The "Arktis Fighter"
[2001] SGHC 124

Case Number : Adm in Rem 600223/2001, SIC 601190/2001

Decision Date : 04 June 2001

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Belinda Ang SC and Chan Leng Sun (Ang & Partners) for the plaintiffs; Navinder Singh (Joseph Tan Jude Benny Anne Choo) for the defendants

Parties : —

Admiralty and Shipping – Admiralty jurisdiction and arrest – Arrest of vessel – Whether ex parte application for inspection of vessel and discovery appropriate – Release of vessel in exchange for security – Amount of security payable – Form of security

: The plaintiffs are claiming to be persons who have an interest in some steel plate cargo on board the Arktis Fighter. They sued the defendant owners of the vessel for damage to the cargo consisting of about 1,100mts of steel plates (with nickel content). The vessel was arrested by the plaintiffs on 23 May 2001 and on 25 May 2001 the plaintiffs obtained orders from the High Court enabling them to inspect the vessel and gain access to various documents with liberty to make copies of them.

The defendants applied before me to set aside or, alternatively, vary the orders of court of 25 May 2001, and also for an order to release the vessel. The defendants were not present or represented at the ex parte hearing on 25 May but were represented by Mr Navinder Singh in the present application.

Mr Navinder submitted that the orders of 25 May 2001 ought not to have been made without notice. In reply, Mr Chan, counsel for the plaintiffs, submitted that the orders were properly made under O 70 r 28 and O 29 r 2 (inspection of vessel and detention or preservation of property respectively). The orders of 25 May 2001 were, in my view, within the purview of these rules. However, it seems wrong to me that the application was made on an ex parte basis. If there are reasons to believe that critical evidence may vanish or diminish in quality unless a preservation order is made, the proper course was to seek an interim injunction pending a full hearing of the application. Ex parte applications ought to be made only in cases where the rules so provide or on exceptional basis. In this case, I see no reason why notice of the application was not served on the defendants. I am mindful that a similar application in **The Mare del Nord** [1990] 1 Lloyd`s Rep 40 was made ex parte; but in that case the facts show that the defendants were given notice of the intended application and the affidavits were served on them.

In a similar situation in the case of **The Cienvik** [1996] 2 Lloyd`s Rep 395, Clarke J had this to say:

> *It is difficult to envisage circumstances in which it would be appropriate for such an order to be made otherwise than on reasonable notice. If there was a reasonable fear that a defendant or proposed defendant might do some harmful act before an inspection or survey could be carried out, it might be that the proper course would be to seek an ex-parte injunction restraining the doing of such an act pending an application for an order for inspection or survey on notice.*

On my part, I am more inclined to the position adopted in the ***Cienvik*** case. In the ***Mare del Nord*** itself Sheen J expressed the view that the plaintiff must first show that he has a good arguable case

on the merits, and secondly, that the exercise permitted under the order of court will assist the judge at trial. It seems to me, therefore, that in either case, the presence of the defendant`s counsel will assist the court in forming a balanced view. This is all the more so when one bears in mind that at this stage the court is not putting the plaintiff`s case on trial. In the present case, the question of whether the plaintiffs had a good arguable case did not appear to have been raised (mainly because the defendants were not notified and therefore not represented) at the application before the judge on 25 May 2001. When counsel appeared before me, the fact that the plaintiffs` cargo was damaged was not in dispute, but Mr Navinder submitted that the defendants have a strong defence based on `perils of the sea` in that the Arktis Fighter was caught in a severe tropical storm in mid voyage. This assertion was challenged by Mr Chan, and it is obvious that that will be a major contention at trial.

Part of the orders of 25 May 2001 is spent. The inspection by the surveyors, for example, had already been carried out, and Mr Chan informs me that the plaintiffs are unlikely to board the vessel again. The documents specified in the orders of court of 25 May 2001 were handed up to the plaintiffs but have since been released to the defendants` solicitors on their undertaking not to dispose of them. I am aware of the shortness of time in which the plaintiffs had to act, and given the circumstances, I am of the view that in that respect they had not acted unreasonably only because of the different approaches by the court in the ***Cienvik*** (supra) and the ***Mare del Nord*** (supra). In these circumstances and for the reasons I expressed above concerning the necessity of notice, I varied the orders of court of 25 May to the extent that the defendants` solicitors were directed to preserve the documents in their possession pending discovery. The other items that were stated in the order of court of 25 May but not in the defendants` solicitors` possession must be preserved by the defendants themselves pending discovery.

In respect of the issue of the arrested vessel, Mr Navinder submitted that the Arktis Fighter ought to be released because the plaintiffs have no basis to support the allegation that they have a claim of up to US$10.3m. Counsel argued that the deposition of Philippe Geeson on behalf of the plaintiffs fails to give adequate particulars of the potential loss. Mr Geeson had stated in his affidavit that the potential damage to the plaintiffs include the sum of US$3.8m being the total replacement costs of the steel plate cargo and US$6.5m as liquidated damages to the plaintiffs` third party contractors. Mr Geeson further stated that the contract between the third party and the plaintiffs are subject to a confidentiality clause which prevents them from divulging the documents but in his third affidavit he had set out the contractual formula upon which he arrived at the estimate of US$6.5m. Mr Geeson also stated that the cargo has been sent for refurbishment in an attempt to salvage it. If they are successful, the cargo may be saved, and to that extent, damages will be reduced.

The legal principles have been amply stated by Brandon J in **The Moschanthy** [1971] 1 Lloyd`s Rep 37 and in **The Polo II** [1977] 2 Lloyd`s Rep 115 where Brandon J stated his views as follows:

> *[The] Court had power to control the amount of security demanded by a plaintiff in an action in rem and that the control should be exercised on the principle that a plaintiff was only entitled to demand such an amount as security as would cover his reasonably best arguable case, that is to say cover the amount of the claim, the amount of any interest that might be recoverable and the amount of any costs. And I took the view that the power of the Court to control security in that way was derived from the inherent jurisdiction of the Court to prevent any abuse of the process of the Court, or the use of Court procedure in an oppressive way. As I pointed out in that case the power to arrest a ship is a very drastic power. And the power to insist that she shall remain under arrest unless security of a certain amount is given is equally a drastic power, and my view, which I expressed in **The Moschanthy** and which I repeat now, is that that power must not be exercised oppressively, and if it is exercised oppressively then the Court can and should interfere to prevent*

conduct of that kind. At the same time the Court must make sure that the plaintiff is not left without sufficient security to cover his reasonably best arguable case.

There is nothing new to add to the basic point that the issue must be determined on the question of whether the security demanded by the plaintiffs is excessive. How much proof is required varies, obviously, from case to case. In certain circumstances, the court may require sight of invoices and documents of payment; and in some cases, not. I am satisfied with Mr Geeson`s account of the replacement costs of the steel plates in this case and therefore, find that a security of up to US$3.8m for it would not be unreasonable. There was no evidence or argument before me as to the value of the Arktis Fighter. Security should be sufficient to cover the amount of the claim plus interest and costs on the basis of the plaintiffs` best arguable case, but should not normally exceed the value of the vessel arrested. Security is given in exchange for the res and unless there are sound reasons otherwise, it should only be of equivalent value.

I do not think that the security should include the liquidated damages of US$6.5m because, in my view, the full circumstances of the likelihood of the plaintiffs having to pay that sum is not adequately presented. It is entirely up to the plaintiffs to honour the confidentiality clause to a third party, but if they do so the court will not have information which may be useful in the proper assessment of the nature, extent, and likelihood of damage that will activate the liquidated damages clause. When a court considers the question of the best arguable case, it ought to take a fairly broad view of the case and not limit its inquiry to the cause of action alone, and it must also take into consideration the resulting damage as part of that case. I can accept that there is a contractual formula by which the plaintiffs and their contractors have agreed as to how liquidated damages will be assessed, but the burden of proof is on the plaintiffs to convince the court that the amount claimed is reasonably likely to be incurred. If they wish to adhere to the confidentiality of contract with their contractors, as they are entitled to do, they must consequently accept the risk that their application may be drained of the strength it otherwise might have. I therefore ordered the release of the vessel on the provision of security in the sum of US$3.8m plus interest over three years at 8% and costs at S$350,000. In regard to costs, I had taken into account the unchallenged statement by Mr Chan that foreign experts will be required to testify at trial. Provision ought accordingly to be made for that.

Next, Mr Chan submitted that the provision of security by way of a letter of indemnity from Skuld (the Protection and Indemnity Club of the defendants) is unacceptable because Skuld is not financially stable. Mr Chan submitted that Skuld was recently downgraded to category `BB` by Standard & Poor in its ratings. A `BB` rating is understood to mean that such insurer has `vulnerable characteristics` and `could lead to insufficient ability to meet financial commitments`. Although such opinions may not be adequate or even accurate, it is not convenient nor appropriate for the court to conduct a comprehensive inquiry into the validity of the ratings. But, nonetheless, if there is sufficient evidence to warrant caution as there is in this case, there should be no order that security be furnished by the suspect insurer. In assessing commercial ratings of such nature the court should satisfy itself that data used by the analyst is not made up entirely of bruit. That the ratings were made by a renowned institution is also a factor to be taken into account. Once the court is satisfied that a vessel has been lawfully arrested, it will order its release only upon adequate security being furnished; otherwise the plaintiff will be relinquishing a substantial security in exchange for a vulnerable one. However, on the evidence before me, I think that the Skuld undertaking should be sufficient in the short term; and I therefore order that the security be furnished by way of the letter of undertaking from Skuld, in the form of the draft presented before me, on the condition that the defendants substitute a local banker`s guarantee for it within a month. I must add that the temporary reliance on the Skuld

undertaking was granted as an indulgence to enable the defendants to find alternative security, strictly on the facts, and was not intended to be used generally if there is objection from the arresting party. My order is not intended to exclude Skuld as a credible provider of security henceforth. Each application must be examined on its merits and it is up to Skuld to take steps to improve its position in future cases.

Finally, Mr Navinder sought to have the Skuld undertaking cover only the liability of the defendants but not their successors on the ground that P & I Club memberships and rights are not transferable. The only authority which counsel has cited in aid of his plea is the textbook ***P & I Clubs - Law and Practice*** (3rd Ed), in which the author Steven Hazelwood merely reminded the clubs that they ought to keep this fact in mind when they consider giving such undertakings to their members. That seems like good advice to the clubs, but so far as third parties such as the plaintiffs in this case are concerned, it has little significance because the club`s indemnity to a third party is not dependent on its private arrangements with its own members so far as that third party is concerned. In the English case of **The Rio Assu (No 2)** [1999] 1 Lloyd`s Rep 115, Clarke J had to contend with a similar point. There the issue was whether the P & I Club`s indemnity covered the State of Brazil which had taken over as successors to the original owners. The judge treated the matter as one of construction. He reminded himself of the commercial purpose of such letters of undertaking; and after coming to the conclusion that there was no commercial sense for the club to cover the owner but not his successor, ruled that the club was liable to the successor as well. The club`s appeal was dismissed by the Court of Appeal who approved the approach of the judge below (save for one minor criticism which is of little relevance here). Waller LJ also approved the alternative approach on the basis that an undertaking to cover the owner implicitly covers his successor as well. In my view, the plaintiffs must be entitled to an undertaking that will be nearly as secure as the vessel they had arrested; and if that can be achieved by inserting the words `and their successors` to the relevant portion of the letter of undertaking then it must, of course, be so inserted - a small matter of prophylaxis.

Outcome:

Order accordingly.