COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2021/CLE/gen/00415

BETWEEN

XB AHTS HERO SHIPPING INC.

Claimant

AND

STAR CLIPPERS LTD.

Defendant

Before:	**Her Ladyship The Honourable Madam Senior Justice Deborah Fraser**
Appearances:	**Mr. Jacy Whittaker for the Claimant**
	Mrs. Sophia Rolle-Kapousouzoglou with Mr. Valdere J. Murphy for the Defendant
Judgment Date:	**01 August 2023**

Striking Out – Order 18 Rule 19(1)(a),(b),(c) and (d) of the Rules of the Supreme Court, 1978 – Order 31A Rule 20(1)(b) and (c) – Res Judicata – Henderson v Henderson Rule - Extension of Time to File Defence — Order 3 Rule 4 of the Rules of the Supreme Court, 1978 – Order 31A Rule 18 (2)(b) of the Rules of the Supreme Court, 1978

JUDGMENT

1. There are two applications brought on behalf of the Defendant, Star Clippers Ltd ("**Star Clippers**") – namely, (i) an application for Striking Out; and (ii) an application for Extension of Time to file a Defence. Each application will be considered in turn.

Background

2. The Claimant, XB AHTS Hero Shipping Inc. ("**Hero Shipping**"), is a registered company incorporated under the laws of The Marshall Islands and the owner of a 162 meter sailing passenger vessel known as "Golden Horizon" (ex Brodosplit Hull No. 483, previously intended to be named "Flying Clipper") ("**Vessel**"). Hero Shipping is also a subsidiary of Brodosplit-Plovidba d.o.o, a company registered and incorporated under the laws of the Republic of Croatia. Brodosplit-Plovidba is a wholly owned subsidiary of Brodogradevna Industrija Split, dionicko drustvo ("**Brodosplit**") a company also registered and incorporated under the laws of the Republic of Croatia. Brodosplit is engaged in the business of shipbuilding.

3. Star Clippers, is a registered company incorporated under the laws of the Commonwealth of The Bahamas and the Respondent in the Matter of An International Arbitration pursuant to the UNUM Arbitration Rules (UNUM Arbitration 19.006) between Brodogradevna Industrija Split, dionicko drustvo ("Brodosplit") and Star Clippers Ltd. ("**Arbitration**").

4. On 02 October 2014, Brodosplit and Star Clippers entered into a shipbuilding agreement whereby Brodosplit agreed to build and deliver the Vessel to Star Clippers for a price of €63,335,000.00 ("**Agreement**").

5. Subsequently, Star Clippers purported to terminate the Agreement for delay in completion by notice dated 29 March 2019. Brodosplit disputed Star Clippers' right to terminate the Agreement and, in turn, sought to terminate the Agreement for default on the part of Star Clippers by notice dated 25 June 2019. Star Clippers, similarly, disputed Brodosplit's right to terminate the Agreement.

6. Thereafter, by contract dated 05 July 2019 between Brodosplit and Hero Shipping, Hero Shipping purportedly purchased from Brodosplit all rights and title to the Vessel at a price of €69,200,000.00 ("**Contract**").

7. Prior to the Vessel being delivered to Hero Shipping and pursuant to the Agreement, Brodosplit commenced an arbitration against Star Clippers for declaratory relief that the Agreement was lawfully terminated by its notice dated 25 June 2019. Star Clippers counter-claimed and asserted that, by reason of their decision to retract their termination notice of 29 March 2019, the Agreement was re-instated and Star Clippers remained entitled to delivery of the Vessel and damages for late delivery of the Vessel.

8. Pursuant to a request made by Star Clippers on 28 October 2019, the arbitral tribunal issued an interim award ("**Interim Award**") in the following terms (according to Hero Shipping):

> **"(1) The Tribunal orders Brodosplit (i) to refrain from facilitating, cooperating or entering into any transaction in respect of the Vessel, and (ii) to ensure on a best efforts basis, which encompasses taking any corporate action necessary, that Hero Shipping will not enter into any transaction or take any other action in respect of the Vessel, until the Tribunal decides on the**

preliminary measures to preserve the status quo as referred to by Star Clippers in its letter of 22 October 2019.

(2) The Tribunal shall decide on the costs of this application in a subsequent award."

9. On 30 January 2020, the arbitral tribunal made another interim award ("**January Award**") modifying and extending the terms of the earlier Interim Award until the Tribunal's final decision in the Arbitration was issued (collectively, "**Interim Awards**").

10. Due to the Interim Awards, Brodosplit alleges that it was enjoined from taking steps to fulfill its obligations to Hero Shipping under the Contract to deliver the Vessel and, consequently, impeded Hero Shipping's exercise of its rights to sell its interest in the Vessel to a third party in December 2019, or to operate and otherwise make use of the Vessel, for the purposes of making a profit.

11. Also, by an email message dated 03 March 2020, a letter dated 25 May 2020 and other actions, Star Clippers allegedly threatened third parties, *inter alia*, Tradewind Voyages UK Limited ("**Tradewind**") with whom Hero Shipping entered into an agreement with. It was further alleged by Hero Shipping that Star Clippers would take legal action against Tradewind if it proceeded with an agreement with Hero Shipping to market and operate the Vessel.

12. Due to the purported threats, it is alleged that Tradewinds elected not to proceed with the agreement.

13. On 15 February 2021, the arbitral tribunal made a final award ("**Final Award**"), adjudging, inter *alia*, that: (i) Star Clippers validly terminated the Agreement; (ii) Star Clippers did not reinstate the Agreement; and (iii) Star Clippers was not entitled to possession of the Vessel.

14. Hero Shipping asserts that, as a result of the Final Award, the Interim Awards should not have been granted.

15. Consequently, Hero Shipping filed a Generally indorsed Writ of Summons on 05 May 2021 and a Statement of Claim on 26 May 2021 ("**Writ and SOC**") against Star Clippers for, *inter alia*, unlawful interference with Hero Shipping's proprietary and economic rights and interest in the Vessel intentionally, negligently or without cause.

16. Hero Shipping claims the following reliefs:

"(A) Damages;

(B) Interest;

(C) Costs;

(D) Such further or other relief as to the Court may appear to be just."

17. Star Clippers was subsequently served with the Writ and SOC on 21 April 2021 and on 26 May 2021 respectively, but did not file a Defence.

18. After a myriad of subsequent applications, Star Clippers then filed an application for Striking Out on 29 April 2022 on the basis that the Writ and SOC disclose no reasonable cause of action, are scandalous, frivolous and vexatious, may prejudice, embarrass or delay the fair trial of the action, and/or are otherwise an abuse of the process of the court, including but not limited to the fact that:

A) The matters pleaded in the Statement of Claim are res judicata and Brodogradevna Industrija Split, dionicko drustvo ("Brodosplit"), through its wholly owned subsidiary, Hero Shipping is seeking to impugn, challenge or re-litigate matters which were heard and adjudicated upon by a duly appointed and competent arbitral tribunal in proceedings styled as "In the Matter of An International Arbitration Pursuant to the UNUM Arbitration Rules (UNUM Arbitration 19.0006) Between Brodogradvena Industrija Split, dionicko drustvo and Star Clippers Ltd; and

B) Hero Shipping could have intervened in the Arbitration under Article 1045 of the Dutch Civil Code but failed and/or refused to do so.

19. Also, on 21 July 2022, Star Clippers filed an application for Extension of Time in which to file its Defence.

Issues

20. The two issues that the Court must decide are: (i) Whether Hero Shipping's Writ and SOC disclose no reasonable cause of action, and/or are scandalous, frivolous and vexatious, and/or prejudice, embarrass or delay the fair trial of the action, and/or are otherwise an abuse of the process of the court? (ii) Whether Star Clippers ought to be permitted an extension of time in which to file its Defence?

Striking Out Application

Star Clippers' Evidence

21. Star Clippers filed the Second Affidavit of McFalloughn Bowleg Jr. on 27 October 2022 ("**Bowleg Affidavit**"). It provides that a Dutch attorney named Mr. Stefan Derksen ("**Mr. Derksen**") executed an unfiled affidavit ("**the Derksen Affidavit**") in Amsterdam, the Netherlands and that the said affidavit is exhibited to the Bowleg Affidavit. The Derksen Affidavit provides: (i) a summary of the Final Award; (ii) Article 1045 ("**Article**") of the Dutch Code of Civil Procedure ("**DCCP**") and states that, due to the Article, Hero Shipping could have intervened during the Arbitration once it established its interest in the proceedings and proves that there is an agreement as between Hero Shipping and either of the parties in the Arbitration; (iii) Hero Shipping could have intervened after the Interim Awards to: (a) request the arbitral tribunal discharge or vary the Interim Awards; or (b) submit a claim for damages or

costs against Star Clippers in respect of the relief granted; (iv) Brodosplit claimed in the Arbitration that it had to pay €62,500 per day to Hero Shipping *"as a consequence of any court or arbitration decision in any dispute with Star Clippers [Hero Shipping] would be limited or prevented [from disposing] with, sell, charter or operated the Vessel after 30th November, 2019"*. Hero Shipping allegedly incurred damage as a result of the Interim Awards and, accordingly Hero Shipping was already compensated by Brodosplit for any purported loss, damage or otherwise; (v) that there was no binding contract for purchase of the Vessel between Hero Shipping or any third party; and (vi) Star Clippers did not threaten Tradewind that it would take legal action against the company if it proceeded with the agreement with Hero Shipping.

22. The Derksen Affidavit further provides that: (i) Star Clippers did not interfere with any marketing activities relating to the Vessel; (ii) by virtue of the January Award, it was not necessary to restrain the physical relocation or operation of the Vessel. Thus, Hero Shipping was under no obligation to keep the Vessel at the Brodosplit shipyard and accordingly, did not have to incur any port tariff cost; (iii) the purported management costs incurred by Hero Shipping is a cost that invariably follows with the operation of a vessel, thus this claim is groundless; and (iv) the crew costs, depreciation costs and consequential losses are unfounded.

23. On 28 November 2022, the Derksen Affidavit was filed.

24. The Fifth Affidavit of McFalloughn Bowleg Jr. was filed by Star Clippers on 06 March 2023. It merely exhibits the Second Affidavit of Stefan Derksen ("**Second Derksen Affidavit**").

25. On 14 May 2023, Star Clippers filed the Second Derksen Affidavit which states that: (i) Star Clippers does not seek to have Dutch Law govern the Bahamian proceedings; (ii) that the correspondence provided by Dutch counsel for Hero Shipping, Mr. Erik Llinkhamer ("**Klinkhamer correspondence**") incorrectly claims that the January Award concerned "any transaction regarding the vessel". The January Award was limited to sale, transfer or encumbrance of the Vessel without prior consent of Star Clippers; (iii) the fact that Star Clippers was never asked by Brodosplit nor Hero Shipping for any consent and that such evidence was not refuted in the Klinkhamer correspondence; (iv) that certain paragraphs of the Klinkhamer Correspondence are erroneous as a matter of Dutch law; and (v) since the Interim Awards were never served before the issuance of the Final Award, Brodosplit was never in jeopardy to be liable for any penalty payments.

Hero Shipping's Evidence

26. On 14 February 2023 Hero Shipping filed the Affidavit of Sheila Taylor which states that: (i) Hero Shipping's Bahamian Counsel received a letter from the attorneys in The Netherlands setting out a reply to the Derksen Affidavit. The letter is exhibited to the affidavit. The letter's contents are adopted in a subsequent affidavit which will be mentioned below.

27. On 24 February 2023, Hero Shipping filed the Affidavit of Sheila Taylor which exhibits an unfiled version of the Affidavit of Erik Klinkhamer ("**Klinkhamer Affidavit**"), Dutch counsel for Hero Shipping. The exhibited affidavit provides information that mirrors the letter exhibited to the original Affidavit of Sheila Taylor and states: (i) That Mr. Klinkhamer is an attorney qualified to practice Dutch law since May 26, 1971; (ii) that he was a Deputy Judge at the Appeal Court of the Hague and arbitrator in several arbitrations in The Netherlands; (iii) that his expertise is Maritime Law; (iv) that Mr. Derksen (in his affidavit) is relying on the old version of the Article of the DCCP, which was applicable at the time of the Arbitration; (v) Hero Shipping is not bound to nor can invoke the provisions of the Agreement; (vi) Hero Shipping has no legal basis to intervene in the Arbitration between Brodosplit and Star Clippers nor did it have any obligation to submit its claim to the tribunal of the Arbitration; (vii) in order for Hero Shipping to intervene in the Arbitration, it would have had to become a part of the Agreement; (viii) Hero Shipping had several reasons not to join the Arbitration, namely (a) it was not a part of the selection of panelists on the tribunal; (b) Hero Shipping wanted to avoid the high legal costs associated with arbitration; and (c) Hero Shipping's right to start proceedings in The Bahamas was not waived because of the Arbitration; and (ix) there is no guarantee that the arbitral tribunal would've permitted Hero Shipping to intervene.

28. The Klinkhamer Affidavit further provides that: (i) Mr. Derksen's does not provide any Dutch law or case law on the matter; (ii) in accordance with Dutch law, Brodosplit was bound by the Interim Awards from the moment the order became known to Brodosplit and that formal service was not required for such immediate effect; (iii) Brodosplit would have to pay a penalty fee of €25,000,000 if it did not comply with the Interim Awards; and (iv) since Brodosplit ensured that Hero Shipping complied with the Interim Awards, any damages emanating from such compliance are for the account and risk of Star Clippers as Star Clippers requested the arbitral tribunal to make the Interim Awards.

29. The Klinkhamer Affidavit was subsequently filed on 14 March 2023.

Star Clippers' Submissions

30. Star Clippers' counsel submits that Hero Shipping's Writ and SOC ought to be struck out because (i) they disclose no reasonable cause of action; (ii) are scandalous, frivolous and/or vexatious; (iii) they may prejudice, embarrass or delay the fair trial of the action; and/or (iv) are otherwise an abuse of the process of the court. Counsel asserts that the Court has the power to strike out any pleading by virtue of **Order 18 Rule 19 (1), of the Rules of the Supreme Court, 1978** ("**RSC**"). The rule reads as follows:

> **"(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —**

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

31. Star Clippers also rely on **Order 31A rule 20(1) of the RSC**, which provides:

> **"20. (1) In addition to any other powers under these Rules, the Court may strike out a pleading or part of a pleading if it appears to the Court —**
>
> **(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the Court in the proceedings;**
>
> **(b) that the pleading or the part to be struck out is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings;**
>
> **(c) that the pleading or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or**
>
> **(d) that the pleading or the part to be struck out is prolix or does not comply with the requirements of any rule."**

32. Star Clipper's counsel further submits that, if an application for striking out involved prolonged and serious argument, as a general rule, the judge should decline to proceed, unless it not only harbors doubt about the pleading, but would eliminate the need for a substantive trial. She relies on the case of **Williams & Humbert Ltd v W. & H. Trade Marks (Jersey) Ltd [1986] A.C. 368 SCP 1999 18/19/5 ("Williams")** for this proposition.

33. Star Clippers' counsel also contends that Hero Shipping's pleadings are an abuse of the court's process as the matters pleaded are *res judicata* and are a collateral attack on the Interim and Final Awards. She asserts that the principles relating to a plea of *res judicata* are summarized by the learned authors of **Spencer Bower and Handley: Res Judicata 4th edition at paragraph 1.02**. It states:

> **"1.02 A party setting up a res judicata as an estoppel against his opponent's claim or defence, or as the foundation of his own, must establish its constituent elements; namely that:**
>
> (i) **The decision…was judicial in the relevant sense;**
>
> (ii) **It was in fact pronounced;**
>
> (iii) **The tribunal had jurisdiction;**

(iv) **The decision was:-**

a. **Final**

b. **on its merits;**

(v) **It determined a question raised in the later litigation; and**

(vi) **The parties are the same or their privies, or the earlier decision was in rem."**

34. Counsel further advances that the doctrine of *res judicata* is applicable to the instant case. The doctrine was considered in the Bahamian Court of Appeal decision of **Queirazza v Leday [2017] 2 BHS J. No. 14** ("**Queirazza**")**.** At paragraph 21 of the judgment, the court held:

> **"He contended that the doctrine relating to raising issues in subsequent proceedings which could have been litigated in earlier proceedings was first addressed in Henderson v Henderson (1843) 3 Hare 100. The Henderson rule was set out in the Privy Council case of Yat Tung Investment Company Ltd. v. Dao Heng Bank Ltd. [1975] AC 581 where Lord Kilbrandon noted at page 590:**
>
> > **"But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram V.C. in Henderson v. Henderson [1843] 3 Hare 100, 115 , where the judge says:**
> >
> > **"…where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."**
> >
> > **The shutting out of a "subject of litigation"–a power which no court should exercise but after a scrupulous examination of all the circumstances — is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence**

or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule…

The Vice-chancellor's phrase "every point which properly belonged to the subject of litigation" was expanded in Greenhalgh v. Mallard [1947] 2 All E.R. 255, 257, by Somervell L.J.:

> **'…res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but.., it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.'"**

35. Star Clippers' counsel submits that the elements of *res judicata* are present as:

- The Interim and Final Awards were judicial in the relevant sense.
- The Interim and Final Awards were in fact pronounced.
- The arbitral tribunal had jurisdiction.
- The decision of the arbitral tribunal was final and on the merits.
- In effect and substance, the same subject of the Brodosplit Arbitration (i.e., the Vessel) is being raised in these proceedings.
- Hero Shipping is a privy of Brodosplit.

36. Counsel also submits authorities on what is meant by "privity of interest". She relies on the decision of **Gleeson v J. Wippell & Co. [1977] 1 WLR 510 ("Gleeson")** where Megarry V-C made the following pronouncements at page 515:

> **"Privity for this purpose is not established merely by having "some interest in the outcome of litigation." ….**
>
> **….In Zeiss No. 2 [1967] 1 A.C. 853, 911, 912, Lord Reid suggested that if a plaintiff sued X and established some right in that action, a servant or third party employed by X to infringe the right and so raise the whole question again should be regarded as being a privy of X's in subsequent proceedings, for it would be X who would be "the real defendant." Lord Reid agreed with a statement which applied the rules of res judicata to subsequent proceedings brought or defended "by another on his account," that is, on X's account.**
>
> **…… First, I do not think that in the phrase "privity of interest" the word "interest" can be used in the sense of mere curiosity or concern. Many matters that are litigated are of concern to many other persons than the parties to the litigation, in that the result of**

a case will at least suggest that the position of others in like case is as good or as bad as, or better or worse than, they believed it to be. Furthermore, it is a commonplace for litigation to require decisions to be made about the propriety or otherwise of acts done by those who are not litigants. Many a witness feels aggrieved by a decision in a case to which he is no party without it being suggested that the decision is binding upon him.

Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party….. (emphasis added)."

37. Counsel then drew the Court's attention to **Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd [2015] EWHC 1640 (Comm)** where Flaux J made the following propositions at paragraphs 140-141:

"140 This formulation of the test for privity of interest was approved by Lord Bingham of Cornhill in Johnson v Gore Wood [2002] 1 AC 1 at 32. The earlier authorities were also considered and usefully summarised by Arnold J in Resolution Chemicals v Lundbeck A/S [2013] EWHC 739 (Pat) at [100]:

"The conclusions which I draw from this survey of the authorities are as follows:

i) The test for privity of interest is whether, having due regard to the subject of the matter of the dispute, there is a sufficient degree of identification between the relevant persons to make it just to hold that the decision to which one is party should be binding in the proceedings to which the other is party: Gleeson v Wippell approved in Johnson v Gore Wood.

ii) Where someone who has knowledge of the earlier proceedings and a legal interest in their outcome sits backs and allows another person with the same legal interest in the outcome to fight his battle, he will be a privy with the other person: House of Spring Gardens. But this is a narrow exception to the general rule that a person will not be bound by the outcome of proceedings to which he is not a party: Skyparks v Marks, Powell v Wiltshire, Seven Arts v Content.

iii) A direct commercial interest in the outcome of the litigation is insufficient to make someone a privy: Kirin-Amgen v Boehringer Mannheim.

iv) Whether members of the same group of companies are privies or not depends on the facts: Special Effects.".

32 Drawing this together, in my judgment a court which has the task of assessing whether there is privity of interest between a new party and a party to previous proceedings needs to examine (a) the extent to which the new party had an interest in the subject matter of the previous action; (b) the extent to which the new party can be said to be, in reality, the party to the original proceedings by reason of his relationship with that party, and (c) against this background to ask whether it is just that the new party should be bound by the outcome of the previous litigation (emphasis added)."".

38. Counsel submits that, based on the above law, Hero Shipping is in privity of interest with Brodosplit because, *inter alia*: (i) Hero Shipping has the same direct and parallel interest in the relevant subject matters in the Brodosplit Arbitration; (ii) Hero Shipping is a wholly owned subsidiary of Brodosplit and; (iii) Mr. Debeljak and Ms. Vedrana Debeljak were at all material times the managing directors of Hero Shipping.

39. Star Clippers' counsel further contends that Hero Shipping's claim is *res judicata* because the issues being raised by Hero Shipping are part of the subject matter of the Arbitration and could have been raised there and then. She asserts that, it would be an abuse of the court's process to allow Hero Shipping to proceed with its action any further.

40. Counsel, alternatively, states that, even if the matter is not *res judicata*, it is still an abuse of the court's process by virtue of the Henderson v Henderson rule. The doctrine emanates from the case of **Henderson v Henderson (1843) 3 Hare 10**0. It was mentioned in the ***Queirazza*** decision at paragraph 22, which states:

> ***"The Henderson rule being wider than res judicata was confirmed in Barrow v. Bankside Agency Ltd. [1996] l WLR 257. At page 260 Bingham MR stated:***
>
> > ***"The rule in Henderson v. Henderson … requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict***

> ***doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed (emphasis added)""***

41. Counsel submits that these principles apply to a party who has "privity" with one of the parties in the litigation. She advances that, as Mr. Debeljak is the managing director of both Brodosplit and Hero Shipping, and gave instructions in the Arbitration on behalf of Brodosplit, he was in a position, in effect and in substance, to take steps to protect any purported rights on behalf of Hero Shipping.

42. Star Clippers' counsel also contends that Hero Shipping is plainly seeking to oppress Star Clippers with successive suits which are doomed to fail and which ultimately are an abuse of the court's process.

43. Counsel also submits that Hero Shipping's action is a collateral attack on the Interim and Final Awards. She relies on the case of **Hunter v Chief Constable of the West Midlands Police [1982] AC 529 ("Hunter")** to advance this proposition. Page 536C of that decision provides:

> ***"It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."***

44. Counsel further relies on the case of **Secretary of State for Trade and Industry v Bairstow [2003] 3 WLR 841** at paragraph 38, which reads:

> **"If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute (emphasis added)"**

45. Based on the foregoing and the evidence found in the First Derksen Affidavit, Star Clippers' counsel asserts that it would be manifestly unfair to Star Clippers

to allow Hero Shipping to pursue its claim as allowing such would invariably bring the administration of justice into disrepute.

46. Further, Counsel submits that Hero Shipping's claim discloses no reasonable cause of action and relies on the well-known decision of **Drummond-Jackson v British Medical Association [1970] 1 All ER 1094**. Lord Pearson made the following pronouncements at page 1101 of that decision:

> ***"No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success, when….only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out."***

47. Counsel submits that there is no reasonable cause of action, *inter alia*, because: (i) the Vessel was transferred by Brodosplit to Hero Shipping prior to the issuance of the October Interim Award. Thus, Brodosplit was not enjoined from transferring the Vessel to Hero Shipping; and (ii) On 20 December 2019 at the hearing of the Arbitration in which injunctive relief was sought, Brodosplit did not indicate that Hero Shipping had already entered into a binding agreement with a third party for the sale of the Vessel and that an order prohibiting such sale would cause substantial loss to either Brodosplit or Hero Shipping.

48. Counsel further contends that the claim is scandalous, frivolous and vexatious. She advances the case of **Attorney-General of Duchy of Lancaster v London and North Western Railway Company [1892] 3 Ch. 274** where Lindley LJ stated the following at page 277:

> ***"It appears to me that the object of the rule is to stop cases which ought not to be launched – cases which are obviously frivolous or vexatious, or obviously unsustainable."***

49. Among other reasons, Star Clippers' counsel also submits that there were no threats made by Star Clippers as against Tradewind and that the unchallenged evidence contained in the First Derksen Affidavit confirms that the Vessel was renamed and marketed under the name "Golden Horizon. Further, counsel asserts that Star Clippers did not interfere with these marketing activities nor did it threaten anyone.

50. With respect to prejudice, embarrassment or delay in the fair trial of the action, Star Clippers' counsel asserts that the court is to provide a liberal interpretation of these words. In that regard, she relies on earlier submissions in relation to the arguments of res judicata and abuse of the process of the court to augment her position.

51. Finally, Counsel asks the Court to strike out Hero Shipping's Writ and SOC for all the above mentioned reasons and requests costs.

<u>Hero Shipping's Submissions</u>

52. Counsel for Hero Shipping submits that the Striking Out application should be dismissed as none of the reasons for striking out as set out under Order 18 rule 19 of the RSC apply to the instant case. He asserts that the case of **Biguzzi v Rank Leisure plc [1999] 1 WLR 1926** sets the tone for the appropriate approach the Court should take when considering a striking out application. There, the court stated the following:

> **"The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without the draconian step of striking the case out. (emphasis added)"**

53. Counsel submits that this approach has been utilized in several local decisions and this Court should apply same.

54. He then relies on the Jamaican Court of Appeal decision of **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir** for the following pronouncements made by Bishop JA:

> **"The authorities have equally made it clear that striking out or dismissing a party's case is a draconian or extreme measure and so it should be regarded as a sanction of last resort. As Lord Woolf explained in Biguzzi, there may be alternatives to striking out, which may be more appropriate to make it clear that the court will not tolerate delay but which, at the same time, would enable the case to be dealt with justly, in accordance with the overriding objective. The court in considering what is just, he said, is not confined to considering the effects on the parties but is also required to consider the effect on the court's resources, other litigants and the administration of justice."**

55. Counsel submits that Star Clippers seeks to rely on numerous affidavits and expert evidence to show that the action should be struck out, but that the voluminous documents only demonstrate that this case is not a plain and obvious case that warrants striking out.

56. Counsel further submits that the Court should exercise its discretionary powers with the greatest care and circumspection. He further contends that Hero Shipping ought to be permitted an opportunity to ventilate its claim as Star Clippers points out several facts in dispute as between the parties and seeks a mini trial of the matter in this application.

57. With respect to *res judicata*, Counsel relies on **Halsbury's Laws of England, 4th edition at page 1528** for the following:

> ***"In order for the defence of res judicata to succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovery and but for his own fault might have recovered in the first action that which he***

> ***seeks to recover in the second action….<u>It is not enough that the matter alleged to be concluded might have been claimed. It is necessary to show that it was actually put in issue or claimed</u>. (emphasis added)"***

58. Counsel submits that Hero Shipping was never a party to the Arbitration, and the disputed facts were never put in issue, nor claimed by Hero Shipping. Accordingly, *res judicata* does not apply.

59. Counsel also submits that an issue of estoppel does not arise because the issue as to damages suffered by Hero Shipping flowing from the Interim Awards was never distinctly put in issue or had directly come into issue in the initial proceedings.

60. Counsel further contends there is a reasonable cause of action in the instant case. Relying on **Turner v Harajachi et al BS 2005 SC 110**, Counsel submits that when it is clear "*from the face of the pleading that the pleading is obviously unsustainable*", an application to strike pursuant to Order 18 Rule 19(1)(a) of the RSC may be granted. Counsel contends that, on the face of the pleadings, it cannot be readily seen as obviously unsustainable.

61. On the issue of *res judicata*, Counsel relies on **Russell on Arbitration 21st Edition at paragraph 6-201** for a summary of the principles relating to *res judicata* and the Henderson v Henderson rule. The excerpt provides:

> **"…To the extent that a cause of action has been decided by the award, a party will be prevented from asserting or denying, as against the other party, its existence or non-existence in subsequent proceedings. Any attempt to do so may be met by a plea of res judicata. Where one or more issues have previously been determined, albeit that the cause of action is different, a party will again be prevented from seeking to contradict the earlier findings on those issues on the basis of "issue estoppel". Further, the principle of issue estoppel has been extended to prevent issues being raised in subsequent proceedings which could and should have been raised in the earlier proceedings, i.e. those issues which properly belong to the subject of the earlier proceedings. This principle has been specifically applied to arbitrations."**

62. Further Counsel submits that Hero Shipping's claim is not frivolous and vexatious. He contends that a claim may be found to be frivolous and vexatious where it is brought for an improper purpose or "*merely to cause hassle*" to the defendants (**White v Withers LLP [2008] EWHC 2821 (QB), 20**).

63. In that regard, Counsel relies on the Bahamian Court of Appeal decision of **West Island Properties Limited v Sabre Investment Limited and others [2012] 3 BHS J. No. 5**7 where Allen P, delivered the decision and succinctly summarized the law in relation to striking out pleadings. There, the court stated:

"15 In the case of Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688, Lord Pearson determined that a cause of action was reasonable where it had some chance of success when considering the allegations contained in the pleadings alone. That is, beginning at page 695, he said the following:

…In my opinion the traditional and hitherto accepted view - that the power should only be used in plain and obvious cases - is correct according to the intention of the rule for several reasons. First, there is in paragraph (1)(a) of the rule the expression "reasonable cause of action," to which Lindley M.R. called attention in Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd. [1899] 1 Q.B. 86, pp. 90 - 91. No exact paraphrase can be given, but I think "reasonable cause of action" means a cause of action with some prospect of success, when (as required by paragraph (2) of the rule) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In Nagle v. Feilden [1966] 2 Q.B. 633 Danckwerts L.J. said, at p. 648:

'The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court.'

Salmon L. J. said, at p. 651: 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable.' Secondly, subparagraph (a) in paragraph (1) of the rule takes some colour from its context in subparagraph (b) "scandalous, frivolous or vexatious," subparagraph (c) "prejudice, embarrass or delay the fair trial of the action" and subparagraph (d) "otherwise an abuse of the process of the court."….Thirdly, an application for the statement of claim to be struck out under this rule is made at a very early stage of the action when there is only the statement of claim without any other pleadings and without any evidence at all. The plaintiff should not be "driven from the judgment seat" at this very early stage unless it is quite plain that his alleged cause of action has no chance of success. The fourth reason is that the procedure, which is (if the action is in the Queen's Bench Division) by application to the master and on appeal to the judge in chambers, with no further appeal as of right to the Court of Appeal, is not appropriate for other than plain and obvious cases…."

64. Counsel asserts that the Court's discretion to strike out should only be utilized in plain and obvious cases that are unarguable or where it is scandalous, frivolous or vexatious or otherwise an abuse of the court's process. He submits that it is clear that this case does not fall within any of those categories and the matter should proceed to trial.

65. Counsel also cites the case of **Johnson v Gorewood & Co [2002] 2 AC 1 [22] at [31]** where Lord Bingham referred to the need to make a:

> **"..broad, merit based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court…"**

66. At page 490 of that decision, Lord Bingham said:

> **""Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court."**

67. Hero Shipping's counsel asserts that there is no abuse of the court's process as the matter has not been dealt with by the arbitral tribunal and accordingly, the action should be allowed. He further submits that striking out cases where there is considerable difference in expert opinion adduced by both parties would bring grave injustice to Hero Shipping.

68. Finally, Counsel concludes by requesting that the striking out application be dismissed with costs awarded to Hero Shipping.

Discussion and Analysis

(i) Whether Hero Shipping's Writ and SOC disclose no reasonable cause of action, are scandalous, frivolous and vexatious, prejudice, embarrass or delay the fair trial of the action and/or are otherwise an abuse of the process of the court?

69. The law relevant to Striking Out is outlined at Order 18 rule 19(1) and Order 31A rule 20(1) of the RSC (as mentioned above). Star Clippers seek to invoke all possible grounds for striking out pleadings. Each will now be considered in turn.

The Writ and SOC disclose no reasonable cause of action

70. When bringing a striking out application on this ground, no evidence is to be considered – only the bear pleadings may be examined. This is clear from the express wording of **Order 18 rule 19(1) and (2) of the RSC** which provide:

> **"19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —**
>
> (a) **it discloses no reasonable cause of action or defence, as the case may be….**
>
> **(2) No evidence shall be admissible on an application under paragraph (1) (a)."**

71. From the Court's understanding of the matter, it is the Interim Awards and Final Award which form the basis of Hero Shipping's claim. Hero Shipping alleges that the Interim Awards amounted to tortious interference as it allegedly prevented Hero Shipping from selling the Vessel, which in turn purportedly caused financial loss.

72. Further, Hero Shipping claims that, due to Star Clipper's alleged threats to potential third party buyers of the Vessel, the purported sale fell through. This, Hero Shipping alleges, caused further financial loss. The Court notes that Hero Shipping was not a party to the Arbitration, but the pleadings allege that there was a contract as between Brodosplit and Hero Shipping which was purportedly impacted by the Interim and Final Awards.

73. It is difficult to conclude, on the bare pleadings alone, that the action ought to be struck out. The SOC is quite extensive and provides a thorough history of the matter. On the face of the pleadings, the Court cannot say that there is no reasonable cause of action.

74. Relying on **Turner v Harajachi et al BS 2005 SC 110**, the Court does not find the Writ and SOC "*obviously unsustainable*".

75. In the circumstances, the Court is not prepared to strike out the Writ nor the SOC as disclosing no reasonable cause of action.

Scandalous, Frivolous and Vexatious

76. As was noted in **Attorney General v Barker [2000] 1 FLR 759 at page 764** by Lord Bingham of Cornhill:

> **"Vexatious is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that is has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and it involves an abuse of process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."**

77. Hero Shipping wants this Court to consider its claim at a full blown trial and determine the matter based on the merits of the respective parties' case. As was noted prior, the crux of the claim appears to be based on the Interim and Final Awards. According to the evidence provided in the Derksen Affidavit (which was not refuted or challenged), the Interim Award was made to maintain the status quo. Brodosplit was empowered to obtain consent from Star Clippers to sell the Vessel, but this was never done. Hero Shipping did not challenge this evidence.

78. In that vain, it is unclear on what basis Hero Shipping seeks to attribute any liability for losses to Star Clippers if it never even attempted to seek consent for the sale of the Vessel.

79. Further, the arbitral tribunal had made several awards for damages and costs to both Brodosplit and Star Clippers.

80. In addition, as was highlighted in the First Derksen Affidavit, Brodosplit stated that pursuant to an agreement between Hero Shipping and Brodosplit, Brodosplit had to pay €62,500 per day "*as a consequence of any court or arbitration decision in any dispute with Star Clippers [Hero Shipping] would be prevented limited or prevented, to dispose with, sell, charter or operate the Vessel after 30 November 2019".* This, Star Clippers' counsel asserts means that Hero Shipping was already compensated by Brodosplit for any purported loss, damage or otherwise. This evidence, once again, was not impugned.

81. The Court is at a loss as to why Hero Shipping seeks to pursue Star Clippers when Hero Shipping had a separate arrangement with Brodosplit and it (i.e. Hero Shipping) was not a party to the arbitral proceedings.

82. It appears as though Hero Shipping seeks to litigate a matter simply for litigating a matter, with no real legal basis upon which to advance its position and "*merely to cause hassle"*, as was noted in **White v Withers LLP [2008] EWHC 2821 (QB) 20**.

83. Accordingly, the Court rules that the Writ and SOC be struck out as frivolous, scandalous and vexatious.

Prejudice, Embarrass and Delay the Fair Trial of the Action, Abuse of the Process of the Court and Res Judicata

84. Based on Star Clipper's submissions, it appears that these three grounds have been combined. Accordingly, the Court will address them all under the same heading.

85. The ***Queirazza*** decision succinctly outlines the relevant principles for abuse of the court's process in relation to *res judicata*. All parties are to bring their respective cases before the court, so a proper and thorough determination of the issues can be made. To allow any party to use the Court as a means to re-litigate matters, would be an abuse of the court's process.

86. As Star Clipper's counsel correctly points out, the matter is *res judicata* because: (i) the Interim and Final Awards were judicial; (ii) they were in fact pronounced; (iii) the arbitral tribunal had jurisdiction; (iv) the decision of the arbitral tribunal were final on the merits; (v) the same subject matter is being litigated (i.e. the Vessel) and (vi) Hero Shipping is a privy of Brodosplit.

87. The privy aspect, as outlined in the ***Gleeson*** decision, was proven by Star Clippers as Hero Shipping share the same managing directors and is a subsidiary of Brodosplit. This was never disputed by Hero Shipping in any of its affidavits.

88. Essentially, Hero Shipping seeks to pursue claims with respect to the Vessel and purported losses. These matters were already before the arbitral tribunal and were already decided. Though Hero Shipping was not a party to those

proceedings, it is deemed a privy and thus *res judicata* applies to it as if it were Brodosplit itself bringing this claim before the Court.

89. The Court also views this claim as a collateral attack. As was pointed out in the ***Hunter*** decision at pages 541B-C and 542C:

> ***"The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made. (emphasis added)"***

90. The Court also wishes to highlight the pronouncements made in **Micheal Wilson & Partners v Sinclair and others [2017] 1 WLR 2626** at paragraph 48 which provides as follows:

> ***"48 The following themes emerge from these cases that are relevant to the present appeal.***
>
> ***(1) In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in Hunter's case [1982] AC 529, Lord Hoffmann in the Arthur J S Hall case [2002] 1 AC 615 and Lord Bingham in Johnson v Gore Wood & Co [2002] 2 AC 1. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in Hunter's case. Both or either interest may be engaged.***
>
> ***(2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse: see Bragg v Oceanus [1982] 2 Lloyd's Rep 132; and the court's power is only used where justice and public policy demand it, see Lord Hoffmann in the Arthur J S Hall case.***
>
> ***(3) To determine whether proceedings are abusive the court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in Johnson v Gore Wood & Co and Buxton LJ in Laing v Taylor Walton [2008] PNLR 11.***
>
> ***(4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules', see Lord***

Hoffmann in the Arthur J S Hall case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the Bairstow case [2004] Ch 1; or, as Lord Hobhouse put it in the Arthur J S Hall case, if there is an element of vexation in the use of litigation for an improper purpose…(emphasis added)"

91. To allow Hero Shipping to pursue this claim any further would indeed be an abuse of the process of the Court as these claims have already been litigated and decided by the arbitral tribunal.

92. It would simply be manifestly unfair and bring the administration of justice into disrepute to allow this claim to be pursued any further.

93. In reliance on the ***Williams*** decision and the evidence that is before me, the Court harbours doubt as to the merits of this action as it appears these matters have already been dealt with.

94. Accordingly, the matter is *res judicata* and thus cannot be pursued by Hero Shipping.

95. Even if the Court were to consider the matter substantively, based on the Henderson v Henderson rule, Hero Shipping's concerns regarding any financial losses emanating from the Interim Awards should have been dealt with before the arbitral tribunal. Whether there was any inadvertence in doing so does not permit this Court to consider such pleadings now. To do so would mean the Court would need to consider matters which ought to have been addressed at those initial proceedings. Parties must bring their whole case before a court/tribunal. Litigation must eventually come to an end.

96. Based on the foregoing, Hero Shipping's Writ and SOC are hereby struck out and dismissed as the pleadings: (i) are an Abuse of the Court's Process; (ii) are scandalous frivolous and vexatious; and (iii) prejudice, embarrass and delay the fair trial of the action. The Court also rules that the matters are *res judicata*; and the claim is a collateral attack on the Interim and Final Awards.

Extension of Time for Filing Defence

97. This application need not be considered as the Writ and SOC have been struck out, thus the action stands dismissed.

Conclusion

98. For the reasons cited above and the authorities relied upon, I exercise my powers under Order 18 rule 19(1)(b), (c) and (d) of the Rules of the Supreme Court, 1978 and strike out the Writ and SOC. Accordingly, this action is dismissed.

99. The Extension of Time Application falls away as it is no longer necessary to consider it.

100. Hero Shipping shall pay Star Clipper's costs, to be taxed if not agreed.

Senior Justice Deborah Fraser

Dated this 01st day of August 2023