The Rainbow Spring
[2002] SGHC 255

Case Number : Admiralty in Rem No 600391 of 2001, RA No 600031 & 600036 of 2002

Decision Date : 29 October 2002

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean JC

Counsel Name(s) : Magdalene Chew (Joseph Tan Jude Benny) for the plaintiff; Toh Kian Sing and Loh Wai Yue (Rajah & Tann) for the defendant

Parties : —

Admiralty and Shipping – Admiralty jurisdiction and arrest – Action in rem – Whether defendant liable in personam for claim – Whether s 4(4) of the High Court (Admiralty Jurisdiction) Act satisfied – High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Rev Ed) ss 3(1)(h), 4(4)

Admiralty and Shipping – Admiralty jurisdiction and arrest – Wrongful arrest – Whether arrest obviously groundless as to amount to mala fides or crassa negligentia implying malice

Civil Procedure – Full and frank disclosure – Ex parte application to set aside warrant of arrest of vessel – Whether arrest of vessel should be set aside on ground of non-disclosure of material facts – Court's discretion in setting aside warrant of arrest on ground of material non-disclosure – Rules of Court (Cap 322, R 5, 1997 Rev Ed) O 70 r 4

Judgment

GROUNDS OF DECISION

1. By a time charterparty dated 8 January 1998, Admiral Chartering Ltd ("Admiral"), a Liberian incorporated company, chartered the "RAINBOW SPRING" on an amended New York Produce Exchange Form. The present dispute stems from a May 2002 voyage charter whereby Admiral as disponent owner sub-chartered the "RAINBOW SPRING" to International Coffee and Fertilizer Trading Co ("INCOFE"). A consignment of crystalline potassium nitrate shipped on board the "RAINBOW SPRING" in June 2000 at Tocopilla, Chile for carriage to and delivery at Puerto Caldera, Costa Rica and Puerto Quetzal, Guatemala had sustained wet damage. INCOFE consequently commenced arbitration in New York against Admiral for damages.

2. On 31 October 2001, Admiral as Plaintiff commenced an action in rem against the vessel "RAINBOW SPRING". The Plaintiff's claim is for damages for breach of time charterparty and/or for an indemnity against all losses should Admiral be found liable to INCOFE for wet damage to its cargo. The writ was served on "RAINBOW SPRING" and she was at the same time arrested in Singapore on 31 December 2001. Security was provided by West of England Ship Owners Mutual Insurance Association (Luxembourg) as P&I Club on behalf of its member, Rainbow Spring Shipping Limited Inc ("RSSL"), a Panamanian company. The vessel was released on 3 January 2002.

3. The Plaintiff's case is that the time charter of the "RAINBOW SPRING" was from the outset made with RSSL as registered owner. The Plaintiff is entitled to proceed by way of an action in rem against the vessel because RSSL is the person who would be liable on the claim in an action in personam, and because RSSL is the owner of the vessel, both when the cause of action arose and when the action is brought.

4. RSSL as Defendant entered an appearance and on 14 January 2002 applied to set aside the writ of summons and warrant of arrest. RSSL's contention is that the in personam requirement of

s4(4) of the High Court (Admiralty Jurisdiction) Act (cap 123) is not satisfied. RSSL was not a party to the time charter of the "RAINBOW SPRING". The contracting parties were the Plaintiff and Oriental Shipway Inc ("Oriental"). An alternative ground put forward to set aside the warrant of arrest is non-disclosure of material facts.

5. The Assistant Registrar, who heard the application on 25 March 2002, declined to set aside the in rem writ. However, the warrant of arrest was set aside on the ground of non-disclosure of material facts. The Assistant Registrar also ordered damages for wrongful arrest to be assessed.

6. Both parties appealed against her decision. Further affidavits were filed after the hearing before the Assistant Registrar. All in all, a total of 13 affidavits were filed before and at the appeal stage. Within the affidavits the opposing contentions of the parties are found.

The Defendant's Appeal

(i) The jurisdictional issue - In personam test in s4(4) of the Act

7. It is common ground that the claim falls within s3(1)(h) of the Act. It is also common ground that the court only has jurisdiction to entertain an action in rem if the Plaintiff satisfies s4(4) of the Act.

8. It is not in dispute that the burden is on the Plaintiff to establish that RSSL is the likely person to be liable in personam on the claim. As to the standard of proof, Selvam JC (as he then was) in The *"Opal 3"* [1992] 2 SLR 585 stated that in applying the in personam test in s4(4) of the Act, all that is needed is an arguable case. See The *"St Elefterio"* [1957] 1 Lloyd's Law Rep 283 and The *"Wigwam"* [1982-1983] SLR 188. Justice Chua's decision in The *"Wigwam"* was affirmed by the Court of Appeal. (See unreported decision dated 14 September 1984 in Civil Appeal no. 89 of 1982). Admiral has only to show that it has an arguable case, even though it may have a difficult case in fact or law. If the Plaintiff discharges the burden, the action would proceed to trial.

9. The sole question, which I have to consider, is whether it is arguable that RSSL would be liable in personam. If the plaintiff's case on jurisdiction is plainly unarguable in that it is bound to fail, the in rem writ would be set aside. The present case is no different from the rest where the substance of the underlying claim is factually inseparable from the basis of jurisdiction.

10. Counsel for the Defendant, Mr. Toh Kian Sing, urged the court to adopt the robust approach taken in The *"AA V"* [2001] 1 SLR 207 where 15 affidavits were filed. Judith Prakash J said:

> "….if the evidence before me convincingly established that the defendants were not party to those contracts then I would have to hold at this early stage that the admiralty jurisdiction of the court had not been properly invoked." [p218]

11. On the first page of the charterparty, Oriental is named as 'Owners" of the "RAINBOW SPRING". The "owning company" is stated to be Oriental in the Description Clause (Clause 74) which incorporated Charterer's completed Questionnaire. On page 3, there is a company stamp of RSSL where Tam Kwong Lim("Tam"), who is president and director of RSSL, had signed the document on behalf of RSSL. The signature of Tam as RSSL representative/director viewed in isolation is unqualified.

12. Counsel for the Plaintiff, Ms Magdalene Chew, advances the proposition that a party who signs a contract in his own name is deemed to have contracted personally unless it is clear he executed it as agent only. The general principle is set out in *Scrutton on Charterparties* (20th Edition) Art 19 p45:

> "Where a person signs the charter in his own name without qualification, he is prima facie deemed to contract personally and, in order to prevent this liability from attaching, it must be clear from the other portions of the charterparty that he did not intend to contract personally."

13. Counsel further submits that if nonetheless there is ambiguity on the face of the charterparty as to identity of the contracting party, extrinsic evidence is admissible as an aid in identifying the contracting party: *Chitty on Contracts* (28th ed) Vol. 1 12-120.

14. Ms Chew said that on construing the entire document, RSSL was clearly the contracting party. Ms Chew referred me to some of the clauses in the charterparty. For example, Clause 72 which provides:

> "Owners to have the option to sell the vessel together with charterparty subject to Charterer's approval of new ownership, which should not be unreasonably withheld."

The Defendant is the only party who would have the right to "sell" the vessel. Therefore, the word "Owners" in Clause 72 is clearly referable to the Defendant as registered owner of the vessel and not Oriental.

15. Clause 40 states that West of England is "Owners' P&I Club". Again the word "Owners" there is referable to RSSL. During negotiations for the charter, West of England had at the behest of RSSL commented on the terms of the charter. West of England also handled the off-hire dispute and dispute over prices of bunkers applicable at time of redelivery. Furthermore, West of England communicated with the Plaintiff on these disputes as if the charter was with RSSL. West of England only disclosed that Oriental was not its member at the setting aside stage.

16. There are some documents emanating from the Defendant which showed the time charterparty dated 8 January 1998 to be between Admiral and RSSL. For example, the Notice of Assignment of earnings dated 29 April 1999 was addressed to Admiral and signed by Tam for RSSL.

17. Woo Man Fong ("Woo"), the general manager of the Defendant, asserts in his affidavit that the Defendant's rubber stamp on the charterparty was due to a clerical mistake. Kingstar Shipping Ltd ("Kingstar"), the vessel's agent, kept the Defendant's rubber stamp in its office and the wrong stamp was used.

18. Woo also asserts that the Plaintiff was fully aware at the time of the arrest that the contracting party was Oriental. He cites in support the Plaintiff's voyage instruction to the master dated 22 April 1998 where Oriental was expressly referred to as head owner and Admiral as time charterer. The Notice of Assignment of earnings dated 8 February 1998 named Oriental as the contracting party. Ms Chew had earlier drawn my attention to a contrary position appearing in the Notice of Assignment of earnings dated 29 April 1999. The Defendant also referred to the Protocol of Delivery to evidence delivery of the vessel by Oriental to Admiral. However, that document is unreliable in that not only is it incomplete as the blank spaces were not filled in but the document

alludes to a bareboat charterparty dated 25 November 1997 between Admiral and Oriental. Further, the Protocol of Delivery was not signed by Admiral.

19. The inconsistencies in documents are dismissed as clerical mistakes by the Defendant. As for West of England pursuing a claim ostensibly on behalf of RSSL, the explanation put forward by Fiona Caldwell McCoig on behalf of West of England is that she was assisting the manager, Hang Woo Ship Management Ltd, who is also a member.

20. In addition, it is said that Admiral's P&I Club, Assuranceforeningen SKULD (Gjensidig) Den Danske Afdeling ("Skuld"), and American lawyers M/s Lambos & Junge have in correspondence acknowledged and treated Oriental as the contracting party. Furthermore, on 11 October 2001 Skuld appointed John Schofield as arbitrator in respect of the dispute under the charter between Admiral and Oriental.

21. I have in the foregoing paragraphs mentioned the main points in the case on either side. Fortuitously for the Defendant, in the present case the jurisdictional fact in dispute could be decided despite these apparent conflicting evidence, arguments and counter arguments. Of decisive importance is whether I accept the contrary view of the Defendant that the fixture was concluded by exchanges of correspondence before the formal charter was drawn up and signed.

22. Negotiations for the charter took place over two months. The faxes/telexes culminating in the fixture were exchanged between Plaintiff's brokers, Rodskog Shipbrokers Limited ("Rodskog") and the vessel's agent, Kingstar. By a fax dated 8 January 1998, Kingstar informed Rodskog that the contracting party in the charterparty was to be "Oriental Shipway Inc". In that fax, Kingstar stated:

> "PLS NOTE OWRS ON C/P SHALL BE "ORIENTAL SHIPWAY INC."

23. On 9 January 1998, Rodskog replied and confirmed by telex the final terms as acceptable to charterers:

> "VERY PLEASED WE ARE NOW CLEAN FIXED
>
> CHARTERERS LOOKING FORWARD TO A PLEASANT COOPERATION WITH OWNERS AND VESSEL
>
> WE HAVE NOTED OWNERS STYLE FOR C/P BEING "ORIENTAL SHIPWAY INC" (WHERE REGISTERED PSE) BUT PLEASE FULL STYLE/ADDRESS OF MANAGERS TO WHOM HIRE STATEMENTS ETC SHALL BE MAILED…"

24. The phrase used to conclude the contract was "VERY PLEASED WE ARE NOW CLEAN FIXED". The expression "clean fixed" in chartering parlance is used to signify a binding charterparty contract or concluded fixture.

25. The unchallenged evidence shows: Oriental was named as contracting party and agreed by the Plaintiff. I am satisfied that there was no contract between the Defendant and Plaintiff. It is plain that the Plaintiff's case is unarguable and the writ of summons is therefore set aside. Consequently, the arrest is set aside on this ground and not on the ground of non-disclosure.

26. Having answered the main issue in favour of the Defendant, it is unnecessary to deal with the bareboat charter point raised at the hearing of this appeal.

The Plaintiff's Appeal

(i) Non-disclosure of material facts

27. Counsel for the Defendant submits that the Assistant Registrar was right and the arrest should be set aside because the arrest was procured as a result of non-disclosure of material facts. The disclosure of the charterparty itself was grossly inadequate to present to the court the true picture. He contends that all or some correspondence and documents which show that the charterparty was between Admiral and Oriental should have been disclosed. In particular, the fax dated 8 January 1998 from Kingstar to Rodskog (pp 18 to 19 of Woo's 2nd affidavit); telex dated 9 January 1998 from Admiral to RSSL (p 34 of Woo's 1st affidavit); fax dated 13 January 1998 (p 20 of Woo's 2nd affidavit); telex dated 16 January 1998 from Kingstar to Rodskog (p 35 of Woo's 1st affidavit); Notices of Assignment dated 2 February 1998 (pp 50, 51 and 53 of Woo's 2nd affidavit); Sailing instructions from Seaside Navigation (pp 43 and 45 of Woo's 2nd affidavit); Skuld's fax dated 16 May 2001 (p 55 of Rasmussen's 2nd affidavit) and Skuld's fax of 31 May 2001 (pp 36 and 38 of Woo's 2nd affidavit).

28. Counsel for the Plaintiff contends on the authority of The *"Varna"* [1993] 2 Lloyd's Rep 253 that there is no duty to disclose the documents. In that case, the English Court of Appeal held that O75 r 5(1) of the English Rules of the Supreme Court expressly bestowed the power to issue a warrant of arrest on the plaintiff thereby effectively removing the discretion vested in the court as to whether or not to issue a warrant of arrest. According to Ms Chew, Order 70 r 4(1) of our Rules of Court was amended in 1997 and is in line with the English position. The *"Damavand"* [1993] 2 SLR 717 was a decision before 1997. And in The *"AA V"*, the court's attention was not drawn to the changes to the Rules of Court and decision of The *"Varna"*.

29. The decision of The *"Varna"* turned largely on amendments made to the Order 75 r 5(1) of the English Rules of Supreme Court. With the amendments, the Praecipe for Warrant of Arrest was revoked by RSC (Amendment No.2) 1981 (S.I. 1981 No. 1734).

30. Even though the language of our Order 70 r 4 (1) is similar to Order 75 r5(1) of the English Rules, the phrase "the plaintiff may issue a warrant in Form 156" in Order 70 r 4 (1) when read in conjunction with Form 156 and r 4(2)(a) does not confer a power on the plaintiff to issue the warrant of arrest. It is the court that issues the warrant of arrest (Form 156) following the filing of a Praecipe for Warrant of Arrest (see Order 70 r 4(2)(a)). A sensible reading of Order 70 r (4)(1) is that it is only after the writ is issued that the plaintiff may initiate issuance of a warrant of arrest. By Order 70 r 4(3), the warrant of arrest will not be issued unless there is an affidavit complying with the particulars required by r 4 (6) and (7). Order 70 r 4(3) provides that even if there is non-compliance with r 4(6) and (7), the court may in its discretion issue the warrant. Conversely, a failure to comply with the rules could render the warrant of arrest a nullity as Kulesekaram J so held in The *"Courageous Colocotronis"* [1978-1979] SLR 337.

31. In Singapore, the issue of a warrant of arrest is a discretionary remedy and, as on any ex-parte application for a discretionary remedy, full disclosure of material facts is required. The requirement that there be full and frank disclosure of material fact on an application for arrest is clearly established.

32. Although I have ruled in favour of the Defendant on the jurisdictional issue, for the reasons below, I am of the view that there is no material non-disclosure. The materiality of the non-disclosure

complained about is neither premised nor dependent on the success of the Defendant's contention that the charter was concluded by exchanges of correspondence. Even if I have found that there has been material non-disclosure, I have a discretion to uphold the warrant of arrest: *The Fierbinti* [1994] 3 SLR 864 at 879.

33. The Defendant's position is that a binding fixture was made before the formal charter was drawn up and signed. If a contract is to be found from the correspondence the whole of that which passed between the parties must be taken into consideration. See *Hussey v Horne-Payne* (1874) 4 App. Cas. 311. In the present case, the Plaintiff sued on the charterparty having taken the view that the signed charter constituted the binding contract. Given the Plaintiff's case as put forward and without reference to the further point whether it is likely to succeed or not, it was not unreasonable for Admiral to have excluded the pre-fixture documents because of the parol evidence rule. To that extent, the Plaintiff could not be criticised for making no disclosure of pre-fixture correspondence.

34. The charterparty was indeed the working document for the parties over the 4-year relationship. I also have regard to the passage of time since its formation in 1998 and the conduct of the parties in the context of this charter in the ensuing years. RSSL was set up to own the vessel and Oriental to operate the vessel. Tam is a director of RSSL. Mr. Tam is also a director and shareholder of Oriental and Kingstar. It is not the Plaintiff's case that the corporate arrangement was a sham or faade or that Oriental was RSSL's nominee. But Ms Chew in her submissions said that the Plaintiff throughout the period of charter dealt with Tam. Also over the 4-year relationship, the Defendant's slipshod documentation has created confusion. The situation was further compounded and complicated by the involvement of West of England as explained. It is clear that in the present case there are extenuating circumstances. Against this background and context, there is Peter Rasmussen who particularly deposed in 6 of his affidavit in support of the arrest that Admiral's solicitors (not the American lawyers) had advised that it has a good claim against the Defendant.

35. For these reasons, I do not consider a case has been made out to justify setting aside of the arrest on the ground of non-disclosure of material facts. Accordingly, Counsel for Defendant's submission must fail.

36. I note that the Assistant Registrar in this case, set aside the warrant of arrest but not the in rem writ. Ordinarily, where the very existence of jurisdiction cannot be challenged or survives an attack in that the jurisdiction requirements of the Act are satisfied and the writ not set aside and, there being at the same time no complaint that rules 4(6) and (7) have not been complied with, non-disclosure should seldom be the sole ground for setting aside the warrant of arrest. In such a situation, assuming that the matters in question are material and ought to have been disclosed, the court in exercise of its discretion ought not to set aside the warrant of arrest purely on the basis that the claimant had failed to disclose matters in obtaining the warrant of arrest.

37. I would in passing mention Ms Chew's contention that the affidavit leading the warrant of arrest need only specify the matters set out in Order 70 r 4(6) and (7). Whilst this is often the case with most arrest affidavits, the obligation under Order 70 r 4(6) and (7) is not so narrow. Depending on the circumstances, a mere statement in purported compliance with Order 70 r 4(6) and (7) may not be enough. It is incumbent on the deponent of the affidavit to make sure that he has a basis or reasonable ground for his statement of belief as to the statutory requirements and where necessary to support the statement made in his affidavit. As Clarke J in The "*Tjaskemolen*" [1997] 2 Lloyd's Rep 465 said, and I completely agree with his remark, that how much detail is required in the affidavit will depend upon the facts of a particular case. After all, the aim of the requirements of r 4(6) and r 4(7) is twofold: (i) to enable the court to assess whether, on the facts of the particular case, it has in rem jurisdiction under the Act; and (ii) to enable the defendant or prospective defendant, or other

persons interested in the vessel, to identify the basis upon which and the claim in respect of which the property has been arrested: The "*Tjaskemolen*" at p468. See also The *"Lloyd Pacifico"* [1995] 1 Lloyd's Rep 54 at p55; The *"Courageous Colocotronis"* [1978-1979] SLR 337.

Wrongful Arrest

38. For the same reasons explained earlier in this decision, it could not be said that the arrest of the vessel was so obviously groundless as to amount to mala fides or crassa negligentia implying malice. A weak case for a plaintiff is not gross negligence: The *"Euroexpress"* [1988] SLR 67. Of significance is the fact that Admiral pursued the arrest on the back of positive legal advice. Bokhary JA in The *"Muale"* [1995] 2HKC 769 at 774 observed that whilst he was not prepared to go so far as to say that the fact that the plaintiff proceeded under legal advice is invariable a good answer to a claim for wrongful arrest, he said that such advice is at least a relevant factor to be taken into consideration. The Defendant has thus failed to establish mala fides or crassa negligentia in this case. Accordingly, the decision of the Assistant Registrar on wrongful arrest is reversed.

39. It follows from the setting aside of the in rem writ and warrant of arrest that the security provided by West of England is to be returned to the Defendant for cancellation. The Plaintiff is to pay the Defendant the costs of the appeal fixed at $10,000. I have in fixing the quantum of costs taken into account the outcome of the Plaintiff's appeal.

Sgd:

BELINDA ANG SAW EAN

JUDICIAL COMMISSIONER