[1980–87 Gib LR 208]

NEW TERMINAL STEVEDORING INCORPORATED v. OWNERS OF THE VESSEL"MULHEIM"

SUPREME COURT (Alcantara, A.J.): May 21st, 1984

Shipping—arrest of ship—initial burden of proof—in action in rem plaintiff to show that defendant would be person liable if action in personam but no initial burden on plaintiff to show valid claim in rem

Shipping—arrest of ship—necessaries—claim in respect of necessaries creates no "maritime lien or other charge" (within Supreme Court Act 1981, s.21(3)) giving rise to action in rem against vessel

The charterer of a vessel (*Mulheim*), as the intervenor in an action, sought to set aside a writ *in rem* and warrant of arrest against it.

The *Mulheim* was arrested by the plaintiff in support of a claim against the defendants in respect of stevedoring cargo. The charterers of the vessel made an application for leave to intervene, which was granted and a motion was brought on their behalf seeking an order that the plaintiff's writ *in rem* be struck out and the *Mulheim* be released from arrest.

The plaintiff submitted that (a) it had a valid claim *in rem* under the Supreme Court Act 1981, s.21(3) as its claim in respect of stevedoring cargo constituted a "maritime lien or other charge"; and (b) its claim could also fall within the category of claims *in rem* in s.21(4) of the 1981 Act, as it fell within s.20(2)(m) and had been made against the person who would be liable on the claim in an action *in personam* ("the relevant person").

The intervening charterer submitted that the writ *in rem* should be struck out as (a) the plaintiff's claim failed to disclose an action *in rem* under s.21(3) of the Supreme Court Act, 1981, it could not be a "maritime lien or other charge" as a maritime lien did not exist in respect of necessaries, and "other charge" was not wide enough to encompass the claim; (b) the plaintiff's claim also failed to disclose an action *in rem* under s.21(4) of the Act as, although it fell within s.20(2)(m) and had been made against the person who would be liable on the claim in an action *in personam* ("the relevant person"), the vessel had not been under a demise charter, and therefore the claim did not fulfil the requirements of s.21(4); (c) the plaintiff's affidavit in support of the warrant for arrest of the vessel had been defective in failing to comply with O.75, r.5(4) of the Supreme Court Rules and consequently the arrest of the *Mulheim* had been invalid; and (d) had the affidavit complied with O.75, r.5(4), the plaintiff would have realized that they could not have sued *in rem*.

Held, dismissing the motion:

(1) Although it was unclear whether the plaintiff had a valid claim *in rem*, the writ would not be struck out and the *Mulheim* would not be released from arrest. The validity of the claim was contentious as a claim for necessaries was not a "maritime lien or other charge" within the meaning of s.21(3) of the Supreme Court Act 1981 (c.54). A maritime lien did not exist in respect of a claim for necessaries and "other charge" was not wide enough to encompass the claim. There was, however, no initial burden on the plaintiff to prove the validity of its claim. At this stage, it was only necessary for it to show that the persons who were to be proceeded against were persons who would have been liable if the claim had been *in personam* (para. 6; para. 13).

(2) The warrant of arrest of the *Mulheim* was valid, notwithstanding that the affidavit, filed by the plaintiff in support of the warrant, should not have been accepted as it failed to comply with O.75, r.5(4) of the Rules of the Supreme Court. In future, however, no warrant of arrest would issue unless the affidavit in support of it complied with the specimen affidavit set out in *The Supreme Court Practice* (para. 16).

Cases cited:

(1) *C. & C.J. Northcote* v. *The Heinrich Björn (Owners), The Heinrich Björn* (1886), 11 App. Cas. 270, considered.

(2) *Schwarz & Co. (Grain) Ltd.* v. *St. Elefterio, Ex Arion (Owners)*, *The St. Elefterio*, [1957] P. 179; [1957] 2 W.L.R. 935; [1957] 2 All E.R. 374, followed.

(3) *Smith's Dock Co. Ltd.* v. *The St. Merriel (Owners)*, [1963] P. 247; [1963] 2 W.L.R. 488; [1963] 1 All E.R. 537, considered.

Legislation construed:

Rules of the Supreme Court, O.75, r.5(4): The relevant terms of this paragraph are set out at para. 14.

Supreme Court Act 1981 (c.54), s.20(2)(m): "[A]ny claim in respect of goods or materials supplied to a ship for her operation or maintenance."

s.21(3): The relevant terms of this sub-section are set out at para. 5.

s.21(4): The relevant terms of this sub-section are set out at para. 6.

L. Attias for the plaintiff;
P.R. Caruana for the intervenor.

1 **ALCANTARA, A.J.:** This is a motion on behalf of the intervenor in the above action for an order that the plaintiff's writ *in rem* be struck out and the *res* be released from arrest.

2 The matter arises in this manner. The *Mulheim* was arrested by the plaintiff on May 10th, 1984 in support of their claim for US$213,310.35 in respect of stevedoring cargo. On May 17th, 1984, Hapag-Lloyd AG, as the charterers of the vessel, made an urgent application before me for

leave to intervene. On that same day leave was granted and, on being informed that the solicitors for the plaintiff were willing to accept short notice of motion, I set down the hearing of the present motion for the following day. The motion was heard but I adjourned for decision.

3 The case for the intervenor, according to its notice of motion, is that the plaintiff's claim does not disclose an action *in rem* against the *res*, within the meaning of s.21(3) of the Supreme Court Act 1981, as applied to Gibraltar.

4 Counsel for the intervenor is prepared to concede that the plaintiff may have a valid claim against the vessel under s.20 of the Act, but only as an action *in personam*, not as an action *in rem*. Counsel accepts that a claim for stevedoring is a claim for necessaries and therefore within the jurisdiction of the Admiralty Court. This concession is very helpful; it not only shortens the arguments, but releases me from making a finding.

5 Although in the notice of motion only s.21(3) of the Supreme Court Act 1981 is referred to, counsel mainly relies on s.21(4). I can do no better than to reproduce both sub-sections in full. Section 21 deals with the mode of exercise of Admiralty jurisdiction.

> "(3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in rem may be brought in the High Court against that ship, aircraft or property."

6 Counsel for the plaintiff has sought to argue that the present claim for necessaries could either be a "maritime lien or other charge." The authorities are against him on this point. Counsel for the intervenor has brought to my attention *C. & C.J. Northcote* v. *The Heinrich Björn (Owners)* (1) for the proposition that a maritime lien does not exist in respect of necessaries, and *Smith's Dock Co. Ltd.* v. *The St. Merriel (Owners)* (3) for the proposition that "other charge" is not wide enough to cover a claim for necessaries. In that case it was not a claim for necessaries which gave rise to a statutory lien, but a claim for work done to the vessel, which gave rise to a possessory lien.

> "(4) In the case of any such claim as is mentioned in section 20(2)(e) to (r), where—
>
> (a) the claim arises in connection with a ship; and
>
> (b) the person who would be liable on the claim in an action in personam ('the relevant person') was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,
>
> an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against—

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charterer by demise . . ."

7 It is conceded by the intervenor that the claim for necessaries falls under s.20(2)(e)–(r). In fact it is para. (m) of s.20(2). It is also conceded that the necessaries were supplied to the relevant person, he being the charterer of the vessel. What is denied is that he was a charterer by demise. That being so, the plaintiff was not entitled to issue a writ *in rem* or arrest the vessel. The point in issue is the relevant person.

8 In support of their motion, the intervenor has filed an affidavit sworn by counsel in this case, which states that the *Mulheim* is owned by J.P. Morgan Interfunding Corp. It goes on to depose that Hapag-Lloyd AG are the bareboat charterers of the *Mulheim*. There is nothing in the affidavit to show how they became bareboat charterers. Then there is a statement that Hapag-Lloyd AG, by deed of charterparty dated March 22nd, 1984, time-chartered the *Mulheim* to Saudi U.S. Lines. A copy of the charterparty has been produced. It is not clear who signed the charterparty, or the addresses of either party. What may or may not have any significance is that the agent of the intervenor describes himself as time-chartered owner of the *Mulheim*, whereas I would expect him to describe himself as the agent for the bareboat charted owners. In any case, there is a denial of liability by J.P. Interfunding Corp. and by Hapag-Lloyd AG, and an allegation that this debt was incurred by Saudi U.S. Lines.

9 In reply there is an affidavit from the solicitor of the plaintiff exhibiting an affidavit of a Mr. J.W. McPherson, to the effect that his company is owed the amount claimed by the *Mulheim*, and that the invoices were sent not only to the vessel but to the agents, Messrs. Marine Management for account of Saudi U.S. Lines.

10 Before dealing with the facts, I shall deal with the law relating to the striking out of a writ *in rem*.

11 There is a particular case which is very relevant to the proceedings before me. It must have escaped the notice of counsel because it has not been cited. That is the case of *Schwarz & Co. (Grain) Ltd.* v. *St Elefterio*, *Ex Arion (Owners)*, *The St. Elefterio* (2), where Willmer, J. considered the Administration of Justice Act 1956, s.3(4), the predecessor of the present s.21(4) of the Supreme Court Act 1981. The provisions in both Acts are similar, except that the Act of 1981 is even wider. In *The St. Elefterio*, the plaintiffs had arrested the vessel and the defendants moved to set aside the writ and warrant of arrest, contending that the court had no jurisdiction *in rem* to entertain the action. Willmer, J. dealt with matters thus ([1957] P. at 183–184):

"It is argued that, on the true construction of that subsection, before the plaintiffs can proceed in rem . . . they must show that the defendants, the owners of the ship proceeded against, are persons who would be liable on the claim in an action in personam . . .

As I understand his argument, Mr. Roskill shrank from asserting that a defendant who claimed to have a good defence on the facts would be entitled to have the writ and arrest set aside, but he did claim that, if he could show a good defence in law, then, on the true construction of the section, there would be no jurisdiction to arrest the ship, and the action would therefore be halted *in limine*."

12 Further on, Willmer, J. continued (*ibid.*, at 185–186):

"The defendants' argument is founded on the proposition that section 3(4) of the Act of 1956 introduces new restriction on the right to proceed in rem, and that a plaintiff cannot arrest a ship under that sub-section unless he can prove—and prove at the outset—that he has a cause of action sustainable in law. In my judgment that proposition rests on a misconception of the purpose and meaning of section 3(4) . . . In my judgment the purpose of the words relied by Mr. Roskill, that is to say, the words 'the person who would be liable on the claim in an action in personam,' is to identify the person or persons whose ship or ships may be arrested in relation to this new right (if I may so express it) of arresting a sister ship. The words used, it will be observed, are 'the person who would be liable' not 'the person who is liable,' and it seems to me, bearing in mind the purpose of the Act, that the natural construction of those quite simple words is that they mean the person who would be liable on the assumption that the action succeeds. This action might or might not succeed if it were brought in personam; that would depend on the view which the court ultimately took of the various contentions raised by Mr. Roskill. But clearly, if the action did succeed, the person or persons who would be liable would be the owner or owners of the steamship *St. Elefterio*. In such circumstances, in the absence of any suggestion that the action is frivolous or vexatious, I am satisfied that the plaintiffs are entitled to bring it and to have it tried, and that, whether or not their claim turns out to be a good one, they are entitled to assert that claim by proceeding in rem."

13 On the strength of this authority it is unnecessary for me to make any findings of facts on the affidavits produced for the purpose of this motion. I am glad because I would have been in some difficulty in finding what type of charterers either Hapag-Lloyd AG or Saudi U.S. Lines are. I do not only agree with the judgment of Willmer, J., but I intend to follow him. I am not prepared to strike out this writ *in limine*. It will be up to the plaintiff not only to prove the amount it alleges is owing to it, but to satisfy

the court at the trial that it is entitled to sue *in rem*. However, there is in my view no initial burden on the plaintiff to prove that it is entitled to issue a writ *in rem*.

14 There is another point which is not before me on the terms of the present motion, but it has been raised by counsel for the intervenor. Counsel argues that the affidavit of the plaintiff in support of the warrant for arrest of the vessel is defective, and that consequently there has not been a valid arrest. I have looked at the affidavit, and I have no doubt that it is defective and not in conformity with O.75, r.5(4) of the Rules of the Supreme Court which reads:

> "A warrant of arrest shall not be issued until the party applying for it has filed a praecipe requesting issue of the warrant . . . together with an affidavit made by him or his agent containing the particulars required by paragraphs (7), (8), (9) and (11) so, however, that the Court may, if it thinks fit, allow the warrant to issue notwithstanding that the affidavit does not contain all those particulars."

15 The affidavit filed in the present action should never have been accepted. No doubt it follows local precedents, and similar affidavits have been sworn to and accepted in the past. In 1 *The Supreme Court Practice 1982*, para. 75/5/5, at 1220, the form of the affidavit that should be used is set out. In future, no warrant of arrest should issue unless the proper facts are deposed to in the terms of the specimen affidavit set out in 1 *The Supreme Court Practice 1982*.

16 Counsel for the intervenor has further argued that if the plaintiff had had to depose in the terms required by O.75, r.5(4) it would have realized that it could not have sued *in rem*. I do not agree with that proposition. The most it would have realized would have been the burden of proof it was undertaking at trial. I am satisfied that notwithstanding the defective affidavit, the warrant of arrest was not invalid. Whether the arrest was wrongful is another matter which is not for me to decide at this stage or in this manner.

17 It is not for me to defend the registry for having issued a warrant of arrest on a defective affidavit. However, as an explanation, though not necessarily an excuse, I would like to say that the registry is entitled to assume that documents brought in by qualified persons are in order and in accordance with the rules, unless the contrary appears or is proved. Further, it has been my experience that a sense of extreme urgency is given to all Admiralty matters by practitioners and the registry becomes imbued by this sense of haste. Nearly all matters in Admiralty are either extremely urgent or urgent. For example, in this case the application to intervene was urgent if the intention was to arrange for the release of the vessel. I have my reservations whether the hearing of the motion to strike out on short notice was a matter of extreme urgency. I will say no more

than that urgent matters should be promptly and expeditiously dealt with but never in a rush and hurry. Promptness is not synonymous with immediacy but with due celerity.

18 Willmer, J. in *The St. Elefterio* has a passage in relation to the motion to strike out that I would like to quote (*ibid.*, at 186):

> "It is an odd circumstance, but it almost seems as if there must be some malignant fate which ordains that questions of this character always manage to arise on the last day of term."

19 Dealing with urgent applications generally without reference to the present action and not confined to Admiralty, I would with poetic licence put it this way: it is an odd circumstance, but it almost seems as if there must be some malignant fate which ordains that matters of urgency always manage to arise in the late afternoon of the last day of the week, rarely on the early forenoon at the start of the week.

20 In my judgment, therefore, this motion is misconceived and I find myself unable to accede to it.

21 Motion refused with costs.

Order accordingly.
