The "Acrux"
[2004] SGHC 198

Case Number : Adm in Rem 57/2004, RA 221/2004

Decision Date : 07 September 2004

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Loo Dip Seng, Goh Kok Leong and John Wang (Ang and Partners) for plaintiff; Augustine Liew (Haridass Ho and Partners) for defendant

Parties : —

Admiralty and Shipping – Admiralty jurisdiction and arrest – Action in rem – Defendant's vessel arrested by plaintiff for failure to make payment by deadline – Defendant making part payment and later paying shortfall and interest under protest – Whether declaration of rights as regards payment under protest remaining a claim within admiralty jurisdiction – Whether plaintiff only entitled to security limited to cost of action up to payment under protest or release of vessel – Section 3(1)(l) High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed)

Admiralty and Shipping – Admiralty jurisdiction and arrest – Action in rem – Defendant's vessel arrested by plaintiff for failure to make payment by deadline – Whether defendant had provided security by way of earlier guarantee – Whether claim paid once defendant gave instructions to bankers to remit payment – Whether plaintiff entitled to claim for shortfall – Section 3(1)(l) High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed)

Admiralty and Shipping – Practice and procedure of action in rem – Duty of disclosure – Whether plaintiff failing to make full and frank disclosure in ex parte application for arrest

7 September 2004

Belinda Ang Saw Ean J:

1 This appeal was brought by the defendant, as owner of the *Acrux*, to set aside the *in rem* writ on the ground that the plaintiff's claim had been paid, so much so that there was no basis for the arrest of the *Acrux* in the first place. It was also contended on behalf of the defendant that on the *ex parte* application for the arrest of the *Acrux*, there had not been full disclosure of all material facts. There was the usual prayer for the plaintiff to pay damages for wrongful arrest. At the conclusion of the hearing, I upheld the decision of the Senior Assistant Registrar, Ms Thian Yee Sze, and dismissed the defendant's appeal. I now publish my reasons.

2 On 2 April 2004, the plaintiff, Schaar & Niemeyer (Far East) Pte Ltd, commenced *in rem* proceedings against the *Acrux* whose registered owner at all relevant times was Acrux Shipping Ltd, a Maltese company. The plaintiff's claim arose from the alleged failure of the defendant to pay for goods and materials supplied to the *Acrux*.

3 It was not seriously disputed that the plaintiff's claim in this action was within s 3(1)(l) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed). I was persuaded that the plaintiff had satisfied the standard of proof required in an application to set aside an arrest of a vessel. That is to say, there was an arguable case that the defendant was the party liable in an *in personam* action. The plaintiff was not required to show that it was likely to win: see *The St Elefterio* [1957] P 179; *The Rainbow Spring* [2003] 3 SLR 362. I shall elaborate on the reasons for my decision.

4 It is important to bear in mind the dates of some of the documents and events because it may possibly explain the furore over the arrested vessel. It is convenient to mention that the

plaintiff's claims were outstanding for about two years and the defendant did not settle the debt by the end of March 2004 as agreed to between the vessel's manager, Accord Ship Management (Pvt) Ltd, and the plaintiff. At about the same time, the plaintiff learnt of the sale of the *Acrux* and her delivery to the new owner was scheduled for the period between 6 and 9 April 2004. The prevailing concern, after the defendant failed to make payment, was to ensure early recovery of the indebtedness before the plaintiff's *in rem* rights became prejudiced. Mr Rene Heim, the managing director of the plaintiff, wrote on 31 March 2004 to Mr Mauro Balzarini, who is the beneficial owner of Galaxy Group Holding, the 100% shareholder of Acrux Shipping Ltd, informing him that if a bank guarantee in the sum of $51,064.06 was not provided by 1 April 2004 or payment was not received by 9.00am (Singapore time) on 2 April 2004, he would instruct a lawyer to arrest the *Acrux*. In the same fax, Mr Heim informed Mr Balzarini that the guarantee from Siba Ships Spa, a related company, was unacceptable. A guarantee from Siba Ships Spa was viewed as "practically worthless". Another guarantee from Siba Ships Spa, this time to pay $51,064.06 out of the deposit the defendant expected to receive following the sale of the *Acrux,* was also rejected. The defendant, however, took a different view on this, arguing that the plaintiff should not have arrested the vessel, as security for its claim had been furnished by way of the second guarantee from Siba Ships Spa. I prefer the plaintiff's view, as it is consistent with the defendant's subsequent instructions to its bank to remit $51,064.06 to the plaintiff. Besides, the affidavit evidence of Claus Trenner of M/s Thümmel, Schütz & Partners, the plaintiff's German lawyers, corroborated Mr Heim's account of the events.

5 Counsel for the defendant, Mr Augustine Liew, pinned the defendant's opposition on the primary issue of whether or not there was an existing cause of action as at the date of commencement of these proceedings. He argued that the plaintiff's claim was paid in the sense that the defendant had on 2 April 2004 given instructions to its bankers to remit payment to the plaintiff and that was understood by all concerned to suffice as timely payment. Counsel's argument is unsustainable on the evidence. The plaintiff was expecting payment into its bank account and there was no payment on 2 April 2004 by 9.00am. I was satisfied on the evidence that there was no agreement that the plaintiff had changed its earlier position and agreed to wait until 6 April 2004 for payment. The alleged remittance advice produced by the defendant showed 6 April 2004 as the value date. Counsel was unable to point to any evidence to show that there was *consensus ad idem* to accept payment on 6 April 2004. In stipulating the value date as 6 April 2004 on the remittance advice, the plaintiff did not obtain an immediate and unconditional right to use of the money until the value date: see *The Chikuma* [1981] 1 Lloyd's Rep 371. Separately, it is convenient to mention that the text of the remittance advice relied on by the defendant was in Italian. It was sent to the plaintiff without an English translation and the document itself bore no identification mark of the remitting bank. The deficiencies left the plaintiff in doubt as to its genuineness. Above all, the remittance advice showed the value date to be 6 April 2004. Accordingly, I was of the view that the plaintiff was justified in issuing the writ on 2 April 2004.

6 The *in rem* writ was served on 5 April 2004. The defendant asked for the service to be set aside, but gave no reasons for its challenge to service. Accordingly, this complaint must fail.

7 This brings me to the next issue on this appeal, which is whether the plaintiff was justified in obtaining a warrant of arrest and thereafter continuing with the arrest until 10 April 2004. An interesting sub-issue is whether a payment under protest justifies a release of the arrested vessel upon provision of security for the plaintiff's costs of the action up to the time of payment or release of the vessel. There are two parts to this sub-issue, which I shall deal with below.

8 The relevant facts seem to be these. In chronological order, the next relevant event is the e-mail notice sent to the defendant's London solicitors on 6 April 2004 prior to the issue and execution of the arrest warrant on 7 April 2004. The defendant's London lawyers, the firm of M/s

Stallard Solicitors, were notified on 6 April 2004 by M/s Ang & Partners, solicitors for the plaintiff, that as the defendant had failed to make timely payment in full, the plaintiff was demanding payment of the claim in full, interest thereon at the rate of 6% per annum from the due date of each of the outstanding invoices and legal costs of the action in the sum of $10,000.

9 It was disclosed in the affidavit in support of the arrest filed on 7 April 2004 that after the writ was issued and served, the plaintiff on 6 April 2004 received part payment in the sum of $50,955.23, and that the defendant had refused to pay "the balance and costs in this action". The claim amount stated in the indorsement of claim was for a figure of $51,044.06 instead of $51,064.06. The defendant's London solicitors on 6 April 2004 roundly rejected the payment of legal costs, arguing that the defendant had already paid in full the principal amount on 2 April 2004 and the action was deliberately actuated to obtain legal costs. I presume nothing was said about the claim for interest, given the position taken that the principal claim had been paid. The defendant's perceived view (and it turned out to be incorrect) accounted for the somewhat vitriolic exchange of correspondence between its London solicitors and the plaintiff's solicitors who took umbrage with the comments of the London solicitors.

10 The object of an *in rem* action is to recover, or to obtain security for, compensation for the complaint. The defendant's ensuing argument on the trivial shortfall is that it was in respect of bank charges of the plaintiff's bank, DBS Bank, which were normally absorbed in the past by the plaintiff. The defendant argued that there was thus no obligation to pay this. However, the advice from DBS Bank did not show that the shortfall in the amount of money received was on account of its bank charges. Even if the practice in the past was different, the fact of the matter is that since 6 April 2004, the plaintiff was already demanding payment of the shortfall as well as interest from the date of the outstanding invoices, *ie* from October 2002. The defendant was left under no illusion as to the plaintiff's demands. There was no question of an accord arising from the part payment of $50,955.23 being accepted in full payment and the shortfall, interest and costs (the defendant is liable for costs as a matter of principle once the writ is issued) being discharged by the accord. In any event, if the accord which the defendant relied upon is based on past practice, it will probably fail from want of consideration as required by law. I should mention that on the claim for interest, the plaintiff relied on the case of *People's Park Development Pte Ltd v Tru-Mix Concrete (Pte) Ltd* [1980–1981] SLR 223 for the proposition that the court has power to award interest on a debt which was paid after commencement of proceedings: see also para 6 to the First Schedule of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed).

11 It is trite law that to avoid the arrest of a vessel or to secure the release of an arrested vessel, a proper security in the amount of the claim (based on the plaintiff's reasonably best arguable case), plus interest and costs, is required. There are advantages to both parties in the provision of security. The advantage to the defendant is that it will have secured the release of the vessel so that, in the present case, she can be delivered to the buyers. The advantage to the plaintiff is that it will have obtained security for its claim and that security will be unaffected by any other claims which might be brought against the vessel. At times, the parties may satisfy or compromise the claim and the vessel will be released accordingly.

12 In the present case, the defendant made payment of the shortfall and interest under protest, reserving its right to sue in separate proceedings to recover the payment, thereby leaving legal costs up to the time of payment or release of vessel as the remaining issue to be secured. Accordingly, the defendant asked the court to hold that the plaintiff was not entitled to security for costs to litigate this matter. No authority was cited where it had been held that the arresting party in these circumstances is only entitled to security limited to the costs of the action up to the stage of payment under protest on 8 April 2004 or release of the vessel as argued for by the defendant.

13 In paying the shortfall and interest in the total sum of $4,390.01, the defendant took the precaution, which I think was open to it, for the preservation of any right it might have against the plaintiff, by causing the payments to be made under protest. A party may challenge the admiralty jurisdiction and at the same time make payment of the claim under protest. This was the course adopted. At the same time as making payment under protest, the defendant separately filed on 8 April 2004 its application to set aside the arrest.

14 Counsel for the plaintiff, Mr Loo Dip Seng, took up the position that a payment under protest prolonged rather than brought to an end the proceedings, so much so that the plaintiff should be secured for legal costs beyond the date of payment or release of the vessel. I accept that a payment under protest does not end the matter: see *Maskell v Horner* [1915] 3 KB 106. Whilst the defendant had reserved its right to seek recovery of the money in separate proceedings, the defendant appeared to have changed tack and for the first time in its notice of appeal, sought an order for the return of the money paid under protest. On any view, I agree with counsel that where the payment was made under protest, the validity of the claim for the shortfall and interest nonetheless still remains a direct issue between the parties in the *in rem* action. The question of whether the plaintiff was entitled to make a claim for the shortfall and interest is a matter which the plaintiff is entitled to have fought out between the parties in the *in rem* action, albeit in such a situation, given the developments, a declaratory relief may be sought. A declaration of rights as regards the claim for which a payment under protest was made is still a claim under s 3(1)(l) of the Act. I adopt the views of Clarke J in *The Hamburg Star* [1994] 1 Lloyd's Rep 399 at 406 that s 20 of the UK Supreme Court Act 1981 (*in pari materia* with s 3 of our High Court (Admiralty Jurisdiction) Act) "does not limit the type of claim which is to be within the Admiralty jurisdiction by reference to the remedy sought". It follows that the plaintiff, as a matter of principle, is entitled to be secured for the costs of the action based on its reasonably arguable best case and not for limited costs up to the time of payment under protest or release of the vessel. It is for the defendant to seek a moderation of the quantum demanded (after 6 April 2004 the costs figure has been revised to $30,000) and until then, the plaintiff is entitled to be suitably secured for costs before release of the vessel from arrest. I should add that given the history behind the commencement of the proceedings and the special circumstances here, the trivial amount of the shortfall itself could not be a reason for a finding of oppressive use of the arrest jurisdiction.

15 Counsel for the defendant had a further and separate ground on which he invited the court to set aside the warrant of arrest. This was that on an *ex parte* application for the arrest of the *Acrux*, there had not been full disclosure to the court of the material facts. The importance of full and frank disclosure being made on an *ex parte* application was endorsed by the Court of Appeal in *The Rainbow Spring* ([3] *supra*). It was argued that the shortfall was not explained, the remittance advice was not exhibited to the affidavit leading the warrant of arrest and the guarantee from Siba Ships was not disclosed. In the light of the conclusions reached, there is no failure to make full and frank disclosure in the plaintiff's affidavit affirmed in support of the *ex parte* application to arrest *Acrux*.

16 For these reasons, I dismissed the appeal with costs.