

The "Aquarius III"
[2002] SGHC 138

Case Number : Adm in Rem 600360/2001, NM 600038/2002
Decision Date : 03 July 2002
Tribunal/Court : High Court
Coram : Woo Bih Li JC
Counsel Name(s) : Raymond Ong (Rajah & Tann) for the plaintiffs; Alvin Looi (Gurbani & Co) for the interveners
Parties : —

Admiralty and Shipping – Practice and procedure of action in rem – Sale of ship pursuant to arrest – Sheriff's expenses – Whether crews' post-arrest wages and disbursement part of sheriff's expenses

Judgment

GROUND OF DECISION

Introduction

1. One Myoe Aung and seven other persons were the Interveners in Admiralty in Rem No 600360 of 2001. They were the crew of 'AQUARIUS III' ('the Vessel') which had been arrested in Singapore on the application of the Plaintiff Gulf Agency (Singapore) Pte Ltd ('Gulf Agency').
2. Gulf Agency was the Vessel's agent. After the Vessel arrived in Singapore on 9 May 2001, Gulf Agency supplied food, provisions, bunkers and water and was responsible for the port dues. In the meantime, crew's wages were not paid for several months. The owners had apparently abandoned the Vessel.
3. Although the crew's wages ranked higher in priority to the claim of Gulf Agency, it was Gulf Agency who arrested the Vessel on 21 September 2001.
4. Gulf Agency then obtained an Order of Court dated 2 November 2001 for the Vessel to be appraised and sold pendente lite. The Order was suspended for ten days to allow the owners an opportunity to satisfy all claims against the Vessel. However, Gulf Agency did not proceed to sell the Vessel upon expiration of the ten day period. The Interveners' solicitors Gurbani & Co then requested Gulf Agency's solicitors to file the Commission for Appraisal and Sale of the Vessel. They said that if this was not done by 15 November 2001, the Interveners would file the same and ask the court for costs of taking over the sale process. Apparently there was no response.
5. On 27 November 2001, Gurbani & Co wrote again to Colin Ng & Partners on the same subject but on an urgent basis. They also asked for a copy of the Order of Court dated 2 November 2001. On 29 November 2001, they wrote a third time and asked for the Order of Court dated 2 November 2001 to be served on them. This time, Colin Ng & Partners replied to say that the Interveners might take whatever action they deemed fit but would first have to apply to intervene in the action as they were not yet formally on record as Interveners.
6. The Interveners then applied for and obtained an Order of Court dated 5 December 2001 to allow them to intervene in the action and to have conduct of the sale of the Vessel.
7. Thereafter, the Sheriff took steps to advertise the Vessel for sale. The advertisement was to appear in

the Straits Times on 4 January 2002. However Gurbani & Co requested the Sheriff to abort this advertisement.

8. Colin Ng & Partners were not aware of this development. In mid-January 2002, they made enquiries with the Sheriff's office. They say that it was then that they discovered that the advertisement had not taken place because the Interveners had received part payment of their wages from the owners.

9. On 21 January 2002, Colin Ng & Partners sent a fax to the owners' solicitors, copied to Gurbani & Co, giving the owners a final opportunity to satisfy all claims by 28 January 2002 or the advertisement would proceed. Gurbani & Co sent a similar fax on 21 January 2002 to the owners' solicitors although they had received a second part payment by then.

10. As the owners failed to pay, Gurbani & Co then wrote on 28 January 2002 to the Sheriff to proceed with the advertisement.

11. However, on 29 January 2002, they once again requested the Sheriff to postpone the advertisement so as to give the owners a final opportunity to settle all claims by 8 February 2002. This was because the owners' solicitors had made a written request for a final extension of time to 8 February 2002 to settle all outstanding.

12. On 30 January 2002, Colin Ng & Partners wrote to the Sheriff. Their fax stated:

'We refer to M/s Gurbani & Co's fax of 29 January 2002 and your fax of 30 January 2002.

We were not informed of M/s Gurbani's intention to delay the sale, and we do not agree to the same.

However, as your good office has exercised the discretion to delay the sale by a week, we respect the same and will abide by it.

Our clients however, reserve their rights to seek reimbursement payment of Sheriff's expenses from M/s Gurbani's clients for the one week from 1 February 2002 to 8 February 2002.'

13. Although Colin Ng & Partners took the position that they were not informed of the request by Gurbani & Co, the request was in fact copied to them. What they meant was that they were not given prior notice of the request.

14. On 30 January 2002, the Sheriff wrote to Gurbani & Co to state that the postponement, until 8 February 2002, would be final and the Sheriff would not entertain such requests in future. On the same day, Gurbani & Co replied to agree that no more postponements should be granted thereafter. They also said that if the Sheriff did not hear from them by noon of 11 February 2002, the Sheriff was to proceed with the advertisement.

15. On 18 February 2002, Gurbani & Co followed up by writing to the Sheriff to proceed with the advertisement whereupon the advertisement was eventually effected on 1 March 2002. The advertisement requested bids for the purchase of the Vessel to reach the Sheriff by 15 March 2002. However, no bids were received.

16. On 20 March 2002, the Sheriff wrote to Gurbani & Co requesting for another \$3,000 to re-advertise the Vessel. The Sheriff received no response. On 27 March 2002, Colin Ng & Partners wrote to Gurbani & Co to put up the advertisement fees. There was no response.

17. In April 2002, Gulf Agency managed to get a buyer through its own efforts and applied to court to sanction the sale. However the buyer failed to complete the sale.
18. On 2 May 2002, Colin Ng & Partners requested the Sheriff to re-advertise the Vessel for sale since the Interveners did not put up any fresh funds for further advertisements. Gulf Agency also arranged for an advertisement in Lloyd's List. However, there was no bid except for an offer of \$140,000. Gulf Agency then applied for and obtained a Court order to sanction this sale.
19. The price of \$140,000 was insufficient to pay port dues and guard charges which ranked in priority to crew's wages.
20. Hence, the Interveners applied by Notice of Motion for an order that the wages and disbursements of the crew from the date of arrest till the date of repatriation be treated as Sheriff's expenses and to rank in priority to all other claims.
21. The Interveners' application also covered the costs of repatriation of the crew and the Interveners' deposit of \$3,000 in respect of an appraisal of the Vessel, and advertisement to sell the Vessel. However, Gulf Agency had taken steps to pay for the repatriation of the crew and did not contest that the \$3,000 deposit should be treated as Sheriff's expenses. Hence, these became non-issues.
22. It was obvious that although the crew's wages ranked in priority to that of Gulf Agency's claim, the Interveners would not receive anything from the sale proceeds as such proceeds were not sufficient even to pay port dues and guard charges which in turn ranked in priority as Sheriff's expenses to the crew's wages.
23. If, however, the crew's wages were to be treated as Sheriff's expenses, then they would be paid either from the sale proceeds or by Gulf Agency under the usual indemnity (from Gulf Agency) to the Sheriff to pay for the Sheriff's expenses.

Arguments for the Interveners

24. The Interveners' application was confined to the crew's wages and disbursements from the date of the arrest of the Vessel and did not include wages and disbursements prior to arrest.
25. Mr Alvin Looi, Counsel for the Interveners, submitted that the equities were such that the post-arrest wages and disbursements should be part of the Sheriff's expenses because the Sheriff was obliged to preserve and maintain the Vessel from the date of arrest. To do so, the Sheriff was required by law to maintain a minimum number of crew on board the Vessel during the period of arrest.
26. He referred to Regulation 9 of the Maritime and Port Authority of Singapore (Port) Regulations which states:

`Adequate crew on board

9.(1) The owner, agent, master or person-in-charge of a vessel shall at all times ensure that the vessel is sufficiently and efficiently manned.

(2) The owner, agent, master or person-in-charge of a vessel at anchor shall at all times have on board the vessel a sufficient number of men -

(a) capable of veering cable and keeping anchor lights burning; and

(b) for taking appropriate action in case of an emergency.

(3) The Port Master may, in respect of any vessel or class of vessels, from time to time stipulate the number of men required under paragraph (2).

(4)'

27. The Port Marine Circular No 38 of 1998 dated 3 August 1998 states:

'VESSELS AT ANCHOR IN PORT

1 Pursuant to Regulation 9 of the Maritime and Port Authority of Singapore (Port) Regulations 1997, the owner, agent, master or person-in-charge of every vessel (including harbour/pleasure craft) at anchor in port shall at all times have onboard sufficient number of men capable of veering cable, keeping anchor lights lit and taking appropriate action in case of an emergency.

2 Vessels under active employment/repair must have their full operational crew onboard. In other cases, at least half the number of Officers, Engineers and crew (or Watchmen/Security Guards) or the minimum manning as in Appendix 1, must be onboard at all times.

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28. Appendix 1 provided for a minimum of seven crew for the type of vessel applicable to the Vessel.

Arguments for Gulf Agency

29. Mr Raymond Ong, Counsel for Gulf Agency, did not dispute that a minimum crew had to be retained during the arrest. He also did not dispute that had the Interveners been repatriated earlier, the arresting party would have had to engage a replacement crew and would also have asked for the wages and disbursements of the replacement crew to be part of the Sheriff's expenses. However he stressed that in the present case, the arresting party had not engaged a replacement crew and there was no order that the Interveners' post-arrest wages and disbursements be paid as part of Sheriff's expenses.

30. Mr Ong submitted that, usually, crew's wages and disbursements came under the category of maritime liens which ranked after Sheriff's expenses. He referred to various cases but I need refer to only one.

31. In *Keppel Corp Ltd v Chemical Bank [1994] 1 SLR 346*, there were various claims. According to the established order of priorities, they were:

(1) sheriff's expenses

(2) plaintiff's costs of the application of the appraisalment and sale of the vessel

(3) claim of the salvors

(4) claim of Keppel Corp Ltd ('Keppel') who had a possessory lien over the vessel

- (5) crew's wages and repatriation expenses
- (6) claim of Chemical Bank as mortgagees of the vessel
- (7) several other claims for necessities.

32. The vessel was worth about \$10 million. This was only sufficient to pay the first three claims in full and a small part of Keppel's claim.

33. The crew members refused to leave until their outstanding wages had been paid and arrangements for repatriation had been made. Neither the salvors nor Keppel were willing to advance the money to meet the wages and repatriation expenses. To break the impasse, Chemical Bank was prepared to advance the money to pay the wages and repatriation expenses even though it would not receive any part of the sale proceeds. However, it wanted such payment to be treated as Sheriff's expenses and to be reimbursed out of the proceeds of sale. It applied for an order to this effect.

34. The application was resisted by Keppel only in respect of the payment of crew's wages and disbursements. Keppel did not oppose the payment of crew's repatriation expenses (viaticum). Keppel's arguments was that if the crew's wages were treated as Sheriff's expenses, that would be to alter the established order of priorities.

35. The Court of Appeal decided that whether the crew's wages and disbursements should be treated as Sheriff's expenses depended on the equities of the case and the category of Sheriff's expenses was not a closed category. In the circumstances of that case, the equities were such as to persuade the court to sanction the treatment of the payment of crew's wages and disbursements as Sheriff's expenses.

36. Mr Ong submitted that that case was not authority for the proposition that crew's wages and disbursements would always be treated as Sheriff's expenses. He referred to Admiralty Law & Practice by Toh Kian Seng, 1998, where p 306 footnote 62 has the following comments about that case:

'62 *Keppel Corporation v Chemical Bank* [1994] 1 SLR 346. There are two unique features in this case: first, the inability of a creditor who is prepared to pay the cost of repatriation and wages to recover in full their financial outlay merely by stepping into the shoes of the crew and secondly, the creditor stood to gain nothing out of the arrangement because of other more superior creditors. At p 353, Karthigesu JA considered the equities of the case as being sufficiently compelling to warrant categorisation of the wage payment as Sheriff's expenses; a stalemate would have been reached otherwise. It may be wondered to what extent the recovery of such outlay as Sheriff's expenses should become standard practice in Singapore, in view of the concerns that such wage claims would effectively be elevated into the highest rung on the priority ladder even though the claims may not have been adjudicated upon. In respect of the latter, the Court of Appeal proposed that if need be, a sum of moneys can be left in court to satisfy any judgment obtained. See also *The Eastern Lotus* [1980] 1 MLJ 137 where a mortgagee successfully claimed as Sheriff's expenses expenditure incurred in paying the master and crew because the equities of the case were in their favour.'

37. Mr Ong sought to distinguish the *Keppel* case from the present by pointing out that in that case, it was in the interest of all parties that the crew be paid off so that a sale could be effected. Secondly, a skeleton crew was actually employed at much lower cost after the existing crew were repatriated. Thirdly, the sale proceeds in that case were more than sufficient to cover all the Sheriff's expenses.

38. He also submitted that in the present case, the crew were anxious to be repatriated before their wages and disbursements were paid, unlike the *Keppel* case where the crew refused to leave the vessel

until they were paid.

39. Mr Ong also submitted that it was not fair to Gulf Agency who had had to incur expenses both prior to and during the arrest to have to be effectively saddled with the Interveners' wages and disbursements after arrest when Gulf Agency itself would not be fully reimbursed and had also incurred expenses to provide food and supplies to the Interveners. It was also Gulf Agency who had arrested the Vessel with a view to its subsequent sale to put a stop to expenses continuing to be incurred in respect of the Vessel.

40. Finally, Mr Ong submitted that if the court was minded to allow the Interveners' application, then, the Interveners' wages and disbursements for the period when they delayed the sale should not be part of Sheriff's expenses. He submitted that the period of their delay was from December 2001 to March 2002, meaning actually three months i.e from December 2001 to end February 2002.

41. I would also point out that Mr Ong conceded that, prior to the arrest, Gulf Agency was aware of the requirement for a minimum number of crew to stay on board the Vessel. However, he submitted that the Sheriff was obliged to preserve the Vessel and crew only to the extent of ensuring that the crew were fed and maintained but not to pay their wages and disbursements.

Counter-Arguments for the Interveners

42. Mr Looi pointed out that Gulf Agency itself had been holding its hands before taking steps to arrest the Vessel. It had held its hands with a view to enabling the owners to settle claims.

43. Secondly, although Colin Ng & Partners were aware of the proposed advertisement on 4 January 2002, they did nothing until mid-January 2002 to ascertain whether the advertisement had in fact been published.

44. Thirdly, Gulf Agency had also received some part payment from the owners during the delay.

45. I would reiterate that:

(a) Colin Ng & Partners themselves wrote on 21 January 2002 to the owners' solicitors to say that they would give the owners another seven days to settle all claims failing which they would request the Sheriff to advertise the sale,

(b) in their subsequent fax dated 30 January 2002 to the Sheriff (which I have cited in para 12 above), they had reserved Gulf Agency's rights to seek reimbursement of Sheriff's expenses from the Interveners for one week only i.e from 1 February to 8 February 2002.

46. Mr Looi also submitted that the expenses incurred by Gulf Agency from the date of arrest would be in its capacity as agents of the Sheriff and not in its capacity as the arresting party. The two should not be mixed up.

My Decision

47. I was of the view that this was not a case of altering the established order of priorities or making an exception to the established order of priorities.

48. In the *Keppel* case, the crew were seeking payment of what was primarily pre-arrest wages and disbursements. Likewise in the various cases which Mr Ong was seeking to rely on. I have emphasized that the application before me was confined to post-arrest wages and disbursements.

49. In my view, the post-arrest wages and disbursements were in substance Sheriff's expenses. It did not matter that there was no prior order allowing the same to be treated as Sheriff's expenses or that the Interveners were not engaged by the Sheriff himself or his agents Gulf Agency.

50. Gulf Agency knew the requirement of the relevant regulation, as must the Sheriff. They were content to let the Interveners stay on board to meet the requirement. As Mr Ong himself had said, the Interveners had wanted to be repatriated even without payment of their pre-arrest wages and disbursements. Yet although two of the crew were repatriated, the rest were not. This must be because they were needed to meet the requirement. I was of the view that the Interveners had effectively been adopted by Gulf Agency, as the agent of the Sheriff, to meet the requirement, and it did not lie in the mouth of Gulf Agency to suggest otherwise. I also did not think that the Sheriff's obligation was only to feed and maintain the Interveners with supplies. It extended to paying their post-arrest wages and disbursements.

51. Therefore, the Interveners did not have to rely on the equities of the case. However, even if they had to do so, I was of the view that the equities of the case were with them.

52. The Sheriff had had the benefit of the Interveners' presence and services to meet the regulatory requirement as a result of which the Sheriff had saved on having to engage a replacement crew. If Gulf Agency had thought that it could have engaged a cheaper crew for the Sheriff to replace the Interveners, it should have done so. The fact that it did not, speaks for itself.

53. As regards Mr Ong's attempt to distinguish the case before me from the *Keppel* case, it was my view that it was in the interest of all parties that the Interveners stayed on after the arrest to meet the regulatory requirement. Secondly, no replacement crew was engaged in place of the Interveners whose presence made such an engagement unnecessary. Thirdly, the fact that the sale proceeds in the case before me were not sufficient to cover the Sheriff's expenses made it all the more important that the Interveners should not be left to seek redress from the owners when the Sheriff had had the benefit of the Interveners' presence and/or services.

54. I should mention that Mr Ong also argued that the Interveners could still seek redress from other vessels of the owners, but Gulf Agency might not be able to do so. I presumed that as between Gulf Agency and the owners, Gulf Agency would take a different position. In any event, I did not agree that the Interveners should have to look elsewhere when the Sheriff had had the benefit of their presence and/or services.

55. Although I had some sympathy for Gulf Agency who did not simply abandon its responsibilities, I was not minded to be too sympathetic. Gulf Agency had arrested the Vessel with a view to selling it so as to stop the daily and other expenses, which it was incurring, from running. The arrest was also to recoup part if not all of its own expenses incurred in respect of the Vessel. True, the Interveners might have benefited from the arrest and subsequent sale, but the arrest was not for altruistic reasons only, as Mr Ong conceded.

56. I would add that my decision was not a case of punishing Gulf Agency as Mr Ong was suggesting. Gulf Agency and the Interveners were victims of an unfortunate situation and the outcome had to be in favour of one or the other.

57. As for alleged delay by the Interveners in selling the Vessel, I took into account various factors.

58. First, Gulf Agency itself delayed in having the Vessel arrested even though it was paying the daily expenses.

59. Secondly, after it had arrested the Vessel, Gulf Agency itself was not prompt in proceeding with the sale. That is why the Interveners had to intervene and ask to be allowed to take over the sale. The Order of Court allowing them to do these things was dated 5 December 2001. The first intended advertisement by the Sheriff was 4 January 2002. Therefore, it was quite clear that the Interveners were not responsible for the delay in December 2001 up to 3 January 2002.

60. As for the delay between 4 January to 28 January 2002, Gulf Agency itself did not follow-up until mid-January 2002. Thereafter, their own solicitors wrote to the owners' solicitors to give the owners up to 28 January 2002 to make full payment. The Interveners' solicitors followed suit. Accordingly, it did not lie in the mouth of Gulf Agency to complain about delay for this period.

61. As for the delay between 29 January to 8 February 2002, the Interveners had been requested by the owners (through solicitors) to grant a final extension of time. Given that some payments had been made by the owners by then, and given that the owners' request for a delay was the final one and for a short duration of less than two weeks, it was not unreasonable to give them another chance.

62. Secondly, while Colin Ng & Partners had said that they had not received prior notice of the intention to delay, up to 8 February 2002, and were reserving their clients' rights (for a short period of about a week), they had on the other hand recognised that it was the Sheriff who had exercised his discretion to delay the sale and they had said they would abide by it. It seemed to me that Gulf Agency was prepared to wait for that duration i.e up to 8 February 2002.

63. As for the period from 9 to 28 February 2002, Gurbani & Co had informed the Sheriff to proceed with the advertisement if the Sheriff did not hear from them by 11 February 2002 (9 and 10 February 2002 being the weekend). Indeed, on 18 February 2002, it was Gurbani & Co, and not Colin Ng & Partners, who reminded the Sheriff to proceed with the advertisement which was eventually published on 1 March 2002. Accordingly, I did not agree that the Interveners were responsible for the delay from 9 to 28 February 2002.

64. In the circumstances, I did not think that I should deprive the Interveners of their post-arrest wages and disbursements for even the one week for which Colin Ng & Partners had reserved their clients' rights, let alone for three months.

65. Accordingly, I allowed the Interveners' application.

Sgd:

WOO BIH LI

JUDICIAL COMMISSIONER

SINGAPORE

