IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 218

Admiralty in Rem No 63 of 2016
(Registrar's Appeal Nos 386 and 387 of 2016)

Between

DSA CONSULTANCY (FZC)

… *Plaintiff*

And

OWNER AND/OR DEMISE CHARTERER OF THE VESSEL "EUROHOPE"

… *Defendant*

GROUNDS OF DECISION

[Admiralty and shipping] — [Admiralty jurisdiction and arrest] — [Action in rem]

DSA Consultancy (FZC)
v
The "Eurohope"

[2017] SGHC 218

High Court — Admiralty in Rem No 63 of 2016 (Registrar's Appeal Nos 386 and 387 of 2016)
Chua Lee Ming J
15, 17 November 2016

31 August 2017

Chua Lee Ming J:

Introduction

1 The main issue in this case was whether the High Court's admiralty jurisdiction under the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("the Act") could be invoked by an action in rem for the sole purpose of obtaining security in aid of pending court proceedings in London. I concluded that it could not.

Undisputed facts

2 The plaintiff, DSA Consultancy (FZC), chartered the vessel *Eurohope* ("the Vessel") from the defendant. The charterparty was governed by English law and contained an exclusive jurisdiction clause in favour of the High Court of London (except for claims not exceeding US$100,000).

3 On 29 February 2016, soon after entering into the charterparty, the defendant purported to terminate the charterparty. On 30 March 2016, the plaintiff commenced an admiralty action in the High Court of London for wrongful termination of the charterparty ("the London proceedings").

4 On 25 April 2016, the plaintiff issued the writ in rem in the present action and arrested the Vessel. The affidavit filed in support of the application for the warrant of arrest stated that

(a) the application for the warrant of arrest was "to obtain security in aid of [the London proceedings]"; and

(b) "once the security is obtained, the Plaintiffs intend to apply for a stay of this action with the security in place, pending the determination of the [London proceedings]".

5 The defendant furnished security by way of a letter of undertaking issued by the American Steamship Owners Neutral Protection and Indemnity Association Inc ("the American P&I Association") and the Vessel was released on 29 April 2016.

6 On 5 May 2016, the plaintiff filed Summons 2153 of 2016 for an order to stay all proceedings in the present action, and for the security furnished by the defendant to remain in force, pending final determination of the London proceedings.

7 On 17 May 2016, the defendant filed Summons 2377 of 2016 for, among other things, the writ and/or warrant of arrest to be struck out and/or set aside, damages for wrongful arrest and in the alternative, for moderation of the security amount.

8 The assistant registrar ("AR") dismissed the defendant's application and granted the plaintiff's application. The defendant appealed against the AR's decisions in both applications. These were Registrar's Appeal Nos 386 and 387 respectively. I allowed both appeals and struck out the writ and set aside the warrant of arrest. However, I refused the defendant's application for damages to be assessed for wrongful arrest or wrongful continuation of the arrest of the Vessel.

Whether the writ in rem and/or warrant of arrest should be struck out and/or set aside

9 Section 3 of the Act confers admiralty jurisdiction on the High Court. The types of admiralty claims that the High Court has jurisdiction to hear and determine are set out in s 3(1)(*a*) to (*r*) of the Act.

10 Section 4 of the Act deals with the mode of exercise of the admiralty jurisdiction of the High Court. Broadly speaking, the admiralty jurisdiction of the High Court may be invoked

(a) by an action in personam in all cases (s 4(1) of the Act); or

(b) by an action in rem where the claim falls within s 4(2)–4(5) of the Act.

An action in rem is against the res and allows the plaintiff to obtain security (in the form of the res) for its claim in the action.

11 In the present case, it was not disputed that the plaintiff's claim for wrongful termination of the charterparty fell within the scope of s 3(1)(*h*) of the Act which provides as follows:

> 3.—(1) The admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims:
>
> …
>
> (h) any claim arising out of any agreement relating to carriage of goods in a ship or to the use or hire of a ship;
>
> …

12 It was also not disputed that by virtue of s 4(4) of the Act, the plaintiff was entitled to invoke the admiralty jurisdiction of the High Court by commencing the present action in rem. Section 4(4) of the Act provides as follows:

> (4) In the case of any such claim as is mentioned in section 3(1)(*d*) to (*q*), where —
>
> (a) the claim arises in connection with a ship; and
>
> (b) the person who would be liable on the claim in an action in personam (referred to in this subsection as the relevant person) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,
>
> an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against —
>
> (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charter of that ship under a charter by demise; or
>
> (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

However, the plaintiff admitted that it had no intention of proceeding with the present action in Singapore and that the sole purpose of commencing the action was to obtain security in aid of the London proceedings.

13 The issue before me was whether it was an abuse of process to commence an action in rem for the sole purpose of arresting a vessel in order to obtain security in aid of legal proceedings in a foreign court.

14 In *The "Cap Bon"* [1967] 1 Lloyd's Rep 543, the plaintiff invoked the court's admiralty jurisdiction for the purpose of providing security for the payment of an arbitration award. The court held that it had no jurisdiction under the Administration of Justice Act 1956 (c 46) (UK) ("AJA 1956") to arrest ships for this purpose. Brandon J reasoned as follows (at 547):

> [Section 3(4) of the AJA 1956] provides that the Admiralty jurisdiction may be invoked by an action *in rem*, and the jurisdiction referred to is the jurisdiction to hear and determine various types of claim as set out in [s 1(1) of the AJA 1956]. It is to be inferred from that that the object of the process *in rem* is to provide security for a plaintiff in respect of any judgment which he may obtain as the result of the hearing and determination of a claim. That is the purpose of proceedings *in rem* and, subject to the point I made, that it covers also payment of a sum due under a settlement in an action, it is the sole purpose of such process … In my view the court … only has jurisdiction to arrest ships and keep ships under arrest for the purpose of providing security for a judgment of the Court.

Sections 1(1) and 3(4) of the AJA 1956 are, for all intents and purposes, identical to ss 3(1) and 4(4) of the Act respectively.

15 Brandon J found reinforcement for his view in the fact that under the Rules of the Supreme Court that were in force then, bail "must be given by bond in Form No. 11" and Form No. 11 covered only a judgment in the action or a sum payable by virtue of a settlement of the action (at 547–548).

16 Subsequently, in *The "Vasso" (formerly "Andria")* [1984] 1 Lloyd's Rep 235 ("*The Vasso*"), the English Court of Appeal disagreed with Brandon J's reasoning in *The Cap Bon* although the end result was the same. The Court of

Appeal was of the view that the plaintiff's purpose in invoking the court's admiralty jurisdiction did not affect the *existence* of the court's jurisdiction under the Supreme Court Act 1981 (c 54) (UK) ("SCA 1981"), but only the court's *exercise* of its jurisdiction. Goff LJ stated as follows (at 241):

> [W]e find ourselves unable to agree with [Brandon J's] view that the Court has no *jurisdiction* to arrest a ship, or to maintain an arrest, where the purpose of the plaintiff is simply to obtain security for an award in arbitration proceedings. We are ourselves unable to conceive of a case where the jurisdiction of the Court depends upon the purpose of the plaintiff invoking the Court's jurisdiction. Generally speaking, the word "jurisdiction" simply expresses a power of the Court – in such cases as the present, the power of the Court – to "hear and determine", i.e. to adjudicate upon, certain types of claim. These types of claim are set out in the lettered sub-paragraphs of what used to be s 1(1) of the [AJA 1956] (now s. 20(2) of the [SCA 1981]): and, as appears from s 3(4) of the [AJA 1956] (now s. 21(4) of the [SCA 1981]) that jurisdiction may be invoked by an action in rem in the case of some, though not all, of those types of claim. Of course, where the court's jurisdiction may be invoked by an action in rem, the Court must have the power to arrest …
>
> In our judgment, the purpose of the plaintiff in invoking the Admiralty jurisdiction cannot affect the existence of the jurisdiction. The jurisdiction is simply there. The Court has power to arrest. But the exercise of the power is, as O. 75 r. 5(1) [of the Rules of the Supreme Court] shows, not mandatory; the Court may decline to exercise it … The Court's decision whether to exercise [this power] may be affected by the manner in which, or the purpose for which, the plaintiff has proceeded …

17 Goff LJ then went on to hold (at 242) that the court's jurisdiction to arrest a ship in an action in rem should only be exercised to provide security in respect of *the action in rem, and not any other proceedings*. Accordingly, the court held that it should not issue a warrant of arrest if its jurisdiction was invoked to obtain the arrest of a ship as security for an award in arbitration. As noted in *The Vasso* (at 242), s 26 of the Civil Jurisdiction and Judgments Act 1982 (c 27) (UK) ("CJJA 1982") had not yet been brought into force then.

Section 26 of the CJJA 1982 changed the law in the United Kingdom and this is discussed later at [28] below.

18 *The Vasso* was cited with approval by the High Court in *The "ICL Raja Mahendra"* [1998] 2 SLR(R) 922. The issue there was whether a plaintiff, having arrested a vessel in Singapore, may obtain alternative security to cover a judgment or an award in any other jurisdiction (in exchange for the release of the arrested vessel) apart from the provisions under ss 6 and 7 of the International Arbitration Act (Cap 143A, 1995 Rev Ed) ("IAA 1995"). For present purposes those provisions do not differ materially from their equivalents in the current version of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). The High Court held (at [22]) that:

> [t]he purpose of invoking the court's jurisdiction in the first instance and the reason for the application for stay are relevant considerations to the court in the exercise of its discretion to release the arrested vessel. I agree that the court's jurisdiction to arrest a ship in an action *in rem* should not be exercised for the purpose of providing security for an award or judgment elsewhere. An exception is where a party applies under s 6 of the [IAA 1995] …

19 In response to the above cases, the plaintiff referred me to *Avin International Bunkers Supply SA v The Owners of the Ship or Vessel "United Endurance"*, Admiralty in Rem No 108 of 2007 ("*The United Endurance*"). That case involved a dispute over the specifications of fuel oil supplied by the plaintiff ("Avin") to the vessel. Avin commenced an action in the First Instance Court of Piraeus, Greece, against the owner of the vessel ("Trade Tankers") and filed an application for the arrest of the vessel. Avin obtained a temporary order for the arrest of the vessel. The vessel was released after Trade Tankers provided a bank guarantee to secure Avin's claim. Trade Tankers filed a claim for damages suffered due to the supply of off-specifications fuel oil and applied to the same court for an interim attachment of Avin's assets.

20 Both Avin's and Trade Tankers' applications were heard by the First Instance Court of Piraeus. The court disallowed Avin's application. It decided that (a) it was not likely that Trade Tankers would sell the vessel or fail to pay if Avin succeeded in its claim, and (b) security was not necessary as Trade Tankers' claim exceeded Avin's claim. The court allowed Trade Tankers' application and ordered Avin to provide security for Trade Tankers' claim. Avin provided a bank guarantee and the attachment on its assets was lifted. The bank guarantee provided by Trade Tankers to secure Avin's claim was discharged.

21 Pending the hearing of the substantive claims in Greece, Avin learned that Trade Tankers had put up the vessel (which was the only vessel owned by it) for sale.

22 When the vessel subsequently entered Singapore port limits, Avin commenced action in Admiralty in Rem No 108 of 2007 in Singapore and arrested the vessel. Trade Tankers furnished security by way of a bank guarantee and the vessel was released. The guarantee was wide enough to cover judgment sums that might be awarded in the proceedings in Greece. Avin filed an application to stay the action in favour of the proceedings in Greece. Trade Tankers filed an application to, among other things, dismiss the plaintiff's action, set aside the warrant of arrest and discharge the guarantee. The Assistant Registrar granted Avin's application for a stay as it was common ground that Greece was the more appropriate forum. She dismissed Trade Tankers' application to dismiss the action and to set aside the warrant of arrest. However, she ordered that the security furnished by Trade Tankers be discharged.

23 Trade Tankers appealed against the dismissal of its application. One of the arguments made by Trade Tankers in support of its appeal before the High Court was that the court had no jurisdiction to arrest a ship in an action in rem

for the purpose of providing security for a judgment in a foreign court. Avin took issue with Trade Tankers' argument and appealed against the order discharging the security furnished by Trade Tankers. The High Court dismissed Trade Tankers' appeal and allowed Avin's appeal. The result was that the bank guarantee furnished by Trade Tankers continued to be maintained as security for the proceedings in Greece.

24 No grounds of decision were issued in *The United Endurance.* In the present case, the plaintiff submitted that the High Court in *The United Endurance* must have disagreed with *The ICL Raja Mahendra* and decided that a vessel could be arrested to provide security for proceedings in a foreign court. However, in my view, *The United Endurance* offered limited guidance since I did not have the benefit of the learned judge's reasons.

25 In any event, I agreed with *The Vasso* and *The ICL Raja Mahendra* and concluded that the power of arrest in an action in rem should not be exercised in aid of legal proceedings in a foreign court. First, as stated in *The Vasso* (at 242), the purpose of the arrest in an action in rem is to provide security in respect of *the action in rem*. In my respectful view, this must be correct. After all, an action in rem is a mode of exercise of the admiralty jurisdiction conferred on the High Court by s 3(1) of the Act and that jurisdiction is to "hear and determine", *ie*, to adjudicate upon, those questions and claims set out in s 3(1)(*a*) to (*r*) of the Act.

26 Second, this conclusion was reinforced by the fact that (similar to what Brandon J had noted in *The Cap Bon*) pursuant to O 70 r 15(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), bail "must be given by bond in Form 168" and Form 168 covers only a judgment in the action or a sum payable by virtue of a settlement of the action.

27 Third, this conclusion was also supported by the fact that legislative intervention was required to give the court power, when staying proceedings in court pending arbitration, to order that "property arrested be retained as security for the satisfaction of any award made on the arbitration". Section 7(1) of the IAA, which gives the court such power, had been enacted in 1994 following a recommendation by the Law Reform Committee of the Singapore Academy of Law that "specific provision be made to allow ships arrested under the High Court's admiralty jurisdiction to be used as security for pending international arbitrations" (Law Reform Committee, Singapore Academy of Law, *Report of the Sub-Committee on Review of Arbitration Laws* (August 1993) at paras 48–49 (Chairman: Giam Chin Toon)).

28 In contrast, there is no statutory provision that empowers the Singapore courts to order that property arrested be retained for the satisfaction of a judgment given in foreign court proceedings. This differs from the position in the United Kingdom where the court's powers are clearly wider. In addition to s 11(1) of the Arbitration Act 1996 (c 23) (UK) (which is substantially similar to s 7(1) of the IAA), s 26(1) of the CJJA 1982 further provides as follows:

> 26.—(1) Where in England and Wales or Northern Ireland a court stays or dismisses Admiralty proceedings on the ground that the dispute in question should be submitted *to the determination of the courts* of another part of the United Kingdom or *of an overseas country*, the court may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest –
>
> > (a) order that the property arrested be retained as security for the satisfaction of any award or judgment which –
> >
> > > (i) is given in respect of the dispute in the legal proceedings in favour of which those proceedings are stayed or dismissed; and
> > >
> > > (ii) is enforceable in England and Wales or, as the case may be, in Northern Ireland; or

> (b) order that the stay or dismissal of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award or judgment.
>
> [emphasis added]

29 In my view, in Singapore, legislative intervention would be required if the court is to be given powers to order that property arrested in an action in rem in Singapore be retained as security for the satisfaction of a judgment given in legal proceedings in a foreign court.

30 Since the power of arrest in an action in rem should not be exercised in aid of legal proceedings in a foreign court, in my view, it followed that the plaintiff's action in rem was an abuse of process since it was commenced for the sole purpose of arresting the Vessel to obtain security in aid of the London proceedings. Accordingly, I struck out the writ of summons and set aside the warrant of arrest against the Vessel.

31 The plaintiff next submitted that the court has ordered security for foreign proceedings as a condition for the stay of Singapore proceedings. The plaintiff argued that in the present case, the court should similarly order the Singapore proceedings to be stayed and the security furnished by the defendant to remain in force. The plaintiff relied on *The "Reecon Wolf"* [2012] 2 SLR 289 and *The "Asian Plutus"* [1990] 1 SLR(R) 504.

32 *The Reecon Wolf* involved a collision between the plaintiff's and the defendant's vessels. The defendant brought an action in Malaysia and arrested the plaintiff's vessel. The plaintiff brought an action in Singapore and arrested the defendant's vessel. The defendant then applied to stay the Singapore proceedings on the basis that Malaysia was the more appropriate forum for the dispute to be heard. The court agreed with the defendant and ordered a stay of the Singapore proceedings on condition that the defendant provided the plaintiff

with security to answer any judgment which the plaintiff may obtain against the defendant in Malaysia (at [59]).

33 In *The Asian Plutus*, the plaintiff sued the defendant for damage to cargo discharged in Singapore. The cargo was shipped under a bill of lading which provided that any action against the carrier was to be brought in the Tokyo District Court. The defendant applied to stay the Singapore proceedings in favour of proceedings in the Tokyo District Court. The Registrar who heard the stay application ordered a stay on the condition that, among other things, the defendant provided security for the plaintiff's action to be brought in the Tokyo District Court (at [4]). The High Court affirmed the Registrar's decision.

34 I disagreed with the plaintiff's submission. In my view, *The Reecon Wolf* and *The Asian Plutus* did not assist the plaintiff. In both *The Reecon Wolf* and *The Asian Plutus*, the plaintiff wanted to proceed with the proceedings in Singapore. The issue before the court in each case was whether the proceedings in Singapore should be stayed in favour of a foreign jurisdiction. The provision of security was imposed as a condition to the order staying the proceedings in Singapore. Neither case involved an application to strike out the Singapore proceedings. In contrast, in the present case, the defendant had applied to strike out the action. Although the plaintiff did file an application to stay the action in Singapore, that application became irrelevant once I decided to strike out the action.

Whether damages should be awarded for wrongful arrest or wrongful continuance of arrest

35 The defendant asked for damages for wrongful arrest or wrongful continuance of arrest of the Vessel. The legal principles are not in dispute. To succeed in a claim for damages for wrongful arrest, the defendant must show

that there was bad faith or malicious negligence on the part on the plaintiff in bringing the action or in rejecting any security offered for release of the vessel. The same test is applied to determine whether there was wrongful continuance of an arrest. See *The Kiku Pacific* [1999] 2 SLR(R) 91 at [14]–[17] and *The Evmar* at [29].

36 The defendant submitted that the following demonstrated bad faith on the plaintiff's part:

> (a) The plaintiff pursued the arrest of the Vessel for the purpose of providing security in foreign court proceedings, in blatant disregard of Singapore law.
>
> (b) The plaintiff failed to act expeditiously in providing the security quantum and/or in responding to the wording of the undertaking to be provided as security, and such delay was an attempt to extract favourable terms in the London proceedings.

37 In my view, the law was not so settled that the plaintiff could be said to have proceeded with the arrest of the Vessel in bad faith. It was not unreasonable for the plaintiff to rely on the decision in *The United Endurance*.

38 As for the alleged delay, I disagreed with the defendant that the plaintiff had dealt with security negotiations in such a dilatory manner as to amount to bad faith. I accepted the plaintiff's explanations that (a) it had to take instructions from solicitors in London, who in turn had to take instructions from the plaintiff in Dubai, and (b) the conditions which the plaintiff had sought to impose on the defendant were part and parcel of legitimate commercial negotiations.

39 In my view, the plaintiff's behaviour taken as a whole was reasonable and did not amount to bad faith or malice. I therefore did not award damages for wrongful arrest or wrongful continuation of arrest.

Conclusion

40 For the foregoing reasons I allowed both appeals. I dismissed the plaintiff's application for a stay of proceedings and for the maintenance of security pending the final determination of the London proceedings. I ordered that the writ be struck out, the warrant of arrest be set aside, and that the letter of undertaking issued by the American P&I Association be returned to the defendant or their solicitors for cancellation forthwith. I declined to order damages for wrongful arrest or wrongful continuance of arrest of the Vessel.

41 Finally, I ordered the plaintiff to pay costs here and below, for both appeals, fixed at $16,500 inclusive of disbursements.

Chua Lee Ming
Judge

Liew Teck Huat, Dafril Phua and Christopher Yee (Niru & Co LLC)
for the plaintiff;
Leong Kah Wah and Lim Ruo Lin (Rajah & Tann Singapore LLP)
for the defendant.