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SHIPBUILDING: **CONTRACT CONSIDERATIONS FOR AN EMERGING INDUSTRY** *Cherie Gopie*

Some 11 billion tons of goods are estimated to be transported by ship each year around the world. Trinidad and Tobago, located at the southern base of the Caribbean, is well positioned in relation to shipping lanes in the Eastern Caribbean and North, Central and South America. The country currently acts as a trans-shipment hub, engaging in land-based and offshore, bulk and containerised trans-shipment activities, and servicing smaller ports in the Caribbean. To bolster our maritime economy, shipbuilding and ship repair industries have been identified as key areas of expansion.

The parties to such a contract, the builder of the ship and the buyer of the ship may come from different countries and may have varied backgrounds, experiences and bargaining power. It is therefore important to ensure that both parties' rights and obligations are adequately covered and protected in a contract for shipbuilding. Traditionally, shipbuilders around the world present potential buyers with their own standard contracts which can be subject to negotiation and amendment. It should be noted that shipbuilding contracts are

different from other types of contract in terms of the provisions required and how they might be interpreted by a court or arbitration tribunal when there is a dispute.

What goes into a shipbuilding contract?

Express Specifications

A shipbuilding contract will expressly and essentially provide detailed specifications that the vessel should conform to. These might include a number of 'guaranteed' standards of performance, such as speed, deadweight, container capacity and fuel consumption. Parties might agree that breach of the guaranteed standards by the shipbuilder entitles the buyer to damages and, in some cases, a right to reject the vessel and treat the contract as having been repudiated. Ensuring that all the essential specifications of the vessel are listed as a contract term is key to ensuring the buyer receives what he desires and there is no ambivalence.

Delays and Extensions of Time

Many commercial contracts for delivery of an item may contain an express provision setting out the contractual delivery date. A shipbuilding contract is no different. It is not difficult to imagine that in many instances, the shipbuilder will encounter an issue which would make delivery on the agreed date impossible. A shipbuilding contract therefore should also contain provisions that address delays due to the buyer's conduct or circumstances beyond either parties' control by allowing, for example, extensions of time to the date of delivery in certain circumstances. In

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- Defamation in the Digital Age

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DEFAMATION IN THE DIGITAL AGE

Catherine Ramnarine

Social media and messaging platforms have revolutionized communication in the digital age, making it possible for the average person to reach a much wider audience than was previously possible. The ease of communicating through these platforms can, in some cases, encourage users to post things about others that they might not say in person or on a more formal platform. This can have serious consequences, both for person making the post and for the person that they are posting about, as illustrated in the recent High Court case of CV2020-00493 *MS v CH*.

The Facts:

The Claimant and Defendant were both members of the Trinidad and Tobago Police Service ("TTPS") and participants in a 'WhatsApp' group chat. The group chat had more than 211 participants, many of whom were members of the TTPS.

The Defendant replied to a message posted by the Claimant in the group chat with the following:

"...you cant talk about me you aint ready you [expletive] to work in the task force i does work i could solve crime... You getting personal. Study because ah two police in longdenville you get away from case with yuh big bandit man."

The Claimant contended that this message was defamatory in that it suggested that she (a) rendered sexual favours to obtain her position (b) was a criminal and narrowly avoided prosecution and (c) was involved in criminal activity with her significant other. She claimed that the message caused significant harm to her reputation and that she suffered considerable distress and embarrassment.

The Law of Defamation:

One of the issues that the Court had to determine was whether a message posted on WhatsApp could ground a claim for defamation.

Generally speaking, defamation occurs when words are published about an identifiable person, which are likely to cause harm to that person's reputation in the estimation of the minds of reasonable people in society. 'Slander' is a defamatory statement that is oral, while 'Libel' is a defamatory statement that is written.

A claimant in a defamation suit is required to prove three things in order to obtain judgment and an award of damages:

1. That the impugned words were defamatory, in the sense that they would tend to lower the claimant's reputation in the eyes of a reasonable person;
2. That the words in fact referred to the claimant; and
3. That the words were 'published'.

Members of the public sometimes have the misperception that defamatory words need to be 'published' in book or newspaper or to a wide audience in order for them to be actionable. However, this is not true. 'Publication' in the context of the law of defamation has a very specific meaning. It means only that the defamatory information was communicated in such a way that it was 'made known to a third party'. Publication has two components (a) an act that makes the defamatory information available to a third party in a comprehensible form and (b) the receipt of the information by a third party in such a way that it is understood. The nature and extent of the audience to which the words were published may impact the amount of damages that a claimant is awarded, but does not determine whether or not they are actionable.

It is also important to note that a person who repeats or 'republishes' defamatory information is generally subject to the same liability as if they had originally created or published the defamatory statement. The fact that they merely repeated someone else's words is no defence to liability.

SHIPBUILDING: CONTRACT CONSIDERATIONS FOR AN EMERGING INDUSTRY

Cherie Gopie (Cont'd from page 1)



some contracts, what is a permissible delay is specifically defined.

Performance and Refund Guarantees

Another important element of a shipbuilding contract is that of performance and refund guarantees. Essentially if a shipbuilder fails to perform the contract as it has been agreed, a clause to that effect can be incorporated into the agreement where, in the event of a ship builder's default, a third-party guarantee can be called upon. In this regard, at the outset of the contract, a shipbuilder may be asked to provide a refund guarantee. A refund guarantee is an undertaking by a bank, or other surety that if the shipbuilder fails to refund the pre-delivery instalments of the contract price in circumstances where the buyer has lawfully cancelled the contract, it will repay those instalments to the buyer in full.

Warranties

Shipbuilding contracts usually contain a guarantee or warranty provision, warranting the condition of the ship on delivery. The builder, usually for a period of twelve months would guarantee the vessel in her entirety including parts and equipment installed, furnished or incorporated by the builder against all defects due to omissions, non-conformities, defective materials or equipment, faulty design and/or performance, construction miscalculations, and/or poor workmanship by the builder. It is interesting to note that the English courts generally construe warranty provisions in shipbuilding contracts very narrowly and the buyer in particular, should ensure the wording of the warranty is expansive enough to cover the type of losses that may occur as a result of defects in the vessel.

Price Increases

If there is a fixed agreed price for the vessel, what happens if there are unexpected price increases of labour and materials? If the contract does not have price escalation provisions, which address these items, such increases will be for the builder's account. Shipbuilding contracts typically provide

that the fixed price may be increased or decreased in the event of any modifications to the specifications or the vessel. However, the shipbuilder should ensure it does not perform additional work unless the parties have agreed and recorded any modification to the price of the vessel or its delivery date. If this is not so specifically agreed, the builder may not be able to claim these costs subsequently.

The above represents some of the basic contractual terms that are relevant in a shipbuilding contract. The terms of such a contract are nuanced and should be drafted carefully to ensure smooth sailing, in particular that both the buyer and seller are clear on the expectations of either party and the remedies which are available to both in the event legal issues arise.

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The Decision:

In the earlier case of *CV2016-02974 DRA and SA and another v Jenelle Burke*, the High Court had held that messages posted on Facebook could ground claims for defamation. It adopted a similar approach in the *MS v CH* case, finding that messages posted on WhatsApp could also ground legal claims for defamation.

The Claimant, having established the other requirements needed to make out a case in defamation, was successful in her claim. The Defendant was ordered to pay her \$75,000.00 in damages, in addition to her legal costs.

Cautionary Words:

The Court noted that, while persons might feel that there was a measure of security and privacy when using WhatsApp, this was misguided. Messages sent via WhatsApp were also fairly easy to track, as accounts were tied to mobile numbers which were visible and traceable. It also cautioned that forwarding defamatory messages could also amount to 'republishing' under the law of defamation, exposing persons who did so to potential liability.

Legal defences to defamation are available and it is not every 'shady' post or comment that will ground a legal claim for defamation. However, the simple rule is – as eloquently put by the Court in the *MS v CH* case – do not post or forward a message about another person unless you would be prepared to defend the contents of that message in Court.

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