THE HIGH COURT

[2017 No. 6557 P.]

IN THE MATTER OF THE M/V LADY MAGDA

BETWEEN

ATLAS BALTIC OÜ

PLAINTIFF

AND

THE OWNERS AND ALL PERSONS CLAIMING

AN INTEREST IN THE M/V "LADY MAGDA"

DEFENDANT

JUDGMENT of Mr. Justice McGovern delivered on the 18th day of July, 2018

1. The plaintiff's claim is for the sum of €95,381.49 alleged to be due and owning from the defendant to the plaintiff in respect of the disbursements made by the plaintiff on behalf of "*Lady Magda*". The claim is based on breach of contract.

2. The vessel is registered in and flies the flag of the Kingdom of the Netherlands. The claim in these proceedings is in respect of disbursements made by the plaintiff at ports in Latvia and Estonia.

3. As the plaintiff claims that the sums due have not been paid, it sought and obtained a warrant to arrest the vessel when it came to this jurisdiction. The warrant for arrest was obtained on the basis that the claim constituted a "*maritime claim*" within the meaning of Article 1 of the 1952 International Convention relating to the Arrest of Seagoing Ships ("*the arrest convention*") which has been incorporated into our law by virtue of the jurisdiction of Courts (Maritime Convention) Act, 1989.

4. The warrant of arrest issued on 19th July, 2017 and on 21st July, 2017 an appearance was entered by the defendants. In due course security was put up for the release of the vessel. The vessel has been sold since these proceedings commenced.

5. The defendants' position is quite simple. They state that they never entered into any agreement with the plaintiff for the provision of agency or any other services, they never requested the provision of such services nor did they obtain the benefit of such services. They, therefore, claim that they have no liability in these proceedings and that the plaintiff is not entitled to judgment against the security which was offered for the release of the vessel.

6. There is very little dispute on the facts. The defendants have not contested the sum being claimed nor do they take any issue with the invoices save and except that the invoices were not issued to them and they maintain they had no liability to pay them.

7. Although the statement of claim pleads that the defendants entered into a series of contracts with the plaintiff for the provision of services for reward and that those services were provided by the plaintiff to the defendants, this was not the claim that was made when it replied to a notice for particulars on 4th December, 2017. The defendants sought particulars of each and every invoice pleaded in the statement of claim and each in every case the plaintiff stated "*the plaintiff entered into an agreement to provide agency and other services to the vessel at the request of Dennis Maritime Oy Limited".* Dennis Maritime Oy Limited ("*DM*") is a Finnish company unconnected with the defendant. Although there is no dispute between the parties on these facts the plaintiff contends that notwithstanding that the service was requested by a third party who is not before the court that the plaintiff is entitled to a judgment against the owners of the vessel. The defendants reject this contention arguing that the claim for disbursements does not give rise to a maritime lien which only arises in the case of the personal liability of the owners.

8. The plaintiff raised seventeen separate invoices all addressed to DM. At the time when the services were requested by DM they were time charters of the vessel. Mr. Kekkonen on behalf of the plaintiff gave evidence that the plaintiff had provided ship agency services at the express request of DM since 2012 and they were usually provided on the basis of written appointments sent by the DM operations department.

9. He also gave evidence that DM paid debts on behalf of the vessel and other vessel debts but failed to pay the invoices which are the subject matter of these proceedings on the basis that they were having financial difficulties. In April, 2017 the plaintiff concluded an agreement for deferred payment with DM but this agreement was subsequently broken by DM. DM subsequently went into liquidation.

10. On 7th April, 2017 the defendants were copied with a letter of demand from lawyers for the plaintiff which was addressed to DM. The defendants were copied with a further letter of 9th May, 2017 from the plaintiff's lawyers again addressed to DM calling on DM to pay the plaintiff the sums due on foot of the unpaid invoices.

11. On 11th May, 2017 Mr. Baar of the defendants wrote to the plaintiff's Estonian lawyer expressing his surprise to receive (in copy) the letters dated 7th April and 9th May, 2017 and he explained that the defendants did not know the status of any agreed services between DM and the plaintiff as the vessel was chartered out to DM. He also added "*for good orders' sake we note that the owners of M/V Lady Magda are not the debtors of your clients".*

12. It is clear from the evidence that the agreements upon which the plaintiff's claim is based were concluded with DM. It is also clear that up until the time that DM got into financial difficulties and reached an agreement for rescheduled payments that all the demands were made by the plaintiff on DM and on no other party.

13. The issue before the court is a simple one, namely, whether the plaintiff can recover against the vessel (or the security) in respect of the services sought by and given to DM ?

14. The plaintiff relies heavily on the judgment of Rushington J. in "the Perla" (1858) 1 Swabey 353. In the course of his judgment the learned judge stated:-

> "*where goods are furnished for the use and benefit of a ship, the presumption is that the ship is liable; and, to rebut this*

presumption, it must be distinctly proved that credit was given to the individual only, whoever he may be."

The defendants rely on *Campus Oil Ltd v. MF/V Avro Hunter* [2004] 4 JIC 2701. This was a claim in respect of necessaries or fuel supplied by the plaintiff to the vessel. The application was made on notice to Mr. Barry English who was not the registered owner of the vessel but was the beneficial owner. The circumstances were that Mr. English purchased the vessel in 2001 from Mr. Brendan McGrath. He did so with the aid of a loan from AIB Plc. Mr. English did not procure his registration as owner and the vessel remained registered in the name of Brendan McGrath who executed a declaration of trust of the vessel in favour of Mr. English dated 1st June, 2001. Mr. McGrath executed a mortgage of the vessel in favour of AIB Plc to secure the advance to Mr. English. The agreement between the parties was that Mr. McGrath would repay the loan made by AIB to Mr. English by making the repayments to on foot thereof. Under the agreement Mr. Brendan McGrath continued to operate the vessel. He defaulted in making the agreed payments and proceedings *in rem* were commenced by the plaintiff to recover the cost of fuel supplied to the vessel. In the course of his judgment Finnegan P. stated:-

> *"A lien for necessaries is not a maritime lien and a plaintiff's right to the res as a security only arises on proceedings being instituted and is subject to any claim then existing: The Pacific (1864) 10 LT 541: The Two Ellens (1872) L.R. 4 P.C. 161. The object of the arrest is to provide security for the plaintiff for the sum which he claims: The Cella (1888) 13 P.D. 82.*
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> *Counsel on behalf of Mr. English argues that as there is no personal liability on Mr. English the vessel is not amenable to arrest. It seems to me that he is correct. In the St. Merriel [1963] 1 All E.R. 537 Hewson J. at p. 542 in relation to a claim in respect of repairs ordered by a demise charterer taken by the repairers against the owner said:-*
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> > *'I find as a fact that there was no contract express or implied between the owners and the repairers, and I have had affidavit evidence to that effect. Counsel for the defendants has submitted throughout that the wrong person was sued in this case and that there was no liability upon the owner. Even if I am wrong and the holder of a possessory lien has a charge upon the ship for the amount claimed, I should still hold that he failed in this case, because there was no contract between the ship owner and the ship repairer. I have been referred by counsel for the defendants to Morgan v. Castlegate S.S. Co. The Castlegate (1893) A.C. 38 and to Utopia (Owners) v. Primula (Owners and Master), the Utopia (1893) A.C. 492 a Privy Council case. It will be sufficient for me to read from the Castlegate from Lord Watson's speech:-*
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> > > *'In the case of lien for wages of master and crew the legislation has recognised the rule that it attaches to ships independently of any personal obligation of the owner, the sole condition required being that such wages shall have been earned on board the ship. But that rule, which is founded upon obvious considerations of public policy, constitutes an exception from the general principle of maritime law, which I understand to be that, in as much as every proceeding in rem is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in its personal liability. It was argued that the case of lien for damages by collision furnishes another exception to the general rule, and there are decisions and dicta which point in that direction; but these authorities are hardly reconcilable with the judgment of Dr. Lushington in the Druid (1842) 1 Wm. Rob. 391, with the law laid down by the Appeal Court in the Parlement Belge, where the present Master of the Rolls with the assent of James and Baggallay, stated:*
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> > > > *'in a claim made in respect of a collision the property is not treated as the delinquent per settlement. That the ship has been in collision, and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she were in charge of a compulsory pilot. That is conclusive to show that the liability to compensate must be fixed, not merely on the property, but also on the owner through the property'."*

15. Finnegan P. also referred to the remark of Hewson J. at p. 543 in the *St. Merriel* that "It is a fundamental rule that the basis of maritime liens lies in the personal liability of the owner". On the basis of those decisions Finnegan P. decided that as there was no personal liability on the beneficial owner and the demise charter having been terminated before the institution of the proceedings there was no entitlement to arrest the vessel.

16. In the case before me while the master of the vessel was employed by the defendants, he not the servant or agent of the defendants while acting as master during the currency of the time charter since he was subject to the directions of the charterer. There is absolutely no evidence before the court that the master entered into the arrangements which are the subject matter of these proceedings. As Mr. Kekkonen stated on behalf of the plaintiffs the services provided by DM to the vessel were usually on the basis of written appointments sent by DM's operation department. This fact distinguishes the present case from "*the Perla*" where the master of the vessel came to the office of the plaintiff accompanied by another man who placed the order for necessaries to repair the vessel. While the issue of actual or ostensible authority was not considered in that case the facts are clearly different to the dispute which I have to determine.

17. Although the court received submissions on the question of actual or ostensible authority there was no evidence to support a claim that the master of the vessel sought the services of the plaintiff or made any representations to the plaintiff about his authority to do so. The plaintiff's own evidence is clear as to how the contracts were agreed.

18. The defendants rely on the provisions of the charter party including clause 18 (e) which states, *inter alia*, subject to the provisions of clause 17 the charterer shall have no authority to make any contracts imposing any obligations whatsoever upon the Owners in respect of the cargo or its carriage. I am not satisfied that this clause relates to the type of agreements which are at issue in these proceedings. However, I am satisfied that the defendants did not enter into the agreements which are the subject matter of these proceedings and only became aware of them after DM got into financial difficulties and had failed to adhere to a repayment schedule agreed with the plaintiff. The plaintiff's own conduct in its dealings with DM establishes clearly that it regarded DM as the party to the contract and the party which had liability.

Conclusion

19. I am satisfied that this claim is based on breach of contract and the defendants were never a party to that contract. There is no evidence of a contractual relationship between the plaintiff and the defendants. The fact that the claim was one for disbursements merely went to the issue of the admiralty jurisdiction to arrest the vessel. It was not determinative of whether or not the vessel could be condemned for this claim. I adopt the judgment of Finnegan P. in the *Avro Hunter* and I am satisfied that there is no liability on the

part of the defendants in respect of the claim made in these proceedings and therefore neither the vessel nor the security provided can be condemned in respect of that claim.

20. I dismiss the plaintiff's claim. I will hear counsel in due course on any ancillary orders to be made.