

**STATE OF UKRAINE v. IMPACT MARINE II
INCORPORATED**

COURT OF APPEAL (Fieldsend, P., Davis and Neill, JJ.A.):
March 6th, 1997

Shipping—arrest of ship—affidavit in support—by Rules of Supreme Court, O.75, r.5(9), affidavit in support of application for arrest of ship to include reasons for beliefs and information on which based

Shipping—charterparties—charter by demise—ship operator is charterer under charter by demise if possesses and controls day-to-day running of ship, including master and crew, without reference to owner

The respondent brought proceedings requiring the impounding in Gibraltar of a ship allegedly owned by a Ukrainian organization.

The respondent, a US company, entered into an agreement with a Ukrainian organization, SATCO, for it to tow the respondent's vessel from the Bahamas to India using its tug. This latter ship failed to arrive in the Bahamas on the appointed date and the respondent subsequently claimed the return of an advance payment it had made under the agreement. SATCO did not make this repayment and the respondent instituted proceedings requiring the arrest of the tug in Gibraltar. Its affidavit in support of the arrest warrant stated, *inter alia*, its belief, as required by O.75, r.5(9) of the Rules of the Supreme Court, that SATCO would be the person liable on the respondent's claim in an action *in personam* under s.21(4) of the Supreme Court Act 1981; that the ground of that belief was the towing agreement; and that at the time when the cause of action arose, SATCO was the owner of the ship.

However, the respondent gave no ground for the latter belief and the State of Ukraine, the present appellant, subsequently claimed ownership of the ship, which had by then been arrested, and provided expert evidence as to Ukrainian law, to the effect that although SATCO, a State body, had control of and responsibility for the day-to-day running of State assets entrusted to it, including the ship in question, ultimate ownership rested in the state, which also received the profits derived from commercial contracts entered into by SATCO. Before the Supreme Court (Pizzarello, A.J.), the respondent provided a further affidavit in which it was deposed that even if the ship was owned by the appellant, SATCO had "at all material times" had possession and control of the ship on terms equivalent to a charter by demise. The court held that the arrest was justified.

On appeal against the continuance of the arrest order, the appellant submitted that (a) the original affidavit had been defective in that it

disclosed no reason for the respondent's belief that SATCO was the owner of the ship; in fact, the ship was owned by the State of Ukraine and was simply operated by SATCO; (b) in any case, the respondent had only deposed to believing that SATCO was the owner at the time the cause of action arose and not at the time when the action was brought, as required by s.21(4) of the Supreme Court Act 1981; and (c) the respondent had not alleged, as required by s.21(4), that at the time the action was brought, SATCO was the beneficial owner or charterer under a charter by demise of the ship.

The respondent submitted in reply that (a) on the evidence before the court, including the further affidavit, there had been sufficient information for the judge to order that the arrest be continued; in particular, (b) SATCO had been alleged to be the ship's owner "at all material times"; and (c) even if the appellant and not SATCO had been the owner at the relevant time, SATCO had been a charterer of the ship under a charter by demise, providing the necessary justification for the arrest order, in that it had had complete day-to-day control of the running of the ship, even though ultimate political control of SATCO's activities rested with the appellant.

Held, dismissing the appeal:

(1) The court would not interfere with the judge's order, even though by virtue of O.75, r.5(9) of the Rules of the Supreme Court, the original affidavit supporting the arrest warrant should have stated not only the details of the respondent's claim, but also the grounds for its belief that SATCO was the party liable on its claim in respect of the ship, and the sources of its information. In particular, it should have stated that at the time the writ was issued, SATCO was either the beneficial owner of all the shares in the ship, or the charterer of it under a charter by demise, as required for an action under s.21(4) of the Supreme Court Act 1981 (page 102, lines 21–39).

(2) SATCO was at the relevant time the charterer of the ship under a charter by demise since, although the appellant owned the ship, received the profits made from SATCO's use of it in its commercial ventures and retained ultimate political control over its activities, SATCO had possession of and complete day-to-day control over the manner in which the ship was operated: the test was whether the owner had given the charterer the power and right to decide what to do with the ship, and how to direct its master and crew (who became its servants), without referring back to the owner. Thus it was SATCO and not the appellant which was the proper party against which to bring any action relating to the use of the ship, such as the present proceedings, and the court's order could not therefore be impugned (page 106, line 24 – page 108, line 34).

Case cited:

(1) *Nazym Khikmet, The*, [1996] 2 Lloyd's Rep. 362, *dicta* of Bingham, M.R. considered.

Legislation construed:

Rules of the Supreme Court, O.75, r.5:

“(4) A warrant of arrest shall not be issued until the party intending to issue the same has filed an affidavit made by him or his agent containing the particulars required by paragraph (9); however, the Court may, if it thinks fit, give leave to issue the warrant notwithstanding that the affidavit does not contain all those particulars.

... .

(9) An affidavit required by paragraph (4) must state—

(a) in every case:

- (i) the nature of the claim or counterclaim and that it has not been satisfied and, if it arises in connection with a ship, the name of that ship; and
- (ii) the nature of the property to be arrested and, if the property is a ship, the name of the ship and her port of registry; and

(b) in the case of a claim against a ship by virtue of section 21(4) of the Supreme Court Act 1981:

- (i) the name of the person who would be liable on the claim in an action in personam (‘the relevant person’); and
- (ii) that the relevant person was when the cause of action arose the owner or charterer of, or in possession or in control of, the ship in connection with which the claim arose; and
- (iii) that at the time of the issue of the writ the relevant person was either the beneficial owner of all the shares in the ship in respect of which the warrant is required or (where appropriate) the charterer of it under a charter by demise. . . .”

Supreme Court Act 1981 (c.54), s.21(4):

“In the case of any such claim as is mentioned in s.20(2)(e) to (r) [certain claims relating to shipping], 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 the 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 charter by demise; or

- (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.”

L.W.G.J. Culatto for the appellant;
A.V. Stagnetto, Q.C. and *L.J. Attias* for the respondent.

FIELDSEND, P.: This appeal concerns the arrest in Gibraltar of the ship *Sapfir*.

In October 1996, Impact Marine Inc., an American company, concluded an agreement with SATCO, a Ukrainian organization, whose status will be considered in detail below. The contract was for the towage of a ship from the Bahamas to India for the sum of US\$480,000 of which US\$144,000 was payable and was paid on the signing of the agreement. On December 5th, 1996, SATCO having missed the date on which it was obliged to present its tug, the *Sapfir*, at Freeport (November 30th, 1996), the company cancelled the agreement and claimed the return of the US\$144,000. This has not been repaid. The towage agreement showed SATCO as owner of the tug and on December 19th, the tug was arrested in Gibraltar following the service of the company’s writ on the same day.

The affidavit supporting the warrant of arrest stated that in the deponent’s belief, the person who would be liable on the respondent’s claim in an action *in personam* was SATCO, the ground of such belief being stated as being the towage agreement. It then stated that in the deponent’s belief, when the cause of action arose (*i.e.*, December 5th, 1996), SATCO was the owner of the *Sapfir*. No grounds of belief were given for this statement. 1 *The Supreme Court Practice 1995*, para. 75/5/6, at 1292, reads:

“An affidavit filed pursuant to this rule may contain statements of information and belief with the sources and grounds thereof The sources and grounds should be stated with precision and particularity. A general statement such as ‘from documents and information supplied to me by the plaintiffs’ will not suffice.”

See also the suggested form of affidavit set out in para. 75/5/9 (*ibid.*, at 1293). Furthermore, the affidavit did not go on to state, as required by O.75, r.5(9), referring to s.21(4) of the Supreme Court Act 1981 (which applies in Gibraltar), that SATCO was at the time of the issue of the writ (December 19th, 1996) either the beneficial owner of all the shares in the *Sapfir* or the charterer of it under a charter by demise.

On being made aware that the State of Ukraine claimed ownership of the tug, a further affidavit was sworn on January 27th, 1997, stating:

“If the court were to come to the conclusion that the *Sapfir* was in the ownership of the Republic of Ukraine and that the statements contained in my affidavit were incorrect, there is ample evidence in the affidavit of the said Lionel W. Cullato [*sic*] that SATCO was at

5 all material times in possession and in control of the *Sapfir* on terms equivalent to a charter by demise, that is to say, at the time the cause of action arose, SATCO was in possession or control of the *Sapfir* on terms equivalent to a charter by demise and at the time when the action was brought, SATCO was in the possession or control of the *Sapfir* on terms equivalent to a charter by demise.”

10 As matters turned out, the company did not pursue its claim on the basis that SATCO was the owner of the tug, but on the basis that it was in possession and control of the tug on terms equivalent to a charter by demise. It is on this basis only that the continuance of the arrest can be justified, and it was on this basis that the court below held that the arrest should remain in force.

15 Mr. Culatto for the appellant argued first that the original arrest was unjustified for three main reasons: (a) that the first affidavit of December 18th was unsatisfactory as it did not disclose any reason for the deponent’s belief that SATCO was the owner of the *Sapfir*; (b) that the belief was directed only to the date on which the cause of action arose (December 5th, 1996) and not to the date on which the action was brought (December 19th, 1996) as required by s.21(4) of the Supreme Court Act 1981; and (c) there was no allegation, as required by s.21(4)(i), that at the time when the action was brought, SATCO was the beneficial owner of the ship as respects all the shares in it or the charterer by demise.

25 There is substance in Mr. Culatto’s first point, and I think it is probable that a warrant of arrest should not have been issued on the defective affidavit of December 18th, 1996. There is technical substance also in Mr. Culatto’s second and third points, but the original affidavit of December 18th had been corrected and elaborated by the time the case came on for hearing before the court below by the affidavit of January 27th. On the additional evidence, the learned judge exercised his discretion to continue the arrest. I would not interfere with the exercise of his discretion. The amended affidavit made all the required allegations of facts as existing “at all material times,” the ship’s papers had shown SATCO to be the owner, confirmed by the reference to it as owner in the towage agreement, and there was an allegation as to SATCO being a demised charterer, which has been the main issue in this appeal.

30 Of more moment is whether on the evidence it can be said that SATCO was the charterer of the *Sapfir* under a charter by demise. This includes consideration of (a) the Memorandum of Establishing Enterprise of November 27th, 1991, being the agreement made between the State Property Fund of Ukraine (the “Founder”) and SATCO (the “enterprise”); (b) the statute of SATCO; (c) the evidence of Professor Vysotsky as to the law of Ukraine; and (d) the evidence of Mr. Vladimir Repetey, a Vice-President of SATCO since 1987. Even with the assistance of the statements by the two experts, it is difficult fully to appreciate the

juridical nature of SATCO as a State enterprise and its relationship to the State of the Ukraine, particularly since both experts were primarily concerned with the question of ownership of the *Sapfir*. The Professor summarized his conclusions by saying that SATCO “is a separate legal entity. It is a State enterprise as distinct from a joint stock company, but it is not part of the State, although it is 100% owned by the State.” 5

It appears that Part I of Article 37 of the Ukrainian Law on Property provides that property in State ownership that is secured to a State enterprise belongs to the enterprise under the right of full economic management. This gives the enterprise the right to possess, use and dispose of this property subject to statute law and the purposes of the activity of the enterprise. The Professor explained “full economic management” as meaning “possession, use and some control of the property,” clause 7 of the memorandum obliging it to secure effective use of State property and to provide the Founder with necessary information about financial and economic activities, rendering an approved statement annually. 10 15

SATCO’s statute provides that SATCO is a juridical person (clause 3.1) and is bound by Ukrainian law and its Statute. The aims of the enterprise are set out in clause 2 of the Statute as being life-saving and ship-rescuing services at sea, dealing with pollution from fuel and other substances, towage, ship-lifting, under-water engineering and other commercial sea service, but the main “orientation” of its “activity” (clause 2.2) is to be the “performance of regular break-down salvage and readiness for life-saving service in the sea basin, rescue of aircraft, as well as liquidation of break-down spreads of fuel in the sea.” These activities are then elaborated in 11 further sub-paragraphs including, in clause 2.2.10, “carrying out foreign economic activity.” Clause 5.2.1 provides that “when determining its strategy SATCO must take into account State contracts and State orders and other contractual obligations” and goes on to provide that “State contracts and State orders become binding if issued in the legally prescribed order.” 20 25 30

There is a Chief Executive of the enterprise employed by the Ministry who is in overall control of the activities of the enterprise (clause 6.2). It appears from clause 6.2 and clause 7.3.2 that the Chief Executive is seconded to SATCO under a contract with the Ministry of Transport. But clause 6.3 provides that the Ministry “is not entitled to interfere in the operative and economical activities of the enterprise” (see also clause 4 of the memorandum). 35

Clause 7 provides: 40

“(1) Profit is the principal generalised index of the economy and production activities of the enterprise, and

(2) Clear profit of the enterprise, which is left after covering material expenses and the ones, adequate to them, expenses for labour remuneration, payment of interest on bank credits, payment 45

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of taxes, envisaged by the Code of Laws of Ukraine, and other payments to the budget, deductions to the branch investment funds and production development fund, remains at his [*sic*] entire disposal.”

5 But of course the enterprise has no personal shareholders who can participate in any profits. Profits in the final event accrue to the state.

It is in the light of this statute that one must analyse the memorandum, which is the document under which the Founder entrusted (to use a neutral word) the *Sapfir* to SATCO for 10 years. There is no provision for
10 any payment by SATCO to the Founder.

Leaving aside the recitals, the Founder became obliged (clause 6 of the memorandum) to transfer to the enterprise in “possession and use” the *Sapfir*; “to exercise control annually as to effectiveness of using the State Property [the *Sapfir*]; to render methodical assistance and to give consultations in questions of enterprise economic activities” and “to discuss the
15 enterprise agreements as to its participation in State and non-State economic associations.”

As already stated, SATCO became obliged (clause 7 of the memorandum) to secure effective use of the *Sapfir*, “to keep separate
20 records of State property (main funds and working capital) and property purchased at the expense of enterprise funds” and “to provide Founder [with] the necessary information about financial and economic activities,” rendering an approved statement annually. It must be noted that in clause
25 2, SATCO acknowledged that it was established primarily “for being in position of constant emergency-salvage readiness in the Black Sea/Azov Sea in order to render assistance to the vessels and persons in distress at sea and for liquidation of oil pollution.”

These somewhat tortuous provisions are dealt with in a more down to earth manner in Mr. Repetey’s statement. “The vessels,” he says—

30 “are allocated to SATCO as operating managers. The functions that SATCO fulfils are those the statute and the memorandum of agreement terms suggest. We provide crews to the vessels, we victual the vessels, bunker the vessels, carry out maintenance and repairs and provide technical advice. We charter the vessels and
35 enter into contracts of affreightment. We are responsible for effecting the routine maintenance of the vessels out of the operational income generated from the vessels’ operations.”

He adds that because SATCO is not the legal owner of its vessels, there are certain things it cannot do with the vessels attached to it (*e.g.* sell or
40 mortgage them). His statement continues:

“Generally speaking, it is SATCO who gives routine voyage
orders to the vessels through the masters. This is a normal function of a ship manager managing the vessels on behalf of the state. However, the right to give such orders was received by SATCO
45 from the state by its agreement with the Ministry of Transport/State

Property Fund dated November 27th, 1991. That is consistent with the fact that the vessels are state property.”

He goes on:

“In accordance with the memorandum of November 27th, 1991 and SATCO’s statute, the first SATCO function is having emergency salvage readiness and rendering assistance to persons and vessels being in disaster at sea as a main salvor in Ukraine and main service as to oil pollution liquidation (see art. 2.1.1 and 2.1.2 of SATCO’s statute and art. 2 of the memorandum of November 27th, 1991).”

This makes it plain that Mr. Repetey is dealing in general with all the vessels that may have been or may be allocated to SATCO. SATCO may be operating freighters, possibly even passenger ships, as well as anti-pollution and rescue ships, but clause 5 of the memorandum, by reference to the addendum to the agreement, makes it clear that the memorandum applies to the tug *Sapfir*.

Moreover, it is from Mr. Repetey’s explanation of SATCO’s functions that one finds the basis for Professor Vysotsky’s comment:

“Should the State of Ukraine wish, it may legally compel SATCO to withdraw a tug engaged in performing a commercial contract in order to perform State functions (such as cleaning up a marine oil pollution incident, for example), although the state might have to indemnify SATCO in respect of any damages it had to pay as a result of such request.”

Although the question of whether there had been a charter by demise did not arise in the case of *The Nazym Khikmet* (1), it contains careful and most useful consideration of a similar enterprise, BLASCO. There, the issue was whether BLASCO or the Ukrainian Government owned the ship the arrest of which was in dispute. Upholding the very full judgment of the court below, Bingham, M.R. said ([1996] 2 Lloyd’s Rep. at 374):

“The evidence makes plain that the process of liberalization which took place in the USSR before its dissolution, and in the Ukraine once it became independent, has involved a devolution of commercial authority to trading enterprises, which are expected to conduct their operations in a manner closer to that of their Western counterparts than to that of their socialist predecessors. This process has led to a loosening of the bonds of state control, but not to a severance of them. The state has retained its ownership of the income-earning assets of enterprises such as BLASCO, and has retained the right and power of ultimate decision over the use and exploitation of those assets. The antithesis between the public law powers of a sovereign state and the rights of an owner is in our view a false one in a situation where, as in the Ukraine, ownership of assets has been retained by the state in order to ensure that it has the power of ultimate decision on the manner in which those assets are exploited for the benefit of the public. Even if in practice BLASCO

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enjoyed a wide measure of commercial discretion, it did not in our judgment enjoy what English law would recognize as the rights of an equitable owner.”

5 The problem in the appeal now before us is to determine whether the memorandum as read with the statute amounts to a charter by demise of the *Sapfir* to SATCO, so as to fall within the words of s.21(4)(i) of the Supreme Court Act 1981.

10 In simple terms, a charter by demise is the letting of a ship by the owner to the charterer in such a way that the charterer becomes, at least in relation to third parties, the temporary owner of the ship. In the normal case, the charterer will be obliged to pay to the owner a hire charge but, as Mr. Stagnetto submitted, that is not an essential feature of the transaction, just as rent is not an essential feature of the lease of property: see Woodfall, 1 *Landlord & Tenant*, para. 7.003, at 7/2 (Release 34, September 1995). It is necessary, however, that possession and control passes from the owner to 15 the charterer. The owner will have divested himself of all control over the ship, his sole right being to take back the ship when the charterparty comes to an end and to receive any stipulated hire.

20 The primary legal effects of a charter by demise, whether it be a “bare-boat charter” or a charter with master and crew, are between the owner, the charterer and third parties. The owner has divested himself of control either over the ship or over the ship and the master and crew and thus of any liability to persons who have had, for example, goods conveyed upon the ship or who have done work on the ship or supplied stores for her. 25 Those persons can look only to the charterer by demise, who is also responsible for any navigational damage done by the ship. The test is whether the owner has given the charterer a power and right independent of him and without reference to him to do what he pleases with regard to the master, the crew, and the management and employment of the ship. 30 The master and crew become the charterer’s servants and through them, the possession of the ship is in him: see *Scrutton on Charterparties*, 20th ed., Section IV, art. 28, at 59–61 (1996). There would seem, however, to be no reason why in particular circumstances, and provided the language of the charter were sufficiently clear, the owner could not call upon the 35 charterer to make the ship available to him for a specific purpose. In that event, the charter by demise would be suspended and the liabilities of the owner would revert to him.

40 Examining whether or not there is a charter by demise of the *Sapfir* by the Founder to SATCO, one starts with the factual evidence of Mr. Repetey. This is that as operating manager SATCO is, as regards the operation of the ship and entering into contracts (both for its maintenance and its employment), independent of direct control by the Founder. It is what in the limited Russian sense is referred to in Mr. Repetey’s statement as “a shipowner” with “the right to manage the vessel on its 45 own behalf.” In short, at least in the commercial field, SATCO has full

possession and control of the ship. This means that it, and it alone, is responsible for its operation, maintenance and navigation. The corollary of this is that the Founder is not responsible for debts and obligations incurred by SATCO in exercising its powers of possession and control. This is what appears to be envisaged by clause 8 of the memorandum and clause 3.5 of the statute which respectively read: 5

“8. ‘Founder’ shouldn’t [*sic*] bear any responsibility as to ‘enterprise’ obligations and ‘enterprise’ also shouldn’t be responsible for ‘Founder’ obligations.”

“3.5. The enterprise shall take responsibility for it’s [*sic*] obligations within the limit of it’s [*sic*] property due to the law in force.” 10

The position may be different if and when SATCO is obliged on orders from the Founder to undertake emergency salvage work. That is not a situation which arises in the present circumstances. There is no evidence that SATCO was called upon to perform such a function at any time relevant to the facts we have to consider. 15

It is true that at the end of the day, any eventual net profit earned by SATCO will accrue to the State of Ukraine as represented by the State Property Fund but in my view, that does not affect the fact that control and possession of the ship was passed by the Fund to SATCO. I do not read the passage I have quoted from the Master of the Rolls above as inconsistent with that view. It is true that he said that the State had retained its ownership of the income-earning assets (such as the *Sapfir*) and had retained the right and power of ultimate decision over the use and exploitation of those assets. I would stress the use of the word “ultimate,” however, which I do not regard as meaning that the state retains any continuing daily control if that has been passed to an organisation such as SATCO as, in my view, it has in SATCO’s case. 20 25

In my view, the memorandum we have to consider (as read with the statute) amounts, in the circumstances prevailing, to a charter by demise of the *Sapfir* to SATCO so as to fall within s.21(4) of the Supreme Court Act 1981. For these reasons I decided that the appeal should be dismissed. 30

DAVIS and NEILL, J.J.A. concurred. 35

Appeal dismissed.