The "Oriental Baltic"
[2011] SGHC 75

Case Number : Admiralty in Rem No 163 of 2010 (Summons No 5654 of 2010)

Decision Date : 30 March 2011

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Goh Wing Sun (W S Goh & Co) for the plaintiff; Bernard Yee (Gurbani & Co) for the intervener.

Parties : The "Oriental Baltic"

Admiralty and Shipping – Admiralty jurisdiction and arrest – Action in rem

30 March 2011

Tan Lee Meng J:

Introduction

1 The plaintiff, United Bunkering & Trading (Asia) Pte Ltd ("UBT"), applied for leave under s 299 of the Companies Act (Cap 50, 2006 Rev Ed) (the "Act") to continue with its *in rem* action against the defendant, the owner of the *Oriental Baltic* (the "Vessel"), Oriental MES Logistics Pte Ltd ("OML"), which is being wound up. UBT's application was opposed by the intervener, Posh Maritime Pte Ltd ("PMP").

Background

2 In November 2009, PT Sarana Kelola Investa, which had instituted Admiralty in Rem No 328 of 2009 ("ADM 328") against, OML, arrested the Vessel in Singapore.

3 UBT, which had then not instituted any action against OML, filed a caveat against the release of the Vessel on 25 May 2010.

4 On 23 July 2010, PMP, which had instituted Admiralty in Rem No 92 of 2010 ("ADM 92") against OML, was given leave to intervene in ADM 328.

5 On 7 September 2010, OML's directors resolved to wind up the company as it could not continue with its business because of its liabilities. The winding up of OML commenced on 8 September 2010 at around 10.18 am. Mr Farooq Ahmad Mann and Mr Ewe Pang Kooi of M/s Ewe Loke & Partners were appointed as the company's provisional liquidators.

6 After the liquidation of OML commenced, UBT instituted its *in rem* action against OML on the afternoon of 8 September 2010 at around 2.25 pm. UBT claimed that OML owed it US$183,106.84, as well as contractual interest, for the supply of marine gas oil in November and December 2009.

7 On 15 October 2010, the Vessel was sold by the Sheriff and the proceeds of sale, which amounted to $403,000, were paid into court.

8 On 25 October 2010, PMP obtained judgment in ADM 92. On 26 November 2010, it applied for the determination of priorities and payment out of the proceeds of sale of the Vessel.

9 On 1 February 2011, UBT's application for leave to continue with its *in rem* action was heard.

Whether leave should be given to UBT to continue with its action

10 Section 299(2) of the Act, which concerns legal proceedings where the winding up of a company has commenced, provides:

> After the commencement of the winding up no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

11 Obviously UBT wanted leave to continue with its action in order to obtain judgment and stake a claim for a share of the proceeds of sale of the Vessel. As UBT's claim potentially competed with that of PMP, the latter intervened in the present proceedings and strenuously argued that UBT's application for leave should be rejected.

12 Whether leave to continue with admiralty *in rem* proceedings after the owner of the vessel has gone into liquidation must be considered very carefully because of the effect of such proceedings on other creditors of the company. In an oft-cited case, *In re Aro Co Ltd* ("*Re Aro*") [1980] Ch 196, Brightman LJ explained at 207H-208C:

> The usual object of suing in rem is to obtain security. The plaintiff becomes entitled upon the institution of his suit to the arrest and detention of the subject matter … and on adjudication in his favour to a sale and satisfaction of his judgment out of the net proceeds thereof, subject to other claims ranking in priority to or pari passu with his own. So stated, the rights of a plaintiff suing in rem have points of similarity with the rights of a legal or equitable mortgagee or chargee….

13 The main problem faced by UBT in its application for leave to continue with its action against OML was that its *in rem* action was instituted *after* the winding up of OML had commenced. There are two approaches which may be taken when considering whether or not leave should be granted under s 299(2) of the Act to UBT to continue with its action. The first approach focuses on whether or not an applicant for such leave is a secured creditor. In *The Hull 308* [1991] 2 SLR(R) 643, the Court of Appeal, relying on *Re Aro*, reiterated at [10] that the proper test for determining whether the plaintiffs in any given case are secured creditors is to ask whether immediately before the presentation of the winding-up petition, they could assert against all the world that the vessel was security for their claim. While *The Hull 308* was concerned with an application for leave under s 262(3) of the Act which applies to compulsory winding up, the principles enunciated in that case are applicable to s 299(2) of the Act, which governs voluntary winding up and is *in pari materia* with s 262(3) of the Act. Evidently, UBT was in no position at the material time to assert against the whole world that the Vessel was security for its claim as it had not instituted *in rem* proceedings against the owners of the Vessel. That being the case, it should not be allowed to continue with its suit.

14 An alternative approach outlined by Brightman LJ in *Re Aro* was also adopted by the Court of Appeal in *The Hull 308*. It is that the court's power to grant leave to continue the action is not dependent on whether the applicant for leave is a secured creditor and the court's task is to do what is right and fair in the circumstances. That was why in *Re Aro*, leave was granted to continue an *in*

rem action even though the writ was instituted but not served before the commencement of the liquidation of the defendants.

15 While the courts have allowed a plaintiff who instituted an *in rem* action before the commencement of liquidation of the shipowner to continue with the action even though the writ had not been served by that date, the position is different where an *in rem* action is instituted *after* the commencement of liquidation. In *The Hull 308*, the plaintiff, who supplied equipment and engines for the construction of the defendant shipowner's vessel, started an *in rem* action one month after the commencement of the liquidation of the defendant. LP Thean JA explained (at [14]) as follows why the plaintiff should not be allowed to continue with its action:

> Following the alternative broad approach adopted by Brightman LJ and doing what is right and fair in the circumstances we do not think that in this case the discretion under […the Act] should be exercised in favour of the plaintiffs. The plaintiffs immediately before the commencement of winding up of the defendants had no security over the vessel, and *should leave in such circumstances be granted, it would confer upon the plaintiffs a security on an asset of the defendants which the plaintiffs otherwise did not have and could not have*. *That would be unfair to the other unsecured creditors*. The primary object of the winding up provisions of the Act, as held by Lindley LJ in *In re Oak Pits Colliery Co* (1882) 21 Ch D 322 at 329, is to put all unsecured creditors upon an equality and to pay them *pari passu*; ….
>
> [emphasis added]

16 UBT contended that while it had not issued a writ before the commencement of liquidation proceedings against OML, the fact that it had filed a caveat against release before that date should be taken into account. However, a caveat against release does not establish the caveator's status *vis-à-vis* a vessel in the way that the issue of a writ does. In *Re Aro*, Brightman LJ stated at 211 that such status is established by the issue of the writ. In my view, on the basis of the alternative approach outlined by Brightman LJ, it would not be right and fair in the circumstances to allow UBT to continue with its action against OML as that would be most unfair to OML's other creditors.

17 For the reasons stated, UBT's application for leave to continue with its action was dismissed.