The Court notes that during the hearing on the 17th November, 2022 before then Justice Ntshonda Tynes, (Ag.) Plaintiff Counsel objected to the OAG acting on behalf of the Admiralty Marshal and the DIR however, Plaintiff Counsel at the time was not minded to agree to have the said hearing adjourned so that the Legal Officer on behalf of the DIR could receive further instructions relative to the DIR’s interest in that application. It does not appear that the Court at that time made a determination as to whether the OAG should represent the Admiralty Marshal and the DIR but advised

Counsel for the OAG that they were free to take any steps they wished between the hearing date and the rendering of a Ruling on that application.

22. While the Plaintiff's application has moved from asking the Court to direct the Admiralty Marshal to object to the Notice of Assessment by the DIR to now objecting to the legitimacy of the application of VAT to the judicial sale of the said vessels, the Court is of the view that the intervention of the OAG for this hearing was premature. The real dispute between the Plaintiff and the DIR should be properly adjudicated by way of the DIR bringing its own claim to recover the sum representing VAT attached to the judicial sales of the said vessels they allege is now due and owing.

23. Further, in a Ruling dated the 19th December, 2022 by then Justice Ntshonda Tynes (Ag.) following an application by the Plaintiff to determine the order of priorities for payment out from the said judicial sales of the vessels, Justice Tynes (Ag.) set aside certain sums to be retained and held as security and costs for prospective judgments that may be obtained by the relevant Claimants in prosecuting their claims. Considering the application before it, the Court echoes the same sentiment as Justice Ntshonda Tynes (Ag.) at paragraph 12 of the said Ruling whereby she stated **"The relevant Interveners and Intended Caveator are urged to prosecute their respective claims with dispatch should they so choose."** (emphasis added)

DISPOSITION

24. Therefore, having heard and read the submissions on behalf of the Plaintiff and considered the relevant case law, the Court is of the view that the application filed by the Plaintiff is premature at best as the Admiralty Marshal has yet to make a payout and can only do so where a party has been

adjudged a creditor. To date the Plaintiff is the only party so adjudged. Additionally, funds have been set aside subject to further determination by the Court.

25. The Court is also of the view that the OAG was not required to participate in this application and as such their intervention at this juncture was misguided at best.

26. Therefore, as the Plaintiff was not successful on its application, the Court will exercise its discretion and make no order as to costs.

27. The Plaintiff asked for the Court to set a date within 14 days should the Plaintiff wish to seek leave to appeal the Court's Ruling. The Court was not minded to deny the Plaintiff's right to appeal and subsequently granted the Plaintiff leave to appeal its Ruling.



Justice Andrew Forbes

Dated the 30 day of March 2023