

Kabanov Vladimir & 18 Others v The Owners of The Ship or Vessel "Virgo I" ex "Kapitan
Voloshin" and Others
[2000] SGHC 110

Case Number : Adm in Rem 774/1998, RA 000461/1999
Decision Date : 19 June 2000
Tribunal/Court : High Court
Coram : Lim Teong Qwee JC
Counsel Name(s) : Vivian Ang and Mark Ortega (Allen & Gledhill) for the defendants; Khoo Kah Ho (Fabian & Khoo) for the second intervener
Parties : Kabanov Vladimir & 18 Others — The Owners of The Ship or Vessel "Virgo I" ex "Kapitan Voloshin"; Singapore Technologies Marine Ltd (Interveners); Joint Stock Company Vladivostok Base of Trawling & Refrigeratory Fleet (VBTRF) (Interveners)

JUDGMENT:

GROUNDS OF JUDGMENT

1. This is an appeal from the order of an assistant registrar made on 20 October 1999 dismissing the application of Falkland Investments Ltd ("Falkland") (which has entered an appearance as defendant by leave granted on 21 July 1999) for an order that the second intervener ("VBTRF") provide security for costs. I heard the appeal on 18 February 2000 and allowed it. I made an order for security to be provided by VBTRF in an amount of S\$20,000. VBTRF has given notice of appeal and these are my written grounds.

2. The plaintiffs in this action are members of the crew of the vessel and their claims are for unpaid wages and other moneys due to them. The action was commenced by writ issued on 18 November 1998 and the same day the vessel was arrested. Judgment in default of appearance was entered on 15 January 1999.

3. The first intervener ("ST Marine") claims an interest in the vessel as an unpaid repairer. ST Marine is the plaintiff in Admiralty *in Rem* Suit No 854 of 1998 against the same vessel and judgment in default of appearance was entered in that action on 12 February 1999.

4. The vessel has since been sold pursuant to an order of court and both the plaintiffs in this action and ST Marine have been paid out of the proceeds of sale and their judgments have been satisfied. There is a substantial surplus and the money lies in court. The order of court for the sale of the vessel was made on 29 December 1998 and it does not appear that any order under O 70 r 21(2) has been made but I have not been informed if there are any claims against the owners of the vessel which are enforceable against the proceeds of sale.

5. On 19 June 1999 well after the plaintiffs had entered judgment and the vessel had been sold Falkland applied as owner of the vessel for leave to enter an appearance as defendant. The application was opposed by VBTRF and on 2 July 1999 an assistant registrar gave directions for affidavits to be filed and adjourned the hearing to 20 August 1999. Falkland appealed and on 21 July 1999 the court ordered:

"1. [Falkland] be at liberty to enter an appearance as defendants in this action.

2. This order does not determine the issue as to who is the true owner of the vessel and therefore the proceeds of sale.

3. [VBTRF] is to take out an application to enter an appearance or to intervene in this action within 3 weeks from the date hereof together with supporting affidavits.

4. No application for payment out of the balance of the proceeds of sale be taken out by [Falkland] until after 3 weeks from the date hereof or until further order.

5. Costs of the appeal be reserved."

It was pursuant to this order of court that as noted above Falkland entered an appearance as defendant.

6. In due course (after time had been extended for this purpose) VBTRF applied *ex parte* for leave to intervene in this action. In the affidavit filed in support of its application its solicitor Mr Khoo said:

"VBTRF say that they are Owners of the Vessel "VIRGO I" and therefore have an interest therein. A current copy of an extract from the Vladivostok Registry of Ships is annexed hereto and marked as exhibit 'A' showing that the current ownership of the Vessel lies with VBTRF."

The application was granted on 18 August 1999 and VBTRF entered an appearance as intervener.

7. On 27 September 1999 VBTRF applied by motion for these orders:

"(1) the determination of the issue of the validity and enforceability of the purported Agreement dated 16 January 1998 allegedly made between [Falkland] and [VBTRF] be reserved and remitted to the Primorskiy Krai Arbitration Court; and that until such final determination thereof all further proceedings herein are to be stayed;

(2) alternatively, that the purported Agreement dated 16 January 1998 allegedly made between [Falkland] and [VBTRF] be declared null and void and to have been of no effect whatsoever; and that [VBTRF] be substituted as the owners of the ship or vessel 'Virgo I' (previously known as the 'Kapitan Voloshin') [as] the defendants herein in place of '[Falkland]'; and

(3) the costs of these proceedings and this application be taxed and paid by [Falkland] to [VBTRF]."

I shall refer to this application as the "VBTRF application". Falkland responded with the application for security for costs which is the subject matter of this appeal. The security ordered has been provided by VBTRF.

8. Section 388(1) of the Companies Act provides:

"Where a corporation is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs"

Mr Khoo conceded that for the purpose of the VBTRF application VBTRF is a "plaintiff" within the meaning of s 388(1). Its case is that Falkland is not a "defendant" and accordingly s 388(1) does not apply as regards its costs.

VBTRF as plaintiff

9. In *Tomlinson v The Land and Finance Corporation Ltd* (1884) 14 QBD 539 goods in the possession of the debtor were seized by the sheriff in execution upon a judgment. A claim to the goods having been made by a holder of a bill of sale the sheriff interpleaded and the court ordered an issue to be tried in which the claimant should be plaintiff and the execution creditors defendants and that the question to be tried should be whether at the time of the seizure by the sheriff the goods were the

property of the claimant as against the execution creditors. The execution creditors were ordered to give security for costs.

10. Brett MR said at p 541:

"If the chattels are claimed under an alleged title which is inconsistent with the supposed property of the execution debtors, upon the sheriff interpleading the execution creditors will have to prove that they are entitled to the chattels seized: it is true that the execution creditors are usually made defendants in the interpleader issue, but they have to assert their right, and substantially are plaintiffs"

Bowen LJ said at p 542:

"The claimant to goods seized under a writ of fieri facias is usually bound to prove his title to them upon the trial of the interpleader issue; but this does not put the execution creditor into the position of an ordinary defendant; and when an interpleader issue has been directed and the sheriff has slipped out of the dispute, the parties who remain, that is, the execution creditor and the claimant, are both plaintiffs, they are not in the position of the parties to an ordinary action."

11. In *In re Milward & Co* [1900] 1 Ch 405 the solicitors were ordered to pay into court a fund in their hands belonging to a client and an inquiry was directed who was entitled to it. Upon the inquiry a claimant resident out of the jurisdiction claimed to have a charge on the fund. He was ordered to give security for costs.

12. Lindley MR said at p 407:

"The solicitors had a sum of money in their hands upon which Shield alleges that he has a charge. That sum belongs to Mrs Gardner unless Shield can establish his charge. In substance he is in the position of a plaintiff, and not of a defendant. It is Mrs Gardner's money unless he can make a claim upon it. Under these circumstances, the true analogy is that which I have suggested, namely, that it is an interpleader issue; and, that being so, Mr Shield must be ordered to give security for costs."

Mr Shield had to assert his right and he was substantially a plaintiff.

13. In the present case the balance of the proceeds of sale have been paid into court. Subject to the claims of creditors if any they belong to the owner of the vessel at the time of its arrest. VBTRF claims to be the owner. It has applied for the issue of the validity and enforceability of an agreement dated 16 January 1998 (an agreement among other things for transfer of the vessel to Falkland) to be remitted to a tribunal in Russia. Alternatively it asks this court to declare the agreement to be null and void and to substitute it as owner of the vessel and defendant in place of Falkland. If such an order is made the effect is to allow VBTRF to apply for payment out of the balance of the proceeds of sale to itself. VBTRF is asserting its right to the fund in court. I think it is in substance the plaintiff in the proceeding in relation to the VBTRF application and Mr Khoo's concession has been properly made.

Falkland as defendant

14. In *Tomlinson* Brett MR went on to say at p 541:

"... both the execution creditors and the claimants were plaintiffs, neither were defendants in point of fact, although on the record, as a matter of convenience, one party was made plaintiff, and the other defendant."

He was of course referring to the position under the Interpleader Act and the subsequent statutes relating to interpleader (since

repealed) but the position on this point was the same under Order LVII then in force and would be the same in the case before me under O 17. Bowen LJ said that neither party was in the position of an *ordinary defendant*. They were both in agreement that the execution creditors' appeal against the order for security for costs to be given should be dismissed.

15. In *The Silver Fir* [1980] 1 Lloyd's Rep 371 the disponent owners of the vessel claimed against the charterers in an arbitration damages for repudiation of the charter-party for wrongful refusal to load their cargo and in their points of defence the charterers alleged that the vessel was not at any material time ready to load any cargo under the charter-party and gave particulars in support of their allegation. They went on to allege that each of the particulars pleaded constituted a breach of the charter-party and as a result those allegations became the basis of their counterclaim for damages. Both parties were corporations registered and carrying on business out of the jurisdiction. In the court below security for costs was ordered against the claimants but not against the respondents in respect of the counterclaim. On appeal security for costs was ordered.

16. Lawton LJ at p 374 referred to *Neck v Taylor* [1893] 1 QB 560 where Lord Esher MR said at p 562:

"Where, however, the counterclaim is not in respect of a wholly distinct matter, but arises in respect of the same matter or transaction upon which the claim is founded, the court will not, merely because the party counterclaiming is resident out of the jurisdiction, order security for costs; it will in that case consider whether the counterclaim is not in substance put forward as a defence to the claim, whatever form in point of strict law and of pleading it may take, and, if so, what under all the circumstances will be just and fair as between the parties; and will act accordingly."

He held that the court had a discretion to order security to be given.

17. In *The Silver Fir* security for costs was ordered against both the claimants and the respondents in the arbitration. The orders were made applying O 23 pursuant to which the court may order security for "the *defendant's* costs of the action or other proceeding as it thinks just". Each of the parties was in substance a plaintiff and the other a defendant.

18. In *Tomlinson* security was ordered against the execution creditors for the costs of the claimant in the trial of the issue. There were no other parties involved. In *In re Milward & Co* the claimant was ordered to give security for the costs of the solicitors' client in the inquiry. There was no other party or at any rate no other party at that stage. In *The Silver Fir* orders were made for security for costs against both parties to the arbitration. Both were plaintiffs and both were defendants for the purpose of O 23. It seems to me that where a party would if he is successful in his defence in an action or other legal proceeding be entitled to the costs of his defence against another party if costs follow the event and that other party is a plaintiff for the purpose of s 388(1) of the Companies Act or O 23 r 1 then the first party is a defendant for this purpose.

19. If Falkland succeeds in its defence in the VBTRF application and costs follow the event it would have the costs of its defence against VBTRF. VBTRF is a plaintiff in this application for the purpose of s 388(1) of the Companies Act. In my judgment Falkland is a defendant and it is entitled to apply for security for its costs.

Discretion

20. VBTRF is in liquidation and it is not in dispute that it will be unable to pay Falkland's costs if Falkland is successful in its defence. What I have to consider is what under all the circumstances will be just and fair as between the parties. VBTRF borrowed US\$7m from Falkland. It agreed to repay the loan by July 1997. As security for the loan VBTRF mortgaged the vessel to Falkland. VBTRF has defaulted and on Falkland's application the vessel was arrested on 14 November 1997 by order of the Dalian Court. This is a summary of the facts recited in the agreement dated 16 January 1998 which VBTRF is seeking to have declared null and void. The agreement provides for the transfer of the vessel to Falkland in partial discharge of VBTRF's indebtedness and to that extent total discharge of the mortgage obligations. In the VBTRF application the indebtedness of VBTRF and its default are not disputed but it is alleged that Mr Nikitenko Nikolay Ivanovich who signed the agreement for and

on behalf of VBTRF had no authority to do so.

21. Mr Khoo has not invited my attention to any other circumstances which I should take into account and in the circumstances which I have outlined I think VBTRF ought to be ordered to give security for Falkland's costs of its defence of the VBTRF application. I think security should be in an amount of \$20,000 and I made an order accordingly.

Lim Teong Qwee

Judicial Commissioner

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