

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Commercial Division
2022/COM/adm/00012
2022/COM/adm/00013
2022/COM/adm/FP/00006
2022/COM/adm/FP/00007**



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

BETWEEN

**DNB BANK ASA
Claimant**

AND

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

AND

**IN THE MATTER OF an Admiralty Action in Rem against the
M.V. "CRYSTAL SERENITY"**

BETWEEN

**DNB BANK ASA
Claimant**

AND

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

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Ms. Wynsome Carey along with Mr. Darzhon Rolle on behalf of the
Claimant

Ms. Luana Ingraham of the Office of the Attorney General on behalf of
the Department of Inland Revenue (VAT Department)

**RULING
(on the papers)**

1. There are two applications before the Court. The first is an application by the Office of the Attorney General on behalf of the Comptroller of the Value Added Tax ("VAT") Department seeking to intervene in the instants actions and the second is an application by the Claimant seeking to have the Office of the Attorney General's Notice of Motion and Affidavit filed December 1, 2022 on behalf of the Admiralty Marshal and the Comptroller of VAT and an Appearance entered on January 12, 2023 on behalf of the Admiralty Marshal and the Comptroller of VAT set aside.
2. The background facts to these actions have been encompassed in previous Rulings given by then Acting Justice Ntshonda Tynes on December 19, 2022 and Justice Andrew Forbes on March 31, 2023. However, for completeness, the brief facts are that 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, 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 ("**the Joint Accounts**") in the names of Alexiou, Knowles & Co and the Admiralty Marshal pursuant to the terms of the Order. Creditors were given notice by an advertisement by the Admiralty Marshal on the TradeWinds 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...". At different stages of the proceedings, various interested parties took steps to participate in these proceedings, most of them as Intervenors. By the 5th August, 2022, the Plaintiff obtained Judgment in Default against the Owners of the Vessels. On the 27th September, 2022, the Plaintiffs filed their respective applications by way of Notice of Motion for an Order for the determination of priority of payments to the Claimant against the proceeds of sale of the subject vessels and for the payment out of the amounts found due to the various Intended Claimants. By her Ruling dated December 19, 2022 Justice Tynes ordered that sufficient funds be set aside to secure the potential future judgment of the prioritized Claimants. This Order was not appealed.

3. The Claimant also made an application by way of Notice of Motion seeking to have the Court order the Admiralty Marshal to object to the Notice of Assessment by the Department of Inland Revenue levying VAT on the sale of both vessels. Additionally, the Office of the Attorney General sought to enter an appearance on behalf of the Admiralty Marshal and the Department of Inland Revenue. Justice Forbes in his Ruling dated March 31, 2023 did not accede to the Claimant's application to direct the Admiralty Marshal to object to the Notice of Assessment nor did he agree that the Office of the Attorney General's intervention at that juncture was necessary for the application before the Court.
4. In both of the respective Rulings, then Justice Tynes and Justice Forbes cautioned the parties that the Claimant is the only party with a Judgment in the action and that any interested parties wishing to receive their respective payouts may do so by prosecuting their claims in separate actions.

Application to Intervene

5. The Office of the Attorney General ("**OAG**") makes its application for leave to intervene in the matter on behalf of the Comptroller of the VAT Department pursuant to a Summons to Intervene filed May 30, 2023; Notice of Application filed June 12, 2023 and Notice of Application filed June 23, 2023. They also seek costs to be reserved and such further orders the Court deems fit. The OAG has set out five grounds of the application however there are only two grounds that I find are relevant. These two grounds are (i) that the Intended Intervener for the purpose of or in connection with any civil proceedings by or against the Crown is to be served and is a necessary party to the proceedings to ensure that all issues in question are effectually and completely determined; and (ii) that there exists between the Claimant and Defendants questions and issues arising out of and related to the Intended Intervenor and the relief sought within the instant application which would be just and convenient to be determined by the Court in these proceedings. They also seek to rely on the Affidavit of Dexter Fernander filed on June 23, 2023 in support of their application.
6. The evidence of Dexter Fernander as stated in his Affidavit in part is that he is a Senior Tax Manager in the VAT Department; that on March 24, 2022 the Court made Orders for sale and appraisal in relation to the vessels and on June 14, 2022 they were sold by the Marshal for \$128,000,000.00 with the proceeds of the sale being deposited on or about June 20, 2022 into the Joint Accounts. He states in part that on October 20, 2022 the Comptroller of VAT issued a Notice of Assessment for VAT in the amount of \$11,636,364.00 due on the sale of the vessels which was served on the Admiralty Marshal

on the same day and that the Admiralty Marshal accepted that the sales were subject to VAT and requested the assessed tax be paid out of the Joint Accounts to satisfy the VAT owed.

7. The OAG also relies on their undated Skeleton Arguments to Intervene. Counsel for the OAG submits in part:-

- a. That Part 59.17 of the Supreme Court Civil Procedure Rules, 2022 ("CPR") is a liberal basis upon which an order for intervention will be granted and that it sets a low bar requiring only that where there is a sale of property and the money therefrom is in court and a person has interest in that money they may intervene with the Court's leave;
- b. That the evidence in the Affidavit of Mr. Fernander shows they have a clear interest in the proceedings as the Crown and is a necessary party to the proceedings to ensure that all issues in question are effectually and completely determined;
- c. That the Comptroller of VAT assessed the sales for VAT and under the provisions of the Value Added Tax Act, 2014 ("VAT Act") the sale price is deemed to include VAT and the VAT due on the sales is required to be held on trust for the Crown;
- d. That the scope of Part 59.17(1) and the Supreme Court Civil Procedure Rules, 2022 Practice Guide on page 371 ought to be considered and that it would be injurious to the VAT Department if they are not permitted to intervene on behalf of the Comptroller of VAT in these proceedings;
- e. That in the instant case the Intended Intervenor is due VAT payable from the proceeds of sale of the vessels which is the subject of the instant application;
- f. That the result of these proceedings will have a material impact upon the VAT Department collecting VAT due and owed;
- g. That even prior to the result of the instant case the Intended Intervenor has a material interest in being involved at every juncture of the proceedings so as to properly participate and provide information which could assist in preventing delays and ensuring a full picture is before the Court;
- h. That the Court should apply the relevant tests as found in **Bahamas District of the Methodist Church in the Caribbean and the Americas v Bahamas (Speaker of the House of Assembly)** [1993] BHS J. No. 91 and **Bahamas District of the Methodist Church in the Caribbean and the Americas v Bahamas (Speaker of the House of Assembly)** [1993] BHS J. No. 120.

8. The Claimant opposes the application before the Court and relies on its Skeleton Arguments dated July 5, 2023.
9. Counsel for the Claimant submits in part:-
 - a. That the OAG has not provided an explanation in its evidence in support as to what are the questions or issues between the parties that could arise out of or be related to the OAG or the Comptroller;
 - b. That the OAG has failed to show how it has an interest in the vessel or its sales proceeds;
 - c. That the sales proceeds are the liquidated form of the subject of the action, the res and this is an admiralty action in rem against the M/V Crystal Serenity/Symphony;
 - d. That it is insufficient that a party should merely claim that it wants to be paid out of the proceeds but it must show that it had a claim in rem in respect of an interest in the vessel prior to its sale. See British Shipping Laws (Vol. 1 Admiralty Practice) at paragraph 295;
 - e. That while the Comptroller has assessed the Marshal for VAT on the court sales the Marshal does not own the sales proceeds;
 - f. That the sales proceeds are the liquidated form of the res and in accordance with Admiralty Law and the Order for the Sale and the Order for Priorities the proceeds are being held to the Court's order for the benefit of limited categories of claimants:- (i) Marshal's expenses and the legal costs of the fund producer and (ii) claims in rem against the vessels which are defined exhaustively in sections 8 and 9 of the Supreme Court Act;
 - g. That the Comptroller does not have an in rem claim against the vessels neither does it have an in personam claim against the previous owners of the vessels;
 - h. That the Comptroller's claim is in personam against the Marshal and as such the issue is between the Claimant and the Marshal as to whether VAT could be a Marshal's expense;
 - i. That if the Bank is unsuccessful in its application regarding the Marshal's expenses then will the Marshal potentially have a claim against the proceeds and that the Bank is still contesting the Assessment on narrow tax law grounds;
 - j. That the only established category that the Court can grant intervention using its inherent jurisdiction is if the effect of an arrest would be to cause a party serious hardship, difficulty or danger (See *The Mardina Merchant* [1973] 3 All ER 749) and

that the res in this matter has been sold and the inherent jurisdiction does not avail the OAG;

- k. That the question posed on an application to be joined (formerly under Order 15, Rule 6(2)(b)(ii) of the Rules of the Supreme Court) is whether there is any question between the intended party and one of the existing parties arising out of or relating to or connected with any relief claimed in the cause or matter and that the relief claimed in the action by the Bank against the Defendants (the owners of the vessels) has already been granted by the Judgment in Default obtained by the Bank and none of those reliefs arise out of or relate to or are connected to any question between the Comptroller and the Bank;
- l. That the case relied on by the OAG in support of their application to intervene can be distinguished from the instant action as:-
 - a. The Methodist case concerned Order 15, Rule 6(2)(b)(ii) of the Rules of the Supreme Court and an application by non-parties to be joined as defendants to an action which was a public law action concerning breach of the Constitution and the existing defendants were all government ministers;
 - b. That the application in the Methodist case was made at an interlocutory stage and the applicant was held to be a necessary defendant in the proceedings;
 - c. That this is an admiralty action in rem and not a public law action, the Bank has obtained judgment on its claim and priorities have been declared, the Comptroller is not seeking to be added as a defendant to the Bank's action and it does not seek to defend the Bank's claim and there is no issue as to any relief claimed in this action therefore Order 15, Rule 6 of the RSC is inapplicable in this situation.

The Law

10. Part 59.17 of the CPR states:-

"(1) Where property against which an action in rem is brought is under arrest or money representing the proceeds of sale of that property is in court, a person who has an interest in that property or money but who is not a defendant to the action may, with the leave of the Court, intervene in the action.

(2) An application for the grant of leave under this rule must be made without notice by affidavit showing the interest of the applicant in the property against which the action is brought or in the money in court.

..."

Discussion/Analysis

11. The application to intervene in the instant action by the OAG on behalf of the Comptroller of VAT is predicated on the OAG's position that VAT is to be applied on the sale of the vessels and that following the Assessment of the same ought to be paid.
12. The instant action was commenced by the Claimant Bank against the Owners and Parties Interested in the Motor Vessels the "Crystal Symphony" and the "Crystal Serenity". Presently, the only party that has a Judgment against the Defendants in both actions is the Claimant Bank. The events that have transpired which affect the respective Applicants is that the Claimant Bank obtained its Judgment in Default against the Defendants, an Order was made by the Court for the appraisalment and sale of the vessels and subsequently the sale was completed; an application was made by the Claimant Bank for a determination as to the order of priority of claims for the Claimant Bank and other interested parties/intervenors and such Order was made. The Claimant Bank has objected to the levying of VAT on the sale of the vessels and has submitted before my brother Judge Forbes and in the instant application that VAT should not be applied on the sale of the vessels and further, that if it is found that it should be, it would be a Marshal's expense.
13. On an application by a party who wishes to intervene in an admiralty action it must be shown that the person has a substantial interest in the res and such intervention is to protect the said interest which may be injuriously affected by the action against the res. (See Notes in the Supreme Court Civil Procedure Rules, 2022, Practice Directions on page 371 and Note 75/17/2 on page 1452 in Volume 1 of the Supreme Court Practice, 1999).
14. I wish to highlight the portions of then Justice Tynes' Orders made on December 19, 2022 whereby she ordered in the action with M.V. Crystal Serenity "2. Of the Proceeds of Sale:...(g) the further sum of US\$9,363,636.36 be retained within the Joint Account as security for the amount assessed by the Department of Inland Revenue against the Admiralty Marshal in respect to Value Added Tax on the supply of the Vessel subject (i) to this Court's determination as to whether the sum assessed is properly to be included in the Marshal's expenses of the sale, taking into account the relevant provisions of the Value Added Tax Act 2014 (as amended), and the steps that should customarily be taken thereunder to establish the net value added tax liability, if any, properly arising from the

sale, (ii) any directions the Court may make in connection with the establishment of the said net tax liability and (iii) to any aggrieved party's right to object to such assessment and appeal any decision by the Comptroller" and in the action with M.V. Symphony at "2. Of the Proceeds of Sale:...(g) the further sum of US\$2,272,727.27 be retained within the Joint Account as security for the amount assessed by the Department of Inland Revenue against the Admiralty Marshal in respect to Value Added Tax on the supply of the Vessel subject (i) to this Court's determination as to whether the sum assessed is properly to be included in the Marshal's expenses of the sale, taking into account the relevant provisions of the Value Added Tax Act 2014 (as amended), and the steps that should customarily be taken thereunder to establish the net value added tax liability, if any, properly arising from the sale, (ii) any directions the Court may make in connection with the establishment of the said net tax liability and (iii) to any aggrieved party's right to object to such assessment and appeal any decision by the Comptroller". Justice Tynes (Acting) had also ordered that the proceeds of sale of the subject vessels were to be deposited into the interest-bearing joint accounts held by the Admiralty Marshal and the Plaintiffs' Attorneys ("the Joint Accounts").

15. As I understand the OAG's position before me, they are of the view that their interest which is sums to be paid to the Department of Inland Revenue for VAT on the sale of the vessels will be injuriously affected by the action against the res. However, the test on such an application to intervene under the provisions relating to an admiralty action is that it must be shown that they will be injuriously affected by the action against the res. This has not been done by the OAG. In this instant proceedings, the action against the res was brought by the Claimant against the Defendant. The other parties to the action made their respective applications to intervene to ensure that they were considered at the point of priority. As a result of their intervention then Justice Tynes made the Orders in relation to the setting aside of certain sums so that all persons who had a claim would be able to recover their respective funds. However, in her Ruling at paragraph 12 she states "The relevant Interveners and Intended Caveator are urged to prosecute their respective claims with despatch should they so choose."
16. Obviously, the OAG's application to intervene is to ensure that the VAT Department receives the totality of sums on what they assert is the VAT applied on the sale of the vessels and prevent the payout by the Admiralty Marshal to the Claimant Bank as such a payout can only be made to a Judgment holder or by consent. By then Justice Tynes' Orders provisions have been made for the setting aside of the sums the OAG asserts are

owed to the DIR as the VAT levied on the sales of the Vessels. It is for this reason that I am of the view that at this juncture in this action it would not be necessary for the intervention of the Comptroller of VAT. There is of course no bar to the Comptroller of VAT commencing an action against the Owners of the vessels as I fully expect other Creditors to do.

Claimant's Application to Set Aside OAG's Notice of Motion Filed December 1, 2022

17. The Claimant Bank filed a Notice of Application on May 11, 2023 seeking to:-
 - a. Set aside the OAG's Notice of Motion filed December 1, 2022;
 - b. Set aside the OAG's appearances on behalf of the Admiralty Marshal and Comptroller of VAT filed on January 12, 2023;
 - c. Prohibit the OAG from representing the Admiralty Marshal.
18. The Claimant also seeks costs and such further orders the Court deems just. The Claimant provides the grounds of the application as:-
 - a. That only the owners of the res can enter an appearance as a Defendant;
 - b. That no leave was given to either the Admiralty Marshal or the Comptroller of VAT to intervene and it is not clear upon what grounds the Comptroller could have an interest in the proceeds of sale in an action in rem as their alleged claim is in personam against the Marshal;
 - c. That the Admiralty Marshal as an officer of the Court can make his own representations without having to enter an appearance;
 - d. That the Appearance, Notice of Motion and Affidavit were improperly filed in that they assumed that the actions concerning the vessels had been consolidated when they have not since an action in rem can proceed against one res alone.
19. The OAG has submitted that:-
 - a. There are no provisions under the CPR that allows for an application to be set aside;
 - b. That the OAG accepts that the appearance entered on behalf of the Comptroller on January 12, 2023 was irregular;
 - c. That the overriding objective of the CPR to deal with cases justly should be considered and should give effect to the just determination of the Comptroller's case on the merits and refers the Court to Part 1.1(1) of the CPR; Part 1.2(2) of the CPR and *Three Rivers District Council v Governor and Company of the Bank of England (No. 3)* [2001] UKHL 16;

- d. That the sale of the vessels is subject to VAT, that the Admiralty Marshal has not objected to the assessment of VAT, and that the assessment is now final and as such the Comptroller is entitled to collect the VAT due and setting aside the Notice of Motion would deny the Comptroller the opportunity to obtain an order from the Court to have the outstanding amount paid from the joint accounts; and
- e. That Part 26.9 of the CPR empowers the Court to put matters right where there has been an error of procedure or failure to comply with a rule.

20. The Claimant submits:-

- a. That the OAG by filing their application before seeking leave to become a party made their application stillborn and that the rules are clear that an intended intervenor must make application for leave and the OAG had no locus standi to file any application other than an application for leave to intervene;
- b. That the case of Three Rivers is not applicable as it deals with applications to strike out a claim but the Comptroller has not filed one;
- c. That the authorities are clear that the overriding objective may be used to overcome the OAG's filing of their application does not cure all ills and refers to the cases of *Vinos v Marks & Spencer plc* [2001] 3 All ER 784; *Lennox Offshore Services Ltd. v Haliburton Trinidad Ltd* (CV 536 of 2010) and *Jennison v Jennison* [2022] EWCA Civ 1682.

21. The OAG's Notice of Motion filed on December 1, 2022 seeks in summary that the sale proceeds of the vessels be paid out of the joint account to the Value Added Tax Department in respect of the VAT assessed by the Comptroller pursuant to Section 60 of the VAT Act against the Admiralty Marshal on the supply of the vessel.

22. The Claimant Bank in its application before the Court has asked that the OAG's application be set aside and that the appearances entered by the OAG also be set aside. The OAG in their Written Submissions have conceded that the said appearances ought not to have been entered but they assert that the Court has the power to "correct" their error of procedure under the CPR. While the Court is indeed empowered by the provisions of the CPR to put matters right where there has been an error of procedure or failure to comply with a rule, the provisions that govern admiralty actions are clear. All interested parties and intended intervenors must seek the leave of the Court before they can be enjoined to an action. This was not done by the OAG at the time they entered their appearance on January 12, 2023. Considering that the OAG has conceded that their appearances were

irregular and the Court not being of the view that it should act on its powers under the CPR, the Court hereby sets aside the appearances filed on behalf of the OAG on January 12, 2023.

23. Order 67, Rule 24 of the RSC and the Notes of the White Book at page 1461, 75/24/6 both state that a payment out of the proceeds of sale of the vessels can only be made to the Judgment Holder which in the instant action so far is ONLY the bank or by consent of the parties. Therefore, as I understand it only DNB Bank who has the Default Judgment in the action is the only party that can receive a payout from the proceeds of sale and if any other party wishes to receive their respective payout all of the parties must either consent or obtain judgment.

24. Further, under Part 59.24(2) and (3) of the CPR and the Notes found on page 377 of the Practice Guide provides:-

(1)...

(2) Subject to paragraph (3), money paid into court shall not be paid out except in pursuance of an order of a judge in person.

(3) The Registrar may, with the consent of the parties interested in money paid into court, order the money to be paid out to the person entitled thereto in the following cases, that is to say —

(a) where a claim has been referred to the Registrar for decision and all the parties to the reference have agreed to accept the Registrar's decision and to the payment out of any money in court in accordance with that decision;

(b) where property has been sold and the proceeds of sale thereof paid into court, and the parties are agreed as to the persons to whom the proceeds shall be paid and the amount to be paid to each of those persons;

(c) where in any other case there is no dispute between the parties."

"Notes

The Court lacks jurisdiction to order payment out from the proceeds of a sale by order of the Court, to persons other than judgment holders or, in the case of the residue after all claims have been satisfied. However, payment out may be ordered to any person where the defendants and all other parties interested in the proceeds of sale (judgment holders, interveners and caveators) consent."

25. I once again reiterate the sentiments of then Justice Tynes and Justice Forbes and encourage all interested parties in these proceedings to prosecute their respective claims.

The Appearance by the Admiralty Marshal

26. The OAG had previously sought to represent the Admiralty Marshal and the Comptroller of the VAT Department in these proceedings. However, Counsel for the Claimant Bank objected to such representation and Counsel for the OAG opted to represent the Comptroller of the VAT Department.
27. I am not of the view that the Admiralty Marshal needs Counsel as he is a duly appointed officer of the Court. According to Part VIII of the Supreme Court Act, entitled "Offices and Officers of the Court"; Section 70 of the Supreme Court Act provides "The Governor-General acting in accordance with the advice of the Public Service Commission may appoint a marshal to the Court in its admiralty jurisdiction." Further, Part 59.12 of the CPR empowers the Admiralty Marshal to act on his own volition to apply to the Court for directions with respect to the property under arrest in an action and no such application is before me. Therefore, I find that there is no need for the Admiralty Marshal to be represented by the OAG or for him to seek separate Counsel to represent him in these proceedings. He will be subject to the Court's direction in this instance.

Disposition

28. The application by the Comptroller of VAT to intervene in these proceedings is dismissed and the Notice of Motion, Affidavit in Support and the Appearance filed herein by the OAG on behalf of the Admiralty Marshal and the Comptroller of Vat without the leave of the Court are set aside. The Court shall proceed to hear the Claimant's extant application on the next available date.

Costs

Costs of Adjournments on May 16 and June 28, 2023

29. I have read and considered the Submissions on costs filed herein by the parties. With respect to the adjournment granted on May 16, 2023 I had already determined that the Bank would have its costs thrown away. Although the OAG had made no election during that hearing as to who it would represent, the AG was clearly not ready to proceed despite the Admiralty Marshal having been served 9 days before the hearing. An election was subsequently made to represent the Comptroller of VAT. I am persuaded by the Claimant's submissions that in the circumstances the Comptroller of VAT should bear these costs. With respect to the costs thrown away on June 28, 2023 I am again persuaded by the submissions of the Claimant. The AG office did not meet the Court's deadline for the filing of documents by the parties and no Skeleton Submissions had been laid over, all occasioning the adjournment.

30. The Comptroller of VAT should also bear the costs associated with and occasioned by these applications, that is, the application to intervene and the Claimant's application to set aside the AG's Notice of Motion, Affidavit and Appearance. I shall now proceed to hear Counsel further on the issue of costs so awarded to the Claimant.

Dated this 25th day of September A. D. 2023



Petra M. Hanna-Adel
Judge

