FOURTH SUPPLEMENT TO THE
GIBRALTAR GAZETTE L.R. 2/78

No. 1,771 of 5th OCTOBER, 1978.

LAW REPORTS

Note: These Reports are cited thus —
(1978) Gib. L.R.

THE DANIAN GAS: J. & F. Restano v. Owners of M.G.T. Danian Gas

Supreme Court
Spry, C. J.
16 February 1978

Admiralty — jurisdiction in rem — whether right of action in personam must be established to found jurisdiction — Administration of Justice Act, 1956, s.3(4)

Shipping — bareboat charter — necessaries supplied during charter — charter determined before issue of writ — whether action against owners should be struck out in limine.

The plaintiffs, who had supplied necessaries to the Danian Gas when she was under demise charter, took out a writ in rem against the owners and arrested the ship. The owners, who had determined the charter before the issue of the writ, applied to have the writ set aside, claiming that the charterers were the only persons who would be liable in an action in personam and consequently that there was no jurisdiction in rem.

HELD: (i) To found jurisdiction in rem, it is only necessary to show an arguable case in personam against the owners.

(ii) There was prima facie evidence suggesting a contractual relationship between the plaintiffs and the owners and therefore the court had jurisdiction in rem.

Cases referred to in the judgment:

The Penguin: *Trouvé* v. *Owners of the M.T. Penguin* No. 11 of 1966.
The St Elefterio [1957] P.179
The I Congresso [1977] 1 Lloyd's Rep. 536.
The St Merriel [1963] P.247

Motion

This was a motion to set aside the writ in an action in rem for lack of jurisdiction.

J. E. Triay for the owners
P. J. Isola for the plaintiffs
9 March 1978: The following order was read—

This is a motion under RSC Ord. 12, r. 8, to set aside the writ in an action in rem against the owners of the motor Gas Tanker Danian Gas for lack of jurisdiction. Jurisdiction as regards actions in rem is derived from the Administration of Justice Act, 1956, which was applied to Gibraltar by S.I. 1961 No. 2031. S. 3(4) of the Act, so far as it is relevant, provides that in the case of certain classes of claim, which include claims in respect of goods or materials supplied to a ship for her operation or maintenance

> "where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of ... the ship, the Admiralty jurisdiction of the High Court ... may be invoked in an action in rem against —
>
> (a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person..."

The court is being moved by Reliance Gas Transport Corporation, a company incorporated in Liberia, to which I shall refer as Reliance. The case, as presented by Mr J. E. Triay, is essentially a very simple one.

He claims—

(a) that Reliance is the owner of the Danian Gas;
(b) that by a bareboat or demise charter dated 28 March 1977, the Danian Gas, then known as the Amy Multina and later as the Reliance Gas, was chartered to Multinational Gas and Petrochemical Company, also a company incorporated in Liberia, to which I shall refer as Multinational, for six years;

(c) that the charter was determined by Reliance on or about 30 September 1977;
(d) that the writ was issued on 29 December 1977;
(e) that the writ claims the price of goods supplied to the Reliance Gas between 27 April and 21 August 1977, that is, during the charter.

On these facts, Mr Triay submits that for the purpose of s. 3(4) the person who would be liable in personam on the claim is Multinational, while at the date when the action was brought the owner of the Danian Gas was Reliance: therefore, there is no jurisdiction in rem.

Mr Triay placed considerable reliance on the case of *The Penguin*: *Trouvé v. Owners of the M·T. Penguin* (1), and claimed that the two cases are on all fours. That was also a case of a bareboat charter on terms which, for present purposes, are substantially similar to those on which the Amy Multina was chartered. The owners of *The Penguin* were held not liable to creditors for goods supplied to the ship during the charter. There is, however, one important difference. The case of *The Penguin* was decided after the action had been heard: here, the court is concerned with an application to set aside the writ in limine.

There is, if my understanding is correct, no dispute as to the beneficial ownership of the Danian Gas at the date when the action was brought, although nothing has formally been conceded. Again, it does not appear to be disputed that the charter was effectively determined. The question is, whether Reliance would be liable on the claim in an action in personam. Mr Triay's answer is that the goods were bought by the master of the Reliance Gas as agent for the charterers, Multinational, and neither Multinational nor the master, who was engaged by Multinational, had any authority under the charter party or otherwise to pledge the credit of Reliance.

Mr Peter Isola, for the plaintiffs, claimed that the application was misconceived; that it was in effect an attempt to try the action on affidavit evidence, when there were substantial issues that could only properly be decided in the action itself, after discovery and on viva voce evidence.

(1) No. 11 of 1966.

Before dealing with his submissions in detail, it will, I think, be convenient to consider two English decisions cited to me by counsel: *The St Elefterio* (1) and *The I Congreso* (2). *The St Elefterio*, like the present proceedings, was an application to set aside. The argument there put forward was that if it could be shown that there was a good defence in law to an action in personam and that the owners of the ship could not be liable, there was no jurisdiction in rem. That argument was rejected by Willmer J., whose view was that the possible outcome of an action in personam should not be anticipated, unless it could be said that the action was frivolous or vexatious.

The I Congreso dealt with a different question. It concerned the ownership of a vessel at the time when action was begun. Robert Goff J., drew a clear distinction between the two halves of s. 3(4) and particularly between the use of of the words "would be liable" in relation to the notional action in personam and the word "is" in relation to the ownership of the vessel at the commencement of the actual action in rem. From this he concluded that the question of ownership of the res, if in issue, had to be decided on a motion to set aside. That does not concern this court now, as it has not been suggested that Multinational was, on any interpretation of the law, the owner of the Danian Gas when the action was begun.

The decision in *The St Elefterio* was quoted at length in *The St Merriel* (3). At first sight, the judgment in the latter case might seem to depart from that in the former, since Hewson, J., made a specific finding on affidavit evidence that there had been no contract, express or implied, between the owners and the plaintiffs, who had carried out repairs to the ship. The case appears to have been argued on the question whether a possessory lien gave jurisdiction in rem under s. 3(3), but s. 3(4) was also considered by the learned judge. That case can be distinguished from the present in that there is here an issue whether Reliance, through the agency of the master, was a contracting party, while in *The St Merriel* there was no allegation of a contractual relationship between the parties.

The law as I understand it is that to found jurisdiction in rem under s. 3(4), it is necessary to prove ownership of the ship at the time when the action is brought but only necessary to show that there is an arguable case on the notional action in personam.

(1) [1957] P. 179. (2) [1977] 1 Lloyd's Rep. 536.
(3) [1963] P. 247.

I turn then to Mr Isola's arguments on the basis that he has only to show that if the claim had been brought in an action in personam against Reliance, it would not have been struck out as frivolous or vexatious.

Mr Isola's submission falls into two parts. The first concerns what I may call the general circumstances. The Danian Gas, then known as the Amy Multina, belonged to Multinational. She was sold to Reliance on 28 March 1977 and immediately chartered back to Multinational. Following the sale, the Amy Multina was renamed the Reliance Gas. On 29 September 1977, Multinational ceased trading on account of insolvency and thereupon Reliance determined the charter. Thereafter, Reliance again changed the name of the tanker, this time to Danian Gas. Mr Isola argued that these circumstances give rise to suspicion; that there is no evidence of the financial arrangements made at the time of the sale of the Amy Multina, a time when, in the light of subsequent developments, Multinational must have been hopelessly insolvent. I think that is perhaps overstating the case a little. According to evidence produced by the plaintiffs, the major difficulty facing Multinational, apart from a deteriorating trading position, lay in contingent claims for very large amounts in respect of building contracts and the cancellation of charters. We do not know when the company actually became insolvent. In any case, I cannot accept Mr Isola's argument. In recent years, when many large and apparently stable companies have experienced liquidity problems, transactions of sale and leaseback have become commonplace. The sale of the Amy Multina may well have been part of an honest attempt to salvage Multinational and there is no reason, on the evidence now before the court, to suspect any fraudulent intent on the part of Multinational, and still less to attribute to Reliance knowledge of any such intent or, indeed, of the insolvency of Multinational, if the company was then insolvent. These suspicions are not enough to found a cause of action.

Mr Isola's second proposition concerns the invoices issued by the plaintiffs and accepted by the master of the Reliance Gas. They are made out to the master and owners of the Reliance Gas: that, in itself, I regard as of no significance. But three of the invoices bear two rubber stamps: the first states that the invoice was for payment by Fratelli Cosulich S.P.A. and be-

low this is the signature of the master. The second shows the name M/V Reliance Gas surrounded by the words Reliance Gas Transp. Corp. Monrovia Liberia. Mr Triay said that he did not know how this stamp came to be on the invoices and argued that it was clearly in breach of the charterparty and may have been fraudulent. Mr Isola, on the other hand, suggested that Reliance might have authorized the use of the stamp as a way of helping Multinational to obtain credit.

It is idle to speculate how the second stamp came to be used. It would appear likely that it was cut after the execution of the charterparty, since the tanker was still called the Amy Multina at that date. It may have been procured with a fraudulent intent, but courts are always reluctant to infer fraud I do not overlook the fact that the master was engaged by Multinational, not by Reliance, but I do not think the possibility can be excluded, unlikely as it may seem, that Reliance, concerned for the safety of its ship, gave authority for the master to use the stamp in certain emergencies. If that were so, there might be a triable issue whether or not Reliance had held out the master to be its agent.

Mr Triay pointed out that there is evidence that Fratelli Cosulich is the agent of Multinational. There is, however, no evidence that it is not also the agent of Reliance, nor is there any evidence that the plaintiffs had any knowledge of the principal for whom Fratelli Cosulich was acting.

Mr Triay also drew attention to the fact that the master signed, on 16 May 1977, by way of acknowledgment, a letter sending him copies of a first preferred mortgage and of the charterparty and requesting him to post notices of them in the master's cabin and the chart room. Mr Triay argued from this that even if the master was unaware of the true position at the date of the first invoice, he must have known it before the other invoices were signed. This seems to me irrelevant at this stage, because if the plaintiffs have a right of action in respect even of one invoice the present application must fail.

On the face of the invoices, there is prima facie evidence suggesting a contractual relationship between the plaintiffs and Reliance. This is not the appropriate time to consider whether such a relationship did or did not exist in fact or in law. In the circumstances, I am not prepared to say that the claim is frivo-

lous or vexatious and I hold that the court has jurisdiction in rem.

I would add that I think a court should hesitate before allowing an application such as this. As Willmer J., pointed out in *The St Elefterio*, before the plaintiffs could appeal, their security would have disappeared. They would then, for a relatively small sum, have to incur the considerable expense of instituting fresh proceedings in some other country.

The application is dismissed.