

IN THE SEYCHELLES COURT OF APPEAL

**THE OWNERS OF THE VESSEL
"GLOBAL NATALI"**

APPELLANT

versus

TEXTIL BAQUIT

RESPONDENT

Civil Appeal No: 7 of 1999

[Before: Ayoola, P., Silungwe & De Silva, J.J.A]

Mr. P. Boulle for the Appellant
Mr. K. Shah for the Respondent



JUDGMENT OF THE COURT

(Delivered by Ayoola, P.)

Prior to an application for judgment in default by the plaintiff in an action in rem against the vessel 'Global Natali', ("the vessel") titled: "Between Textile Baquit ... owners and consignees of cargo ... versus the owners and charterers of the vessel "Global Natali anchored in the territorial waters of Seychelles", the appellant in this appeal, Elpida Marine Company Ltd ("Elpida"), describing itself as owners of the vessel, filed an acknowledgement of service. Subsequent to the plaintiff's (now referred to as "Baquit") application, Elpida on 30th May 1997 applied for leave to file a statement of defence out of time. Baquit opposed the application on the ground, inter alia, that there was no proof that Elpida was the owner of the vessel at the material time and that "Elpida Marine Company Limited which filed an Acknowledgement of Service three days out of time are not parties to the case, have not applied for leave to intervene, they have no locus standi." Perera, J., before whom the two applications came granted leave to Elpida to defend the action.

Perera, J's decision was set aside upon an appeal by Baquit and the matter was remitted by this Court to the Supreme Court to "determine the question of Elpida's standing to apply for leave to file a defence out of time and, depending on the outcome of such determination, for the application for judgment in default to be considered and determined on its merits." Pursuant to that order, the matter came before Amerasinghe, J who ruled on 29th January 1999 that Elpida was without standing to file a defence out of time.

This appeal by Elpida is from that decision. It concerned the validity of the opinion which underpinned Amerasinghe, J's decision that the Bill of Sale relied on by Elpida as evidence of its ownership of the vessel did not transfer the vessel to it for want of compliance with Section 24 of the Merchant Shipping Law of Cyprus ("the Cypriot Act").

Elpida's case was that it bought the vessel from West Coast Marine Co. Ltd. The vessel was registered in Cyprus. Under Cyprus law a Bill of Sale is sufficient to transfer the ownership of a vessel. Elpida produced the Bill of Sale by which ownership of the vessel was transferred to it. It was admitted in evidence as exhibit A5. Counsel on behalf of Baquit contended at the Supreme Court that the Bill of Sale did not comply with Section 24 of the Cypriot Act in that there was no proof, in terms of that Act, that it had been executed in the presence of and attested by a witness or witnesses.

The trial judge viewed with suspicion the Bills of Sale on which Elpida relied for two main reasons, namely:-

- (i) Lawyer Severiades who gave evidence for Elpida was biased because "the seller and the buyer" of the vessel has a common secretary and their common registered office is at the law office of the witness, lawyer Severiades;

- (ii) Two sets of Bills of Exchange relating to the same vessel and the same transaction bore different particulars in that one consisted of execution of the bill subject to an existing mortgage and the other was free of any encumbrance.

He concluded in regard to this latter reason that:

“Execution of two bills of sale under the aforesaid circumstances necessarily takes away the inference of genuineness of the bill.”

For good measure, the learned Judge added yet another reason why the Bill of Sale (Exh. A5) was regarded by him as suspect. Put simply, that third reason is that the seller, West Coast Marine Co. Ltd, had “even on 27th February 1997” demonstrated its interest in the vessel even after execution of the impugned Bill of Sale by participating in the settlement of salvage claim.” After stating several other reasons, not of decisive importance, why he felt some reservation about the claimed sale of the vessel to Elpida, the learned Judge, at the end, concluded thus:-

“It is my conclusion after a careful analysis of the oral and documentary evidence that the applicant has failed to establish that the parties ever intended to act according to the Merchant Shipping Law of Cyprus or they in fact complied with the specific provisions to effect a transfer of the ship to the applicant to have a standing to apply before court to file a defence out of time.”

To put this conclusion and the issues on this appeal into proper perspective, it is appropriate to recount, albeit briefly, the context in which a determination of the locus standi of the Elpida arose. The action in rem being a claim against the vessel by virtue of Section 21(4) of the Supreme Court Act 1981 it became incumbent on Baquit, pursuant to 075 r.a (b) of the U.K. Supreme Court Rules to state:-

- “(i) the name of the person who would be liable on the claim in an action in personam (“the relevant person”); and
- (ii) that the relevant person was when the cause of action arose the owner or charterer of, or in possession or in control of, the ship in connection with which the claim arose; and
- (iii) that at the time of the issue of the writ the relevant person was either the beneficial owner of all the shares in the ship in respect of which the warrant is required or (when appropriate) the charterer it is under a charter by demise:...”

Pursuant to these requirements, Baquit in its affidavit filed for the issue of warrant of arrest of the vessel gave the name of West Marine Company Ltd. in response to items (ii) and (iii) above. Nowhere was Elpida mentioned as the “relevant person”, or as owner of the vessel. If Elpida was not the “relevant person” in terms of Section 21(4)(b) of the Supreme Court Act but was, nevertheless, the beneficial owner of the ship at the time the action was brought, he would not be denied standing to raise the question of the propriety of instituting an action in rem (whether or not the claim gave rise to a maritime lien on that ship) in the Supreme Court.

The remedy in rem given by the Admiralty Court Acts for claims such as the present one arising under contracts of carriage, is not founded upon a maritime lien, but has as its objective the founding of a jurisdiction against the owner who is liable for the damage. It follows that a person who claims to be owner of the vessel at the time the action was brought but who claims not to be a “relevant person” and has become the owner of the res after the cause of action has arisen, but was not a party to the action should, appropriately, intervene to be joined as a party.

The matter was remitted to the Supreme Court to determine the standing of Elpida to make an application for extension of time to file a

defence in the action. It is evident that such standing is primarily dependent either on Elpida being already a party in the action or its having been joined as a party on its intervention. If Elpida is a "relevant person", Elpida would no doubt be the proper defendant. If Elipda was not a "relevant party" but has acquired the vessel subsequent to the cause of action, its intervention would be for the purpose of showing that an action in rem was not appropriate.

However, the Supreme Court, no doubt encouraged by counsel's conception of the directive of this Court, proceeded to determine the question of Elpida's ownership of the vessel. Counsel for Baquit raised the limited question, which this Court had intended the Supreme Court to consider, in his affidavit in opposition to Elpida's application for extension of time to file a defence, as follows:-

"12. Elpida Marine Company Ltd which filed an Acknowledgement of Service ... are not parties to the case, have not applied for leave to intervene, they have no locus standi ...

13. The Elpida Marine Company Limited have failed to file any defence in support of their claims which ought to be discarded."

Notwithstanding that Epida did not file further affidavit elucidating the basis of its right to bring an application in the action, the Supreme Court, with the active encouragement of counsel, plunged into a consideration of Elpida's claim to ownership of the vessel. The result as will be seen is that the Court embarked on an enquiry without the guidance of affidavits defining the issues.

Section 24 of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law of the Republic of Cyprus (which is admitted by all to be the proper law) provides as follows:-

“24(1) A registered ship or a share thereon (when disposed of to a qualified person) shall be transferred by Bill of Sale.

(2) The Bill of Sale shall contain such description of the ship as is contained in the certificate of survey, or some other description sufficient to identify the ship to the satisfaction of the Registrar and shall be executed by the transferor in the presence of and be attested by a witness or witnesses.”

The Bill of Sale (exhibit A5) was shown to be executed by the sellers, West Coast Marine Company Ltd in the presence of Andriani Prochopoulou – Christopoulus who certified that it was signed by Andreas Yiannaulos described as Director/Attorney-in-Fact of the sellers. The trial judge held that:-

“No where in the document such fact (i.e. that the bill of sale was executed in the presence of and attested by a witness or witnesses) has been recorded.” (emphasis ours)

He went on:

“No where in the proceedings did any evidence transpire to draw the said conclusion. It is remembered that Andreas Yiannaulos only received the delivery of the Bill of Sale A5 along with three other similar documents. He never witnessed the execution of the said documents.”

The trial Judge seemed to have come to these conclusions without due attention to the materials before him. As earlier seen, the Bill of Sale (exhibit A5) bore attestation in terms of Section 24(2) of the Cypriot Act and a statement that it was executed in the presence of a witness. There was no evidence that the statement was false. Correspondence exchanged between West Coast and the Royal Bank of Scotland culminated in the bill of Sale (exhibit A5).

The impression which Baquit sought to give, and which the trial judge seemed to have relied on, was that the documents and transaction of sale relied on were all a contrivance to shield West Coast. It is trite law that where fraud is relied on it must be specifically alleged and proved with particularity and strictly. That has not been done in this case. On the totality of the evidence, there was no basis for the conclusion that Elpida and West Coast never intended to act according to the Cypriot Act, in the face of the Bill of Sale (exhibit A5) and the evidence of Mr. Severiades, a Cypriot Lawyer, who gave expert evidence and opinion. The trial judge viewed the evidence of the witness with unnecessary suspicion when he commented on the fact that Elpida and West Coast shared his office as registered office and charged the witness with giving biased evidence.


Once the Bill of Sale (exhibit A5) has been shown to comply with Section 24(2) of the Cypriot Law, consequence which according to the law of Cyprus should attend to it as an effective transfer of ownership of the vessel is sufficient proof of Elpida's ownership of the vessel from the date of the Bill of Sale, namely 12th February 1997. The trial Judge erred not to have so held.

In the result, this appeal must be allowed and the judgment of the Supreme Court set aside. Elpida is proved to be the owner of the vessel from 12th February 1997. The matter will now go back to the Supreme Court to give necessary consequence to this decision. It is observed that the parties had once agreed that:


"In the event that the Supreme Court determines the issue of ownership in favour of the appellants then the appellants shall be at liberty to file a defence ..."

That agreement should now be given effect to. The consequence of so doing is that Elpida should be joined as a defendant with liberty to file a defence in the action.

The appellant is entitled to costs of the appeal.


E. O. AYoola
PRESIDENT

A. M. SILUNGWE
JUSTICE OF APPEAL


G. P. S. DE SILVA
JUSTICE OF APPEAL

Dated at Victoria, Mahe this 13th day of April 2000.