

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCv2023/0220

BETWEEN:

YULIA GURIEVA-MOTLOKHOV

Applicant/Claimant

and

**[1] THE PORT MANAGER OF THE ANTIGUA & BARBUDA PORT
AUTHORITY**

**[2] THE DIRECTOR OF THE ANTIGUA AND BARBUDA
DEPARTMENT OF MARINE AFFAIRS AND MERCHANT
SHIPPING**

[3] ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Respondents/Defendants

Appearances:

Mr. Thomas Roe KC and Mr. Andrew O’Kola for the Claimants in Claim nos.
ANUHCv2023/0239 and ANUHCv2023/0254

Mr. Robin Barclay KC, Dr. David Dorsett and Ms. Leandra Smith for the Claimant in
Claim no. ANUHCv2023/0220

Mr. Anthony Astaphan SC, Ms. Carla Brookes-Harris, Ms. Alicia Aska, Ms. Joy
Dublin, Ms. Rose- Anne Kim and Mr. Zachary Phillips for the Defendants in all claims
Ms. C Debra Burnette holding a watching brief on behalf of Marina & Resorts Limited

2024: February 28th
June 6th

**RULING
(APPOINTMENT OF A YACHT SURVEYOR)**

[1] **WILLIAMS, J.:** The vessel M/Y Alfa Nero which is described as a superyacht entered Falmouth Harbour, Antigua in March 2022 and has remained there ever since. Due to sanctions imposed by the international community as a result of the ongoing conflict between Russia and Ukraine it appears that the vessel’s owners were unable to expend funds to maintain it, pay crew wages and port charges.

Background

- [2] The Parliament of Antigua and Barbuda in March, 2023 enacted the **Port Authority (Amendment) Act 2023**¹ which granted the Port Manager (the First Defendant) the power to seize and sell the vessel. The Port Manager seized the vessel in April, 2023 and thereafter commenced the process of selling the vessel via auction.
- [3] This action has led to the filing of various claims in the High Court which all seek to challenge the decision to seize and sell the vessel. This present claim is brought by Ms. Yulia Gurieva-Motlokhov (the Claimant) who claims to be the owner of the vessel by virtue of being a beneficiary of trusts governed by the law of Guernsey. By Originating Motion filed on 15th June 2023 she challenges the seizure and intended sale of the vessel on the basis that these actions contravene her rights to property guaranteed by sections 3 and 9 of the Constitution.
- [4] There is other ongoing litigation which involves this vessel, namely judicial review and constitutional proceedings filed by Flying Dutchman Overseas Ltd. and Vita Felice Ltd. Flying Dutchman was the registered owner of the vessel before its seizure whilst Vita Felice Ltd. claims to be the owner of works of art aboard the vessel.
- [5] Various interlocutory applications common to all claims were heard from 26th to 28th February 2024. These included applications for specific disclosure and applications to strike out an affidavit filed by a lawyer Mr. Paul Reichler on behalf of the defendants. However, this application filed on 14th September 2023 is only in relation to Ms. Motlokhov's claim. This particular application seeks the following orders:

1. Mr. Peter Chettleborough who is an experienced marine engineer and yacht surveyor be permitted to file an expert report as to the condition of the Alfa Nero vessel.

¹ Act No. 1 of 2023

2. That Mr. Chettleborough be permitted, if necessary, to give oral evidence at the trial herein.
3. That there be no order as to costs.

[6] The application was heard on 28th February 2024 on the basis of written submissions and authorities previously filed by the parties and oral submissions made at the hearing.

Grounds of Application

[7] The grounds of the application are as follows:

1. It is the position of the Claimant that (i) s. 38A of the Port Authority Act 1973 (as enacted and amended by The Port Authority (Amendment) Act 2023) and (ii) actions taken or to be taken pursuant to or connected with s. 38A (as described in the Claimant's Schedule of Grounds) were unconstitutional.
2. It is the position of the Respondents that such items and actions are permissible under article 9(4) of the Constitution, by virtue of being reasonably necessary because the relevant property (the Alfa Nero) is in a dangerous state or likely to be injurious to the health of human beings, animals, or plants.
3. It is the position and evidence of the Respondents that the Alfa Nero was, at relevant times, in a dangerous state (Affidavit of Darwin Telemaque dated 14 July 2023 ("DTI"), paragraphs 11et seq).
4. Whether the vessel was and is in a dangerous state, therefore, is of central importance in the present proceedings.

5. Mr. Chettleborough is an experienced, qualified yacht surveyor and marine engineer, with significant experience in assessing the state of vessels and providing evidence to Courts in respect of the same.
6. The expert evidence of Mr. Chettleborough as to the state of the Alfa Nero including, in particular, whether it is or was in a dangerous state, is relevant and reasonably required as to the issues in the case.
7. Mr. Chettleborough is able to perform his duty to the Court in accordance with the CPR.
8. Pursuant to CPR 26.1(2)(w) and CPR 21.6(6) and the overriding objective, the Court may issue such directions and orders so that the expert report prepared by Mr. Chettleborough do form part of the intended evidence and be deemed an expert report in the form and manner required by CPR 32.13 and CPR 32.14

Notice of Objection

[8] The defendants by Notice of Objection filed on 19th September 2023 have objected to the application on the following grounds:

1. The Notice of Application and Affidavit in Support are signed and sworn to respectively by the Attorney on Record.
2. The expert evidence given by Mr. Chettleborough is not relevant to the issues to be determined in the claim filed herein for constitutional redress more particularly the evidence relied on by the Port Manager.

The issues

[9] The issues to be determined are as follows:

1. Whether the affidavit of Mr. Radford Hill sworn to in support of the application should be struck out?
2. Whether the application should be dismissed if Mr. Hill's affidavit is struck out?
3. Whether Mr. Chettleborough's proposed expert evidence is relevant to the issues to be determined in this claim?

Striking out the Affidavit of Mr. Radford Hill

[10] The issue of whether Mr. Radford Hill's affidavit in support of the application should be struck out will be examined first. The material paragraphs of Mr. Hill's affidavit are as follows:

- "3. I have read the notice of application filed herein on behalf of the claimant/applicant and believe that the grounds are true, and that the claimant/applicant is relying on those grounds in making the application.
4. I verily believe that the application made herein is to have Mr. Peter Chettleborough appointed as an expert witness and for him to be permitted to file an expert report. Mr. Chettleborough is director of Winterbotham's Ltd. a marine surveying and consultancy firm. He has 17 years of experience as a marine engineer and around 20 years' experience as a yacht surveyor. A copy of his curriculum vitae is exhibited and marked Exhibit RH1.
5. I verily believe that Mr. Chettleborough is duly qualified and able to fulfil the requirements to be an expert under the CPR."

[11] The defendants' attack on Mr. Hill's affidavit may be summarized as follows:

1. Mr. Hill has appeared as counsel in this matter.
2. The affidavit offends CPR 30.3(2) (ii) in that paragraphs 3, 4 and 5 (quoted above) do not identify the source of Mr. Hill's knowledge and information.

[12] The defendants rely on the well-known Court of Appeal decision of **Casmir v. Shillingford** where then Chief Justice Lewis stated as follows:

“During the course of the argument, I made reference to the fact that it was not proper (I put it no higher than that) for a barrister who is going to appear in a cause to swear an affidavit in the same cause, even if he swears it in his capacity as solicitor. In England, of course, barristers do not practise as solicitors and the rule without the rider which I have added may be found at the back of the White Book relating to the conduct of barristers. It puts the court which has to pronounce upon the acceptability of the affidavit in an embarrassing position, when the person who has made this affidavit as solicitor appears before it in the same cause as counsel, and it is more appropriate that either some other person, preferably the party who desires to appeal, should swear the affidavit, or that if the circumstances are such that counsel has to swear it himself that he should then brief other counsel to argue the case before the court.”²

[13] On the basis of the excerpt of **Casimir v. Shillingford** quoted above, Mr. Astaphan SC argues on behalf of the defendants that Mr. Hill’s affidavit is “incurably bad” and should be struck out. He points out that Mr. Hill has appeared on record in these proceedings as is evidenced by previous orders made by this court. As a result, Mr. Hill is therefore precluded from swearing any affidavit in the proceedings.

[14] The claimant argues that the defendants’ submission on this issue is without merit and resists the objection on the following grounds:

1. Mr. Hill is not counsel who is going to appear in this matter. He fulfils the role as local instructing solicitor who instructs counsel.
2. There is no prohibition on a barrister swearing an affidavit in his capacity as a solicitor, provided, he is not going to appear in the case.

² (1967) 10 WIR 269

3. In any event, the Respondent's do not explain why a barrister swearing an affidavit of itself renders that affidavit inadmissible.

[15] Chief Justice Lewis' observations in **Casmir v. Shillingford** quoted above are still good law and have not been overturned by the Privy Council or doubted in any subsequent decisions. It is thus binding on this court. In the more recent decision of **Richard Frederick v. Comptroller of Customs**³ George-Creque JA (as she then was) stated:

"[49] It is well settled and accepted that it is most undesirable for counsel with conduct of a matter or application to swear an affidavit in that matter for the reason given by Lewis CJ in *Casimir v Shillingford and Pinard* (1967) 10 WIR 269. In common parlance it amounts to giving evidence from the bar table – an unacceptable and wholly inappropriate practice. Having so stated however, it is not applicable to the current circumstances since the solicitor swearing the affidavit in support of the application to extend time to the defendants did not appear as counsel in the matter."

[16] As I understand the **Richard Frederick** case, counsel within the same Chambers may swear to an affidavit in proceedings where he or she has not appeared as counsel in the matter. This is not applicable to the present proceedings as according to the relevant orders Mr. Hill is recorded as counsel in June 2023 when an application for an interim injunction was heard. Having already appeared as counsel and having not totally withdrawn from the matter in accordance with CPR Part 63, Mr. Hill is precluded from swearing an affidavit in the same proceedings. Accordingly, the affidavit of Mr. Radford Hill filed in support of the application is hereby struck out.

CPR 30.3(2) (ii)

[17] Although this is strictly speaking not necessary to address in light of my earlier finding, I however, do not find that Mr. Hill's affidavit contravened CPR 30.3(2) (ii)

³ SLUHC VAP2008/0037 decided 6th July 2009 (unreported)

as submitted by the Defendants. CPR Rule 30.3(2) (ii) provides that an affidavit must “identify the source of any matters of information or belief.” The affidavit speaks to Mr. Chettleborough’s qualifications as a yacht surveyor and exhibits his curriculum vitae. It is thus reasonable to infer that Mr. Hill’s belief that Mr. Chettleborough is qualified to be an expert is based on the exhibited curriculum vitae. Thus, there was no need for Mr. Hill to further identify the source of information or belief as to Mr. Chettleborough’s qualifications.

Should the Application be Dismissed?

[18] Does the striking out of Mr. Hill’s affidavit inevitably lead to the entire application being dismissed? Fortunately for the claimant there is an affidavit of Mr. Chettleborough himself filed in these proceedings on 27th October 2023. This affidavit provides details of Mr. Chettleborough’s qualifications and experience and also outlines the proposed methodology to be used in preparation of the expert report. There was no objection to this affidavit by the defendants.

[19] Accordingly, I find that there is evidence to support the application for the appointment of an expert pursuant to CPR 11.9. The merits of the application will now be considered.

Discussion

[20] Expert evidence is governed by Part 32 of the Revised Civil Procedure Rules 2023. CPR 32.2 provides as follows:

“Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly.”

[21] CPR 32.6 speaks to the Court’s power to restrict expert evidence and states as follows:

“(1) A party may not call an expert witness or put in the report of an expert witness without the court’s permission.

(2) The general rule is that the court’s permission is to be given at a case management conference.

- (3) When a party applies for permission under this rule – that party must name the expert witness and identify the nature of his or her expertise; and permission granted shall be in relation to that expert witness only.
- (4) The oral or written expert witness' evidence may not be called or put in unless the party wishing to call or put in that evidence has served a report of the evidence which the expert witness intends to give.
- (5) The court must direct by what date the report must be served.
- (6) The court may direct that only part of an expert witness' report be disclosed."

[22] The Privy Council in **Bergan v. Evans**⁴ further outlined the purpose of Part 32 of the Civil Procedure Rules Revised 2023 as follows:

"[41]Turning to rule 32.6, read in conjunction with the court's and the parties' general duty to limit expert evidence in rule 32.2, these provisions were intended (as in England and Wales) to work a sea-change in the approach to expert evidence in civil proceedings by subjecting the entirety of the deployment of expert evidence to active judicial control by way of case management, in the pursuit of the overriding objective and, in particular, the need to ensure proportionality and economy in the resolution of civil disputes."

[23] In **John Oliver Dryud v. Palmavon Jasmin Webster**⁵ the Court of Appeal adopted the guidance of the UK Supreme Court in **Kennedy v. Cordia**⁶ in relation to the admissibility of expert evidence. The court stated:

"[97] In **Kennedy v Cordia**, Lord Reed and Lord Hodge, giving the unanimous opinion of the Supreme Court, formulated (at para. 44) four considerations which govern the admissibility of expert evidence in civil proceedings. These are:

- (i) whether the proposed evidence will assist the court in its task;

⁴ [2019] UKPC 33

⁵ John Oliver Dryud v. Palmavon Webster AXAHCVP2021/0010 decided 27th April 2022 (unreported)

⁶ [2016] 1 WLR 597 at para 43.

- (ii) whether the witness has the necessary knowledge and experience;
- (iii) whether the witness is impartial in his or her presentation and assessment of evidence and;
- (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence."

[24] The instant application turns primarily on item (i) listed above namely whether the proposed evidence will assist the court in its task. I note that there has been no objection as to whether Mr. Chettleborough is a qualified yacht surveyor or whether or not he will be impartial. Thus items (ii) to (iv) above will not be considered in depth.

[25] However, for the sake of completeness, I will briefly outline Mr. Chettleborough's qualifications and experience. According to his affidavit evidence, Mr. Chettleborough's career started in the Royal Navy where he served from 1987 to 1994 eventually reaching the rank of Petty Officer. From 1994 to 1998 he served as a marine engineer on a variety of vessels. In 2002 he graduated with a bachelor's degree in Ship Science from Southampton University. He is a Chartered Engineer (CEng); a Chartered Marine Engineer (CMarEng); a Member of the Institute Of Marine Engineers, Science and Technology (MIMasEST); and an Associate Member of the Royal Institution of Naval Architects (AMRINA). He states that he has surveyed over 150 yachts ranging in size from 20 to 160 metres.

[26] I am satisfied that Mr. Chettleborough satisfies the criteria (ii) to (iv) as outlined in **Kennedy v. Cordia** quoted above based on his academic qualifications and extensive experience as a yacht surveyor. There also has been no suggestion that Mr. Chettleborough will be anything but impartial in his presentation of evidence to the court.

[27] I will now turn back to the issue of necessity. The Court of Appeal in **John Oliver Dryud v. Palmavon Jasmin Webster** has provided guidance on this issue. The court stated:

“[101] An important principle is that a judge considering an application to rely on expert evidence, must caution himself or herself against too rigid an interpretation of what expert evidence of fact is necessary to assist the court. In relation to that category of expert evidence, the test for its admissibility is not strict necessity “as otherwise, the court could be deprived of the benefit of a skilled witness who collates and presents to the court in an efficient manner the knowledge of others in his or her field of expertise.” Where skilled evidence of fact is likely to be of assistance to the efficient and proper determination of the issues in the case, the judge ought to admit it.”

Scope of the Proposed Expert Report

[28] It is therefore necessary to examine the nature of the evidence which Mr. Chettleborough proposes to present to the court. Mr. Chettleborough’s proposed methodology and the scope of his report are contained at paragraphs 19 to 27 of his affidavit filed on 27th October 2023.

[29] The proposed methodology is extensive and will not be reproduced in its entirety. However, at paragraph 19 of his affidavit Mr. Chettleborough succinctly outlines the process:

“In order to determine now (or after the Court decides whether to allow evidence from me) whether the Alfa Nero was in a dangerous state in April 2023, I would use the following methods and items of evidence, drawing on my experience of working on and surveying yachts:

- a. I would conduct a physical survey of the Alfa Nero;

- b. I would examine the Alfa Nero's records, including logbooks and other documentation, which should have been kept on board the Alfa Nero by its crew; and
- c. I will make an assessment by combining and comparing the current state of the yacht with what the documents tell me about the interim period since April 2023.

[30] At paragraph 20A of his affidavit Mr. Chettleborough describes in detail the proposed physical inspection of the vessel. This includes an examination of the overall cosmetic condition of the vessel, its main engines and gearboxes, electrical systems and generators and safety equipment. The second stage of the process is described at paragraph 20B of the affidavit and involves the examination of relevant documentation.

[31] Mr. Chettleborough states that all superyachts keep the following logbooks: a bridge log and an engineering log. He states: "The engineering log will not only be used to record the running of machinery, and associated running parameters, but also major equipment failures, defects, and so forth. The bridge log will be used to record navigational operations, day to-day running of the vessel whilst in port, and sea-going issues and operations, such as the dropping of anchors, mooring operations, or fouling incidents."⁷

[32] Mr. Chettleborough also proposes to examine the Alfa Nero's on-board computer system. According to Him, accessing this system will allow him to see what repair works have been carried out on the vessel since March 2022 and before. Finally, Mr. Chettleborough intends to examine damage reports, insurance claims, port state authority reports, class reports, and flag authority reports if these are available. He claims that "these reports may give an insight into the condition of the vessel both now and in the past."⁸

⁷ Affidavit of Peter Chettleborough-paragraph 21

⁸ Affidavit of Peter Chettleborough-paragraphs 22- 24

[33] I will firstly address Mr. Chettleborough's proposal to inspect the vessel. This assumes that the Government of Antigua will still be in possession of the vessel when he intends to carry out his inspection. On 29th June 2023 I refused an application in this very claim which among other things sought an interim injunction restraining "any sale of the Alfa Nero by the Respondents until further order or determination of the matter." This order was appealed and the Court of Appeal by order made on 22nd November 2023 dismissed the appeal in its entirety. I have not been directed to any order from the Privy Council in this claim so I can safely assume that none exists.

[34] Accordingly, there is no order of this court which prevents the Government of Antigua and Barbuda from selling the vessel. The fact that the vessel may still be in Falmouth Harbour at present is not due to any order of this court. Accordingly, as far as the court is concerned the vessel may be sold at any point.

[35] Thus, requiring the defendants to give Mr. Chettleborough access to the vessel would be in effect impliedly requesting that I stay my previous order which refused an interim injunction. The fact that the vessel can be sold also militates against the argument that Mr. Chettleborough's evidence is necessary. If the M/Y Alfa Nero had already been sold to a third party, the yacht surveyor would not have had access to the vessel itself, its on-board computer or the relevant logbooks.

[36] However, this would not prevent this constitutional claim from progressing at all. The claimant has several options at her disposal. Firstly, she can seek evidence as to the condition of the vessel by specific disclosure (which has been done). The claimant may also challenge the defendant's evidence by cross-examination. Finally, the claimant may comment on the available evidence in submissions. Therefore, ordering an inspection of the vessel is patently unnecessary for the just disposal of these proceedings.

Burden of Proof

[37] At the hearing of this application Mr. Barclay KC pointed out that the only evidence before the court as to the state of the vessel at the date of its seizure in April 2023 is from Mr. Darwin Telemaque the Port Manager in his affidavit filed on 14th July 2023. According to him this case raises the question of “whether the taking of property rights in the Alfa Nero was objectively necessary because the property is in a dangerous state or likely to be injurious to the health of human beings, animals or plants.”⁹

[38] This raises the issue of the burden of proof in constitutional matters with the appropriate principle having been established by the Privy Council in **Worme v. Commissioner of Police**.¹⁰ This in turn will require an examination of the issues raised in this claim based on the filings thus far. I wish to emphasize however that any observations I make at this point are only provisional as the claim has not yet proceeded to trial.

[39] Based on **Worme v. The Commissioner of Police**, the burden of proof will be on the claimant to provide evidence to demonstrate a prima facie breach of sections 3 and 9 of the Constitution. Assuming the claimant can do so, the defendant will then have to establish that section 38A of the Port Authority (Amendment) Act and the seizure and sale of the vessel were reasonably necessary in accordance with section 9(4)(a)(v) of the Constitution.

[40] Mr. Chettleborough’s proposed evidence is concerned with the application of section 9(4) (a) (v) of the Constitution relied upon by the defendants. In fact, Mr. Chettleborough expressly states so at paragraphs 14 to 16 of his affidavit. Section 9(4) (a) (v) of the Constitution provides:

⁹ Claimant’s submissions at paragraph 12

¹⁰ [2004] 2 AC 430 at paragraph 41

“(4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section-

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right-

(i).....

(ii).....

(iii)....

(iv).....

(v) In circumstances where it is reasonably necessary so to do because the property is in a dangerous state or likely to be injurious to the health of human beings, animals or plants;

and except so far as the provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;”

[41] Thus, at the appropriate juncture the court may have to determine whether the defendants have provided enough evidence to discharge the burden of proof imposed on them by section 9(4) of the Constitution to justify seizure and sale of the vessel. This burden will fall squarely on the defendants, assuming of course that the claimant can first prove a prima facie breach of her fundamental rights. However, it is not the court’s function in the exercise of its constitutional jurisdiction to seek evidence to prove or disprove the defendant’s assertions. Taking the foregoing into account, I therefore decline to grant permission for Mr. Peter Chettleborough to give evidence as an expert in these proceedings.

Role of Expert Witnesses

[42] The expert proposes to carry out his own inspection of the vessel as well as an examination of the available documentation. In this particular case this goes beyond

the role of an expert witness in litigation. In **TUI v. Griffiths**¹¹ the UK Supreme Court outlined the role of experts as follows:

“[36] In this judgment I address civil proceedings and leave to one side questions of criminal procedure. It is trite law that as a generality in civil proceedings, the claimant bears the burden of proof in establishing his or her case. It is trite law that the role of an expert is to *assist* the court in relation to matters of scientific, technical or other specialised knowledge which are outside the judge’s expertise by giving evidence of fact or opinion; but the expert must not usurp the functions of the judge as the ultimate decision-maker on matters that are central to the outcome of the case.”

[43] In this case granting permission to Mr. Chettleborough to prepare a report as to the state of the vessel in April 2023 would be inviting him to displace the court as the finder of fact. I would have been more inclined to permit expert evidence in this matter if for example Mr. Chettleborough wished to express an opinion on any technical content of the Port Manager’s evidence. However, this is not what he proposes to do.

Economy in Litigation

[44] In coming to a decision, I am also obliged to take the Overriding Objective of the Civil Procedure Rules into account. In my view the most relevant aspect of the Overriding Objective in relation to this application is that of saving expense.

[45] In this regard I note that Mr. Chettleborough proposes to examine documents such as the vessel’s logbooks which are not in evidence before the court. This is likely to spawn further requests for information or applications for specific disclosure. The defendants would also be entitled to put questions to the expert in accordance with CPR 32.9. This will lead to an increase in costs with no apparent benefit, as findings as to the state of the vessel at the material time can be made without this additional

¹¹ [2023] UKSC 48

evidence. I therefore find that Mr. Chettleborough's methodology and scope of his proposed report will lead to a disproportionate increase in costs and further delay the timely resolution of this claim.

Costs

[46] Although the claimant has not been successful on this application in accordance with CPR 56.11(6) I will make no order as to costs.

Order

[47] Accordingly, it is hereby ordered as follows:

1. Permission for Mr. Peter Chettleborough to file an expert report as to the condition of the vessel M/Y Alfa Nero is hereby refused.
2. The Claim is set down for pre-trial review on 3rd July 2024.
3. No order as to costs

[48] The court takes this opportunity to express its gratitude to all counsel for their helpful submissions.

Rene Williams
High Court Judge



By The Court

Registrar