IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2023/CLE/gen/01252

IN THE MATTER OF A POLICY OF HULL AND MACHINERY MARINE INSURANCE NO. B0180MA2204468

AND

IN THE MATTER OF THE MARINE INSURANCE ACT, 349 SLB

BETWEEN

(1) DEAN'S SHIPPING LTD.

(2) ERNEST DEAN

Claimants

AND

(1) AEGIS MANAGING AGENCY LIMITED
(in a representative capacity for all members of Lloyd's of London Syndicate No. 1225 for the 2022 Year of Account)

(2) LIBERTY MANAGING AGENCY LIMITED
(sued for its own account and in a representative capacity for all members of Lloyd's of London Syndicate No. 4472 for the 2022 Year of Account)

(3) ASCOT UNDERWRITING LIMITED
(sued for its own account and in a representative capacity for members of Lloyd's of London Syndicate No. 1414 for the 2022 Year of Account)

(4) HCC UNDERWRITING AGENCY LIMITED
(sued for its own account and in a representative capacity for members of Lloyd's of London Syndicate No. 4141 for the 2022 Year of Account)

(5) AMPHITRITE UNDERWRITING AGENCY LIMITED
(for and on behalf of Arch Insurance (UK) Limited)

(each an underwriter [or in the case of a syndicate, each member of the syndicate being an underwriter] participating in a policy of marine insurance No. B0180MA2204468 on a several [not joint] basis and liable only for the proportion of liability each has underwritten)

Defendants

Before:	**The Honourable Madam Justice Simone I. Fitzcharles**
Appearances:	**Mr. Carl Bethel, KC, with Mr. Branville McCartney (*of Halsbury Chambers*) for the Claimants**
	Mr. Richard J. W. Horton with Mr. Darzhon Rolle (*of Alexiou, Knowles & Co.*) for the Defendants
Hearing Date:	**12 November 2024**
Submissions:	**18 October 2024; 28 October 2024; 13 November 2024; and 19 November 2024)**

RULING

FITZCHARLES J:

Introduction

[1.] This ruling involves two opposing applications brought by Dean's Shipping Ltd. and Ernest Dean, the First and Second Claimants named herein, and Aegis Managing Agency Limited, Liberty Managing Agency Limited, Ascot Underwriting Limited, HCC Underwriting Agency Limited, and Amphitrite Underwriting Agency Limited, the First through Fifth Defendants named herein, respectively. The First and Second Claimants apply for summary judgment. The First through Fifth Defendants apply for the present claim, which was commenced by the Originating Application Form method, to continue as if it were commenced by the Standard Claim Form method.

[2.] In this ruling, where the Court refers to the First and Second Claimants collectively, they shall be referred to as the Claimants. Likewise, where the Court refers to the First through Fifth Defendants collectively, they shall be referred to as the Defendants.

[3.] The Claimants, by way of a Notice of Application filed on 14 February 2024, moved the Court on their summary judgment application seeking the following relief, namely, that –

i. pursuant to Rule 15.2(b) of the Supreme Court Civil Procedure Rules, 2022 (as amended) (the "CPR"), an order for summary judgment be granted in favour of the Claimants.

[4.] The sole ground for the Claimants' summary judgment application is that the Defendants have no real prospect of successfully defending the present claim.

[5.] The Defendants, by a Notice of Application filed on 1 March 2024, moved the Court on their application seeking the following relief, namely, that –

i. pursuant to Rule 8.19(1) of the Supreme Civil Procedure Rules, 2022 (as amended) (the "CPR"), the present claim, which was commenced by an Originating Application and Amended Originating Application, continues as if it were commenced by a Standard Claim Form;

ii. further directions consequent thereon be given; and

iii. the Claimants pay the costs of and occasioned by this application.

[6.] The grounds for the Defendants' application are, namely, that –

i. the present claim is made against the Defendants as underwriters (the "Underwriters") for payment under a policy of Hull and Marine Insurance (the "Policy") in relation to the grounding of the M/V Legacy (the "Vessel") on or about 8 February 2023 (the "Grounding");

ii. the Underwriters wish to defend the action;

iii. there are numerous and substantial disputes of fact between the parties, including but not limited to –

(a) whether the Second Claimant has any reasonable cause of action against the Underwriters since he is not a party to the Policy;

(b) the cause and circumstances of the grounding;

(c) the seaworthiness (or otherwise) of the Vessel when it was put to sea on the voyage in question, including –

i. whether the crew was sufficiently trained and qualified;

ii. the state of the Vessel's navigational equipment; and

iii. whether there was a suitable Safety Management System in use, including a proper navigational watch and suitable roster of work and rest;

(d) whether the First Claimant breached an expressed (alternatively, implied) warranty and/or failed to make a material disclosure when it entered into the Policy, when it incorrectly claimed that the Vessel was Bahamian-flagged, when it was not; and

(e) the quantum of damages

iv. the Underwriters, therefore, take the position that these disputes should be resolved with the assistance of formal pleadings, disclosure, and cross-examination of witnesses, which requires the standard claim form method;

v. rule 8.15 of the CPR provides that the originating application form method is intended for use where the Court's decision is sought on a question which is unlikely to involve a substantial dispute of fact, or where statute, rule, or practice direction requires or permits it. Neither of those scenarios applies in the present claim;

vi. the Underwriters therefore make an application pursuant to rule 8.19(1) of the CPR, which provides that "the Court may at any stage, either on application or on its own initiative, order a claim commenced by originating application form to continue as if the proceedings had been commenced using a standard claim form and where the Court takes this course it will give such directions as it considers appropriate"; and

vii. this case was clearly not appropriate for the originating application form method from before the proceedings were commenced, the Underwriters say the Claimants should pay the costs of this application.

[7.] The evidence relied upon by the Claimants in support of their summary judgment application and opposition to the Defendants' application is, namely –

i. the Affidavit of Ernelia Dean-Turnquest filed on 14 December 2023 in support of the Originating Application also filed by the Claimants on the same date;

ii. the First Affidavit of Shenique R. Hanna filed by the Defendants on 2 February 2024 in opposition to the Originating Application filed on 14 December 2023;

iii. the Affidavit of Ernelia Dean-Turnquest filed on 14 February 2024; and

iv. the Affidavit of Cecily A. Dean filed on 26 August 2024.

[8.] The evidence relied upon by the Defendants in support of their application and opposition to the Claimants' summary judgment application is, namely –

i. the First Affidavit of Shenique R. Hanna filed by the Defendants on 2 February 2024 in opposition to the Originating Application filed on 14 December 2023; and

ii. the Affidavit of Mandy M. McKenzie filed on 30 September 2024.

[9.] For the avoidance of doubt, in this ruling, where the Court refers each application individually, it shall be referred to as (i) the Claimants' summary judgment application, and (ii) the Defendants' application. Where the Court refers to both applications collectively, they shall be referred to as the applications.

[10.] All of the evidence filed herein in support of and in opposition to, the applications has been fully considered by the Court, but will not be reproduced in detail in this ruling.

[11.] In this ruling, the Court shall address the Claimants' summary judgment application first. This is particularly so, since it was made first in time and the consequential nature of a summary judgment application, that is, if the Claimants' summary judgment application is successful, the present claim is brought to an end and the Defendants' application would be deemed nugatory. Thereafter, the Court, in this ruling, shall address the Defendants' application, if necessary.

[12.] On 12 November 2024, the Court heard the parties on the applications, and reserved its decision, promising to deliver it at a later time. This ruling serves as the Court's decision on the applications.

Factual Background

[13.] These Claimants brought their main claim by an Originating Application and Amended Originating Application filed on 14 December 2023 and 14 February 2024, respectively. The claim concerns a dispute relating to a hull and machinery marine insurance policy. The parties' positions regarding the present claim are vigorously contested. Given that the present claim is at the interlocutory stage, the factual account expressed herein should not be construed as findings of fact made by the Court.

[14.] The First Claimant, a body corporate duly incorporated under the laws of the Commonwealth of The Bahamas, is a family-owned mail boat service provider that provides bi-monthly mail boat services from the Port of Nassau, The Bahamas, to the Port of Marsha Harbour, Abaco, The Bahamas. The First Claimant is the operator of two motor vessels, namely, the M/V Legacy and the M/V Champion III, which are both insured under a hull and machinery marine insurance policy with the reference number B0180MA2204468. The motor vessels transport containers, palletized/shrink-wrapped general cargo, and Ro/Ro cargo along with postal mail and, rarely, passengers.

[15.] The Second Claimant is the majority shareholder and beneficial owner of the First Claimant and the owner of the motor vessel, the M/V Legacy. The Defendants dispute whether the Second Claimant has any reasonable cause of action against them since he is not a party to the hull and machinery marine insurance policy.

[16.] The First through Fifth Defendants are the underwriters to the hull and machinery marine insurance policy. The hull and machinery marine insurance policy aims to indemnify the First Claimant against hull and machinery risks. Each of the Defendants, as underwriters to the hull and machinery marine insurance policy, is severally and not jointly liable, but only to the proportion of liability each underwriter has underwritten.

[17.] On 8 February 2023, the M/V Legacy ran aground on a reef near Egg Island, Eleuthera, The Bahamas, miles off the coast of Abaco, The Bahamas.

[18.] A claim was made on the hull and machinery marine insurance policy; however, payment was not forthcoming. As a consequence, the Claimants commenced the present claim against the Defendants by way of the Originating Application and Amended Originating Application filed on 14 December 2023 and 14 February 2024, respectively. On the face of the pleadings, the present claim purports to be made pursuant to the terms of the hull and machinery marine insurance policy. Paragraph 1 of the Originating Application and Amended Originating Application reads as follows –

> [The Claimants] make application for full indemnification under the [hull and machinery marine insurance policy] for all costs payable for the repair and restoration to a state of seaworthiness of the Motor Vessel "Legacy" which suffered loss and damage to its hull and other machinery or equipment as a result of running aground in the vicinity of Egg Island, Eleuthera, The Bahamas, on 8 February 2023, as well as for damages for consequential loss for breach of contract as follows –
>
> i. the M/V Legacy, a Ro-Ro Vessel contracted by the Government of The Bahamas to perform service as a "Mail Boat", departed the port of Nassau in the evening of 7 February 2023 on a course to Marsh Harbour, Abaco, The Bahamas;
>
> ii. the M/V Legacy was at all material times covered against loss and damage to its hull and machinery by a policy of marine insurance, certificate number B0180MA2204468;
>
> iii. during the course of the evening, at or about 3:30 am, a sudden tropical squall developed, whose winds and wave action caused the ship to list, thereby endangering the ship and cargo;
>
> iv. the Master of the ship thereupon prudently adjusted his course to the Starboard so as to turn the bow of the ship "into the sea", thus deviating from the established course;

v. at or about 8:00 am on 8 February 2023, while the Chief Mate was at the helm, the M/V Legacy ran aground at or in the vicinity of Egg Island, Eleuthera, The Bahamas;

vi. at the time of her departure, the M/V Legacy was seaworthy with functional navigational equipment and other redundancies, or backup equipment, in place; and she was manned by trained, certified, and competent Master, Chief Mate, Chief Engineer, and Crew;

vii. the Claimants have consequently incurred losses by way of out-of-pocket expenses directly caused by the grounding and failure of the defendants to settle the claim in a timely manner;

viii. the Defendants have, despite the seaworthiness of the M/V Legacy, failed to honour the marine insurance policy covering losses to hull and machinery.

[19.] The Claimants claim for the following relief, namely –

i. the full insured amount payable pursuant to the hull and machinery marine insurance policy;

ii. damages for the consequential loss for breach of contract, caused or occasioned by the failure of the Defendants to honour the hull and machinery marine insurance policy;

iii. interest at the statutory rate pursuant to the Civil Procedure (Award of Interest) Act, Chapter 80 of the SLB, on all sums found to be due and owing; and

iv. costs.

[20.] On 2 February 2024, the Defendants entered an appearance to the present claim by filing an Acknowledgment of Service, by which they deny the present claim in its entirety and express an intention to defend themselves against the present claim.

Submissions

[21.] Each of the parties has tendered helpful written and oral submissions, respectively, which set out their positions regarding the applications. The Claimants laid over written submissions dated 18 October 2024, supplemental written submissions in reply dated 28 October 2024, and further written submissions dated 13 November 2024. The Defendants laid over written submissions dated 28 October 2024, and further written submissions in reply dated 19 November 2024. An overview of the parties' written and oral submissions is set out below. The Court wishes to thank Counsel for their submissions.

Submissions of the Claimants

[22.] The Claimants ground their application for summary judgment on the fundamental premise that the Defendants have no real prospect of successfully defending themselves against the present claim. The Claimants contend overall that there is neither any substantial dispute of fact and/or law with the present claim nor is there any compelling reason why the present claim, which was commenced by Originating Application and Amended Originating Application, ought to continue as if it were commenced by a Standard Claim Form. The Claimants assert that the present claim involves the true construction and interpretation of the terms of the hull and machinery marine insurance policy and the Marine Insurance Act, Chapter 319 of the Statute Laws of the Commonwealth of The Bahamas. They contend that there is no compelling reason why the present claim ought to be disposed of at trial. Therefore, the approach they support would give effect to the overriding objective definitively outlined in **CPR 1.1(1)**, that is, to enable the Court to deal with cases justly and at proportionate cost.

[23.] Counsel for and on behalf of the Claimants, Mr. Carl Bethel, KC, sought to present the Claimants' arguments in manner designed to show that the Defendants' purported substantial dispute as to the facts and the law is baseless and does not constitute a valid defence to the present claim. Therefore, it is argued that the present claim is appropriate for summary judgment.

[24.] Firstly, Counsel conceded that the Second Claimant is and was not a party to the hull and machinery marine insurance policy. However, he contends that the Second Claimant has been directly affected by the wrongful refusal and failure of the Defendants to honour the terms of the hull and machinery marine insurance policy. Counsel contends that the very terms of the hull and machinery marine insurance policy contemplate the possibility that some person, being a natural person or artificial person, might have a claim for damages incurred by him under the terms of the hull and machinery marine insurance policy. As a result, Mr. Bethel, KC, contends that the Second Claimant, having suffered personal damages because of the Defendants' default, has every right in law and equity to redress. This dispute is more a question of law than fact.

[25.] Secondly, Mr. Bethel, KC, contends that the Claimants have always maintained and the evidence will show that the grounding of the M/V Legacy was caused by the negligence, if not misconduct, of the Captain and Chief Officer. The Claimants bear no legal or equitable responsibility or liability for the errors, negligence, or misconduct of the Master and Chief Officer on 7 and 8 February 2023, which led to and caused the grounding of the M/V Legacy. Counsel relied on **sections 40, 56(1) and 2(a) of the Marine Insurance Act, Ch. 349.** Counsel also relied on the cases of **Alize 1954 and another v Allianz Elementar Versicherungs AG and others** and **The CMA CGM LIBRA [2022] 2 All ER 479**.

[26.] Thirdly, Mr. Bethel, KC, advances that the M/V Legacy was at all material times seaworthy, that is, before and on her departure from the Port of Nassau, The Bahamas, on 7 February 2023 at or about 8:15 pm. Mr. Bethel, KC, asserts that the M/V Legacy was well equipped with a functional Garmin GPS Maps Chartplotter, magnetic and digital compasses, radar, and other functioning redundancies. Mr. Bethel, KC, further argues that the Master and Chief Officer were, at the very least, generally competent and had completed no less than 24 complete voyages on the same route without mishap or incident. The Master and Chief Officer had

certificates of proficiency in the relevant disciplines related to their functions. Counsel asserts that nowhere in the present claim is it alleged that the Master and Chief Officer were incompetent or inefficient, nor is it alleged that they suffered from any disabling want of skill or disabling want of knowledge. Mr. Bethel, KC, conceded, though subtly, that not all of the Master's certifications were up to date. However, Counsel maintains that the Master acquired the training, knowledge, and skill to earn the certifications, and such training, knowledge, and skill did not simply disappear because the relevant certifications expired. Counsel states that the ability to renew certifications is simply an administrative matter, which is dependent upon when the courses are offered and the availability of the Master. Mr. Bethel, KC, maintains that the Master was, at all material times, fully competent and efficient in his ability to command the M/V Legacy, notwithstanding this administrative matter.

[27.] Furthermore, in maintaining the position that the M/V Legacy was at all material times seaworthy, that is, before and on her departure from the Port of Nassau, The Bahamas, on 7 February 2023 at or about 8:15 pm, Mr. Bethel, KC, rebuffed concerns made by the Defendants that there were no paper charts on board the M/V Legacy and that the certifications of the Master and Chief Engineer were not accepted by The Bahamas Maritime Authority as red-herrings. Counsel states that paper charts are now otiose in commercial shipping. He contends that the use of electronic navigational charts, such as the Garmin GPSMaps Chartplotter, which was installed and functioning on the M/V Legacy, is now the gold standard of shipping navigation. Mr. Bethel, KC, also contends that the Defendants were well aware that the M/V Legacy was not registered with The Bahamas Maritime Authority. The M/V Legacy was maintained and remains registered under the Boat Registration Act, Ch. 277. Hence, the standards set by The Bahamas Maritime Authority are not applicable. Counsel states that the applicable standards, qualifications, and training are those accepted by the Port Department of Nassau, The Bahamas. To date, there has been no objection to the employment of either the Master (who has now left The Bahamas) or the Chief Engineer, who remains employed by the First Claimant in maintaining the M/V Legacy. In support of the arguments put forth regarding the seaworthiness of the M/V Legacy, Mr. Bethel, KC, relied on the authorities of **Alize 1954(supra)** and **Papera Traders Co. Ltd., and others v Hyundai Merchant Marine Co. Ltd. and another [2002] All ER (D) 101 (Feb)**

[28.] Fourthly, in reference to the contention put forth by the Defendants as to whether the M/V Legacy had a sufficient safety management system and rosters for work and rest, Counsel argues that this contention is another red-herring being raised by the Defendants to delay or preclude the timely, fair and equitable resolution of a matter in which the Defendants have simply delayed, prevaricated upon and stalled for nearly two (2) years, to the great detriment of the Claimants. Counsel opines that the very conduct of the Defendants, i.e., their failure to conduct timely or any crew interviews, undermines their insistence that there are unresolved issues of fact which require a full trial. It is asserted that the Defendants have not made the slightest effort to interview the remaining crew of the M/V Legacy at all.

[29.] Lastly, about the contention put forth by the Defendants as to whether the First Claimant breached an express (alternatively, implied) warranty and/or failed to make a material disclosure when it entered into the hull and machinery marine insurance policy, when it incorrectly claimed that the M/V Legacy was Bahamian-flagged, when it was not, Counsel indicates that such representation amounts to an innocent misrepresentation, which cannot be relied upon by the

Defendants. Mr. Bethel, KC, asserts that the Defendants seek to rely upon an email dated 25 January 2017 authored by Brian Rigby, the US agent of the First Claimant, in which Mr. Rigby stated that the two motor vessels which are separately insured by the hull and machinery marine insurance policy, that is, the M/V Champion III and the M/V Legacy, were Bahamian flagged and registered. Counsel asserts that such representation was innocently made on the part of Mr. Rigby as the M/V Legacy had previously been registered with The Bahamas Maritime Authority but was removed from the register prior to 2017.

[30.] Furthermore, Counsel asserts that in the email, Mr. Rigby made four (4) express representations. The Defendants elected to rely only upon one (1) of the express representations, making it an express term to the hull and machinery marine insurance policy, that is, the M/V Champion III must be IACS Class and Class maintained. Counsel asserts that this was the only express representation relied upon by the Defendants. As a result of the grounding of the M/V Legacy, the Defendants now seek to rely upon what was an express representation as being an implied condition or warranty to the hull and machinery marine insurance policy. Counsel asserts that the Defendants cannot now rely on that express representation; the legal maxim, *expression unius est exclusion alterius*, must apply. The Defendants cannot now seek to rely, by way of implication or implied terms, on other express representations which they did not make express terms to the hull and machinery marine insurance policy. The Defendants were the drafters of the hull and machinery policy. In support of his arguments on the innocent misrepresentation point, Mr. Bethel, KC, drew the Court's attention to **Sections 21(1) and 88(1) and (2) of the Marine Insurance Act, Ch. 349**, **Ellis v Glover & Hobson Limited [1908] 1 KB 388**, **Quest 4 Finance Ltd. v Maxfield and others [2007] All ER (D) 180 (Oct)**, **Idemitsu Kosan Co. v Sumitomo Corporation [2016] EWHC 1909 (Comm)** and **Pan Atlantic Insurance Co. Ltd. and another v Pine Top Insurance Co. Ltd. [1994] 3 All ER 581.**

Submissions of the Defendants

[31.] In their bid to have the Claimants' summary judgment application dismissed and to have the present claim continue as if it were commenced by a standard claim form, the Defendants equate the Claimants' summary judgment application to a mere ploy to circumvent the need for a full trial in the present claim. This is particularly where there are clear and substantial disputes of fact and law. The Defendants argue that the evidence tendered by the Claimants in support of their summary judgment application falls significantly below the standard of proof and burden of proof required, and it is incumbent on the Court to mandate a full trial to assess whether the claims made by the Claimants, in addition to the relief sought by them, are tenable. Moreover, the procedure used by the Claimants, i.e., the Originating Application Form method, to commence the present claim is not appropriate. This is because the present claims give rise to substantial disputes of fact and/or law. Consequently, the Defendants argue that the Claimants' summary judgment application ought to be dismissed with costs to be paid to the Defendants, and the present claim should be converted as if it were commenced by the Standard Claim Form method. No rule or practice direction requires the present claim to be brought by the Originating Application form method. The Standard Claim Form method allows for the substantial disputes of fact and law as addressed by the Defendants to be adequately resolved with the assistance of formal pleadings, disclosure, and cross-examination of witnesses.

[32.] Counsel for and on behalf of the Defendants, Mr. Richard J.W. Horton, directed the Court to **CPR 15.2 and 15.6** and **Maurice O. Glinton & Co. (a Firm) v Robert K. Adams and Graham, Thompson & Co. (a Firm) 2021/CLE/gen/01115**, the latter being a local authority by *Winder CJ* which he asserts sets out the test and procedure relative to summary judgment applications within this jurisdiction upon the advent of the CPR. Counsel also drew the Court's attention to the authorities of **RBC Royal Bank (Barbados) Ltd. v Graham Bethel BB 2020 HC 34**, and **Sagicor Bank Jamaica Limited v Taylor-Wright [2018] UKPC 12**, which he reasons expound on the test and procedure for summary judgment applications.

[33.] Mr. Horton contends that, given the nature of the claims proffered by the Claimants, which are being challenged in both fact and law by the Defendants, this is not an appropriate claim that can be dealt with summarily in the absence of a formal trial. He also contends that the Claimants' choice to commence the present claim by the Originating Application method places the Court in a precarious position as the documents lack the particulars necessary to fully assess the merits of the summary judgment application.

[34.] Counsel asserts that contrary to the Claimants' position, the present claim is not straightforward and/or meritorious. Mr. Horton contends that it is the Claimants' position that they are eligible to be indemnified for all loss and damage associated with the grounding of the M/V Legacy, which they purport was ultimately caused by the negligence, if not misconduct, of the Master and his Chief Officer. The Claimants intend to rely heavily upon the ABM 0704-0128-23 Damage Survey Report, which was produced by Mr. Adam Hammer of Able-Bodied Marine Inc., to support the latter proposition. However, Mr. Horton states that the Court should be cautious as to what weight, if any, should be attached to the report for the purposes of the present claim. Counsel contends that the report was conducted on a preliminary basis to ascertain the nature and extent of the physical damage sustained to the M/V Legacy's hull and machinery. The report was not conducted in a manner to assess the culpability of negligence, if any, on the part of the Master and Chief Officer. Moreover, Mr. Horton contends that the statements of the Master and Chief Officers, which were utilized in the report, were provided to Mr. Hammer by the Second Claimant. Mr. Hammer never actually conducted interviews with any of the crew members who were on board the M/V Legacy at the time it ran aground.

[35.] Moreover, Mr. Horton contends that the statements that were purportedly made by the Master and Chief Officer have never been challenged to determine their veracity or lack thereof, despite numerous attempts by the Counsel for the Defendants to facilitate interviews with both individuals. Mr. Horton contends that it would be extremely inappropriate to grant an order for summary judgment given the current circumstances. Counsel asserts that the Court has not been provided with sufficient information to make an informed decision as to the probability of the Defendants' success.

[36.] Mr. Horton adds that to exacerbate the situation further, it is yet to be determined whether M/V Legacy was seaworthy prior to the voyage in accordance with the terms and conditions of the hull and machinery marine insurance policy. Counsel contends that little is known about the condition of the M/V Legacy prior to its voyage on 7 February 2023, as there was no formal investigation to ascertain the necessary information. From the outset, the Defendants have reserved their rights pending further investigation into the cause and circumstances surrounding the

grounding incident. Moreover, the Claimants have yet to produce any evidence, which, when construed on an objective basis, confirms the state of the M/V Legacy or its seaworthiness prior to commencing the voyage in question.

[37.] Mr. Horton argues that there is competing evidence as to the functionality of the equipment on board the M/V Legacy. Moreover, the Defendants have previously expressed their concerns regarding the relevant qualifications of the crew tasked with operating the M/V Legacy, specifically the validity of their respective certifications and qualifications. A vast amount of the crew's qualifications and certifications were obtained in Honduras, a jurisdiction not accepted by The Bahamas Maritime Authority as being the standard for seafarers to sail on Bahamian-flagged vessels. Amongst other concerns is also whether there was an adequate safety management system instituted on board the M/V Legacy prior to or at the time of the grounding incident, which could have prevented the same. Counsel relied on sections **18, 19, and 40 of the Marine Insurance Act, Ch. 349**, to support his arguments relative to the seaworthiness of the M/V Legacy.

[38.] Counsel further contends that another substantial dispute of fact to be determined based on expert evidence is whether the M/V Legacy was Bahamian-flagged and registered in accordance with the requirements of The Bahamas. Mr. Horton contends that for the M/V Legacy to be deemed Bahamian-flagged and registered, the M/V Legacy must have been registered with The Bahamas Maritime Authority. Yet upon search of the ship registry, it is clear that the M/V Legacy was deleted from The Bahamas' Maritime Authority's register in 2013. Counsel contends that the express representation made by Brian Rigby, the US agent of the First Claimant, in an email dated 25 January 2017, prior to the execution of the hull and machinery marine insurance policy, that the M/V Legacy was Bahamian-flagged and registered amounted a material non-disclosure, which would permit the Defendants to void the hull and machinery marine insurance policy. Counsel argues that unlike regular commercial contracts, insurance contracts are founded upon the *uberrimae fidae* principle *(the utmost good faith)*. Non-disclosures which are material in nature permit the insurer to avoid the insurance policy. Counsel contends the express representation did not need to be included in the hull and machinery marine insurance policy for the Defendants to be able to avoid the hull and machinery marine insurance policy; it only requires the express representation to be untrue. To support his proposition on the material non-disclosure point, Counsel relied on **sections 18 and 19 of the Marine Insurance Act, Ch. 349**, **Pan Atlantic Insurance Co. Ltd. et al v Pine Top Insurance Co. Ltd. [1994] 3 All ER 581** and **North Star Shipping Ltd. et al v Sphere Drake Insurance Plc et al (No.2) [2006] 2 All ER (Comm) 65**.

[39.] Counsel ultimately argues that the Court must take into account not only the evidence actually placed before it on the summary judgment application, but also evidence that can reasonably be expected to be available at trial. The Defendants argue that the Court should hesitate about making a final decision, i.e., summarily dismissing a claim on a summary judgment application, particularly where there is conflict of fact and law and there are reasonable grounds for believing that a fuller investigation into the facts and law of the case would add or alter the evidence available to a trial judge and so affect the outcome of the case. Counsel argues that the burden rests on the Claimants to demonstrate that the Defendants have no real prospect of success and there is no other reason for a trial of the present claim. The standard of proof and burden of proof required of the Defendants is not high. It suffices merely to rebut the Claimants' statement of belief. Counsel argues that the Claimants have failed to establish that this is an appropriate case

for summary judgment; therefore, it is incumbent on the Court to mandate a trial of the present claim to assess whether the claims made and reliefs sought by the Claimants are tenable. Counsel relied on **Royal Brompton Hospital NHS Trust v Hammond (No. 5) [2001] EWCA Civ 550, Doncaster Pharmaceuticals Group Ltd. v Bolton Pharmaceutical Co. 100 Ltd. [2006] EWCA Civ 661, ICI Chemicals & Polymers Ltd. v TTE Training Ltd. [2007] EWCA Civ 725, Saint Lucia Motor and General Insurance Co. Ltd. v Peterson Modeste HCVAP2009/008**, and **ED & F Man Liquid Products Ltd. v Patel [2003] EWCA Civ 472**.

Issues

[40.] The applications have prompted the Court to determine two alternative issues for their determination and disposal. These two alternative issues are as follows –

(i) Whether the Court, in the exercise of its discretion and the application of CPR 15.2, ought to accede to the Claimants' summary judgment application and summarily dispose of the present claim on the basis that the Defendants have no real prospect of successfully defending the present claim; and/or

(ii) Alternatively, whether the Court, in the exercise of its discretion and the application of CPR 8.19(1), ought to allow the present claim, which was commenced by the Originating Application Form method to continue as if it were commenced by a Standard Claim Form method.

Law and Discussion

Preliminary

[41.] The Court is well aware that when it is asked, *inter alia,* to exercise any powers under the CPR, to exercise any discretion given to it by the CPR, and/or to interpret any provision under the CPR, it must seek to give effect to the overriding objective of the CPR in doing so. This is especially true when the Court is asked to consider a summary judgment application under Part 15 of the CPR and/or an application to convert a claim commenced by the Originating Application Form method to a Standard Claim Form method under Part 8 of the CPR. **CPR 1.1(1)** and **1.2** provide as follows –

1.1 The Overriding Objective.

(1) **The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost.**

1.2 Application of the overriding objective by the Court.

(1) **The Court must seek to give effect to the overriding objective when –**

(a) **exercising any powers under these Rules;**

(b) **exercising any discretion given to it by these Rules; or**

(c) **interpreting these Rules.**

(2) **These Rules shall be liberally construed to give effect to the overriding objective, and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits.**

(Emphasis added)

The Claimant's Summary Judgment Application

[42.] Summary judgment refers to the summary disposal of a claim or particular issue by the Court under its wide case management powers, particularly, where the Court is satisfied that the claimant or defendant (as the case may be) has no real prospect of successfully bringing or defending the claim or particular issue. It eliminates the need for a fuller investigation of the claim or particular issue at a trial and gives effect to the overriding objective of the CPR. The Court may exercise its summary judgment powers on an application by the claimant or defendant (as the case may be). The Court may also, under its wide case management powers and acting on its own initiative, direct that an application for summary judgment be heard: **see The Caribbean Civil Court Practice 2024 (3rd Edition) Note 12.1.**

[43.] The learned authors **Gilbert Kodilyne and Vanessa Kodilyne**, in their text, **Commonwealth Caribbean Civil Procedure (3rd Edition) at page 64,** had this to say regarding the rationale and purpose of the Court's power to summarily dispose of a claim or particular issue by summary judgment –

> ... the policy of the CPR is to knock out weak cases at an early stage of the proceedings, whether the weakness is on the defendant's side or the claimant's side. It was felt by the framers of the CPR that it was not in the interest of litigants to pursue cases or put up defences that were doomed to fail, and the result of which would be unnecessary costs burdens."

[44.] **Part 15 of the CPR** sets out the procedure by which the Court may exercise its summary disposal powers to grant summary judgment. The power of the Court to grant summary judgment is found in **CPR 15.2** (which is identical to the Jamaican CPR 15.2 and English CPR 24.2). **CPR 15.2** provides as follows –

15.2 Grounds for summary judgment.

The Court may give summary judgment on the claim or on a particular issue if it considers that the –

(a) claimant has no real prospect of succeeding on the claim or the issue; or

(b) <u>defendant has no real prospect of successfully defending the claim or the issue.</u>

(Emphasis added)

[45.] **CPR 15.6**, which sets out the powers of the Court on an application for summary judgment, complements **CPR 15.2**. **CPR 15.6** provides as follows –

15.6 Powers of the Court on application for summary judgment.

(1) The Court may give summary judgment on any issue of fact or law whether or not the judgment will bring the proceedings to an end.

(2) Where the proceedings are not brought to an end the Court must also treat the hearing as a case management conference.

[46.] The law on summary judgment is well-established and has been frequently rehearsed by the courts in The Bahamas. Summary judgment should only be ordered in plain and obvious cases, that is, where it is sufficiently clear, on the pleadings and/or evidence before the Court, that there ought not to be a trial in relation to a claim or particular issue before the Court.

[47.] *Lord Woolf MR* in the oft-cited English Court of Appeal decision of **Swain v Hillman and another [2001] 1 All ER 91**, which interpreted the Court's power to summarily dispose of a claim or particular issue through summary judgment under the English CPR 24.2, provided the following guidance and test to be satisfied on a summary judgment application –

> Under r 24.2, the court now has the salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification; they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr. Bidder QC submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success.
>
> ... It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interest of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that is the position. Likewise, if a claim is bound to succeed, a claimant should know as soon as possible.

> ... Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr. Bidder put it in his submissions, the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial; that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.

[48.] *Lord Steyn* in the English House of Lords decision of **Three Rivers District Council and others v Bank of England (No. 3) [2001] 2 All ER 513**, which also interpreted the Court's power to summarily dispose of a claim or particular issue through summary judgment under the English CPR 24.2, had the following commentary regarding the test to be applied on an application for summary judgment –

> [94] ... I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is – what is to be the scope of that inquiry?
>
> [95] I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognized exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of fact is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and oral evidence. As Lord Woolf MR said in *Swain's* case [2001] 1 All ER 91 at 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.

[49.] In determining whether to exercise its summary disposal power through summary judgment, the relevant principles were succinctly outlined by *Master Carla Thomas (AG) (as she then was)* in the Jamaican High Court decision of **Demetrius Seixas v Tricia Maddix-Blair [2022] JMSC Civ 103**. *Master Carla Thomas (AG) (as she then was).* In particular, the Court takes note of the observation that summary judgment is not usually granted in negligence cases

(Commonwealth Caribbean Civil Procedure 2nd ed; Island Car Rentals Ltd v. Lindo (2015) JMCA App 2).

[50.] In the English Court of Appeal decision of **Doncaster Pharmaceuticals Group Ltd. and others v Bolton Pharmaceuticals Co. 100 Ltd. [2006] EWCA Civ 661**, *Mummery LJ* at paragraphs, 4-5, 9-12 and 17-18, had this to say regarding the Court's power to summarily dispose of a claim or particular issue through summary judgment under the English CPR 24.2 –

> [4] Summary judgment procedures, which are designed for the swift disposal of straightforward cases without a trial, are only available where the applicant demonstrates that the defence (or the claim, as the case may be) has no "real" prospect of success and if there is no other compelling reason why the case or issue should be disposed of at trial: CPR Pt 24.2. Thus, without the assistance of pre-trial procedures, such as disclosure of documents, and without the benefit of trial procedures, such as cross examination, the court's function is to decide whether the defendant's prospect of successfully establishing the facts relied on by him is "real", that is, more than "fanciful" or "merely arguable". The test to be applied was summarized by Sir Andrew Morritt V-C in *Celador Productions Ltd. v Melville* [2004] EWHC 2362 (Ch) at paras 6 and 7.
>
> [5] Although the test can be stated simply, its application in practice can be difficult. In my experience there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment (or on an application for permission to appeal, where a similar test is applicable) than in trying the case in its entirety (or, in the case of an appeal, hearing the substantive appeal). The decision-maker at trial will usually have a better grasp of the case as a whole because of the added benefits of hearing the evidence tested, of receiving more developed submissions, and of having more time in which to digest and reflect on the materials.
>
> [9] I also wish to say a few words about the litigation expectations and tactics of claimants and defendants. Claimants start civil proceedings (including intellectual property actions) in the expectation that they will win and often in the belief that the defendant has no real prospect of success. So the defence put forward may be seen as misconceived, costly, and time-wasting ploy designed to dodge an inevitable judgment for as long as possible. There is also a natural inclination on the part of optimistic claimants to go for a quick judgment, if possible, thereby avoiding trouble, expense, and delay involved in preparing for and having a trial.
>
> [10] Everyone would agree that the summary disposal of rubbishy defences is in the interest of justice. The court has to be alert to the defendant, who seeks to avoid summary judgment by making a case look more complicated or difficult that it really is.
>
> [11] The court also has to guard against the cocky claimant, who, having decided to go for summary judgment, confidently presents the factual

and legal issues as simpler and easier than they really are and urges the court to be "efficient", i.e., produce a rapid result in the claimant's favour.

[12] In handling all applications for summary judgment the court's duty is to keep considerations of procedural justice in proper prospective. Appropriate procedures must be used for the disposal of cases. Otherwise there is a serious risk of injustice.

[17] It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kinds of case. The classic instance is where there are conflicts of fact on relevant issues, which have to be resolved before judgment can be given (see Civil Procedure Vol 1 24.2.5). A mini-trial on the facts conducted under CPR Pt 24 without having gone through the normal pre-trial procedure must be avoided, as it runs a real risk of producing summary injustice.

[18] In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

[51.] The Judicial Committee of His Majesty's Privy Council, The Bahamas' highest non-resident appellate court, in the Jamaican decision of **Sagicor Bank Jamaica Limited v Taylor-Wright [2018] UKPC 12**, provided invaluable insight as to confinements of the Court when it is called upon to exercise its summary disposal power through summary judgment under Jamaican CPR 15.2. *Lord Briggs*, writing for the Board, adumbrated the following commentary at paragraphs 17-18 and 20-21 –

17. There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then the trial of those issues will generally be nothing more than an unnecessary waste of time and resources.

18. … That phraseology does not mean that, if a defendant has no real prospect of defending the claim as a whole, that there should nonetheless be a trial of an issue. The purpose of the rule in making provision for summary judgment about an issue rather than only about claims is to enable the court to confine and focus a necessary trial of the claim by giving summary judgment on particular issues which are relevant to the claim, but which do not themselves require a trial.

20. Nonetheless the court is not, on a summary judgment application, confined to the parties' statement of case. Provision is made by Part 15.5 for both (or all) parties to file evidence, and Part 15.4(2) acknowledges that a summary judgment application may be heard and determined before a defendant has filed a defence. Further, it is common ground that the requirement for a claimant to plead facts

or allegations upon which it wishes to rely may be satisfied by pleading them in a reply, not merely in particulars of claim: see para 61 of the judgment of the Court of Appeal in this case.

21. The Board considers it axiomatic that, if a pleaded claim is met with a defence (whether pleaded or deployed in evidence) on a summary judgment application which, if true, would still entitle the claimant to the relief sought, then generally there cannot be a need for a trial. If the pleaded claim justifies granting the relief sought then, if the claimant proves that claim, it will succeed. If the alleged defence also justifies the relief sought, then the claimant will succeed even though the defendant proves the facts alleged in her defence. In either case, the defendant will have no real prospect of successfully defending the claim, within the meaning of Part 15.2(b).

[52.] For reasons which will be sequentially outlined below, the Court, in its discretion and the application of CPR 15.2, is satisfied that this is not the appropriate case for the Court to exercise its powers to summarily dispose of the present claim through summary judgment. The Court, having regard to the pleadings and evidence filed herein by the parties, the submissions made by Counsel for and on behalf of the parties and the relevant law on summary judgment, is satisfied that the present claim involves substantial disputes of fact and law that go to the root of the relief being sought by the Claimants. These substantial disputes of law and fact must be fully investigated at trial in order for the present claim to be disposed of in furtherance of the overriding objective of the CPR.

[53.] The Claimants have not satisfied the Court to the requisite burden of proof and standard of proof, that is, on the balance of probabilities that the present claim ought not to be justly disposed of at trial. The prospective defence advanced by Defendants, whether meritorious or otherwise, demonstrates some degree of conviction; it is not merely arguable or fanciful. The Defendants' defence is described as prospective, not because they have failed to file a defence, but because the method used by the Claimants to commence the present claim (that is, by Originating Application Form method) does not allow for an actual defence to be filed. Therefore, the Defendants' defence was only gleaned from the evidence filed by them in opposition to the present claim and in opposition to the Claimants' summary judgment application.

[54.] The present claim was commenced by the Originating Application Form method. For reasons which will be outlined below in the Defendants' application, the present claim must continue as if it were commenced by a Standard Claim Form method. It is only after this process that the substantial disputes of fact and law may be fully investigated through the assistance of formal pleadings, pre-trial procedures (such as disclosure, and the filing of witness statements, and/or expert reports, etc.), and trial procedures (such as cross-examination of witnesses). The Court cannot circumvent, through summary judgment, the discretion and decision-making power rightfully reserved for the trial judge in relation to the present claim. To do otherwise would be an outright abuse of the Court's power to summarily dispose of a claim or particular issue through summary judgment and would result in summary injustice.

[55.] Principal disputes of fact which remain to be determined at trial are the cause(s) and circumstances surrounding the grounding of the M/V Legacy. These matters go to the root of the Claimants' claim for loss and damage under the hull and machinery marine insurance policy. The

Claimants advance that they have always maintained that the cause and circumstances of the grounding of the M/V Legacy were due to the negligence and/or misconduct of the Master and Chief Officer on board the M/V Legacy. The Claimants seek to rely on their various affidavits filed in support of the present claim and in support of the summary judgment application to validate their negligence and/or misconduct assertion. Particularly, the Claimants seek to rely on paragraph 8 of the Affidavit of Ernelia Dean-Turnquest filed on 14 December 2023 in support of the Originating Application filed on even date, which states as follows –

> 8. I also confirm that neither the First Claimant nor the Second Claimant were privy to the navigational decisions, errors or omissions apparently, or allegedly, made by the Master, Chief Mate, Chief Engineer, or any crew member of the M/V Legacy from the time of its departure from the Port of Nassau on the 7th February 2023, until its running aground on the 8th February 2023, or at all at any other time.

[56.] While it may be reasonable to infer and/or imply negligence from paragraph 8 of the Affidavit of Ernelia Dean-Turnquest, such inference and/or implication may also be reasonably contradicted by paragraph 1(3) and (4) of the Originating Application and Amended Originating Application, which reads, in part, as follows –

> 1. [The Claimants] make application for full indemnification under the said [hull and machinery marine insurance policy] for all the costs payable for the repair and restoration to the state of seaworthiness of the Motor Vessel "Legacy" which suffered loss and damages to its hull and other machinery or equipment as a result of running aground in the vicinity of Egg Island, Eleuthera, The Bahamas on 8 February 2023, as well as damages for consequential loss for breach of contract as follows –
>
> ...
>
> (3) During the course of the evening, at or about 3:30 am, a sudden tropical squall developed, whose winds and wave action caused the ship to list, thereby endangering the ship and cargo.
>
> (4) The Master of the ship thereupon **prudently** adjusted his course to Starboard so as to turn the bow of the said ship "into the sea", thus deviating from the established course.
>
> (Emphasis added)

[57.] Having perused the Originating Application and the Amended Originating Application in their entirety, the Court does not think it reasonable to conclude, without more, that the cause of the grounding of the M/V Legacy was the negligence and/or misconduct of the Master and Chief Officer of the M/V Legacy, as asserted by the Claimants in their submissions.

[58.] The Claimants also attached to the Affidavit of Ernelia Dean-Turnquest filed on 14 February 2024, a "Loss and Run Sheet" which was issued and updated by the Defendants'

Insurance Broker, Howden Insurance Brokers Limited T/A Howden Speciality. The "Loss and Run Sheet" purports to have recorded every incident arising on any voyage of the M/V Legacy, including its grounding on 8 February 2023. At paragraph 6 of the Affidavit of Ernelia Dean-Turnquest, the Claimants averred that the "Loss and Run Sheet" confirms that the Defendants made payment pursuant to the hull and machinery marine insurance policy for the salvage of the M/V Legacy for $472,648.00.

[59.] The Court is not certain of the purpose of the latter averment made by the Claimants. The payment of $472,648.00 made to the Defendants for the salvage of the M/V Legacy is no admission of liability on the part of the Defendants in relation to the present claim. As correctly stated by the Claimants, the payment was for the rescue and salvage of the M/V Legacy off the reef of Egg Island, Eleuthera, The Bahamas. The Defendants had contractually reserved their right to make any indemnity payment under the hull and machinery marine insurance policy pending further investigation into the cause and circumstances of the grounding of the M/V Legacy. If, and strictly subject to the outcome of that investigation, the Defendants were to make an indemnity payment under the terms of the hull and machinery marine insurance policy, it would be made to those entitled under the hull and machinery marine insurance policy.

[60.] On the other hand, the Defendants reject the assertion made by the Claimants that the cause and circumstances of the grounding of the M/V Legacy were due to the negligence and/or misconduct of the Master and Chief Officer of the M/V Legacy. Instead, the Defendants call into question the seaworthiness (or otherwise) of the M/V Legacy at the time when it departed from the Port of Nassau, The Bahamas, on 7 February 2023. Particularly, the Defendants call in question, whether the crew of the M/V Legacy was sufficiently trained and qualified, *inter alia,* the state of the M/V Legacy's navigational system, and whether there was a suitable safety management system in use on the M/V Legacy, including proper navigational watch, and suitable roster and rest. The Defendants assert that the cause and circumstances of the grounding of the M/V Legacy were due to the M/V Legacy not being seaworthy when it departed the Port of Nassau, The Bahamas, on 7 February 2023. Perhaps it ought to be said here that the Court is mindful of the caution it must exercise in relation to granting summary judgment where there are conflicts of facts on relevant issues. As well, where negligence is alleged, it is not typical that summary judgment will be granted.

[61.] In an effort to refute the non-seaworthiness assertion made by the Defendants, the Claimants seek to rely on the Vessel Safety Inspection of the Nassau Port Department dated 28 December 2022, and certificates of training and competence of the Master, Chief Officer and Chief Engineer of the M/V Legacy; as well as the Seaman's Books attached to the Affidavit of Ernelia Dean-Turnquest filed on 14 December 2023. The Claimants also seek to rely on a Report commissioned by the Defendants entitled ABM 0704-0128-23 Damage Survey (the "ABM Report"), which Adam Hammer of Able-Bodie Marine, Jacksonville, Florida, USA, prepared at the requisition of the Defendants. Also contained in the ABM Report are two purported statements made by the Master of M/V Legacy, Hubert Gale, and the Chief Officer of the M/V Legacy, Tomas Chong Williams, which purport to give details of the events leading up to the grounding of the M/V Legacy. The Claimants contend that the Defendants have been dilatory in their efforts in conducting a reasonable investigation into the cause and circumstances of the grounding of the M/V Legacy.

[62.] It appears at this stage that the Defendants have been dilatory in their efforts to conduct a reasonable investigation into the cause and circumstances of the grounding of the M/V Legacy. Notwithstanding, the cause and circumstances of the grounding of the M/V Legacy remain a live and substantial dispute of fact to be determined at trial. The burden of proof and standard of proof rest on the Claimants to prove that the cause and circumstances of the grounding of the M/V Legacy were due to the negligence and/or misconduct of the Master and Chief Officer of the M/V Legacy. Additionally, that the M/V Legacy was seaworthy at the time of its departure from the Port of Nassau, The Bahamas, on 7 February 2023. The burden of proof and standard of proof are on the civil standard, that is, on the balance of probabilities. While the evidence sought to be relied on by the Claimants may be helpful to advance the Claimants' assertions as to the cause and circumstances of the grounding of the M/V Legacy and the seaworthiness of the M/V Legacy at trial, the evidence is not sufficient to warrant summary judgment being granted.

[63.] In particular, the ABM Report did not expressly conclude that the cause and circumstances of the grounding of the M/V Legacy were due to the negligence and/or misconduct of the Master and Chief Officer of the M/V Legacy. Moreover, the ABM Report did not expressly conclude that the M/V Legacy was seaworthy at the time of its departure from the Port of Nassau, The Bahamas, on 7 February 2023. The ABM Report and the purported statements of the Master of the M/V Legacy, Hubert Gale and the Chief Officer of the M/V Legacy, Tomas Chong Williams, have not been subject to challenge to test their veracity. This is because Mr. Adam Hammer, Mr. Hubert Gale, and Mr. Tomas Chong Williams, at this time, have not yet been tendered as witnesses to the present claim. Moreover, the Claimants have not proffered, at this time, any expert evidence (as may be required) to show that the cause and circumstances of the grounding of the M/V Legacy were due to the negligence and/or misconduct of the Master and Chief Officer of the M/V Legacy or that the M/V Legacy was seaworthy at the time of its departure from the Port of Nassau, The Bahamas, on 7 February 2023.

[64.] A substantial dispute of law that remains to be determined at trial or otherwise is whether the Second Claimant has any reasonable cause of action against the Defendants since he is not a party to the hull and machinery marine insurance policy. The Claimants conceded that the Second Claimant is not a party to the hull and machinery marine insurance policy. The Claimants contend that the Second Claimant has been directly affected by the wrongful refusal and failure of the Defendants to honour the terms of the hull and machinery marine insurance policy. The Claimants assert that the very terms of the hull and machinery marine insurance policy contemplate the possibility that some person, being a natural person or artificial person, i.e., a corporate body, might have a claim for damages incurred by him under the terms of the hull and machinery marine insurance policy. However, the Claimants have provided no legal support to demonstrate to the Court how the very terms of the hull and machinery marine insurance policy in question should be interpreted and applied in their favour.

[65.] The quantum of damages (if the Defendants are liable) remains another substantial dispute of fact that remains to be determined at trial. The Claimants have attached to the Affidavit of Ernelia Dean-Turnquest filed on 14 February 2024 a copy of an estimate of the cost of repairs to the M/V Legacy that was prepared by Bradford Marine, Freeport, Grand Bahama, The Bahamas, totalling $1,333,126.89 and a copy of a printout of the purported extraordinary costs, expenditure, and economic harm caused to the Second Claimant personally by the Defendants' failure to make

payment under the hull and machinery marine insurance policy totalling $548,000.57. Collectively, the Claimants seek an approximate indemnity payment of $1,881,127.46. However, the indemnity payment amount claimed by the Claimants is being challenged by the Defendants. Moreover, the Second Claimant has produced no evidence to show how exactly he incurred the purported extraordinary costs, expenditure, and economic harm. More fundamentally, the Second Claimant has not satisfied the Court, at this time, whether he is entitled to an indemnification payment under the terms of the hull and machinery marine insurance policy.

[66.] Another substantial dispute of fact and law that remains to be determined at trial is whether the First Claimant, its servants and/or agents, breached an express (alternatively implied) warranty and failed to make material disclosure when it entered into the hull and machinery marine insurance policy, when it claimed that the M/V Legacy was Bahamian-flagged and registered. Moreover, the question will arise whether non-disclosure (if factual) of that nature would enable the Defendants to avoid the hull and machinery marine insurance policy. The Defendants contend that the term Bahamian-flagged and registered means being registered with The Bahamas Maritime Authority, whereas the M/V Legacy was deleted from The Bahamas Maritime Authority's register in 2013. The Claimants contend that it is sufficient that the M/V Legacy was registered with The Bahamas Port Authority. In any event, the Claimants contend that the representation that the M/V Legacy was Bahamian-flagged and registered amounts to an innocent misrepresentation that cannot be relied upon by the Defendants. This dispute of fact and law goes to the root of the hull and machinery marine insurance policy. If the Defendants' position is correct, they may be provided with a full defence since the question of which regulatory body the vessel was registered with has the potential to be a material term, express or implied, to the hull and machinery marine insurance policy.

[67.] Therefore, for the various reasons above discussed, the Court does not grant summary judgment.

The Defendants' Application

[68.] For the purposes of proceedings governed by the CPR, a claim may be commenced by using one of the methods enumerated in **CPR 8.1(1)**, namely –

i. Standard Claim Form;
ii. Fixed Date Claim Form; or
iii. Originating Application Form.

[69.] **CPR 8.1(5)** provides, in part, as follows –

> **8.1 How to start proceedings.**
>
> ...
>
> (5) A standard claim form may be used except where –

(a) rule 8.1(6) requires that the claim be started by a fixed date claim form; or

(b) where an originating application form under this Part is the more appropriate method of starting and thereafter conducting the claim.

[70.] **Section II of Part 8 of the CPR** provides for the alternative procedure for claims commenced by the Originating Application Form method. **CPR 8.15** provides, in part, as follows –

> **8.15 Alternative procedure of an originating application form.**
>
> The alternative procedure of an originating application form for commencing proceedings under this Part instead of by using a standard claim form or a fixed date claim form is intended for use where –
>
> (1) the Court's decision is sought on a question which is unlikely to involve a substantial dispute of fact; or
>
> (2) a statute, rule, or practice direction requires or permits the use of this procedure for commencing proceedings of a specified type.
>
> (Emphasis added).

[71.] **CPR 8.19** provides the general procedure in a claim using the Originating Application Form method. For the purpose of the Defendants' application, **CPR 8.19(1)** provides, in part, as follows –

> **8.19 The general procedure in a claim using the originating application form.**
>
> **(1) The Court may at any stage, either on application or on its own initiative, order a claim commenced by originating application form to continue as if the proceedings has been commenced using a standard claim form and where the Court takes this course it will give such directions as it considers appropriate.**
>
> (Emphasis added)

[72.] **CPR 8.27** provides the procedure for when a defendant objects to the use of the Originating Application Form method. **CPR 8.27** provides, in part, as follows –

8.27 Procedure where a defendant objects to use of the Part 8 Procedure.

(1) Where the defendant contends that the procedure under this Section should not be used because –

(a) there is a substantial dispute of fact; and

(b) the use of this procedure is not required or permitted by a rule or practice direction,

he must state his reasons when he files his acknowledgment of service.

(2) When the Court receives the acknowledgment of service and any written evidence it will give directions as to the future of the case.

(Emphasis added)

[73.] **CPR 26.9** provides the general powers of the Court to rectify matters. **CPR 26.9** provides, in part, as follows –

26.9 General powers of the Court to rectify matters.

(1) **This rule applies where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction, court order or direction.**

(2) **An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the Court so orders.**

(3) **If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the Court may make an order to put matters right.**

(4) **The Court may make such an order on or without application by a party.**

(Emphasis added)

[74.] The Originating Application Form method preserved the Originating Summons method, which was utilized under the former rules of the Court, the Rules of the Supreme Court, Chapter 53 (the "RSC"), which was repealed and replaced by the CPR. By the CPR the Court may clearly, in an appropriate case, cause proceedings begun by Originating Application Form method to continue as if begun by Standard Claim Form method.

[75.] For the reasons stated above, the present claim involves substantial disputes of fact and law that go to the root of the relief being sought by the Claimants. No statute, rule, or practice requires the present claim to be commenced using the Originating Application Form method. The Court, in the exercise of its discretion and the application of CPR 8.19(1), is satisfied that the present claim, which was commenced by Originating Application and Amended Originating Application, ought to continue as if it were commenced by a Standard Claim Form. The Court is not satisfied that having the deponents of the affidavit evidence filed herein in these proceedings attend for cross-examination would result in adequate evidence before the Court. The Court is further satisfied that no prejudice would be suffered by the Claimants or the Defendants if the present claim is ordered to proceed as if it were commenced by a Standard Claim Form. This conversion is necessary for the furtherance of the overriding objective of the CPR and in the interest of justice of this case, that the evidence be distilled more comprehensively in a trial in open court.

[76] This conversion is necessary notwithstanding that the Defendants did not state their objections to the present claim being commenced by the Originating Application Form method in their Acknowledgment of Service filed on 2 February 2024 in compliance with CPR 8.27(1). The Defendants did lodge their objections in the First Affidavit of Shenique R. Hanna filed on the same date. This minor non-compliance or error of procedure is not fatal to prevent the present claim from being converted to the Standard Claim Form method. In any event, the Court is satisfied that it has the general power to rectify matters.

Conclusion

[77.] In light of the foregoing reasons and circumstances, the Court makes the following orders, that –

i. the Claimants' summary judgment application is dismissed;

ii. the present claim commenced by the Originating Application Form method is to continue as if it were commenced by the Standard Claim Form method;

iii. the costs of and occasioned by the Claimants' summary judgment application and the Defendants' application shall be paid by the Claimants to the Defendants to be assessed by the Court (unless sooner agreed by the parties);

iv. if the costs are not sooner agreed by the parties, the Court shall hear the parties on the appropriate quantum of costs to be made in relation to the Claimants' summary judgment application and the

Defendants' application. A pro forma bill of costs shall be laid over to the Court (and served on the Claimants) within thirty days from the date of this ruling; and

v. the parties shall appear before the Court on a date to be fixed for further directions in relation to the conversion of the present claim from the Originating Application Form method to the Standard Claim Form method.

Dated 27 June 2025

Simone I. Fitzcharles
Justice