

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 153

Admiralty in Personam No 46 of 2017
(Summons No 1472 of 2020)

Between

- (1) Thoresen Shipping Singapore
Private Limited
- (2) Thoresen Thai Agencies Public
Company Limited
- (3) Thoresen & Company
(Bangkok) Limited

... Plaintiffs

And

- (1) Global Symphony SA
- (2) NYK Global Bulk Corporation
- (3) Nippon Yusen Kabushiki
Kaisha (NYK)
- (4) South32 Marketing Pte Ltd
- (5) Hillside Aluminium
Proprietary Limited
- (6) Mozal SA
- (7) All other persons claiming or
entitled to claim loss, damage,
and/or expense arising out of
the collision between the
vessel "GLOBAL
VANGUARD" and the vessel
"THOR ACHIEVER" on or
about 8 March 2017

... Defendants

GROUNDS OF DECISION

[Admiralty and Shipping] — [Limitation of liabilities] — [Tonnage limitation]
— [Letter of undertaking]

TABLE OF CONTENTS

INTRODUCTION.....	1
BACKGROUND	2
THE PRESENT APPLICATION.....	3
DISCUSSION	4
CONCLUSION.....	8

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Thoresen Shipping Singapore Pte Ltd and others
v
Global Symphony SA and others

[2020] SGHC 153

High Court — Admiralty in Personam No 46 of 2017 (Summons No 1472 of 2020)

Pang Khang Chau J

23 June, 13, 16 July 2020

22 July 2020

Pang Khang Chau J:

Introduction

1 The Plaintiffs applied *vide* High Court Summons No 1472 of 2020 (“SUM 1472”) for the return and cancellation of the Protection and Indemnity Club letter of undertaking (“the LOU”) previously deposited in court to constitute the limitation fund in the present limitation action (“the Limitation Fund”). The application was made on the basis that parties have reached settlement and the relevant Defendants have received payment pursuant to the LOU. At the first hearing of this application, I expressed concerns with the sufficiency of the evidence filed in support of the application and also with how a particular prayer was framed. After the Plaintiffs filed further evidence, I granted the application with modifications.

Background

2 After the vessel *Thor Achiever* collided with the vessel *Global Vanguard* on 8 March 2017, the Plaintiffs (who are the owners and operator of the *Thor Achiever*) commenced the present limitation action and, on 25 July 2017, obtained a limitation decree in respect of loss or damage arising from the said collision (“the Limitation Decree”) pursuant to s 136 of the Merchant Shipping Act (Cap 179, 1996 Rev Ed). The Limitation Decree also granted the Plaintiff leave to constitute the Limitation Fund by depositing the LOU in court.

3 The operative paragraphs of the LOU, which was deposited on 15 August 2017, read:

We, The Britannia Steam Ship Insurance Association Limited, pursuant to the Order of Court dated 25 July 2017, do hereby irrevocably undertake to the Court and to each of the Defendants in the above captioned action, to pay forthwith to each of the Defendants in respect of its claim of such sums adjudged and ordered in the Limitation Action by way of distribution of the Limitation Fund constituted by this Letter of Undertaking, against all and any of the above-named Plaintiffs.

Always provided that the total of our liabilities under this Undertaking shall not exceed the aggregate of the Singapore Dollar equivalent of 5,463,125 SDRs at the date of this Letter of Undertaking in the sum of SGD 10,501,983.71 (Ten Million Five Hundred and One Thousand Nine Hundred and Eighty-Three Singapore Dollars and Seventy-One Cents) plus interest thereon at the rate of 5.33 percent per annum from the 8th day of March 2017 up to the date of this Letter of Undertaking, and thereafter interest thereon at the rate of 2% per annum up to the date of each payment hereunder.

This Undertaking shall continue and be in place until further Order of the Court with respect of this Undertaking.

This Undertaking shall be governed by and construed in accordance with Singapore law and we hereby submit irrevocably to the jurisdiction of the Singapore Courts in relation to any matter arising out of or in connection with this Undertaking (including, but not limited to, for the purpose of enforcement of this Undertaking).

Further, we undertake to abide by any order of the Court made in connection with this Undertaking.

- 4 Thus the Limitation Fund constituted by the LOU comprised:
- (a) S\$10,501,983.71;
 - (b) interest on the amount in (a) above at the rate of 5.33% *per annum* from 8 March 2017 to 15 August 2017; and
 - (c) interest on the aggregate of the amounts in (a) and (b) above at the rate of 2% *per annum* from 16 August 2017 (the “post-constitution interest”).

5 The 1st, 4th, 5th and 6th Defendants were the only parties who brought claims against the Limitation Fund within the time limit fixed by the Limitation Decree for the purpose of O 70 r 38(2)(b) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (“ROC”), as subsequently extended by the court (*ie*, by 15 November 2017). These four Defendants (“the said Defendants”) entered into a settlement agreement with the Plaintiffs on 20 January 2020 in respect of all their claims arising out of the collision (“the Settlement Agreement”).

The present application

- 6 The prayers in SUM 1472 sought the following:
- 1. A declaration that the Limitation Fund be deemed exhausted and that no further claims be brought against the Plaintiffs in this action and/or against the Limitation Fund.

2. That The Britannia Steam Ship Insurance Association Limited's Letter of Undertaking dated 15 August 2017 be returned by the Sheriff to the Plaintiffs' solicitors for cancellation.
3. Leave be granted to the Plaintiffs for the Limitation action to be discontinued with no order as to costs.
4. Such further and/or other relief that this Honourable Court shall order.
5. Liberty to apply.

7 It was stated in SUM 1472 that the grounds of the application were set out in the supporting affidavit. However, besides setting out the chronology of events up to the Settlement Agreement, the supporting affidavit only alluded to two other matters. First, that the said Defendants had received payments pursuant to the LOU and the Settlement Agreement in full and final settlement of their claims. Second, that the said Defendants had consented to the application in SUM 1472. The supporting affidavit provided neither information on the amounts paid to the said Defendants pursuant to the LOU nor information on the size of the Limitation Fund (taking into account the post-constitution interest).

Discussion

8 I had three concerns about the application. First, it was not clear why prayer 1 sought a declaration that the Limitation Fund "be deemed exhausted" instead of a simple declaration that the Limitation Fund *is* exhausted. Second, the lack of information in the supporting affidavit concerning the amounts paid to the said Defendants and the size of the Limitation Fund meant that there was no factual basis upon which the court could base any declaration concerning exhaustion of the Limitation Fund (deemed or otherwise). Third, it was not clear that the second part of prayer 1 (which sought a declaration that no further claims be brought) was either necessary or justifiable considering that such

orders are never sought when parties apply for payment out of limitation funds in cases where the limitation funds are constituted by payment into court.

9 In response to the second concern, the Plaintiffs sought and obtained leave to file a supplementary affidavit. The supplementary affidavit disclosed that:

(a) A total of S\$11,260,124.48 was paid to the said Defendants on 30 January 2020.

(b) This sum represented the size of the Limitation Fund on 31 December 2019 – *ie*, the sum included post-constitution interest accruing up to and including that date but not after.

(c) The parties had, in the Settlement Agreement, agreed that for the purposes of apportioning the Limitation Fund between parties, the value of the Limitation Fund would be calculated as at 31 December 2019.

10 The supplementary affidavit gave the following justification for calculating the value of the Limitation Fund as at 31 December 2019 instead of as at the date of payment:

In the situation w[h]ere money was deposited in court to constitute a limitation fund, interest that had been accruing on the money deposited with the Accountant General will cease when instruction is given to the Accountant General to break the deposit in preparation for payment out. In our present case, the Limitation Fund had been constituted by a letter of undertaking and hence no money was paid into court. Therefore, at the time when parties agreed to apportion the Limitation Fund by using the ‘value’ date of the Limitation Fund as at the date of 31 December 2019, this is akin to instructions to break the deposit, had there been such a deposit paid into court to constitute the Limitation Fund.

In my view, the analogy drawn in the foregoing passage is not quite apt. The accrual of post-constitution interest in a case where the limitation fund is constituted by payment into court depends on the arrangements between the Accountant-General and the bank or finance company at which the limitation fund had been deposited pursuant to O 90 r 12(4) of the ROC. By contrast, the accrual of post-constitution interest in a case where the limitation fund is constituted by the production of a letter of undertaking depends on the terms of that letter of undertaking, read with the relevant limitation decree.

11 In the present case, the LOU (and the Limitation Decree) provided that post-constitution interest would continue to accrue until payment is made (see [3] above). Thus, notwithstanding parties' agreement for payment to be made based on the value of the Limitation Fund as at 31 December 2019, post-constitution interest continued to accrue in accordance with the terms of the LOU and the Limitation Decree until the date of payment (30 January 2020). Therefore, when a sum equivalent to the value of the Limitation Fund as at 31 December 2019 was paid out on 30 January 2020, there remained in the Limitation Fund an amount equivalent to roughly one month's worth of post-constitution interest (about S\$17,000). In other words, when payment was made to the said Defendants on 30 January 2020, the Limitation Fund was not exhausted and has not since been exhausted.

12 Had the parties taken a different approach, and agreed to a specific future payment date while factoring in the post-constitution interest accruing till that future payment date to arrive at the sum to be paid out, it would have been open to the court to declare the Limitation Fund exhausted by such payment. This is because the limit of liability under the LOU, which represents the value of the Limitation Fund, is specified in the second operative paragraph of the LOU (see [3] above). Once payment pursuant to the LOU is made up to the said limit,

there would be no further liability under the LOU. In that event, the LOU would be spent and the Limitation Fund would be exhausted.

13 Having concluded that the Limitation Fund was not exhausted, I next considered whether I should still grant the order sought in prayer 2 and return the LOU for cancellation. The time limit for bringing claims against the Limitation Fund had expired more than two and a half years ago and no claimants had emerged in the meantime to seek an extension of time to claim against the Limitation Fund. Therefore, the said Defendants may be considered the only parties (besides the Plaintiffs) with an interest in the Limitation Fund. By agreeing in the Settlement Agreement to accept payment based on the value of the Limitation Fund as at 31 December 2019, the said Defendants had forgone their claim to the post-constitution interest accruing between 31 December 2019 and 30 January 2020. I therefore did not consider that any party would suffer injustice or prejudice if the LOU were returned for cancellation.

14 Returning to my first concern (see [8] above), having decided that I could not declare the Limitation Fund exhausted, I also did not think a declaration that the Limitation Fund “be deemed exhausted” was appropriate. A simple declaration that the Limitation Fund *is* exhausted amounts to a concrete finding that the limit of liability under the LOU had been reached and no further liability exists under the LOU. A declaration that the Limitation Fund “be deemed exhausted” does not appear to be a concrete finding of any sort, and is of uncertain legal and practical effect. I therefore declined to make such a declaration.

15 However, as the LOU provides that it “shall continue and be in place until further Order of the Court”, and as a function of the court’s authority over the Limitation Fund, it would be open to the court, by order, to discharge the

LOU. For the reasons discussed at [13] above, I was prepared, for good measure, to make such an order in addition to ordering the return of the LOU for cancellation.

16 As for my third concern (see [8] above), Plaintiffs' counsel responded that she would stand guided by the court and did not attempt to persuade me on why the court should make a declaration that no further claims be brought. In the circumstances, I declined to make such a declaration.

Conclusion

17 For the reasons given above, I ordered that the LOU be discharged and also granted order in terms for prayers 2, 3 and 5 (see [6] above).

Pang Khang Chau
Judge

Tan Hui Tsing (Gurbani & Co LLC) for the first to third plaintiffs;
Aw Hon Wei Adrian and Loke Jia Min Rachel (Resource Law LLC)
for the first defendant;
The second and third defendants absent and unrepresented;
Toh Kian Sing SC and Dedi Affandi bin Ahmad (Rajah & Tann
Singapore LLP) for the fourth to sixth defendants.
