IMPACT MARINE II INCORPORATED v. OWNERS OF THE SHIP "SAPFIR"

SUPREME COURT (Pizzarello, A.J.): April 11th, 1997

Civil Procedure—stay of proceedings—parallel foreign proceedings—admiralty proceedings—court generally to stay Gibraltar proceedings in which ship arrested if parties agreed that foreign court has exclusive jurisdiction, unless plaintiff shows strong cause for trial in Gibraltar—factors to be considered

The applicants sought to set aside the arrest of a ship.

The respondent claimed the return of an advance payment it had made to a Ukrainian organization, "SATCO," under a failed towage contract, which provided, *inter alia*, that any dispute arising out of the agreement was subject to the jurisdiction of the High Court in England, and that no suit could be brought in any other jurisdiction, except for "proceedings *in rem* to obtain conservative seizure or other similar remedy against any vessel or property owned by the other party in any state or jurisdiction where such vessel or property may be found." Repayment was never made and the respondent instituted proceedings *in rem* requiring the arrest of a ship in Gibraltar, where it was then situated, under O.75, r.5 of the Rules of the Supreme Court, its affidavit in support of the arrest warrant stating, *inter alia*, its belief that at the time the cause of action arose, SATCO was the owner of the ship, as evidenced by the agreement.

However, expert evidence showed that the ship was in fact owned by the State of Ukraine and that its day-to-day running was the responsibility of SATCO under a charter by demise. An application by the State of Ukraine for the arrest to be set aside on the ground that it was the true owner of the ship was dismissed by the Supreme Court (Pizzarello, A.J.). The Court of Appeal (Fieldsend, P., Davis and Neill, JJ.A.) upheld the Supreme Court's decision (in proceedings reported at 1997–98 Gib LR 99).

The State of Ukraine and SATCO, the present applicants, then applied for the arrest to be set aside, submitting, *inter alia*, that (a) the court had no jurisdiction to hear any substantive proceedings in the matter by virtue of the "exclusive jurisdiction" agreement between the parties and it should therefore exercise its discretion by staying the Gibraltar proceedings, which it should normally do unless the respondent had satisfied the burden of showing that the agreement should not be adhered to, which it had not done here; (b) there was no evidence that they would fail to satisfy any judgment against them in England; rather, it was clear that the respondent was improperly attempting to obtain a procedural advantage, namely, that it had arrested the ship as security for the

payment of any damages awarded to it when, had the case been heard in England, no such security would be available (the Civil Jurisdiction and Judgments Ordinance 1993 not having come into force); (c) it was insufficient for the respondent to claim, in the face of the agreement, that it might be as convenient to try the action in Gibraltar as in England; and (d) in any case, because the Court of Appeal had found SATCO not to be the legal owner, the arrest provision in the agreement did not allow the respondent to arrest the ship, which was in fact owned by the State of Ukraine, which was not party to the agreement.

The respondent submitted in reply, *inter alia*, that (a) although the first part of the "exclusive jurisdiction" agreement gave jurisdiction to the English court, it went on to empower the parties to take steps to detain a vessel belonging to the other for protective purposes, irrespective of jurisdiction; (b) the applicants were improperly seeking a procedural advantage by attempting to deprive it of the security of the ship, and had demonstrated this by their conduct of the proceedings, in particular, by failing to provide alternative security; (c) because substantial proceedings had already taken place in Gibraltar, the balance of convenience lay in favour of trial here: the relevant law was the same as in England and the evidence was equally easily obtainable here; furthermore, the costs of the proceedings so far were chargeable against the *res* and it would be unfair to allow its release without alternative security; and (d) the applicants were in any case estopped from arguing that SATCO was not the true owner of the ship, since it had described itself as such in the agreement and was effectively the owner for the present purposes.

Held, allowing the application:

The present proceedings would be stayed and the arrest set aside, since the purpose of the power of arrest was to provide security for the action *in rem* and not for any other proceedings. Furthermore, the court had a discretion whether or not to grant a stay of proceedings brought in breach of the exclusive jurisdiction agreement, which it ought to exercise by granting a stay unless the respondent had shown strong cause for not doing so, in all the circumstances of the case, which it had not. The following matters were also relevant to the court's exercise of its discretion: (a) in what country the evidence was more readily available, and the relevance of that to the balance of convenience; (b) whether the law of the foreign court differed materially from Gibraltar law; (c) with which country the parties were most closely connected; (d) whether the applicants genuinely wanted the trial abroad or were seeking a procedural advantage; and (e) whether the respondent would be prejudiced by trial there by virtue of being deprived of security, being unable to enforce judgment, by a time-bar not applicable in Gibraltar, or if for any political, racial, religious or other reason it would be unlikely to receive a fair trial. For these purposes it was irrelevant that the applicants had failed to provide security. The ship would therefore be released, subject to the payment of costs (page 116, line 14 – page 118, line 33).

Cases cited:

(1) *Andria, The*, [1984] Q.B. 477; [1984] 1 All E.R. 1126, followed.
(2) *Aratra Potato Co. Ltd.* v. *Egyptian Nav. Co., The Al Amria*, [1981] 2 Lloyd's Rep. 119; *sub nom. The Al Amria (No. 1)*, [1981] Com. L.R. 136.
(3) *Blueyed Lady, The, Blueyed Nav. Inc.* v. *Blueyed Lady (Owners)*, Supreme Ct., August 25th, 1994, unreported, applied.
(4) *Eleftheria (Cargo Owners)* v. *Eleftheria (Owners), The Eleftheria*, [1970] P. 94; [1969] 2 All E.R. 641, followed.
(5) *K.H. Enterprise (Cargo Owners)* v. *Pioneer Container (Owners), The Pioneer Container*, [1994] 2 A.C. 324; [1994] 2 All E.R. 250, considered.
(6) *Rena K, The*, [1979] Q.B. 377; [1979] 1 All E.R. 397.
(7) *Ultisol Transp. Contractors Ltd.* v. *Bouygues Offshore S.A.*, [1996] 2 Lloyd's Rep. 140.

L.W.G.J. Culatto for the defendant-applicants;
A.V. Stagnetto, Q.C. for the plaintiff-respondent.

PIZZARELLO, A.J.: The vessel *Sapfir* was arrested by the plaintiff in the belief that the vessel was owned by SATCO and in previous proceedings, the State of Ukraine entered a limited appearance to argue that the vessel could not be arrested as she belonged to the State and not to SATCO. In the event, I held that the vessel was beneficially owned by the State of Ukraine but that SATCO held the vessel under a charter by demise, and that the arrest was valid.

Mr. Culatto, for SATCO, which has at the moment entered a limited appearance, seeks to have these proceedings set aside. His application reads:

> "*Take notice* that this honourable court will be moved on Wednesday, March 26th, 1997 at 9.30 a.m. or so soon thereafter as counsel can be heard, by counsel on behalf of SATCO, for an order pursuant to O.12, r.8 of the Rules of the Supreme Court that the writ of summons and all subsequent proceedings herein be set aside and that the warrant of arrest of the ship *Sapfir* be set aside and that the ship *Sapfir* be released from arrest on the grounds that the court herein has no jurisdiction in this matter or for such other relief as may appear to the court to be appropriate on the ground that this court has no jurisdiction in respect of the subject-matter of the claim because a clause in the towage agreement confers exclusive jurisdiction on the High Court of England and Wales and that the costs of and incidental to this motion be paid by the plaintiffs to the applicants to be taxed if not agreed and for an order that any sums remaining deposited with the Admiralty Marshal after payment of the costs of arrest be paid out to the defendant's solicitors on account of such costs."

This action arises under a towage agreement and Mr. Culatto submits that the action *in personam* should be tried in the High Court of England, which has the jurisdiction pursuant to the towage agreement and in particular cl. 25, which reads:

> "This Agreement shall be construed in accordance with and governed by English law. Any dispute or difference which may arise out of or in connection with this agreement or the services to be performed hereunder shall be referred to the High Court of Justice in London.
>
> No suit shall be brought in any other state or jurisdiction except that either party shall have the option to bring proceedings *in rem* to obtain conservative seizure or other similar remedy against any vessel or property owned by the other party in any state or jurisdiction where such vessel or property may be found."

Mr. Culatto concedes that this court has a discretion to allow the proceedings to continue in Gibraltar but having regard to the fact that the parties have agreed a jurisdiction, they should be held to their agreement. If the court agrees with this, then there should be a stay and the merits of the case should be decided in England. In that case, maintaining the arrest of the ship would be making it a security for a foreign judgment and not security for the action *in rem* in Gibraltar. Only the principle of *The Rena K* (6) can help the plaintiff; namely, that the English judgment would not be satisfied.

Turning to the circumstances which the court considers when its discretion is entertained, these are concisely set out in the judgment of Brandon, J. in *Eleftheria (Cargo Owners)* v. *Eleftheria (Owners), The Eleftheria* (4) and are also set out in Rule 31 of Dicey & Morris, 1 *The Conflict of Laws*, 10th ed., at 255 (1980). Mr. Culatto argues that the court's approach should be to give effect to cl. 25 of the towage agreement unless there are good grounds to do otherwise; that is a burden which is on the plaintiff in this case. To show when it is that the jurisdiction agreed by the parties may be substituted for any other, he went through the considerations set out in *The Eleftheria* and submits that apart from the consideration that SATCO may not meet any judgment against it, there is no circumstance which should deprive it from meeting a case against it in the courts of the chosen jurisdiction.

He further submits that in so far as it is alleged that SATCO would not meet any judgment made against it, there is not a scintilla of evidence to show that that is so. That sort of evidence should be produced by the plaintiff on whom the burden lies and it has not done so. Besides, SATCO manages a large fleet of vessels and is commercially well able to meet financially any judgment made against it. It would also not be commercially in its interest to default on any judgment, the result of which would be detrimental to its operations as no one would do business with it. In any case, it is not known whether or not SATCO owns any vessels on its

own account, in its own name or beneficially on which judgment may be executed and it is for the plaintiff to show the relevance of this consideration.

In so far as the plaintiff alleges that SATCO is taking advantage of procedures, that is not so. SATCO has stood on its rights and has not delayed in the circumstances of this case. The State of Ukraine entered a limited appearance and when that action was resolved, SATCO moved in preservation of its rights. It does not wish to fight the merits of the case in Gibraltar but in London. It is in fact the plaintiff which is taking advantage of procedural matters. If SATCO's submissions are right, then the plaintiff had no business to start proceedings in Gibraltar and arrest the vessel in Gibraltar. Why should SATCO have to provide security as a pre-condition for having the arrest lifted in order to have the action proceed precisely where the parties had agreed that any action should proceed? And why should the vessel which by a judgment of this court does not belong to SATCO be held under arrest in Gibraltar, unless it is for the purpose of holding it as security and that is something which cannot be done by the law of Gibraltar as it stands at the moment: see the judgment of Kneller, C.J. in *The Blueyed Lady* (3). Mr. Culatto makes reference to O.11 to argue that the Gibraltar courts would not give leave to serve a writ based on grounds appertaining to this matter out of the jurisdiction and makes the point that the Civil Jurisdiction and Judgments Act 1982 in force in England is not in force in Gibraltar and that makes the law different in each jurisdiction.

For the plaintiff, Mr. Stagnetto, Q.C. agrees with Mr. Culatto that there is a discretion in the court and that in the circumstances of the case the court should exercise its discretion in favour of the plaintiff and dismiss the application. He also agrees with Mr. Culatto that the matter is governed by cl. 25 of the towage agreement. Clause 25, he points out, is in two parts, the first of which gives exclusive jurisdiction to the High Court of Justice in London (which he accepts) and the second of which empowers a party to take steps to detain a vessel for the purpose of protection irrespective of the view that is taken on the first limb. As to jurisdiction, SATCO cannot plead that it is not the beneficial owner in order to deny Impact Marine the rights it thought it had under the second limb because it would be unconscionable to do so. The towage agreement must be looked at in the context of the facts of the case (*Ultisol Transp. Contractors Ltd*. v. *Bouygues Offshore S.A.* (7)) and it is important to recall that in the towage agreement entered into between the plaintiff and SATCO, SATCO is described as the tug owner. SATCO is estopped in this action from resiling from that position. In so far as the first limb is concerned, Mr. Stagnetto also turns to Dicey & Morris, 1 *The Conflict of Laws*, 10th ed., Rule 31, at 255 (1980) and prays it in aid. Rule 31 reads:

"Where a contract provides that all disputes between the parties are to be referred to the exclusive jurisdiction of a foreign tribunal,

> English courts will stay proceedings instituted in England in breach of such agreement, unless the plaintiff proves that it is just and proper to allow them to continue."

He also refers to the notes thereunder (*ibid*., at 256) and accordingly submits that (a) evidence will be as available in Gibraltar as it is in England and the relevant conveniences are the same for Gibraltar and England; (b) the relevant law is the same in Gibraltar as it is in England; (c) neither of the parties are connected to either country; (d) the defendant does not genuinely desire a trial in either country: it is only seeking procedural advantage and the test of this is its unwillingness to provide security in Gibraltar; and (e) the plaintiff would be disadvantaged because in the absence of security, it would be deprived of the security it now has and having regard to the way the State of Ukraine and SATCO have conducted themselves in this case, would it be fair for this court to allow the matter to go elsewhere and would the plaintiff get justice in Ukraine when it comes to enforcement of the judgment?

It is never to be forgotten that the court has a discretion which it must exercise in the circumstances of a case. SATCO is estopped from relying on the second limb of cl. 25 because it held itself out as owner, which is how the towage agreement described it. Had the plaintiff known the position to be otherwise, would it have accepted cl. 25 as it stood? In this context, it is correct to say that ownership of the *Sapfir* is with SATCO within the limited meaning given to it by the Ukrainian experts and for the purpose of conservation seizure. Furthermore, substantial proceedings have already taken place in Gibraltar in respect of which costs have been awarded to the plaintiff and these costs are chargeable against the *res* and the defendants are seeking a procedural advantage. If the court is minded to order a stay, it should do so on condition that the defendant provides security, as has been done in other cases.

In reply, Mr. Culatto points out that there is no evidence to show that the plaintiff would not get justice in Ukraine. As far as the conduct of the State of Ukraine and SATCO in this matter is concerned, both have acted properly and acted in time. This is a second application and follows the finding that the State is the beneficial owner of the *Sapfir* and SATCO is the charterer by demise of the vessel, but the State was entitled to put its case forward and it necessarily followed that SATCO had to await the outcome of those proceedings, which went to the Court of Appeal, before taking steps in the proceedings. Both the State of Ukraine and SATCO have entered limited appearances as both of them argue that this court has no jurisdiction. They rely on cl. 25, which they are perfectly well entitled to do, having regard to what the parties to the towage agreement agreed themselves and contemplated that any action should be heard in London. As to providing security, why should SATCO do so if the law of Gibraltar does not provide for this, since the Civil Jurisdiction and Judgments Ordinance, which would open the door to this, has not yet been brought

into force? He reiterates: Why should SATCO provide security for the privilege of contesting the matter in London when that is the result of cl. 25, which is the parties' agreement?

As for creditworthiness, the evidence is that SATCO keeps all the moneys received from the management of a large fleet of ships and so it may be presumed to be creditworthy. It carries on business and there is no evidence that it will not pay or that any judgment obtained against it will not be satisfied. He reiterates that the court's discretion should be exercised by granting a stay unless strong cause for not doing so is shown, the burden of showing such strong cause being on the plaintiff. He submits that (a) there is no such evidence; and (b) the plaintiff has failed to provide any such evidence. It is a heavy burden and the plaintiff has failed to discharge it. It is not an argument against a stay to say that it is as convenient to have this case tried here as in London: that does not discharge the burden upon the plaintiff. He submits that the only reason the plaintiff wants a trial in Gibraltar is because of security and *The Blueyed Lady* (3) is authority for refusing this.

On the estoppel point, Mr. Culatto submits that the description of SATCO as a tug owner is merely an expression to ascribe to a party a description in a document. It is not proof that SATCO is the true owner. Indeed, the court has found it not to be and it is not a material misrepresentation in that in the context of the towage agreement, it makes no difference to the hirer to whom the tug belongs. Clauses 14 and 22 of the towage agreement make this clear. By virtue of cl. 14, SATCO could provide any other tug, albeit with the consent of the plaintiff, but nevertheless the exact relation of the ship to SATCO is immaterial and that is known to the plaintiff. Clause 14 reads:

> "*Substitution of tugs*
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> The Tugowner shall at all times have the right to substitute any tug or tugs for any other tug or tugs of adequate power (including two or more tugs for one, or one tug for two or more) at any time whether before or after the commencement of the towage or other services and shall be at liberty to employ any tug or tugs belonging to other tugowners for the whole or part of the towage or other service contemplated under this Agreement, provided however, that the main particulars of the substituted tug or tugs shall be subject to the Hirer's prior approval, but such approval shall not be unreasonably withheld."

Clause 22 provides for a warranty regarding ownership by the hirer, for which there is no equivalent to bind SATCO. Clause 22 reads:

> "*Warranty of authority*
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> If at the time of making this Agreement or providing any service under this Agreement other than towing at the request, express or implied, of the Hirer, the Hirer is not the Owner of the Tow [*sic*] referred to in Box 4, the Hirer expressly represents that he is

> authorized to make and does make this Agreement for and on behalf of the Owner of the said Tow subject to each and all of those conditions and agrees that both the Hirer and the Owner of the Tow are bound jointly and severally by these conditions."

As to the security the plaintiff wants to hold on to, that is not a security to which it is entitled, since the tug is not owned by SATCO and the second limb of cl. 25 does not help the plaintiff. The second limb of cl. 25 does not help the plaintiff because the court cannot give the plaintiff more than it is entitled to and under that clause, SATCO is not the owner. There is no denial of justice in making the plaintiff do what the parties have agreed to do: the vessel is under arrest in Gibraltar in circumstances which have provided the plaintiff with a procedural advantage it ought not to have.

Since both counsel accept that the first limb of cl. 25 is an exclusive jurisdiction clause and both counsel agree that I have a discretion, it seems to me that the principles laid down in *The Eleftheria* (4) ought to govern this case. The thrust of that decision is that the court has a discretion whether to grant a stay of proceedings brought in breach of an agreement to refer disputes to a foreign court: but that discretion should be exercised by granting a stay unless cause for not doing so is shown: see *K.H. Enterprise (Cargo Owners)* v. *Pioneer Container (Owners), The Pioneer Container* (5) ([1994] 2 All E.R. at 267, in reference to the judgment of Brandon, L.J. in *Aratra Potato Co. Ltd.* v. *Egyptian Nav. Co., The Al Amria* (2)). It seems to me too that the exercise of that discretion should also be consistent with the principle laid down in *The Andria* (1), namely that "the purpose of the power of arrest under R.S.C., Ord. 75, r.5 was to provide security for the action in rem and not for any other proceedings" ([1984] Q.B. at 477). This was followed by Kneller, C.J. in *The Blueyed Lady* (3) and seems to me to be good law in Gibraltar, which does not have an equivalent to s.26 of the Civil Jurisdiction and Judgments Act 1982.

In *The Eleftheria*, Brandon, J. set out the applicable principles ([1970] P. at 99–100):

> "The principles established by the authorities can, I think, be summarised as follows: (1) where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:—(a) In what country the evidence on the

> issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

In canvassing these matters set out under Head (5) of those principles, Mr. Stagnetto on behalf of the plaintiff, on whom the burden of showing strong cause lies, sought to persuade me that, in effect, Gibraltar was a proper forum in which to proceed because substantial proceedings had taken place in Gibraltar already and, that being a relevant and substantial consideration, the court is therefore well placed to continue with the action. He also submitted, broadly, that a trial in Gibraltar is no different from a trial in England as the circumstances affecting the trial in England would be the same as those affecting the trial in Gibraltar; as a result, there would be no inconvenience to the plaintiff or the defendant if the case is tried in either jurisdiction.

All that is true but, as Mr. Culatto points out, it is not an argument against a stay that it is as convenient to have the case tried here as in London. Besides, it is not what *The Eleftheria* or subsequent cases support as the proper test. But what of the other factors? The first is the question of estoppel. Mr. Stagnetto's argument is attractive: SATCO has described itself as owner and it seeks now to deny the plaintiff the right to avail itself of the second limb of the towage agreement because it now says that it is not the owner. That seems to link in very neatly with the second factor, the plaintiff's claim that the defendants are seeking a procedural advantage. Mr. Stagnetto claims that both SATCO and the State of Ukraine give the appearance of avoiding facing up to the claims made by the plaintiff. Mr. Stagnetto's observation that this is proved by the reluctance to post security I do not accept, although I confess to some hesitation. Mr. Culatto is, I think, right to reject this observation with the rhetorical question: Why should SATCO provide for something it does not have to? The defendant has not dragged its feet, but it is a consideration that the defendant can only answer to a claim made. Neither SATCO nor the State of Ukraine chose their forum in Gibraltar—that was for the plaintiff to do and it is only once it did so that the defendant could argue jurisdiction. By accepting that the court has a discretion, Mr. Culatto has not denied the jurisdiction of the court to try the case on its merits, but he is right to insist that the discretion should be exercised by

granting a stay unless strong cause for not doing so is shown. The burden of showing that is on the plaintiff and his answer to that, namely that both SATCO and the State of Ukraine have acted reasonably and in a timely manner, seems to answer in part the suspicion that both these parties appear to be avoiding facing up to the claims made by the plaintiff.

I say "in part" because I have to confess to an uneasy feeling, as indicated above, that this may be so but as I cannot pin that down—apart from observing that no security has been posted to release the vessel and it seems somewhat odd that a commercial concern would prefer to have a vessel lie idle, deteriorating and running up costs, rather than putting up security (though this may well attract charges)—I must disregard it. The uneasy feeling is further watered down in the face of Mr. Culatto's cogent remarks to the effect that there is no evidence that the defendant will not pay or meet any judgment, that they are commercially solvent, that it is in its interest to meet any judgment or order and that whether or not it puts up security is a matter for it alone. Does the fact that it has not posted security indicate that there is evidence sufficient to maintain an arrest under the principle of *The Rena K* (6)? On this point I think not.

On balance overall, notwithstanding the estoppel point, which is weakened by cl. 14 and especially the last sentence thereof ("such approval shall not be unreasonably withheld"), I do not consider that the plaintiff has discharged the burden lying on it and I am therefore prepared to allow the motion. Mr. Stagnetto says that if the court should stay the action, the stay should only be granted on condition that security is provided. I should like to do so but I do not see how I can, having regard to the lack of jurisdiction to do so, there being no equivalent to the Civil Jurisdiction and Judgments Act 1982 in force in Gibraltar. The ship is under arrest and is security *in rem*, but it does not belong to SATCO. The vessel ought to be released except that, subject to hearing counsel, it seems to me that the *res* is answerable for the costs awarded to the plaintiff in this action and I do not propose to order its release until those costs are paid or until satisfactory arrangements are made to cover them.

Order accordingly.