The "Antares V"
[2001] SGHC 198

Case Number : Adm in Rem 414/1998, RA 600336/2000

Decision Date : 24 July 2001

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : Trevor Ivan D'cruz (Rajah & Tann) for the plaintiffs/appellants; R Govintharash (Gurbani & Co) for the defendants/respondents

Parties : —

Civil Procedure – Originating processes – Writ – Renewal – Principles applicable – Factors to consider – Whether ability to serve writ on vessel during validity of writ fatal to application for renewal – Whether failure to disclose certain information fatal to renewal – Effect of on-going negotiations between parties and manner in which defendants' P & I Club conducts correspondence – Balance of justice between parties

Judgment

GROUNDS OF DECISION

1 The issue in this appeal before me was whether the renewal and service of an admiralty in rem writ should be allowed to stand when it is said that certain background facts were reportedly not placed before the learned assistant registrar when he granted the order to renew the said writ.

2 The material facts as could be gathered from the affidavits filed in this appeal and the chronology of events submitted by the parties' respective counsel can be summarised as follows.

3 The plaintiffs' cargo, made up of about 996.736 metric tons of RBD Palm Olein in bulk, shipped on board the defendants' vessel M V Antares V was reportedly damaged on 21 March 1997. Whatever claims the plaintiffs had against the defendants arose on the same day and the limitation period under the applicable Hague Rules being one year would have elapsed on 20 March 1998.

4 However, by agreement between parties the suit time was extended from 20 March 1998 to 20 June 1998. According to the defendants, the extension was granted on the understanding that the plaintiffs would furnish them with certain documents which they were then reportedly not in a position to provide.

5 The plaintiffs sought to obtain a further extension for the suit time beyond 21 June 1998. Noting that the request contained in the plaintiffs' letter dated 9 June 1998 did not seem to have stirred any response, the plaintiffs wrote to the P & I Club on 15 June 1998 in the following terms:

> We refer to our fax dated 9 June 1998.
>
> We have not received your response. Our clients are left with no alternative but to commence proceedings against the carriers. This will include the arrest of the vessel to obtain security.

6 Following the foregoing letter, on 19 June 1998 the plaintiffs' solicitors wrote to the defendants advising them that they had appointed Mr Ajaib Haridass of Messrs Haridass Ho & Partners to be the arbitrator and asking the defendants whether they were agreeable to the arbitrator nominated. The upshot was the defendants' P & I Club replied on 22 June 1998 requesting the plaintiffs' solicitors a

copy of the contract which called for the appointment of a Singapore arbitrator.

7 Insofar as is material, the said letter dated 22 June 1998 from P & I Club reads as follows:

> We refer to previous exchanges of correspondence and have received from members a copy of your fax of 19 June 1998 wherein you advised that pursuant to the fixture note dated 1 March 1997, you have appointed Mr Ajaib Haridass of Haridass Ho & Partners to be arbitrator.
>
> Maybe you could forward to us a copy of the contract that called for the appointment of Singaporean arbitrator in order that we can consider whether one should be appointed on owner's behalf (presumably sole arbitrator in the contract)?
>
> *We are still interested in negotiating this claim with you, however, feel that the reports that you have sent to us and the documentation is inconclusive and, furthermore, the mathematics do not seem to agree.*
>
> We would like to see the full survey report to verify the exact amount of damaged cargo that was considered as total loss as there was a discrepancy between SGS figures and our own.
>
> We would also be grateful to receive copies of the sale invoices that were sold down-graded. Even if the down-grading price is correct, your claim based on the difference between invoice value (US$647) and sale price (US$572) should equate to a loss based on 988 tons of US74,100.
>
> Please could you provide these documents as soon as possible in order that we can consider this claim further.
>
> [Highlight added.]

8 In the meantime, having received no definite indication from the defendants or the club on further extensions, the plaintiffs on 19 June 1998, a day before the expiry of the deadline, caused to be issued a writ which their counsel characterized as 'protective'. The writ however was not served. The explanation provided by the plaintiffs' solicitors in this connection was that since the parties were intent on proceeding with arbitration, the service of the writ was considered unnecessary. The plaintiffs' counsel averred in this regard (para 11 of the affidavit of D'Cruz filed on 24 August 2000) that in view of the developments sketched out, they did not serve the writ on the vessel although the said vessel called into Singapore on two occasions after the writ was filed.

9 In the following year ie, on 18 June 1999 the original writ of summons expired and the plaintiffs then applied to court and obtained an order renewing the writ for a further period of 12 months from 19 June 1999.

10 To complete the picture, I should add here that during the period between 19 June 1998 and 16 June 2000, the plaintiffs' solicitors had been corresponding with the defendants' P & I Club on the issue of security, legal proceedings and arbitration. In March 1999, the plaintiffs through their solicitors broached the idea of utilising the court process rather than arbitration. In this regard, the letter written by the plaintiffs' solicitors dated 9 March 1999 bears reproduction. It reads:

> We refer to our fax of 1 September 1998 and your fax of 3 September 1998.
>
> The matter has gone into sleep due to an oversight. We would appreciate if you could forward to us the letter of undertaking that you had agreed to put up. On another note, please confirm whether you wish to appoint solicitors to accept service of process in lieu of arbitration. Alternatively, you may wish to try to resolve our clients' claim in order to save costs since the amount involved is modest.
>
> We look forward to your response.

11 The reply from the P & I Club dated 11 March 1999 – on which more will be heard later was not altogether negative and it reads thus:

> Thank you for your fax message of 9 March 1999 and firstly wish to confirm that solicitors should be instructed on the Club and members' behalf.
>
> We firstly wish however to see copies of the claims documents as requested in our fax of 3 September 1998.

12 As the events progressed, the above letter was followed by a letter of undertaking by the P & I Club on 9 September 1999. Insofar as is material, the following segments of the undertaking are of significance:

> IN CONSIDERATION of your at our request refraining from arresting or otherwise detaining any other ships belonging to her Owners of the said m.v. "ANTARES V" in connection with your above claims.
>
> We, Liverpool and London Steamship Protections and Indemnity Association Limited of The Royal Liver Building, Pier Head, Liverpool L3 1HU undertake irrevocably and unconditionally to pay to you or your order on first written demand any sum or sums found to be due to you for damages, interest and costs as may be adjudged or awarded to be due to you by any court or tribunal or (in the event of an appeal against the order/*judgement of the Court* or award of a tribunal) by final judgement of a Court or as may be agreed between the parties to be due to you in respect of the above claims interests thereon and costs, provided always that our liability hereunder shall not exceed the sum of US$83,000.00 plus interest and costs.
>
> …
>
> We hereby further consent and agree that this Letter of Undertaking shall equally apply to any compromises or settlements between yourselves and the owners of m.v. "ANTARES V" in any proceedings and any appeals thereto or to any admissions of liability therein and to any amount by way of damages, interest and costs agreed by the owners of the m.v. "ANTARES V" in the *aforesaid proceedings to be paid in the said proceedings or appeals therefrom or assessed by the Court/Tribunal after admissions of liability or compromises so that if the said owners of the m.v. "ANTARES V*" shall not pay such amounts we shall be liable for the same in the same manner as if they had been adjudged by the Court/or awarded by a Tribunal.

> We further agree that this Letter of Undertaking shall be a continuing guarantee until the final disposal of your aforesaid claim and the granting of any time or other indulgence to the owners of the m.v. "ANTARES V" by you, your servants or agents shall not in anywise avoid or prejudice your rights herein.
>
> We agree that this Letter of Undertaking shall be governed by the laws of Singapore and we agree to submit to the jurisdiction of the Courts of Singapore pertaining to this Letter of Undertaking, including any procedures for the enforcement of this Letter of Undertaking.
>
> *We further irrevocably nominate Gurbani & Co as our solicitors in Singapore to accept service of process or documents/correspondence on behalf of the owners of the ship or vessel m.v. "ANTARES V".*
>
> Dated this 9th day of September 1999.
>
> [Highlight added.]

13 Nearly nine months after the letter of undertaking was provided by the defendants' P & I Club, the defendants' solicitors entered the scene. The upshot was that there was an application by the defendants on 20 July 2000, in the main, to set aside the order of court dated 18 June 1999 which allowed the writ to be renewed for a further period of 12 months from 19 June 1999 and for the return and cancellation of the letter of undertaking issued by the P & I Club on 9 September 1999.

14 The defendants prevailed in the first instance before the senior assistant registrar based on the defendants' arguments that the writ had not been served on the defendants' vessel during its initial validity period, although the subject vessel called into Singapore on two occasions and that when the plaintiffs applied to court for the renewal of the writ, plaintiffs' counsel did not disclose to the court that the vessel had in fact called into Singapore twice.

15 The plaintiffs appealed. The arguments advanced by the respective counsel in the appeal before me can be summarised in the following terms.

Plaintiffs'/appellants' arguments

16 The plaintiffs caused to be issued the protective writ against the defendants for two reasons: first to preserve their claim against the time-bar and secondly to enable the plaintiffs to negotiate and obtain security. After issuing the writ on 19 June 1998, the plaintiffs did not attempt to serve the writ since they had taken steps to commence arbitration proceedings as they were entitled to, under the terms of the charterparty.

17 Furthermore, during the interim period between 19 June 1998 and 16 June 2000, the plaintiffs' solicitors had been corresponding with the defendants' P & I Club on various issues including security, legal proceedings and arbitration. On 11 March 1999, the defendants, through their P & I Club, confirmed that they would be appointing solicitors to accept service of process. The plaintiffs therefore took the view, not unreasonably, that they need not serve the writ directly on the vessel as this would negate the agreement reached with the defendants' P & I Club. However, since the defendants had not appointed solicitors to accept service of the writ even by 18 June 1999, it became necessary for them to renew the writ for a further period.

Defendants'/respondents' arguments

18 The contentions of the defendants are best stated in their counsel's own words. Paragraphs 11 to 13 of his submission read as follows:

> 11. The Plaintiffs in any event failed to disclose in their affidavit for renewal of the Writ, anything about the arbitration proceedings or how it allegedly affected their judgment not to take steps to serve the Writ on the "ANTARES V". The Defendants maintain that this was non disclosure of a material fact in the ex-parte application to renew the Writ, if the Plaintiffs' allegations were true, which is denied.
>
> 12. Further, the Plaintiffs had failed to disclose in their affidavit for the renewal of the Writ, the following material facts:
>
> > (i) The Plaintiffs' claim would be time barred but for the renewal of the Writ.
> >
> > (ii) That the Plaintiffs had not taken any steps to serve the Writ on the "ANTARES V" during the initial 12 months validity period of the Writ, and if they had done so, there were two occasions on which the vessel had called at Singapore during this period providing ample opportunity to serve the Writ.
>
> 13. The law is well established that a Plaintiff should take steps to serve an admiralty writ by keeping a shipwatch on the Defendant vessel from the time of issuing the writ to effect service within the initial validity period of the writ and unless this was done and the Defendant vessels had not called within the jurisdiction, there is no good reason to renew the writ. The law is well established that a renewal of a writ would not normally be granted, if the effect of it would be to deprive the Defendant of suit time limitation.

Findings and conclusion

19 A preliminary aspect requires mention first. In order to parry a criticism as to why the defendants took more than 9 months since the date of the letter of undertaking, to take out the application to set aside the writ, the defendants' counsel hastened to explain that although his firm's name was mentioned in the letter of undertaking given by the P & I Club on 9 September 1999, his firm was in fact not aware of it until the writ was served on them on 16 June 2000. This assertion, to use a less formal expression, did not cut much ice with me. In my view, if what the counsel said was correct, then it would appear that the Club themselves had been extremely leisurely over the defendants' legal rights leading me to infer that time element which they were attempting to highlight in this appeal was the least of their concerns.

20 Reverting to the issues before me, I was mindful first of all, of the principles enunciated by the House of Lords in ***The "Myrto"*** [1987] AC 597 as to the manner in which courts ought to exercise their discretion when deciding whether the validity of a writ should be extended. In short, the law as stated by the law lords was that it was incumbent on the plaintiffs to serve the writ promptly; there

must be a good reason for the grant of an extension; and that a 'good reason' cannot be defined and would depend on the circumstances of each case.

21 The local decision of ***The Lircay*** [1997] 2 SLR 669 echoed the same principle. In ***The Lircay***, the court further observed at page 674G-H:

> In the end, it was the exercise of *discretion* by the court which determined whether the writ was to be extended. In the exercise of that *discretion* – *discretion* that was undefined – the judge was entitled to have regard to the balance of *hardship* between the parties as a relevant matter to be taken into account in extending the writ's validity on an *ex parte* application and further that in doing so, the court may well need to consider whether allowing an extension will cause *prejudice* to the defendants in all the circumstances of the case.

22 In ***The Lircay*** the court also dealt with the issue of material non-disclosure in the affidavit supporting the application for renewal of the writ. The Court observed that while a very stringent requirement for full disclosure had been laid down by the courts over the years in relation to Anton Piller orders, this was not the case for other ex-parte applications. And the Court went on to hold that the claimants' non-disclosure of an additional reason, i.e. the agreement to defer service, was not fatal to the renewal of the writ in all the circumstances of the case. The court also held in that case that since the claimants' application for renewal of the writ was commenced and granted before the expiry of the validity of the writ, although after the period of limitation had expired, the defendants did not have any accrued right of limitation.

23 Having reviewed the events chronicled in the parties' submissions and affidavits, I came to the conclusion that the plaintiffs had justifiable and good reasons for not serving the writ until they had received communication from the defendants that their solicitors would accept service of process. One of the defendants' main contentions was that the plaintiffs' failure to serve the writ on the vessel when it called at Singapore on two occasions within the first period of its validity (i.e. between 19 June 1998 and 18 June 1999), precluded them from seeking a further renewal of the writ. In my determination, although the authorities lay stress on the aspect that the plaintiffs should have taken steps to serve the writ by keeping a shipwatch on the defendants' vessel during the initial validity period of the writ, the authorities referred to, equally emphasize that the overriding consideration for the courts in determining issues of this nature must be the balance of justice between the parties and that circumstances peculiar to each case must be taken into account as well.

24 In the case at hand, first of all when the plaintiffs suggested the idea of arbitration, the defendants were not inimical to the proposal. Secondly, when the plaintiffs suggested negotiated settlement or court process in lieu of arbitration, the defendants again did not raise any objection. This was evident from the defendants' P & I Club's letter of 11 March 1999 – in reply to the plaintiffs' solicitors' letter of 9 March 1999 - where they said that solicitors should be instructed on the defendants' and the P & I Club's behalf although regrettably such appointment did not take place for quite a while. The nomination of solicitors was further expressly stated in the P & I Club in their letter of undertaking of 9 September 1999. From all the correspondence exchanged between the parties, one feature was very clear, that was, that parties were earnestly engaged in negotiations, albeit sporadically, during the material time. At any rate, in my view inasmuch as the defendants' P & I Club had been demonstrably laid back in relation to the time element, the defendants could not be said to have suffered prejudice in respect of the benefit of the limitation period since (as was also the case in ***The Lircay***) no such benefit had yet accrued to the defendants, given that the application to renew the validity of the writ was made before it expired. Another inescapable aspect of the case

was that the defendants' P & I Club could not have been blind-sided to the fact that the writ must have been renewed beyond the extension period granted by them. Had it not been for such an assumption and had it not been for the P & I Club's desire to reach a negotiated settlement, the Club would not have provided the letter of undertaking on 9 September 1999.

25 I was also mindful that before March 1999, the vessel had called into Singapore twice. The body of learning referred to me, no doubt underscores the principle that just because negotiations were afoot and in train, they by themselves, would not constitute a good reason to extend the period of validity of a writ. In ***Waddon v Whitecroft-Scovill Ltd*** [1988] 1 All ER 996, the House of Lords reiterated the rule that the showing of a good reason for failure to serve the writ during its original period of validity, was a necessary step for the grant of an extension. Although it has been said that negotiations between the parties alone do not amount to good reason to extend the period of validity of the writ and that the plaintiffs should protect his position by issuing as well as serving the writ on the defendants, I do not think that this is meant to be applied in a rigid and inflexible manner. The fact is that an attempt on the plaintiffs' part to serve the writ would in all likelihood have ruined the prospects of settlement, or at least would have been a set-back to negotiation process. The court should therefore take into account all the circumstances which may alter the complexion of each case. In ***Kun Kay Hong v Tan Teo Huat*** [1985] 1 MLJ 404, the Singapore Court of Appeal held that the request by the solicitors' underwriters to the plaintiff's solicitors to postpone service pending investigations did amount to good reasons for not serving the writ during its validity period. The authorities also indicate that the defendants' conduct in causing or contributing to the delay may be taken into account by the court in exercising its discretion in such cases. All said, at the end of the day the overriding consideration for the courts, as mentioned by me earlier must be the balance of justice between the parties. This point seems to have received judicial approval in ***Jones v Jones & Anor*** [1970] 2 QB 576 where Sachs LJ at 587C commented that the climate of opinion is 'moving more towards an ascertainment of how lies the balance of justice between the parties'.

26 In the circumstances, having considered all the learning referred to me by the defendants' counsel including the principles articulated by the courts in ***The Berny*** [1979] 1 QB 80, ***The "Big Beacher"*** [1984] 2 MLJ 4, ***The "Union Hodeidah"*** [1987] 2 MLJ 561, ***The Official Receiver, Liquidator of Jason Textile Industries Pte Ltd v QBE Insurance (International) Ltd*** [1989] 1 MLJ 1 and ***Saris v Westminster Transports SA And Kestrel Marine Ltd*** [1994] 1 LLR 115, I concluded that the plaintiffs had amply satisfied the court with sufficiently good reason for not serving the writ during its initial validity. In my view, the fact of the negotiations between the parties and the way P & I Club conducted their correspondence most certainly swung the balance of justice in the plaintiffs' favour. Given the facts, the plaintiffs' omission to state the background facts in their affidavit in support of their application to renew the validity of the writ, was not in my opinion fatal to their application. Next, their omission to mention the aspect of the vessel calling into Singapore during the initial validity period as well as their lapse in not making reference to the contemplated arbitral steps in their affidavit for renewal, were not such as to warrant the setting aside of the renewal granted.

27 Consequently, the plaintiffs' appeal was allowed and the order of court dated 13 October 2000 was set aside. The costs of the appeal and costs below was fixed at $5,000 payable by the defendants to the plaintiffs.

Sgd:

MPH RUBIN
Judge