



Neutral Citation Number: [2024] EWHC 1970 (Comm)

Claim No: LM-2023-00153

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**LONDON CIRCUIT COMMERCIAL COURT (KBD)**

Royal Courts of Justice  
Rolls Building, Fetter Lane,  
London, EC4A 1NL

Date: Monday 29 July 2024

**Before :**

**MR ANDREW HOCHHAUSER KC**  
**SITTING AS A DEPUTY JUDGE OF THE HIGH COURT**

**Between :**

**TONZIP MARITIME LTD.**

**Claimant**

**- and -**

**CORAL ENERGY PTE. LTD.**

**Defendant**

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**Approved Judgment**  
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This judgment was handed down on 29<sup>th</sup> July 2024 in court and by release to the National Archives

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**ANDREW HOCHHAUSER KC**  
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**Emmet Coldrick** (instructed by Wikborn Rein LLP) for the Claimant  
**James Shirley** (instructed by Holman Fenwick Willan Middle East LLP) for the Defendant

Hearing date: Friday 26 July 2024

I direct that pursuant to CPR PD 29A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

## MR ANDREW HOCHHAUSER KC:

### Introduction

1. By an Application Notice dated 24 May 2024 (the “**Application**”), the Defendant, Coral Energy Pte Ltd (the “**Charterers**”), seeks specific disclosure of the following documents:
  - “(a) all extracts from the Vessel's Bridge and Engine Room Logbooks for the period between 06 October 2021 and 17 December 2021 inclusive which refer to the Vessel’s fuel oil purifiers;
  - (b) all correspondence relating to (i) the problem with the Vessels’ main engine and fuel oil purifiers at Rotterdam and thereafter; and (ii) the spare parts needed for the Vessel as a result of that problem, between the Vessel and her Owners and her technical and/or commercial managers for the period between 06 October 2021 and 17 December 2021 inclusive;
  - (c) All survey reports relating to the problem with the purifiers and any related correspondence with the author of any such report as well as notes taken by any surveyor having attended the Vessel; and
  - (d) all photographs taken by the crew and/or surveyors during the investigation of the problem with the purifiers.”
2. The Application was made pursuant to paragraphs 17.1 and /or 18.1 of CPR Practice Direction 57AD (“**PD57AD**”) and was supported by the Third Witness Statement of Florian Matthias Schacker dated 24 May 2024 and an exhibit thereto. He is a solicitor and Senior Associate employed by Holman Fenwick Willan Middle East LLP, solicitors instructed by the Charterers in this matter. Subsequently the following evidence was served: on 12 June 2024 the First Witness Statement of Matt James Illingworth, a solicitor and a partner in the firm of Wikborg Rein LLP, solicitors instructed by the Claimant, Tonzip Maritime Ltd (“**the Owners**”) and an accompanying exhibit and on 19 June 2024 the Fourth Witness Statement of Mr Schacker and an accompanying exhibit.

### The Further Application

3. On 19 June 2024 the Charterers made a further application for permission to adduce expert evidence from Mr. Pat Cannie, a marine engineer at ABL Group, in relation to the damaged purifier and the related technical issues experienced by “M.T. CATALAN SEA” (the **Vessel**”), as set out in the third and fourth witness statements of Mr Schacker. I indicated at the hearing that I would consider that evidence *de bene esse*. Having done so, I am prepared to permit that evidence, but for the reasons set out below, I found it of little assistance in the determination of the Application.

### Representation

4. At the hearing, the Owners were represented by Emmet Coldrick of Counsel and the Charterer by James Shirley of Counsel. I am grateful to them both for their helpful written and oral submissions.

## The Claim

5. The Owners' claim is for damages for repudiatory breach of a voyage charterparty between the parties dated 5 November 2021 (the "**Charterparty**"). The key issue is whether the Owners were entitled under the Charterparty to refuse the Charterers' orders to load and carry aboard the Vessel a cargo of oil to be shipped by Joint-stock company Neftyanaya kompaniya Neftisa ("**Neftisa**") (the "**Neftisa Cargo**"). The Owners refused to load the Neftisa Cargo on the basis that Neftisa was owned and/or controlled by a sanctioned Russian oligarch, Mikhail Gutseriev, or that there were reasonable grounds to believe that that was the case, and that as such carrying the Neftisa Cargo would expose the Owners to EU and/or UK sanctions laws.
6. The Charterers continued to insist that the Neftisa Cargo be loaded and refused to give alternative voyage orders. Both parties purported to terminate the Charterparty for repudiatory breach. After an interval, the Owners obtained alternative business for the Vessel on the spot market for a period during which the Vessel would otherwise have been performing the Charterparty. In these proceedings, both parties seek to recover the losses they allege they suffered as a result of the non-performance of the Charterparty. The Owners claim US\$1,020,104.53 in damages. The Charterers deny the claim and counterclaim US\$233,600.

## The Owners' Position on the Application

7. The Owners oppose the Application on two principal grounds:
  - (1) First, the disclosure sought does not go to the pleaded issues. There is no pleaded issue as to the Vessel's condition or the validity of the Notice of Readiness which was served on 17 November 2021;
  - (2) Secondly, if issues as to the Vessel's condition were to be introduced at this late stage, the trial, which is listed for 17 October 2024, would need to be adjourned, so as to enable factual and expert witness evidence relating to such issues to be prepared. There is no compelling reason for taking that course.

## The Procedural History

8. The claim was issued in the Commercial Court on 25 January 2023. The last of the statements of case – the Charterers' Rejoinder and Reply to Defence to Counterclaim – was served on 4 May 2023. Pursuant to an order of Foxton J dated 30 May 2023, the claim was transferred to the London Circuit Commercial Court on 8 June 2023.
9. The parties agreed directions and an oral CMC was dispensed with. On 20 October 2023, HHJ Pelling KC made an order setting out the agreed directions (the "**CMC Order**"). The matter was listed for a 4 day trial commencing on 21 October 2024, with a day's judicial pre-reading on 17 October 2024.

10. The CMC Order provided for disclosure by 1 December 2023. The parties agreed to treat the matter as a Less Complex Claim for disclosure purposes. In the CMC Order, the Court approved a Disclosure Review Document providing for extended disclosure only in respect of ownership/control of Neftisa, exposure to sanctions and quantum. The model for quantum disclosure was Model D.
  
11. The Charterers were not ready to give disclosure by the agreed date of 1 December 2023. The Owners consented to two extensions of time, to 22 December 2023, but the Charterers were still not ready to give disclosure. Having served notice of change of solicitors the day before, on 22 December 2023 the Charterers applied for a further extension of time for disclosure.
  
12. HHJ Pelling KC granted the application on paper on 5 January 2024, but on a costs reserved basis, noting that:

*“It is not acceptable for a party to make a late change of solicitor and then use that as the basis for a major recalibration of the directions given at a (recent) CMC. Further it is not appropriate that the responding party should have a potential liability for the costs of such recalibration as is directed.”*
  
13. The Court directed a short oral hearing to deal with the recalibration of directions, but this was ultimately dealt with by consent without an oral hearing. When approving the consent order on 24 January 2024, the Court sought, and obtained, confirmation from both parties that the revised directions would not adversely affect the trial date. It can be seen from this that keeping the trial date was regarded as of paramount importance.
  
14. Disclosure was given on 12 January 2024. The Owners’ disclosure contained a series of emails dated between 23 November 2021 (after the Notice of Readiness had been served) and 6 December 2021, passing between various employees of EPS Tanker Ops, the Owners’ agents. They are to be found at pp 158-162 of the Hearing Bundle. I was told by Mr Coldrick on instruction that these were contained in a Claims File that was disclosed in its entirety. They included a statement to the effect that “...we need to respond to Oil majors and it is important to get the second Purifier operational as soon as possible” [23 November 2021] and in response to a query as to how long it would take to get the spare parts to Tallinn “We need to do this and move the spares as all Oil majors are not approving the ship basis the other purifier not being operational.” [25 November 2021] and there was a potential cost of USD 50,000 in transferring the spare costs, but the cost could be avoided if “we pick up items after loading while en route to disport (Vessel is on subs for Ust Luga loading (Declarable Monday NN LDN.))” [4 December 2021].

15. On 2 February 2024, the Charterers' solicitors wrote to the Owners' solicitors making specific disclosure requests in relation to the Vessel's engine, which were stated to be made pursuant to CPR 31.12. On 23 February 2024, the Owners' solicitors replied that disclosure was governed by PD57AD, which disapplies CPR Part 31. They said that if the Charterers wished to obtain further disclosure, they would need to make an application to vary the current disclosure order. They also stated that the Owners' position was that there was no good reason to vary the disclosure order and that any application would accordingly fail. On the same day, the Owners responded to a Request for Further Information, which made no admission about the condition of the Vessel and stated that the Charterers were not entitled to the information sought.
16. On 4 March 2024, the Charterers' solicitors wrote again, this time asserting that the documents they sought were encompassed within Disclosure Issue 1 (quantum) or Disclosure Issue 4 (all other issues). On 6 March 2024, the Owners' solicitors replied, making clear that a reasonable and proportionate search had been carried out for relevant documents within Disclosure Issue 1 and that as regards Disclosure Issue 4, no search was required (as Model B disclosure had been agreed) and the documents sought were not "known adverse documents".
17. Following that response, no application for disclosure was issued. Instead, the parties proceeded to exchange witness statements, on 22 March 2024.
18. Thereafter nothing happened in open correspondence, until 3 May 2024, when the Charterers' solicitors sent a copy of the disclosure application (and a draft of Mr Schacker's third witness statement) to the Owners' solicitors. On 9 May 2024, the Owners' solicitors replied, making clear that the disclosure application was without merit and that if the Charterers wished to advance a case relating to the Vessel's condition that would need to be pleaded.
19. Expert reports were exchanged on 24 May 2024. It was not until then, 24 May 2024, that the Charterers issued the Application, more than two months after the Owners' solicitors had set out their position on 6 March 2024. Initially, no attempt was made by the Charterers to list their application, still less seek expedition.
20. On 7 June 2024, the experts met and produced their Joint Memorandum.
21. Supplementary expert reports were due to be exchanged on 21 June 2024, but the Charterers were not ready to exchange. The Charterers did not apply for an extension of time until 4 July 2024.
22. On 24 June 2024, the parties filed and served their Progress Monitoring Information Sheets.
23. On 3 July 2024, the Charterers' solicitors wrote to the Court seeking expedition, giving a 2 hour estimate. It was listed by HHJ Pelling KC for 26 July 2024, with an estimate of 2 hours. In the event the hearing ran into the afternoon.
24. Supplementary expert reports were exchanged on 5 July 2024.

## The Law

25. As earlier stated, the Application is made “*pursuant to paragraph 17.1 and/or 18.1 of CPR PD57AD*”.
26. Paragraph 17.1 of Practice Direction 57AD states:
- “Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate ...”*
27. Paragraph 17.2 of PD57AD goes on to state that:
- “The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4).”*
28. Paragraph 6.4, referred to in the above, states:
- “In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors—*
- (1) the nature and complexity of the issues in the proceedings;*
  - (2) the importance of the case, including any non-monetary relief sought;*
  - (3) the likelihood of documents existing that will have probative value in supporting or undermining a party’s claim or defence;*
  - (4) the number of documents involved;*
  - (5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);*
  - (6) the financial position of each party; and*
  - (7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.”*

29. I accept Mr Coldrick’s submission (which was not seriously challenged by Mr Shirley) that at a high level, the issues arising as regards the first basis for the application are:

    - a. Is the Court satisfied that there has been or may have been a failure by the Claimant adequately to comply with its extended disclosure obligations under the CMC Order?

- b. If so, is the Court satisfied that making the order sought would be reasonable and proportionate, having regard to the matters referred to in paragraph 6.4 of PD57AD?
  - c. If so, should the Court exercise its discretion to make the order?
30. Turning to the second basis for the Application, paragraph 18.1 of PD57AD states:
- “The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.”*
31. Paragraph 18.2 goes on to state that:
- “The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4).”*
32. Again, I accept Mr Coldrick’s submission (which was not seriously challenged by Mr Shirley), that, at a high level, the issues arising as regards the second basis for the application are:
- a. Is the Court satisfied that it is necessary for the just disposal of the proceedings to make the variation sought by the Defendant to the extended disclosure ordered by the CMC Order?
  - b. If so, is the Court satisfied that making the variations sought would be reasonable and proportionate, having regard to the matters referred to in paragraph 6.4 of PD57AD?
  - c. If so, should the Court exercise its discretion to vary the order?

### **The Importance of Pleadings**

33. In his submissions, Mr Coldrick emphasised the importance of pleadings in defining the factual issues to which disclosure relates. He relied upon a number of authorities in this regard. In particular, a decision of the Court of Appeal in Harrods Ltd v Times Newspapers Ltd [2006] EWCA Civ 294, where Chadwick LJ (with whom Moore-Bick LJ and Lawrence Collins J (as he then was) agreed) stated at [12]:

*“In my view the judge was plainly correct to approach the application for further disclosure on the basis that it was essential, first, to identify the factual issues that would arise for decision at the trial. Disclosure must be limited to documents relevant to those issues. And, in seeking to identify the factual issues which would arise for decision at the trial, the judge was plainly correct to analyse the pleadings. The purpose of the pleadings is to identify those factual issues which are in dispute and in relation to which evidence can properly be adduced. It is necessary, therefore, to have in mind the issues as they emerge from the pleadings and are relevant in the present context.”*

34. He also relied upon two more recent cases at first instance in support of his submission that the dictum of Chadwick LJ remained the position insofar as PD57AD is concerned. Those cases were a decision of Peter MacDonald Eggers KC, sitting as Deputy Judge of the High Court, in Lonestar Communications Corporation LLC v Kaye [2020] EWHC 1890 (Comm) at [32] and [43]-[44], whose approach was followed by HHJ Keyser KC in Curtiss v Zurich Insurance Plc [2021] EWHC 1999 (TCC), where he said at [18]:

*“... For the purposes of this CMC and most case management conferences at which extended disclosure must be considered, the approach of Mr Eggers QC in the Lonestar case is, in my judgment, the correct one. The question before me concerns the disclosure that is necessary for a fair determination of the issues at trial. **Such disclosure must be directed to the issues in dispute on the statements of case.**”* [Emphasis added]

35. Mr Shirley relied upon a decision of James Pickering KC, sitting as a Deputy Judge of the High Court in The Commissioners for Her Majesty's Revenue and Customs v IGE USA Investments Limited [2020] EWHC 1716 (Ch) at [58]-[59]. The circumstances surrounding the application were that almost a year after bringing the claim against the defendant, HMRC wished to add a claim in fraud. In order to advance such a claim, there must be a proper factual foundation on which to do so. The Defendant there sought an order requiring HMRC to disclose certain material in advance of the determination of the application to amend so as to plead fraud. As the Deputy Judge said at [16] *“The basis for the request was that, in broad terms, the test which would be applied on the Amendment Application was whether the proposed claim of fraud has a real prospect of success and the FIS Documents [the documents sought] would be relevant to that determination.”* It was therefore not a pleaded issue in the case as it stood. At [57] the learned Judge acceded to the application on the basis that looking at the term “Issues for Disclosure” - now contained in paragraph 7.3 of PD57AD - *“it is not necessary for the issue to be identifiable of the face of the statements of case – instead, it is enough for that issue to be something which will need to be determined by the court in order for there to be a fair resolution of the proceedings as a whole.”*
36. In my view, the nature of the application in the IGE USA Investments case is wholly different from the present case. There a party facing an amendment alleging fraud a year into a claim was entitled to see the material relating to the amendment in order properly to make submissions that there is no real prospect of success. Here, when dealing with a request for further disclosure, when a trial is in prospect, after the



majority of the trial preparation has been carried out, I agree with both the judges in the Lonestar Communications and the Curtiss cases that when considering the adequacy of compliance with Extended Disclosure or whether to vary the Extended Disclosure Order or order specific disclosure, such disclosure must be directed to the issues in dispute on the statements of case.

### **The Charterers' Submissions**

37. Mr Shirley candidly accepted that neither of the condition of the Vessel nor the validity of the Notice of Readiness formed part of the pleaded issues. He submitted nonetheless that, given the unwillingness of the Owners to disclose the documents requested, and the unhelpful answers in the Further Information they provided on 23 February 2024, there was a legitimate serious cause for concern, and it was appropriate to make the Order sought, relying on the approach of Mr Pickering KC in the IGE USA Investments case. He further relied upon the summary of the expert evidence of Mr Pat Cannie that the issues identified concerning the oil purifiers, the need for spare parts and the fact that the Vessel was not able to obtain oil major approval were "*potentially very serious*". He accepted that the Charterers had proceeded on the basis that there was insufficient material to justify an amendment being made now. Instead, the Application was being made as a possible prelude to applying substantially to amend the Defence in relation to liability at a time when the majority of the trial preparation was complete, the long vacation was imminent, and the trial was due to start on 17 October 2024. Were that amendment to be made, he acknowledged that there would have to be further factual and expert evidence. Although initially he contended in his skeleton that the trial date could be kept, in oral argument he was driven to accept that this was impractical. It would have to be vacated and a new date fixed.
38. In relation to quantum, he submitted that the condition of the Vessel when the Owners were seeking alternative business is relevant because the Owners are only entitled to recover losses that were caused by the Charterers and not losses that were caused by something else, for example the Owners' own breach of the seaworthiness obligation. In this regard, therefore there was no need for an amendment to be made to the Defence in order for the Application to succeed. Mr Coldrick's response to this was that none of the documents requested went to the quantum claim as pleaded and that the Owners had fully complied with their obligations under Extended Disclosure Order.

### **Discussion and conclusion on the Application**

39. I have carefully considered the parties' written and oral submissions. Most, but not all, have been summarised above. Suffice it to say that I have taken them all into account.
40. I am firmly of the view that this Application should be dismissed for the following reasons:
  - (1) the documents requested to do not go to the pleaded issues in the case. There is no suggestion that the condition of the Vessel or the validity of the Notice of

Readiness is in issue. As stated earlier, I agree with both of the judges in the Lonestar Communications and the Curtiss cases that when considering the adequacy of compliance with Extended Disclosure or whether to vary the Extended Disclosure Order or order specific disclosure, such disclosure must be directed to the issues in dispute on the statements of case. The hearsay evidence of Mr Pat Currie is speculative to say the least. It is clearly insufficient to ground an amendment to the Defence. The application is essentially a fishing expedition to see if there is a further defence that might be available.

- (2) The quantum claim would not require disclosure of these documents. Paragraph 32 of the Defence simply denies “*that the Owners had any actionable loss to mitigate, alternatively avers that the Owners failed to take reasonable steps to mitigate their loss in that they took an unreasonably long time to enter into and commence earning pursuant to a subsequent fixture.*”
- (3) I am therefore not satisfied that there has been or may have been a failure by the Owners adequately to comply with the Extended Disclosure Order in the manner contended by the Charterers or that given the issues, currently pleaded there is any basis for varying that Order so as order the provision of the documents sought.
- (4) Moreover, even were there were grounds for granting the Order under either paragraph 17.1 or 18.2 of PD57AD, were I to accede to the Order sought, given its underlying purpose, it would result either in no application for an amendment to the Defence, in which case it would have been a fruitless exercise or alternatively an application substantially to amend the Defence, to introduce further factual evidence and to seek permission for the adduction of further expert evidence, which would have derailed the trial date. Given the Charterers were well aware of the Owners’ position from 6 March 2024 at the latest, the delay of over two months before issuing the Application is inexcusable. This is particularly so given that on 24 January 2024, HHJ Pelling KC had made clear to the parties that he would only grant the variation of the trial directions sought upon confirmation that the trial date would not be affected. Therefore, solely on the basis of the delay in making the application and the consequences which could follow from granting it, I would have refused the application in the exercise of my discretion on the basis that it would have been neither reasonable nor proportionate to grant it.

### **One further matter**

41. In the course of argument, I asked Mr Coldrick why the emails at pp158-162 of the Hearing Bundle had been disclosed, given the pleaded issues. He pointed to the potential claim for USD50,000 relating to the loading of the spare parts, which in the event was not incurred and not claimed by the Owners. He said that these documents were located in a Claim File, the entire contents of which had been disclosed. Mr Shirley drew my attention to the Owners’ Disclosure Certificate dated 10 January 2024, which makes no reference to the Claim File within it. He sought an explanation as to why this was the case. Mr Coldrick was unable to explain this, given he had not come to the hearing prepared to deal with this matter, which had only just surfaced. He pointed out, however, that no complaint had been made by the Charterers as to the adequacy of the searches.

42. In these circumstances, I am therefore going to order that by 4pm on Monday 12 August, a witness statement is made on behalf of the Owners:
- (1) confirming that there has been compliance by the Owners with their disclosure obligations under Model D in relation to the quantum claim, including any known adverse documents, in particular those relating to any defects which prevented or inhibited the Vessel from being chartered for any part of the period of the Charterparty;
  - (2) explaining why there is no mention of the Claim File in the Owners' Disclosure Certificate dated 10 January 2024;
  - (3) confirming that save for privileged documents, the Claim File has been disclosed in its entirety.
43. I am prepared to hear further submissions from Counsel as to the precise wording of this order.
44. I will now hear Counsel in relation to the costs of this application and any other consequential matters.