The "Ivanovo"
[2000] SGHC 22

Case Number : Adm In Rem 334/1999, RA 371/1999

Decision Date : 15 February 2000

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : C Arul and Ooi Oon Tat (C Arul & Partners) for the plaintiffs; Oon Thian Seng and Juliana Yap (Joseph Tan Jude Benny) for the defendants/interveners

Parties : —

Admiralty and Shipping – Admiralty jurisdiction and arrest – Ownership of vessels – Certificate of registration of vessel – Identity of vessel's beneficial owners – Whether certificate offers prima facie evidence of ownership – Whether such evidence rebuttable

Admiralty and Shipping – Admiralty jurisdiction and arrest – Whether High Court has jurisdiction over vessel under s 4(4) of High Court (Admiralty Jurisdiction) Act (Cap 123) – Whether vessel's arrest ultra vires

: This was an application to set aside a writ issued under the High Court (Admiralty Jurisdiction) Act (Cap 123) (`the Act`) and to release the vessel Ivanovo arrested on 26 May 1999 under a warrant of arrest issued pursuant to the writ.

The writ was issued on the application of the plaintiffs. They were the charterers of the Ivanovo and were seeking damages for breach of charterparty.

There were two charterparties. Both charterparties named the shipowners as Azov Shipping Co of Mariupol, Ukraine (`Azov`).

The application to set aside the writ and to release the vessel was made on 15 July 1999 by the State of the Ukraine which intervened on the ground that it was the legal and beneficial owner of the Ivanovo and that Azov was only operating the vessel under a leasing contract.

It contended that the High Court of Singapore has no jurisdiction over the vessel under s 4(4) of the Act. Section 4(4) reads:

> *In a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of the action arose, the owner or charterer of, or in possession or in control of, the ship, the admiralty jurisdiction of the High Court may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against -*
>
> > *(a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or*
> >
> > *(b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid.*

Beneficial ownership was not defined in the Act. That was done by the Court of Appeal in **The Pangkalan Susu/Permina 3001** [1975-1977] SLR 252 , where Wee Chong Jin CJ wrote at p 254:

> *The question is what do the words `beneficially owned as respects all the shares therein` mean in the context of the Act. These words are not defined in the Act. Apart from authority, we would construe them to refer only to such ownership of a ship as is vested in* ***a person who has the right to sell, dispose of or alienate all the shares in that ship. Our construction would clearly cover the case of a ship owned by a person who, whether he is the legal owner or not, is in any case the equitable owner of all the shares therein****. It would not, in our opinion, cover the case of a ship which is in the full possession and control of a person who is not also the equitable owner of all the shares therein. In our opinion, it would be a misuse of language to equate full possession and control of a ship with beneficial ownership as respects all the shares in a ship. The word `ownership` connotes title, legal or equitable whereas the expression `possession and control`, however full and complete, is not related to title. Although a person with only full possession and control of a ship such as a demise charterer, has the* ***beneficial*** *use of her, in our opinion he does not have the beneficial ownership as respects all the shares in the ship and the ship is not `beneficially owned as respects all the shares therein` by him within the meaning of s 4(4). [Emphasis is added.]*

It was common ground that the plaintiffs` action came within s 4(4) if Azov was the owner of the Ivanovo, but was ultra vires if the interveners were the owners.

At the commencement of the action, the plaintiffs relied on the vessel`s classification certificate in which the shipowner was stated to be Azov. Subsequently they also relied on the vessel`s ship`s certificate. This certificate issued by the General State Ships Registrar Inspection of Ukraine on 11 September 1998 also named Azov as the owner of the Ivanovo, but it also declared that:

> *According to the Code of Merchant Shipping of Ukraine this certificate is to be considered as the final and complete evidence of the right of property of Ukraine on the ship "Ivanovo".*

Azov and the interveners produced evidence in support of the interveners` claim of ownership. An affidavit was filed by Mr Oon Thian Seng, counsel for the interveners on 15 July which exhibited a statement of Professor I Zamoyski, a member of the Academic Councils of the Institute of Economic and Legal Problems of the Academy of Sciences of Ukraine, the Kiev National University and the Ukrainian Juridicial Academy, and an advocate licensed by the Ministry of Justice of Ukraine. Although the statement was not sworn or affirmed and was not admissible in evidence, it gave notice of the grounds in support of the application. This was subsequently rectified when the professor filed an affidavit in which he confirmed the contents of the statement.

Professor Zamoyski referred to a lease contract N D1843 dated 2 June 1993 between the State Property Fund of the Ukraine as lessor and Azov as lessee, the Ivanovo`s ship`s certificate dated 11 September 1998 issued by the Harbour Master of Mariupol.

He deposed that:

> *3 The "IVANOVO" is listed among the list of vessels annexed to the Lease Contract The lessor is the Ukrainian State acting through the State Property Fund and the lessee is the Lessee`s Organisation of Azov Shipping Company. In the days immediately following the grant of the lease the Lessee`s Organisation of Azov Shipping Company established "Leasehold Enterprise Azov Shipping Company" to operate the vessels. The lease is for*

10 years running to 2nd June 2003 and the rental payments due to the State are stipulated in the Lease Contract. Article 23 of "The Law on Lease of State and Community Assets", adopted by the Supreme Rada of Ukraine on 10th April 1992 stipulates that the passing of assets into lease does not interrupt the ownership of the lessor. In this case that is to say that the asset remains the property of the State.

4 Clause 1.1 of the Lease Agreement provides that the assets are passed to the lessee`s possession for him to use for a fixed period and in return for the rent stipulated. Therefore the Ownership of the Shipping Company`s vessels is with the State of Ukraine. This is reflected in Clause 4.1 of the Lease Contract which, refecting the Law on Lease of State and Community Assets, also provides that the passing of the possession of the assets does not interrupt the Ownership of the State. Clause 4.2 of the Lease Agreement provides that the lessee is entitled to possess and use the leased assets to conduct economic activity.

5 As I have mentioned, immediately following the execution of the Lease Contract the Lessee`s Organisation of Azov Shipping Company established Leasehold Enterprise Azov Shipping Company. A Leasehold Enterprise is a juridical person in Ukrainian Law. According to Article 4.3 of the Statute the assets leased by the State Property Fund are State Owned. This can be contrasted with Article 4.4 which provides that the ownership of income generated from the leased assets or property obtained by the Leasehold Enterprise are its own property.

and concluded that

11 Taking into account the Lease Contract, the Statute, the Ship`s Certificate and the provisions of Ukrainian Law to which I have referred I do not believe there is any sensible room for doubt that the M/T "IVANOVO" is owned by the State of Ukraine. Leasehold Enterprise Azov Shipping Company is simply the lessee of the vessel as is made clear by the Lease Contract. Indeed the Ship`s Certificate states that it is "final and complete evidence" of the Right of Property of the Ukrainian State and it is correct to do so.

The contract between the State Property Fund of the Ukraine and Azov provided, inter alia:

4. The Right of Property

4.1 After the State Property being transmitted to the lessee, the State remains to be the owner of this property.

4.2 The lessee uses with the property during the lease term.

4.3 The lessee has the right for production made on the basis of the leased property, another property acquired by the lessee for the account of his own or credit funds on the income, gained by the lessee.

4.4 Amortizational deductions remains at the lessee`s disposal and are used for renewal of the main leased funds.

4.5 The right for the property gained by the lessee for the account of amortizational deductions belongs to the lessor.

5. The Rights and Obligations of the Lessee

5.1.1 The lessee has right:

To do his commercial activity independently on the basis of the property leased with the purpose to derive the profit.

5.1.2 To be in charge of incomes from the used leased property.

5.1.3 To put changes in the numbering of the leased property, to reconstruct, to expand, to re-arm technically which increase its value.

5.1.4 Improvements of the leased property made for the account of the own funds of the lessee with the permission of the lessor, both separated and non-separated are to be reckoned upon termination of the leasing contract or the value of the redemption of the object of leasing is decreased on the sum of expenses.

In case of the lessor`s refusal to reckon the lessee`s expenses to reduce the redemption sum, the lessee has the right to appropriate those improvements, which can be separated from the leased property without any damages to it.

Another affidavit deposed by Mr Y Savitch, managing director of Azov was filed on 21 July to reiterate that `[t]he "Ivanovo" is owned by the State of Ukraine and not the defendants. The defendants have use of the vessel through a Leasing Contract, namely Leasing Contract N.D-1843 dated 2nd June 1993`.

Mr A Pidgainyi, Head of the Legal Department of the State Property Fund of Ukraine also deposed an affidavit filed on 26 July 1999. He deposed that:

2 The State Property of Ukraine is vested in the State Property Fund. The State Property Fund is, among other things, charged with the preservation of State Property, acts as the lessor of State Property and acts on behalf of the State in the sphere of privatisation of State Property.

3 The Motor Tanker "IVANOVO" is the State Property of Ukraine. The "IVANOVO" is not owned by Leasehold Enterprise Azov Shipping Company ("Azsco"). The only interest of Azsco in the "IVANOVO" is as lessees. The "IVANOVO" was among the vessels leased to Azsco by the State Property Fund pursuant to a Lease Contract dated 2nd June 1993 and numbered D-1843. The fact that the Ukrainian State is the owner of the "IVANOVO" is clearly apparent from the Ship`s Certificate

4 By the terms of the Law on Lease of State and Community Assets and the Lease Contract dated 2nd June 1993, Azsco have no right to sell and/or mortgage the motor tanker "IVANOVO". The State Property Fund must consent to such sale for which all proceeds are accountable to the State Property Fund.

5 Azsco is a commercial enterprise with legal personality, trading for profit but paying hire on the vessels leased to it by the Ukrainian State. Indeed Azsco is not even a State Owned Enterprise - the proprietors of Azsco are the lessee`s organisation i.e. the employees. The State of Ukraine is not liable for the debts of Azsco and Azsco is not liable for the debts of Ukraine

The State Property Fund is a state body established under Ukrainian law, the Interim Statute on the State Property Fund of the Ukraine, with the power to act as lessor of state property and to

conclude leasing contracts therefor.

In response to these contentions the plaintiffs stated in an affidavit filed on 27 July by Mr V Subramaniam on their behalf that they needed time to file an affidavit by an expert on Ukrainian law.

The interveners` application came on for hearing before the senior assistant registrar, who ruled against them on the jurisdiction issue. They appealed against his decision.

When the appeal came on for hearing on 17 September, Mr Oon sought leave to refer to an affidavit deposed by Professor Zamoyski which was not filed. That was objected to by Mr C Arul, counsel for the plaintiffs, who also complained that the plaintiffs have not received from the interveners full records of transactions involving the vessels covered by the lease contract that they had requested.

The hearing was adjourned to enable parties to produce evidence of the transactions and to produce evidence on the legislation under which the ship`s certificate was issued. Leave was given to the interveners to file Professor Zamoyski`s affidavit, and to the plaintiffs to file an affidavit in reply if desired. Pursuant to the order the interveners filed on 20 September Professor Zamoyski`s affidavit confirming his earlier statement and a further affidavit on 15 October elaborating on the statement. On the same day they also filed an affidavit by Mr S Prusikov, acting president of Azov exhibiting all the documents in Azov`s possession on transactions involving the vessels covered by the lease contract.

The plaintiffs filed an affidavit on 1st December, the eve of the resumed hearing of the appeal. In this affidavit deposed by Mr Ooi Oon Tat on behalf of the plaintiffs was an opinion dated 29 November 1999 by Mr Alexander Vordbiev, a Russian advocate who practices in marine and international commercial cases.

Mr Vordbiev was not sufficiently briefed on the facts of the case, and qualified his opinion by stating:

> *I am to tell you, first of all, that because of the lack of data of the full court`s denomination, of the number of court`s case, of full denomination of the responder and their legal status (state company, joint stock society or private company), and of the data on the case itself - I am unable to prepare for the court the necessary affidavite (**sic**).*

He nevertheless offered the opinion that:

> ***If a company "Azov Shipping" is a 100% state company**, then - in accordance with the Ukrainian law - the law of the Ukraine "about property" (Article 37), - this company have a right to fully manage their property and have a right to realize any actions in relation to this property - being a competent owner of this property. This article directly indicated that the state enterprise to which a state property had been transferred, enjoy all the rights of the owner in relation to this property. However, in accordance with the Ukrainian law **a state company have to get from the state property fund of the Ukraine a permission for a disposal of state assets** (vessels including), but only for such deals as "sale-purchase", granting and so on. This doesn`t concern the cases of passing the vessel over for charter, as well as the forced sale of the vessel for debts upon the decision of the judicial bodies, as in cases of such kind - neither the state enterprise nor the judicial bodies are obliged to get any permission of state property fund of the Ukraine. [Emphasis is added.]*

but did not address the question on the basis that Azov was not a state company.

It was disappointing that even at that stage of the proceedings Mr Vordbiev was not informed of and did not establish for himself the legal status of Azov, after Mr Pidgainyi had stated in his affidavit filed on 26 July that Azov was not a state-owned enterprise. Nevertheless Mr Vordbiev`s statement that Azov cannot sell the Ivanovo without permission even if it was a state company was significant in that it indicated that even a state company does not have the full right to sell, dispose of or alienate the transferred state asset in its possession.

Mr Ooi deposed that `[t]he Plaintiffs will require some time to properly instruct Alexander Vorbiev and to have him depose an affidavit giving his opinion` without disclosing when and what efforts the plaintiffs had made to obtain the required opinion.

When the hearing of the appeal resumed on 2 December, Mr Arul applied for an adjournment to submit Mr Vordbiev`s opinion in the form of an affidavit.

Counsel for the interveners opposed the application, and pointed out that the plaintiffs had notice of the ownership issue from the beginning, and had stated since 27 July that they would be filing an affidavit on Ukrainian law.

There was much to be said for the objection. The plaintiffs must state what they had done to get the expert opinion, and explain why they were unable to get it until they received Mr Vordbiev`s opinion. Furthermore, Mr Vordbiev admitted that he was not ready to render a proper opinion. For these reasons, the application was refused.

Counsel then applied to examine the witnesses viva voce. As the interveners` application was made by way of a summons in chambers, witnesses would only be cross-examined in exceptional circumstances where the court is satisfied that it is required for the proper determination of the matter before the court. No reasons were offered in support of the application. No indication was given as to the facts and issues on which the witnesses were to be cross-examined. The plaintiffs had not made out a case to cross-examine the witnesses.

The central issue in the appeal is the status and effect of a ship`s certificate of registration as evidence of its ownership. Mr Arul contended that such a certificate is accepted in international maritime law and practice as evidence of a vessel`s ownership, and since the Ivanovo`s certificate showed Azov to be the owner, its ownership was established.

There is support for this proposition, albeit on a narrower basis that a ship`s certificate offers prima facie evidence of its ownership, see the judgment of GP Selvam JC (as he then was) in **The Opal 3 ex Kuchino** [1992] 2 SLR 585 .

The learned judge developed on this in his judgment in **The Kapitan Temkin** [1998] 3 SLR 254 . Some of the essential facts in the case are similar to the facts here. The plaintiffs claimed as charterers of the Kapitan Temkin damages for breach of charterparty. In the charterparty, the owners were stated to be the Black Sea Shipping Co, Odessa (`Blasco`). The plaintiffs instituted an action in rem against the vessel. In response an application was made by the defendants to dismiss the action for want of jurisdiction on the ground that Blasco were not the beneficial owners of the vessel, and that beneficial ownership vested in the Republic of Ukraine.

The Kapitan Temkin`s certificate of registration issued by the port office at Odessa, Ukraine stated

that Blasco were the owners of the vessel. Further down the certificate, however, it also stated that:

> *[A]ccording to art. 30 of the Merchant Shipping Code of the USSR this certificate is to be considered as final and complete evidence of the right of property of USSR of the ship Kapitan Temkin.*

There are also significant differences from the present case. The Republic of Ukraine did not intervene in the action. From the judgment it appeared that the defendants relied only on the certificate in support of their application.

GP Selvam J noted at 3 of his judgment:

> *It was alleged that the Republic of Ukraine was the beneficial owner. No person in the employment of the Republic, however, filed an affidavit on its behalf. The affidavits of facts were made by the solicitor for the defendants but produced no evidence to show that the Republic was his client. Thus the identity of the client was not expressly stated. Furthermore, there was no doubt that the application was made by Blasco because there was an alternative prayer to refer the claim to arbitration pursuant to an arbitration clause in the charterparty to which the Republic admittedly was not a party. In other words the applicant was not the Republic but Blasco. If the Republic of Ukraine wished to contend that its ship was wrongly arrested the proper procedure was for it to intervene in the action. This it did not do.*

He dismissed the application and explained at 7:

> *[T]he certificate of registration is important documentary evidence in deciding who the beneficial owners of a ship for purposes of jurisdiction are, especially when it is produced and relied upon on behalf of the state or a department which issued the certificate. It is so because the certificate of registration is also a certificate of ownership. See* ***Chorley & Giles` Shipping Law*** *(8th Ed) at p 35 where it is stated that ` registration is also important as proof of title. It is not conclusive but furnishes at least prima facie evidence of the registered owner being the true owner, thus resulting in a shifting of the burden of proof. Whoever, without being registered, claims ownership must displace that prima facie evidence.` The certificate of registration, adds* ***Chorley & Giles` Shipping Law*** *at p 36, `fulfils to a certain extent the function of title deed`. In this sense the certificate of registration is similar to a certificate of title issued under the Torrens system of land registration which was replicated from the paradigm of the ship registration system. The title evidenced by the certificate of registration is similarly indefeasible, subject of course to rectification in cases like error and fraud. See* ***The Bineta*** *[1966] 2 Lloyd`s Rep 419. For more than a century, public international law has required every merchant ship to carry `ship`s papers` to test the nationality and ownership of the ship. See* ***International Law of the Sea*** *by Colombos (5th Ed) at p 270. Today the certificate of registration fulfils the dual function of proclaiming the nationality and ownership of the ship. All transfers of ownership are done on the basis of information in the register of ships of the port to which the ship belongs. Hence the requirement to state the port of the ship in the affidavit leading the warrant of arrest. No merchant ship may, therefore, lawfully enter or leave Singapore, for that matter any country, without a certificate of ownership, namely a certificate of registration, so that the authorities and others know the owner who is responsible to observe the laws applicable to the ship and discharge the*

obligations incurred by it. More importantly a potential purchaser of a registered ship cannot receive title which is not shown in the register. In other words the person who is stated as the owner and the state which issued the certificate would generally be estopped from asserting a contrary proposition unless the register is rectified before third parties act on it. Thus even though as a general rule the entry regarding ownership in the ship registry is not conclusive evidence of who the beneficial owners of a ship are for the purpose of s 4 of the High Court (Admiralty Jurisdiction) Act (Cap 123), in most cases it would be so. The purpose and effect of the use of the expression `beneficial ownership` therefore is to protect claims against fraudulent concealment and sham transfers designed to defeat a claim and also to protect authentic owners who are not personally liable to the claimants. Hence most applications which go behind the register would be by the claimants and not owners. In either case there must be clear evidence to look beyond the register and the certificate.

He went on to consider the effect of declaration in the certificate that the vessel was the property of the USSR. He found art 30 of the Merchant Shipping Code did not justify the proposition that the Soviet State was the owner and as such had the right of property of the USSR that it was the only person entitled to `sell, dispose of or alienate all the shares in the ship` and that the statement in the certificate as to conclusive evidence had no application in Singapore because whether it was conclusive evidence must be determined by this court by applying Singapore law.

The defendants and the interveners have evidently taken pains to avoid the pitfalls noted in ***The Kapitan Temkin*** (supra). They did not just rely on the declaration in the certificate, but adduced evidence to show that the defendants were not the beneficial owners of the Ivanovo, and that the State of Ukraine held the beneficial title to the vessel.

The question then is whether the findings on the Kapitan Temkin apply to Ivanovo. Neither the defendants nor the interveners took issue with the proposition that a ship`s certificate is prima facie evidence of its ownership.

The matter does not end here, and must be considered further. Any conclusion to be drawn from a ship`s certificate must be drawn from the whole certificate. A certificate which states that Azov is the owner while the right of property in the vessel belongs to the Ukrainian State should be read to take in both statements without preferring one over the other. On this basis, the certificate would be evidence that while Azov was the registered owner of the vessel, the state also had an interest in it. The term `the right of property` called for an inquiry into its nature and extent. For this reason such a certificate on its face has a lower value as evidence of ownership than a certificate without the declaration.

It should also be borne in mind that prima facie evidence may be contradicted. The defendants and the interveners had adduced clear evidence that Azov were not the beneficial owners of the Ivanovo, and there was no evidence adduced by the plaintiffs to contradict that.

Another issue which had to be addressed. Selvam J alluded to the estoppel against the registered owner and the state which issues a ship`s certificate from denying that the registered owner is also the beneficial owner because such a certificate fulfils the dual function of proclaiming the nationality and ownership of the ship. No authority was cited for this proposition which goes beyond the more established proposition that the certificate is prima facie evidence of ownership.

Does a certificate which is prima facie evidence against the registered owner and the state operate

to prevent them from contradicting that evidence? Prima facie evidence is not conclusive, and may be contradicted. Although the registered owner and the state cannot deny the certificate is prima facie evidence, but they are not estopped from seeking to contradict the evidence. They could be estopped if they held the certificate out as conclusive evidence of ownership, or did something else that can give rise to an estoppel. They had not done that by just issuing or holding the certificate.

The plaintiffs raised two objections to the interveners` application. The first was that `If what the Interveners say is true, they will be guilty of committing fraud in the commercial world at large and the Plaintiffs in particular`. This is a serious indictment to make against a sovereign state and its practices. There was no evidence that the State of Ukraine was seeking to deceive other parties about its vessels. It stated in the certificate of registration its interest in the vessel. There was no suggestion that it would not have disclosed the full interest if proper inquiries were made to it. The plaintiffs were not justified in making this charge which they cannot support.

The second objection was that `Even if the Interveners are the beneficial owners of the vessel (which is not admitted) then Azov Shipping will be their agents and the interveners must be responsible and liable for the acts of their agents, as undisclosed principals`. There was no evidence that Azov was acting as the state`s agent in its dealings with the Ivanovo. All the evidence pointed to the contrary. There was no substance to this contention.

The plaintiffs had placed undue reliance on the ship`s certificate. When the defendants and the interveners adduced specific evidence on the beneficial ownership of the vessel, their response lacked substance and merit. As the action was ultra vires, the writ was set aside and the vessel was ordered to be released.

Outcome:

Appeal allowed.