THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA
(CIVIL)

CLAIM NO: ANUHCV 0312/2005

BETWEEN:

VT LEASECO LIMITED
Applicant/Claimant

And

FAST FERRY LEASING LIMITED
First Respondent/ Defendant

RAPID EXPLORER OPERATIONS INC.
Second Respondent/ Defendant

Appearances:
Mr. Sydney Christian Q.C and with him Ms. Gail Christian for the Applicant/Claimant
Mr. Kendrickson Kentish for the First Respondent/Defendant
Mr. Arthur Thomas for the Second Respondent/Defendant
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2006: December 19 2007: July 13
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RULING
[1] Thomas J: On 31st May 2006 VT LEASCO LIMITED ("the Applicant") filed an Amended Notice of Application seeking a number of orders against the first and second Respondents.

BACKGROUND

[2] These proceedings, in their entirety, revolve around three contested documents:

1. Agreement to build and Charter three ships between VT Leaseco Limited, Fast Ferry Leasing Limited and Neptune Worldwide Limited. The three ships built were eventually named Katia, Milancia and Olivia. The agreement is dated 2nd August, 2001.
2. Hydrocruiser Acceptance Agreement executed on 24th March 2004 by Fast Ferry Leasing Limited, Neptune Worldwide Limited and VT Leaseco Limited.
3. Charterparty (Bareboat Charter) Agreement dated 26th March 2004. In this document VT Leaseco Limited is stated to be "Owner".

[3] By virtue of the terms of two latter agreements, Fast Ferry Leasing Limited, the First Respondent, agreed to hire each of the three vessels (Katia Milancia and Olivia) from VT Leaseco Limited ("the Applicant") for a period of thirty-six months.

[4] Various issues arose concerning different terms of the agreements which eventually led to the filing of a Claim Form in Rem and Statement of Claim on 20th July 2005. Amended Claim Form and Statement of Claim on 4th August 2005 and Further Amended Claim Form on 23rd November 2005. The record also shows a Further Amended Statement of Claim but there is no indication that it was filed and that either document was served on either of the Respondents.

[5] The Claimant's claim is against the Defendants as Bareboat Charters and alleged Sub-Bareboat Charters of three vessels, 'Katia', 'Milancia' and 'Olivia' owned by and registered in the name of the Claimant for:

1. An order for delivery up of the vessels 'Milancia', 'Katia' and 'Olivia'.
2. An account of all sums accruing to the Defendants, or either of them by reason of the use of the vessels or any of them from 24th June 2005 to the date of the Judgment hearing.
3. An order for payment by the Defendants to the Claimant of the sums found on the said account.
4. Further or other relief.
5. Interest pursuant to statute.
6. Costs.

AMENDED STATEMENT OF CLAIM

[6] In the Amended Statement of Claim the Claimant's ownership of the three vessels: "Katia", "Milancia" and "Olivia" is pleaded.

[7] At paragraph 4 the following is pleaded:

"Pursuant to an Agreement dated 2nd August, 2001 ("the Agreement"), the Claimant, the First Defendant and Neptune Worldwide Limited, being the parent company of the First Defendant, entered into an agreement whereby the Claimant would build the vessels to a design supplied by the First Defendant, and thereafter that the First Defendant would take the vessels on charter for a period of three (3) years on terms set out in Schedule 2 of the Agreement."

[8] At paragraph 5 of the Amended Statement of Claim various provisions of the Agreement are pleaded and in particular the following:

"4.6 (Fast Ferry Leasing Limited) FFL warrants that it will at all times act towards (V.T. Leaseco Limited) VTL in good faith with regard to its obligations under this Agreement.
7.3 VTL may terminate this Agreement and each Charter then in existence immediately on written notice if FFLL and/or Neptune commit or suffer any of the events set out in clause 7.2.1. – 7.2.4 above or if:
7.3.5 FFLL fails to make the payments pursuant to the terms of a Charter or otherwise materially breach the terms of any Charter.
8.1 If VTL terminates this Agreement in accordance with clause 7.3, VTL shall have no liability whatsoever to any other Party under the terms of this Agreement or otherwise.
8.2 On termination of this agreement for any reason:
8.22 Each charter shall, unless VTL otherwise expressly agrees in writing, immediately terminate."

[9] Following the Agreement there were two further agreements between the Claimant and the First Defendant. The essence of these agreements is pleaded at paragraphs 6 and 7 of the Amended Statement of

Claim in these terms:

"6. The Agreement was amended by a further agreement dated 24th March 2004 ("the Acceptance Agreement") by which all claims between the Claimant and the First Defendant arising prior to the date thereof were settled. The Acceptance Agreement provided among other things as follows:

It is agreed and understood by FFLL that a breach by FFLL of the "Agreement", this Acceptance Agreement and/or any charterparty of a Vessel shall be deemed a breach of the "Agreement" and of all such charterparties. Failure to pay any Charter Hires when due will be deemed a material breach of all the charterparties relating to the Vessels and VT shall have an immediate right to withdraw the Vessels from the service of the Charterer, declare the Charters to be in default of the Charter, terminate the Charter and recover the Vessels.
7. On 26th March, 2004 bareboat charterparties naming the Claimant as owner and the First Defendant as charterer ("the Bareboat Charterparties") were executed in respect of each of the vessels. The Bareboat Charterparties provided among other things, as follows:

7. Sub-Charter Provision
(a) The Vessel may not be sub-chartered without the prior permission in writing of the Owners. Permission shall only be granted if the Charterer demonstrates to the Owner that:
(i) The rights under the Charter of VT Leaseco as Owners shall apply in full to the sub-charter and the Owners shall have the express right to enforce the rights and obligations of the Charterer under the Contracts (Rights of Third Parties) Act 1999.
(ii) The terms of any sub-charter shall otherwise be the same as the Charter.
(b) The Charterer hereby indemnifies the Owner from and against any liabilities, costs, expenses, damages and losses caused that may arise pursuant to the sub-charter of the Vessel from the Charterer, and the Charterer hereby guarantees that the sub-charter of the Vessel from the Charterer, and the Charterer hereby guarantees that the sub-charter shall abide fully to the terms of the sub-charter.
10. Termination
(a) This Charter shall be subject to the termination provisions of the Agreement.
16. Assignment and Sub-Demise
The Charterers shall not assign this Charter nor sub-demise the Vessel except with the prior consent in writing of the Owners which shall not be unreasonably withheld and subject to such terms and conditions as the Owners shall reasonably approve."

[10] As noted above, Clause 7 of the Bareboat Charterparties, sub-charters of the vessels was prohibited except with the prior written permission of the owners. This prohibition applied directly to the first Defendant as it was the other party to the Bareboat Charterparty.

[11] According to the Claimant such permission was granted by the Claimant to the first Defendant. This is pleaded at paragraph 8 of the Amended Statement of Claim. Included is the following: "8. By a letter dated April 30, 2004 the Claimant consented to the sub-charter of the vessel to a party to be nominated by the First Defendant on specified terms …."

[12] At paragraph 9 to 16 of the Amended Statement of Claim a combination of terms of the Bareboat Charterparties Agreement and consequential facts are pleaded as follows:

"[9] Pursuant to the terms of the Bareboat Agreement it was agreed *inter alia* that the First Defendant would

hire each vessel from the Claimant for a period of thirty-six (36) months paying therefor in respect of each vessel the sum of £31,500.00 per month.
[10] It was also agreed between the parties that any delay in payment of the Charter Hire would entitle the Claimant to charge interest at a rate of LIBOR plus 2%.
[11] Between the months of December, 2004 and May, 2005, the First Defendant became indebted for a total sum of £431,482.00 as charter hire due and owing to the Claimant. The Claimant duly requested payment of the said sum but the Claimant failed and/or refused to make payment.
[12] By letter, dated June 1, 2005, the Claimant, through its Solicitors, notified the First Defendant that it was in breach of the Agreement and the Bareboat Charterparties and that those agreements were terminated.
[13] Further, the Claimant informed the First Defendant of the immediate withdrawal of the vessels from respective charters.
[14] By letter, dated June 2, 2005, the First Defendant acknowledged receipt of the Claimant's letter of June 1, 2005.
[15] Subsequently, on June 3rd, 2005 a meeting was held between the parties wherein it was agreed, inter alia, the Claimant would suspend the withdrawal of the vessels on condition that payment of the outstanding amount of £431,482.00 was made by Friday, June 20, 2005. Despite the said agreement, the First Defendant failed and/or refused to make payment.
[16] The Second Defendant is a subsidiary of the same parent company and under the same management control as the First Defendant."

ACKNOWLEDGMENT/DEFENCE

[13] On 16th August 2005 the second Respondent/Defendant filed an acknowledgement of service in which it indicated, *inter alia*, that it intended to defend the claim. And on 19th October 2005 defence and counterclaim was also filed.

[14] A defence and counterclaim was filed by the second Respondent/Defendant on 19th October 2006. It is characterized by a series of denials. It is however admitted that there was a refusal to give up possession of the vessels Milancia and Katia but contends that the vessel Olivia is in the possession of the Claimant having been attached in the Courts of St. Marten on the request of the Claimant. Further, it is contended that this action on the part of the Claimant had certain financial consequences.

[15] In the premises the second Respondent contends that the Claimant is not entitled to an order for possession or to an order for an account as claimed.

[16] In the counterclaim it is contended that a contract was entered into between the First Defendant and the second Defendant with the prior consent of the Claimant/Applicant on the term of the Fast Ferry Leasing Ltd of Bareboat Charters in respect of the three vessels.
It is also contended that the Claimant's consent came by way of a letter dated 30th April 2004.

[17] A further contention by the second Respondent is that the Claimant in breach of contract or duty has purported to exercise their right to withdraw the vessels without reference to the second Defendant thereby preventing the operation of the said vessels and thus resulting in loss and/or damage as particularized.

[18] Breach of implied obligations on the part of the Claimant is also alleged by the Second Respondent.

This relates to the delivery of the vessels in seaworthy condition and or free from defects and or as a result of negligence of the Claimant. These defects as particularized have also resulted in loss and damage as set out.

AMENDED NOTICE OF APPLICATION

[19] The Claimant/Applicant on 31st May 2006 filed an amended notice of application seeking the following orders:

1. That the Claimant be granted Summary Judgment against the 1st Defendant.
2. That the Claimant be granted Summary Judgment against the 2nd Defendant.
3. Further or alternatively that the Defence of the 2nd Defendant be struck out.
4. Further or alternatively that the Counterclaim of the 2nd Defendant be struck out.
5. That the sum of US$50,000.00 paid into escrow by the Claimant pursuant to the Order of Madame Justice Louise Blenman made on 21st December 2005 together with all interest accrued thereon be paid out to the Claimant and that Miss E. Ann Henry of Henry & Burnette attorney at law for the 1st Defendant and Mr. Arthur Thomas of Thomas John & Co attorney at law for the 2nd Defendant forthwith provide their authorities and do all such things as may be necessary for such payment to be made.
6. Alternatively that if the attorney at law for the 1st Defendant has not only been properly removed from the record in respect of the appeal but also the first instance proceedings in Antigua in accordance with the Eastern Caribbean Supreme Court Civil Procedure Rules 2000:
I. That the Court grants leave for service of all court process out of the jurisdiction on the 1st Defendant at 7 Hobury Street, London, SW10 OJD, England, U.K. or elsewhere in the United Kingdom.
II. That Miss E. Ann Henry be ordered to execute and deliver forthwith authority to the Antigua and Barbuda Investment Bank in relation to the escrow account opened in compliance with the Order made by Madame Justice Louise Blenman on 21st December 2005, to undertake all transactions and make payment out of funds held against the signatures of Mr. Sydney P. Christian QC and Mr. Arthur Thomas only and that Mr. Sydney P. Christian QC and Mr. Arthur Thomas do forthwith sign execute and do all things necessary to give effect thereto.
7. That the 1st and/or 2nd Defendants do pay the Claimant's cost of the action including the costs of this Application to be taxed if not agreed.

The grounds of this Applications are:

1. The 1st Defendant has advanced neither a Defence nor any Counterclaim against the Claimant in this action. Unless the 1st Defendant proves to this Honourable Court that there is an issue or question in dispute which ought to be tried, the Court give summary judgment against the 1st Defendant.
2. The 2nd Defendant has no real prospect of successfully defending the claim nor of succeeding upon the counterclaim. Since the 2nd Defendant has failed to provide any evidence of a legitimate right to possession of the vessels, its Defence and Counterclaim disclose no cause of action and must necessarily fail. There is no other compelling reason why the case or issue should be disposed of at trial. On the contrary, there are compelling reasons why the Claimant should not be put to the cost and expense of a trial in dealing with this matter.
3. The Defence of the 2nd Defendant is inadequate and fails to comply with the requirements of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000. The Defence of the 2nd Defendant should be struck out pursuant to Part 26.3(1) (a) and/or (b) and/or (d).
4. The counterclaim of the 2nd Defendant fails to comply with the requirements of the Eastern Caribbean

Supreme Court Civil Procedure Rules 2000. Accordingly the Counterclaim should be struck out pursuant to Part 26.1 (3) (a) (failure to comply with the rules) and or Part 26.1 (3) (b) (disclosing no reasonable cause of action).
5. Since the 1st Defendant has advanced neither a Defence nor any Counterclaim against the Claimant in this action and the 2nd Defendant has no real prospect of successfully defending the claim nor of succeeding upon the counterclaim, there is no reason for the sum of US$50,000.00 paid into escrow by the Claimant pursuant to the Order of Madame Justice Louise Blenman made on 21st December 2005 to remain in the said account but should be repaid to the Claimant together with all interest accrued thereon.
6. The Orders sought under this paragraph are only required if the Court is minded not to deal with the matter summarily, and if the Court deems that the removal of Ms. E. Ann Henry from the record in the Court of Appeal in St. Lucia in relation to the abortive Appeal of the interlocutory Order made by Madame Justice Louise Blenman made on 21st December 2005 is also effective to remove her from the record before this Honourable Court, contrary to the submission of the Claimant.
The Claimant contends that such removal from the record would give rise to procedural issues which were not addressed on the Application for removal made on 3rd February 2006 to the Court of Appeal, and which should have been addressed below for purposes of the future conduct of the matter.
I. That if Miss E. Ann Henry has effectively removed herself from the record in accordance with the Eastern Caribbean Supreme Court Civil Procedure Rules 2000, the 1st Defendant has no address for service within the jurisdiction and an Order is required to enable the Claimant to serve process on the 1st Defendant in this action.
II. To enable the escrow account opened in compliance with the Order made by Madame Justice Louise Blenman on 21st December 2005, to be operated.
7. That if the Claimant has been successful in the action it will therefore be entitled to recover its costs pursuant to Part 64 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000.

[20] On 6th July 2006 Paul Warrick, the sole director of the First Defendant/Applicant filed an affidavit for the purpose of correcting a misunderstanding in the Claimant's pleadings.

JURISDICTION

[21] All three agreements (the Agreement, the Acceptance Agreement and the Charter Party Agreement) all address the matter of jurisdiction.

[22] In the Agreement, Clause 22.1 speaks in these terms:

"This Agreement shall be governed by and construed in accordance with the laws of England and the parties agree that the jurisdiction of the English Courts shall be exclusive in respect of claims brought against VTL and non-exclusive in respect of claims brought against FFLL or Neptune.
The Charter shall be subject to English law but any disputes arising from the Charter which are drectly related to its operation or termination shall be referred to arbitration in London according to the terms of the Charter.
"Charter" is defined in Clause 1.1 to mean "the bareboat charter set out in Schedule 2 to be entered into by FFLL in respect of each ship".

[23] In the Acceptance Agreement which expressly states that it is an amendment to the "Agreement". Both the Agreement and the Acceptance Agreement are concerned with the three vessels: Katia, Milancia and Olivia.

[24] Clause 5 of the Acceptance Agreement states that:

"It is agreed and understood by FFL that a breach by FFL of the 'Agreement' the Acceptance Agreement and/or any charterparty of a vessel shall be deemed a breach of the 'Agreement' and of all such charter parties. Failure to pay any Charter Hire when due will be deemed a material breach of all the Charterparties relating to the Vessels and VT shall have an immediate right to withdraw the Vessels from the service of the Charterer, declare the Charterers to be in default of the Charter, terminate the Charter and recover the Vessels."

[25] In addition Clause 7 provides that:

"Any or all issues or actions that arise following the date of this Acceptance Agreement shall be dealt with by the parties in accordance with the 'Agreement'."

[26] In Clause 21 (a) of Part II of the Bareboat Charter the following is stated:

LAW AND ARBITRATION
(a) "This Charter shall be governed by English law and any dispute arising out of this Charter shall be referred to arbitration in London, one arbitrator being appointed by each party, in accordance with Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force. On the receipt by one party of the nomination in writing of the other party's arbitrator, that party shall appoint their arbitrator within fourteen days, failing which the decision of the single Arbitrator appointed shall apply. If two Arbitrators properly appointed shall not agree they shall appoint an umpire whose decision shall be final."

ANALYSIS

[27] It is clear that the Agreement and the Acceptance Agreement are linked and specifically in terms of arbitration. And in this regard there are three regimes:

1. For Claims brought against VTL the laws of England is the jurisdictional law and the English Courts have exclusive jurisdiction.
2. For Claims against FFLL or Neptune the English Courts have non-exclusive jurisdiction.
3. Any dispute arising from the Charter which are directly related to its operation or termination shall be referred to arbitration in London according to the terms set out in the Charter.

[28] Based on the foregoing, actions against VTL can only be initiated in the English Courts based on the laws of England. It is an exclusive jurisdiction. However, with respect to claims against FFLL or Neptune, the English Courts have a non-exclusive jurisdiction.
These regimes are commented on in RUSSELL ON ARBITRATION (22nd ed.) at paragraph 2-027 thus:
"A jurisdiction clause provides expressly for the courts of a particular country to have jurisdiction to deal with disputes arising under a contract. It may provide that the courts of a particular country have exclusive jurisdiction, in which case no other courts of a particular country have exclusive jurisdiction. Or it may provide that the courts of a particular country have non-exclusive jurisdiction, in which case the chosen court has jurisdiction but both parties also have the right to commence proceedings in any other court of

competent jurisdiction."

[29] It means also that since there is provision for non-exclusive jurisdiction, there can be no question as to the forum convenience and an adjournment for this purpose, see: SPILIADA MARITIME CRPORATION v CANSULEX LTD [1987] AC 460.

[30] Therefore, given the content of Clause 22.1 of the Agreement the Applicant/Claimant can lawfully begin proceedings against FFL in the High Court of Antigua and Barbuda.

[31] Under Clause 7 of Part II of the Bareboat Charter prior written permission of the owner must be obtained before a sub-charter may be effected. The Clause goes on to state the following:

"(i) The rights under the Charter of VT Leaseco as owners shall apply in full to the subcharter and the Owners shall have the express right to enforce the rights and obligations of the Charterer under the Contracts (Rights of Third Parties) Act 1999.
(ii) The terms of any subcharter shall otherwise be the same as this Charter."

[32] Such prior written permission was granted to Fast Ferry Leasing Limited by VT Leaseco Limited by letter dated 30 April 2004. The letter is in these terms:

"Fast Ferry Leasing Limited
7 Hobury Street
London
SW10 OJD
For the attention of Mr. Paul Warrick
30 April 2004
Dear Paul,
Hydrocruiser Sub-Charters
I approve the final amended sub-charter as attached hereto and confirm the consent of VTL to the subcharter of Katia from FFL to Rapid Explorer Operations Inc., subject to the amendment (and demonstration to VTL of the amendment) of all insurance documentation to reflect this interest. I understand that you wish to sub-charter Milancia and Olivia as well as Katia, and I confirm my agreement that this sub-charter document may be used in connection with those vessels, provided that no alterations are made to its terms without VTL's prior written agreement.
I further understand that you wish to introduce a further charter between the sub-charterer and the operating company. I agree to this in principle, provided that:
• The sub-sub-charter document is in the same terms as the sub-charter, any lterations to its terms being subject to VTL's prior written agreement and that it is submitted to VTL for its approval; and
• That all insurance documentation is amended to reflect the interest of the sub-subcharter and submitted to VTL for its approval.
Yours sincerely,
VT Leaseco Limited
John Tivadar"

[33] This letter therefore gives life and effect to Clause 21 (a) of the Bareboat Charter. From this it means that "any dispute arising out of this Charter shall be referred to arbitration in London …." The parties to such arbitration would be the Owners being VT Leaseco Limited, FFL and Rapid Explorer Operations Inc.

But there is another legal issue in that there is nothing to suggest that the sub-charter accords with the terms of the approval.
[34] It follows that on all counts the Courts of Antigua and Barbuda have no jurisdiction in this regard and therefore no jurisdiction over the second Respondent/Defendant.

SUBMISSIONS ON THE APPLICATION FOR SUMMARY JUDGMENT

[35] Given the various arbitration clauses analysed, it follows that the only matter properly before the High Court of Antigua and Barbuda is the matter involving VTL, the Applicant, and FFLL, the first Respondent/Defendant. This in turn leads to a consideration of the orders sought in relation to the First Respondent/Defendant.

[36] The following are the main written submissions advanced on behalf of the Claimant by learned senior counsel, Mr. Sydney Christian, QC:

Summary Judgment against the 1st Defendant
"6. For the reasons set out below I believe that this is a proper case for the Court to give summary judgment against the 1st Defendant.
7. The position of the 1st Defendant in this action has been that the Claimant can not withdraw the vessels from the 1st Defendant because the 1st Defendant was not in actual possession of the vessels at the time the Claimant terminated the Charterparties.
8. In resisting possession of the vessels by the Claimant, the 1st Defendant has been represented and appeared on numerous occasions before this Honourable Court but it has not advanced either a Defence or any Counterclaim against the Claimant in this action.
9. Since the 1st Defendant (i) has been represented and appeared on numerous occasions before this Honourable Court, and (ii) has advanced no Defence or Counterclaim against the Claimant in this action, there is no issue to be tried.
10. The 1st Defendant's approach to the matter appears to be "devious and crafty" because the 1st Defendant has not disclosed to this Honourable Court the true nature of its relationship with the 2nd Defendant. The 1st and 2nd Defendant are inextricably linked. Both companies are controlled by Mr. Raymond Kalley. The 2nd Defendant appears to have been used by Mr. Kalley and the 1st Defendant as a vehicle to prevent the lawful withdrawal of the vessels by the Claimant.
11. The true nature of the relationship between the 1st and 2nd Defendants appears from the following documents:
a. Exhibit "JL1" to the affidavit of Javier Lemoine sworn on 7th July 2005. (Corporate structure Chart)
b. Exhibit "JL2" to the affidavit of Javier Lemoine sworn on 7th July 2005. (Letter dated 3rd July 2001 from Raymond Kalley to Vosper Thornycroft (UK) Limited.
c. Exhibit "JL3" to the affidavit of Javier Lemoine sworn on 7th July 2005. (Letter dated 3rd September 2001 from Raymond Kalley to Vosper Thorncroft (UK) Limited).
d. Exhibit "JL4" to the affidavit of Javier Lemoine sworn on 7th July 2005. (E-mail dated 24th June 2005 from Raymond Kalley [acting on behalf of the 2nd Defendant] to Serena Grainger [acting on behalf of the Claimant], Ben Horn [legal adviser to the Hydrocruisers Group of Companies] and Paul Warrick [the sole director of the 1st Defendant])
e. An undated letter exhibited by the 2nd Defendant in its second affidavit as "NC5". In the second page, paragraph six of this letter Raymond Kalley makes a proposal on behalf of "[the 1st Defendant], [the 2nd Defendant] and all companies in the Hydrocruisers family."
f. Exhibit "JL7" to the affidavit of Javier Lemoine sworn on 27th July 2005 (e-mail, dated 27th October

2003 written by Raymond Kalley. In the second page, answer 4 of this e-mail Raymond Kalley states that "Rapid Explorer is owned 75% by [hydrocruisers] and 25% by RCCL' (Royal Caribbean Cruises Line) and in the third page, answer 5 refers to Rapid Explorer a Hydrocruiser controlled company.")
12. The above documents demonstrate that the 1st and 2nd Defendants share a common management controlled by the said Raymond Kalley.
13. Furthermore the purported confirmation of the permission of the Claimant to the Sub Charter of the vessels given by the 1st Defendant to the 2nd Defendant was contained in a letter dated 30th June 2005, the date of the Claimant's Application to this Honourable Court for possession of the vessels. Notably the letter does not set out the terms of the alleged Sub Charters, nor is there any evidence that these were made (if at all) on the terms
approved by the Claimant. A true copy of the letter dated 30th June 2005 is at exhibit "NC7" to the affidavit of Nick Cheremetteff sworn on 6th July 2005. Further reference to the alleged Sub Charters, nor is there any evidence that these were made (if at all) on the terms approved by the Claimant. A true copy of the letter dated 30th June 2005 is at exhibit "NC7" to the affidavit of Nick Cheremetteff sworn on 6th July 2005. Further reference to the alleged Sub Charters made in affidavits filed on behalf of the 2nd Defendant is contradictory and casts further doubt on their existence (see paragraphs 18 and 19 below).
14. In the Claimant's submissions, the assertion (a) by one company that it is in possession of the vessels adverse to another company in the same group (b) when no evidence of a true contractual basis for that possession has been put before the court and (c) the assertion is founded upon a letter bearing the very date of the Claimants application to this Honourable Court for possession of the vessels, is both devious and crafty and designed to frustrate the ends of justice.
15. Unless the 1st Defendant proves to this Honourable Court that there is an issue or question in dispute which ought to e tried, the Court may give summary judgment against the 1st Defendant."

[37] The following submissions were advanced by Mr. Kendrickson Kentish on behalf of the first Defendant/Respondent:

[38] In opening the following documents were referred to: the Claimant/Applicant's application of 17th May 2006 and the grounds thereof as set out in paragraph 1. Reference was also made to the affidavit of Paul Warrick of 6th July 2006 also to paragraphs 17 and 23 of the affidavit of Javier Lemoine filed on 17th May, 2006 and the affidavit of Juliette L. Dunnah filed on 18th December, 2006.

[39] Reference was also made to the affidavit of Cecily King of 28th October 2005 which, according to counsel, raises the question of the arbitration proceedings. In this regard the case of BANK OF BERMUDA v PENTIUM (BVI) LIMITED Civil Appeal No. 14/2003 was cited.

[40] With respect to Part 15.2 of CPR 2000, learned counsel submitted that if the First Defendant has a real prospect of success it depends on the draft defence. According to him, if the draft defence is an answer to the claim leave may be granted to defend the action, see: Q & M ENTERPRISES v POH KIAT SGHC 155.

[41] The matter of abuse of process was also raised and in this connection the case of THE "*ANGELIC GRACE*" [1995] 1 Lloyds Law Report 86, 88-90 was cited.

[42] On the question of breach of the agreement, learned counsel submitted that the breach would give rise to possession. Further that as long as there is a maritime lien on a ship it can be arrested.

[43] Returning to the question of possession, counsel questioned whether this issue was before an arbitrator. If the answer is in the affirmative this in turn gives rise to abuse of process, see: *CAVALIER CONSTRUCTION COMPANY v OTTERSHAW INVESTMENT LIMITED Appeal No. 75/2002 Bahamas Court of Appeal at paragraphs 4,6,7,9 and 10; THE HONOURABLE ORMOND GIBBONS MINISTER OF WORKS AND ENGINEERING FOR AND ON BEHALF OF THE GOVERNMENT OF BERMUDA and VILLAGE HOTELS OF BERMUDA SUIT NO. 143/1994 (HC: BER)*

[44] In the final analysis Mr. Kentish submitted that the application for summary judgment should be dismissed with costs or in the alternative leave be granted to the first Defendant to defend the claim.

[45] Mr. Arthur Thomas made the following submissions on behalf of the second Defendant/Respondent.

[46] The Claimant is alleging that there is no charterparty between the First and Second Defendants. In this regard learned counsel makes reference to the bareboat charter agreement with Rapid Explorer Operations which is mentioned in the affidavit of Paul Warrick. In this regard also reference is made to paragraphs 17 to 23 of the affidavit of Javier Lemoine of 17th May 2006.
[47] Learned counsel made reference to paragraph 2 of the second Defendant's defence and contends that an application can be made to amend the said defence. It is the submission of counsel that the arrangement between the first and second Respondents/ Defendants entitles them to be in possession unless there is a breach. In terms of the summary judgment, learned counsel contends that the Claimant is not entitled to succeed as the second Defendant has a real prospect of success. Finally, according to learned counsel, the second Defendant is entitled to possession by virtue of the agreement and understandings – estoppel.

[48] Learned as Mr. Arthur Thomas' submissions may be they can go no further having regard to the ruling of the Court on the question of jurisdiction.

[49] In rebuttal Mr. Sydney Christian, QC Counsel for the Claimant raises issue with the affidavit of Mr. Paul Warrick in terms of the existence of a Charterparty. He submits further that the application seeks to hilight the matter of payments between the parties.

[50] Mr. Christian also submitted that the issue of possession is different from that of the quantum of damages. According to him, the quantum is to be determined in England as any claim against the Claimant relates to damages.

THE LAW RELATING TO SUMMARY JUDGMENT

[51] Part 15.2 of CPR 2000 provides thus:

"The Court may give summary judgment on the claim or any particular issue if it is satisfied that
-
(a) claimant has no real prospect of succeeding on the claim or the issue; or
(b) the defendant has no real prospect of successfully defending the claim or the issue."

[52] Part 15.3 prescribes exceptions in these terms:
"The Court may give summary judgment in any type of proceedings except –
(a) admiralty proceedings in rem;
(b) probate proceedings;

(c) proceedings by way of fixed date claim;
(d) proceedings for –
(i) claims against the Crown;
(ii) defamation;
(iii) false imprisonment
(iv) malicious imprisonment; and
(v) redress under the Constitution of any Member State or Territory."

[53] Whether it be the Claimant or Defendant the operative test boils down to 'real prospect'.

[54] The learning in this regard in BLACKSTONE'S CIVIL PRACTICE 2001 at paragraph 30.7 reads thus:

"In *Swain* v *Hillman* [1999] CPLR 779, Lord Woolf MR said the words 'no real prospect of succeeding did not need any amplification as they spoke for themselves. The word 'real' directed the court to the need to see whether there was a realistic as opposed to a fanciful, prospect of success.
The phrase does not mean 'real and substantial' prospect of success. Nor does it mean that summary will only be granted if the claim or defence is 'bound to be diminished at trial.' The Master of the Rolls went on to say that summary judgment applications have to be kept within their proper role. They are not meant to dispense with the need for a trial where there are issues which should be considered at trial. Further, summary judgment hearings should not be mini-trials. They are simply summary hearings to dispose of cases where there is no real prospect of success.
In *Pennington* v *Abedi* [1999] LTL 13/8/99 there had been ongoing litigation in which the defendant had advanced a series of defences which had each been shown to be false. An application was made for summary judgment, and it was held that the defendant's conduct of the litigation was such that there was no realistic prospect of her successfully defending the claim."

[55] In the context of Part 15.2 of CPR 2000 in giving the judgment of the Court, Saunders CJ (acting) in THE BANK OF BERMUDA LIMITED v PENTIUM (BVI) LIMITED and LANDCLEVE LIMITED1 wrote in these terms at paragraph 18:

"A Judge should not allow a matter to be proceed to trial where the defendant has produced nothing to persuade the Court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for summary judgment, a defendant is not entitled, without more, merely to say that in the course of time something might turn up that would render the claimant's case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim".

[56] For his part learned counsel for the Applicant has focused on two aspects of the First Defendant/Respondents conduct. First, that despite numerous appearances before the Court neither a defence nor counterclaim was filed. Second the failure to reveal to the Court the true relationship with the Second Defendant/Respondent when in fact there is evidence to suggest that both entities are subject to a common management structure.

[57] On the other side, learned counsel for the First Respondent submitted that any success depends on the draft defence for which leave may be granted to file same.

[58] Mr. Kentish is on the correct path but there is no application in this regard before the Court as

required by Part 10.3 of CPR 2000 in the instant circumstances. It means therefore that contrary to the requirement of Part 10 of CPR 2000 no defence was filed. This removes the substratum for a real prospect of successfully defending the claim so that summary judgment can be and is hereby granted to the Applicant/Claimant. For the sake of completion, it will be recalled that one of the rules regarding summary judgment is that such a proceeding is not intended to be mini-trial but merely a summary hearing to dispose of cases where there is no real prospect of success. The further point is that the Applicant 1 Civil Appeal No. 14 of 2003 (BVI) is seeking, *inter alia*, an account of all sums accruing to the Defendants and an order for the payment by the Defendants of the sums found on the said account. This in turn relates to non-payment by the first Respondent/Defendant.

RECOVERY OF VESSELS

[59] One of the primary objectives in instituting these proceedings is the recovery of the vessels. And in this regard it will be recalled that in its statement of claim the Claimant pleaded a number of clauses of the Agreement which gave it the right to terminate the said agreement. One such circumstance is contained in Clause 7.3.5 which says the Agreement may be terminated if FFLL fails to make the payments pursuant to the Charter or otherwise materially breaches the terms of any Charter.

[60] At paragraph 3 of his affidavit in support of the application Javier Lemoine deposes as follows: "Since 21st June 2005 the Claimant has sought to recover the vessels 'KATIA' and 'MILANCIA' ('the vessels') from the 1st Defendant who between the months of December 2004 and May 2005 became indebted for a total sum of £567,000.00 as charter hire due to the Claimants."

[61] There was no affidavit in reply in relation to this statement of fact. Likewise because no defence was filed the following matters pleaded remain uncontradicted:

"11. Between the months of December, 2004 and May, 2005, the First Defendant became indebted for a total sum of £431,482.00 as charter hire due and owing to the Claimant. The Claimant duly requested payment of the said sum but the Claimant failed and/or refused to make payment.
12. By letter dated June 1, 2005 the Claimant through its Solicitors, notified the First Defendant that it was in breach of the Agreement and the Bareboat Charterparties and that those agreements were terminated.
13. Further, the Claimant informed the First Defendant of the immediate withdrawal of the vessels from respective Charters.
14. By letter dated June 2, 2005, the First Defendant acknowledged receipt of the Claimant's letter of June 1, 2005.
15. Subsequently, on June 3rd, 2005 a meeting was held between the parties wherein it was agreed, *inter alia,* that the Claimant would suspend the withdrawal of the vessels on condition that payment of the outstanding amount of 43,482.00 was made by Friday, June 20, 2005. Despite the said agreement, the First Defendant failed and or refused to make payment."

[62] Therefore by virtue of the breach of the Agreement, the Applicant is entitled to possession of the vessels.

[63] With respect to the other remedies sought by the Applicant, these cannot be adjudicated upon by virtue of the jurisdictional issues determined above.

MONEY HELD IN ESCROW

[64] In an application (ANUHCV 2004/0082) involving the same parties Madam Justice Louise Blenman in granting the application on 21st December 2005 also ordered that the sum of US$50,000.00 be paid into a bank account in the names of Attorneys-at-Law Arthur G.B. Thomas Esq., Ms. E. Ann Henry and Sydney P. Christian Q.C. Esq. to be held in escrow to abide the outcome of the substantive matter and/or to fortify its undertaking of damages.

[65] The grant of summary judgment removes the requirement for the escrow account. Accordingly the sum of US$50,000.00 must be returned to the Claimant/Applicant together with all interest accrued thereon. And it is so ordered.

ARBITRATION

[66] It is clear that the Agreement provides for arbitration with respect to disputes arising from the Charter which are directly related to its operation or termination.

[67] References have been made to arbitration proceedings initiated. More particularly mention is made of this fact in the draft defence annexed to the affidavit of Juliette L. Dunnah which affidavit was filed on behalf of the first defendant. At paragraph 9 of the draft defence it is stated that pursuant to clause 22 of the Agreement, the Claimant by notice dated 22nd August 2005 has initiated arbitration proceedings in London. Prior to that date, as noted above, a claim form was filed on 20th July 2005 and an amended Claim Form filed on 4th August 2005. Therefore, as far as Mr. Kentish is concerned this constitutes abuse of process.

[68] The arbitration clause is not at large as it is limited to certain disputes directly related to operation and termination. There are no details before the Court as to the nature of the arbitration proceedings initiated but learned senior counsel has indicated that these proceedings relate to possession of the vessels while the question of damages must be determined in England. This is a clear distinction in the two proceedings. In any event, there is nothing before the Court to suggest the precise nature of the before the arbitrator and whether any or both of them fall within the scope of the arbitration clause, see: THE ANGELIC GRACE, supra.

[69] The Court has no reason to doubt what learned senior counsel has submitted on the issue, and, in any event, these proceedings were first in time. In all the circumstances the Court does not consider that these proceedings constitute an abuse of process.

SUMMARY OF CONCLUSIONS
[70] The conclusions of the Court are as follows:

1. By virtue of Clause 221 of the Agreement
(a) the English Courts have exclusive jurisdiction with respect to claims brought against VT Leaseco Limited.
(b) the English Courts have a non-exclusive jurisdiction with respect to claims brought against Fast Ferry Leasing Limited.
(c) any dispute with respect to the Charter must be referred to arbitration in London.
2. The Courts of competent jurisdiction in Antigua and Barbuda may adjudicate upon claims by VT Leaseco Limited and claims against Fast Ferry Leasing Limited.

3. The Courts of Antigua and Barbuda have no jurisdiction over Rapid Explorer Operations Inc, the second Respondent/Defendant.
4. Summary judgment is granted to the Applicant VT Leaseco Limited against Fast Ferry Leasing Limited.
5. The First Respondent/Defendant must deliver the vessels, Katia, Milancia, and Olivia to the Applicant/Claimant, VT Leaseco Limited within sixty (60) days of the date of this Order.
6. The sum of US$50,000.00 held in escrow must be returned to the Applicant/Claimant, together with all accrued interest thereon, within fourteen (14) days of the date of this Order.
7. Having regard to the ambit of the arbitration clause, the fact that these proceedings were first in time and all the other circumstances, the Court does not consider these proceedings to be an abuse of process.

ORDER

[71] IT IS HEREBY ORDERED as follows:
1. Summary judgment against the First Respondent/Defendant is granted to the Applicant/Claimant as prayed.
2. The First Respondent/Defendant must deliver to the Applicant/Claimant the vessels, Katia, Milancia and Olivia within sixty (60) days from the date of this Order.
3. The sum of US$50,000.00 held in escrow must be returned to the Applicant/Claimant, together with all accrued interest thereon, within fourteen (14) days of the date of this Order; and the attorney-at-law for all parties must do all such things as are necessary to give effect to this aspect of the Order of the Court.
4. The First Respondent/Defendant must pay the Applicant/Claimant's costs of this action, including the costs of this Application to be agreed or, in the absence of agreement, in accordance with Part 65.5 of CPR 2000.

ERROL L. THOMAS
JUDGE