Textil Basquit (Tebasa) v
The Owners and Charterers of the Vessel "Global Natali"
(1997) SLR 164

Ramniklal VALABHJI for the Plaintiffs
Philippe BOULLE for the Defendant

[Appeal by the defendant to file notice of appeal out of time granted on 13 April 2000 in CA 7 of 1999.]

Ruling delivered on 21 July 1997 by:

PERERA J: This is an action in rem originating under order 75 r 3 of the Rules of the Supreme Court (U.K.) by a writ of summons with a statement of claim endorsed, by Textile Baquit (Tebasa) of Brazil against "the owners and charterers" of the vessel Global Natali" presently anchored in the territorial waters of Seychelles. The plaintiffs claim a sum of US$775,078.26 in respect of 'loss of cargo", consequential loss, expenses, interest and costs. The claim for consequential loss being unliquidated, learned counsel for the plaintiff withdrew that claim.

In an affidavit filed with a praecipe for a warrant of arrest under order 75 r *3* it was averred that the plaintiffs were the owners and consignees of cargo consisting of bales of cotton shipped under bills of lading nos FOT2/02 and FOT6/02. According to the copies of the bills of lading produced, 2297 bales were shipped on B/L no 2/02 and 748 bales on B/L no 6/02. The total C and F value of the 3045 bales is US$771,642.05. It was averred further that the "loss of cargo" occurred as a result of a fire on board the vessel Global Natali.

Warrant of arrest was issued by this Court on 28 February 1997 and according to the report of the process officer, the warrant was served on the vessel by affixation and on the Harbour Master on the same day at 4.55 pm.

An acknowledgement of service dated 14 March 1997 was filed by Mr P Boulle, attorney-at-law, on 17 March 1997 on behalf of "Elpida Marine (Company) Ltd" as owners of the vessel. This acknowledgement was filed 3 days out of the time specified in the writ of summons.

The instant matter concerns a motion and affidavit filed by the said company, claiming to be the owners of the vessel, to file a statement of defence out of time. A statement of defence has also been attached to the motion dated 30 May 1997.

The motion is supported by an affidavit filed by Mr P Boulle in his capacity as the attorney for the defendant company. The averments may be summarised as follows-

1. The statement of claim endorsed on the writ of summons is only partly

liquidated and hence was not taken by the defendant to be a final statement.

2. Hence, the defendant was led to believe that a further statement of claim would be lodged.

3. Paragraph 9 of the affidavit dated 21st May 1997 states that "the action is based on damages caused to cargo" whereas the statement of claim endorsed on the writ of summons refers to "loss of cargo”. Hence the plaintiffs should file and serve a fresh statement of claim.

4. The acknowledgement of service was filed within 14 days after the writ of summons came to the knowledge of the defendant.

Thus basically, leave is being sought on alleged defects in the statement of claim, which the defendants state misled them, and on the ground that the acknowledgement was filed within 14 days after the writ of summons came to their knowledge.

The action in rem has been filed against the "owners and charterers" of the vessel. The plaintiff has disclosed that the owners are "West Coast Marine Company Limited' and that the charterers are “Global Container Lines (Bahamas) Ltd." However, unlike in a regular civil action, anyone claiming to be the owner could acknowledge service of writ as the action in rem is against the res, the vessel, and notice is to the "whole world". Service is affected not on an individual but on the ship or vessel. In the case of *The Prins Bernhard* (1964) P 117, the writ was served on the Master of the ship but was not affixed on the mast of the ship or on any other conspicuous part of the ship. Order 75 r 11 requires that service of a warrant of arrest or a writ in an action in rem against a ship, freight or cargo shall be affected by

(a) Affixing the warrant or writ for a short time on any mast of the ship or on the outside of any suitable part of the ship's superstructure, and on returning the warrant or writ, leaving a copy of it affixed (in the case of a warrant) in its place or (in the case of a writ) on a sheltered, conspicuous part of the ship.

Hewson J in the above case stated -

> …this method of service prescribed by RSC order 9 r 12 (as it was then) for giving notice to all interested parties is a rule of the court. It has been firmly established by many years of usage. It may not be a perfect way of informing all interested parties that an action in rem is laid against the ship; but no other method has yet been suggested or devised. This method is well known throughout the maritime countries of the world.]t is based upon experience for the protection of all interested parties.

The learned Judge setting aside the service of the writ of summons, further stated

> I have great sympathy for the process server, but the courts must be vigilant towards the rights and interests of third parties who might conceivably be affected by the writ or the consequences of its service. I must do what I can to safeguard the interest of those who have had no proper notice of the existence of this writ, and ….. I am not disposed to save the service of this writ. The degree of irregularity in the service of the writ in rem was not such that I can feel disposed to overlook it.

It is clear that RSC Order 75 Rule II applies to situations where a warrant or writ is served on a "manned" ship. In *The Marie Constance* (1877) 3 Asp MLC 505, Sir Robert Phillimore observed that –

> Service on the Captain, even on board the ship, is not an alternative allowed by the rules of practice, nor sufficient notice to all parties who may have an interest in the ship; as for example, mortgagees, and others, between whom and the Captain there is no privity, either real or implied. I shall not allow judgment to be entered until I am satisfied that the writ of summons has been served in the proper manner, and the proper times have elapsed for appearance and other proceedings subsequent to such."

There are two other cases filed before this Court on the basis of maritime liens on the Global Natali. In case No 19 of 1997 filed on 27 January 1997, the Island Development Company Ltd in applying for an order authorising the release and transhipment of cargo of all owners who provided bank guarantees, averred in paragraph 1 of the petition thus –

> 'The ship Global Natali", its apparel and cargo were salvaged by the applicant and is now held at Victoria, Mahe under a maritime lien for salvage services rendered to it by the applicant after it was abandoned on the high seas by its Captain and crew, when a fire broke out on the ship.

Thus when the process officer of this Court served the warrant and the writ of summons on 28 February 1997 by affixing them on the ship, it was "unmanned", and hence although consistent with the rules was a meaningless exercise. The "res" in the instant matter was a "res derelicta" as Christopher Hill states in *Maritime Law* (4th Edition 1995) at page 114-

> The modem writ in rem has become a piece of legal machinery directed against the ship alleged to have been the instrument of wrongdoing in cases where it is sought to enforce a maritime or statutory lien or in a possessory action against the ship whose possession is claimed. A judgment in rem is a judgment against "all the world".
>
> This does not mean that the vessel itself is the wrongdoer but that it is the means by which the wrongdoer (its owner) has done wrong to some other party. It is also logically the means by which the wrongdoer is brought

> before the court as a defendant to what may thereafter turn into an action in personam…
>
> English legal theory has accepted that an action in rem is procedural, the purpose being to secure the defendant owner's personal appearance.

If that is the ultimate purpose of serving the warrant and writ by affixing them to the mast and a conspicuous part of the ship's superstructure, it must be taken that such procedure was meant to ensure that notice was not merely given to the "birds" but to those who were in privity with the owners. Hence as was done in *The Prins Bernhard* (supra), the circumstances under which the res in the instant matter was arrested and the writ was served necessitates this Court to consider any default in acknowledgement with circumspection.

Lord Penzance in the case of *Howard v Bodington* (1877) 2 PD 203 staled in this respect –

> I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act and upon a review of the case in that respect decide whether the matter is what is called imperative or directory.

In these circumstances should the court exercise its discretion to grant the defendant leave to file the defence out of time?

Under RSC or75 r 3, an action in rem must be begun by a writ and the writ must be in form no 1. The relevant provision in form no 1 is as follows -

> Within (14 days) after the service of this writ, counting the day of service, <u>you must</u> either satisfy the claim or lodge in the court office ... an acknowledgement of service.
>
> If you fail to satisfy the claim or to lodge an acknowledgement within the time stated, the plaintiffs may proceed with the action and judgment may be given without further notice to you and if the property described in this writ is under the arrest of the court, it may be sold by order of the court.

Paragraph 1304 *of* the *Supreme Court Practice* (Vol II) - 1995 contains the "directions for acknowledgement of service."

> *2. If in an action in rem a statement of claim is endorsed on the writ (i.e. words "statement of claim" appears at the top of the back) a defence <u>must be</u> served within 14 days after the time for acknowledgement of service of the writ.*

The stipulation of a time period is not in the rule but in a form prescribed thereunder. An acknowledgement of service is a mere notice to the plaintiff that the defendant intends to contest the claim. The penalty for default uses the word "may", which is directory. But any delay in filing an acknowledgement or defence should not be unfair or unreasonable and must not prejudice the plaintiff. In the instant matter where the last day for the filing of the statement of defence was 28 March 1997, it was filed on 30 Mav 1997 together with the instant motion before the Court, two months out of time.

Mr Boulle, counsel for the defendants submitted that it was "almost by chance" that the defendants came to know about the action in rem. This is understandable due to the reasons I have adduced earlier in this ruling. It has been disclosed that Mr Boulle called for copies of the papers filed in the case from Mr Valabhji, counsel for the plaintiffs, by letter dated 3 March 1997. This confirms that the warrant of arrest and writ of summons with the statement of claim endorsed had not been recovered from the ship after the process officer had affixed them. Hence the 3 days delay in filing the acknowledgement of service is excusable. But the defendants should have filed a defence within 14 days thereafter. The reason adduced that the defendant was led to believe that a further statement of claim would be lodged is however untenable, as there was ample opportunity for them to file a defence raising those objections in time.

In deciding whether the defendants should be deprived of a right to defend consequent to the default in filing pleadings in time, the Court has to consider the subject-matter of the case in relation to the rule disregarded.

There is presently a motion for judgment by default filed by the Plaintiff under RSC or75 r 7. As by virtue of or 75 r 10 the normal provisions of or 13 and or 19 do not apply in admiralty actions in rem, the plaintiff must prove that his claim is well founded and he is entitled to judgment. Although this could usually be done by affidavit without leave, it cannot be done in a summary manner as in actions in personam.

The plaintiffs in opposing the instant motion aver that the owners of the vessel are "West Coast Marine Company Ltd" as named in the statement of claim. They query the locus standi of Elpida Marine Company who claim to be the owners. It has been held in the cases of *The Gemma* [1899] PD 285, *The Dictator* [1892)] P304, and *The August 8* [1982) 2 AC 450 that where a defendant has entered appearance, he has submitted to the jurisdiction of the court and thereafter the action proceeded not only as an action in rem but also against the defendant personally. There is no necessity for a defendant who claims to be owner to apply for intervention, as has been submitted by the plaintiffs. Issues as to whether there has been a subsequent sale of the vessel and who the owners were at the time of service of the writ are all matters to be canvassed at the hearing orally or by affidavit. If the vessel is sold after the claim arises but before the writ is issued, the ship cannot be arrested because the relevant person is no longer the beneficial owner of the ship. The plaintiffs have averred that the ship is not worth US$500,000 while their claim alone is US$775,078. 26. They further aver that the privileged claim of the salvors is about US$300,000 and the port dues are also about

the same amount.

Further in case no67 of 1997 another consignee of cargo claims a sum of US$104,184 in respect of consequential losses and expenses incurred as a result of cargo being damaged by fire on board the vessel.

The plaintiffs have filed a motion for judgment by default on the basis that, among others, West Coast Marine Company Ltd, whom they aver are the owners, had defaulted appearance. But Elpida Marine Company Ltd have come forward as owners and have raised objections as to the plaintiffs' right to maintain an action in rem. Further, the plaintiffs also delayed in filing the motion for judgment by default for almost the same period of the default of the defendants to file a defence Hence they cannot complain that such motion was dilatory, vexatious and an abuse of the process of court. In the circumstances, the plaintiffs have not been materially prejudiced to such an extent that leave should not be granted. Leave is therefore granted to the defendants to file the statement of defence out of time. As the same has been already filed on 30th May 1997, it is accepted as a pleading in the case.

In paragraph 17 of the affidavit dated 3 July 1997, the attorney for the plaintiffs avers that -

> 17. If despite all the above, the Court is still inclined to grant leave to Elpida Marine Company Ltd to defend, I summit that it should be on terms that will do justice to the plaintiff and no justice will be done if the privileged claims of the salvors and the Port Authority are not also covered in the amount to be deposited ie that Elpida Marine Company Ltd be ordered to deposit US$775,078.26, free from the privileged claims of the salvors and of the Port Authority, plus interest at 17% per annum from the date of the writ and costs; within a delay to be fixed by the court; failing which judgment to be entered.

In the statement of claim, the plaintiffs claim a sum of US$775,078. 26 for loss of cargo contained in two bills of lading consisting of 1045 bales of cotton. The defendant avers that this cargo was not lost but transshipped to another vessel in February 1997. This is therefore a contested issue. There is no claim for salvage before this Court and further the consignees of cargo in the present case cannot seek to obtain security from the owners of the vessel to secure any claim of the salvors who are not parties to this action.

As was held by Ayoola J.A in the case of *Village Management Ltd v A Greers* (unreported) SCA 3/95

> It is difficult in the circumstances, even if the Supreme Court has jurisdiction, to accept that the learned Judge could have justifiably ordered security in the amount of damages claimed as security for costs. Although the amount for security for costs awarded is always in the discretion of the

> trial court, the amount is in practice based on an estimate of party and party costs usually up to the end of the proceedings. In a case as this in which a substantial portion of the damages claim would have to be determined at the discretion of the court after the evidence would have been gone into, it is inappropriate to order security in the entire amount claimed.

Mr Valabhji, counsel for the plaintiffs, cited the case of *Hughes v Justin* [1894] 1 QB 667 in support of his submission that the defendants ought to be ordered to deposit the full liquidated claim if leave is to be granted. With respect, that case has no relevance to the facts of the instant case. In that case, a writ of summons was issued endorsed for a liquidated sum. The parties settled the claim outside court for a lesser amount. The Court entered judgment for the full sum. In an application to amend the judgment, it was held that judgment ought to be entered for the amount actually due at the time when such judgment was entered. In the other case cited by Mr Valabhji, in *Re Hartley* [1891] 2 Ch 121, there was an issue of default of appearance. North J in granting the defendant leave to defend granted the plaintiff costs from the time of filing the writ down to and including the costs of the motion. In the present case, the plaintiffs have a maritime lien on the arrested ship. It has been averred that the value of the ship is less than the amount of the claim. This is not a factor that ought to be considered at this stage. Justice demands a consideration of the jural postulates of both parties.

As regards the submission that the deposit to be made should also include the port dues which it is averred amounts to US$2500 per day; in admiralty actions, deposits in the nature of security are provided when an arrested vessel is released from arrest. The arresting party cannot have the res under arrest and also seek monetary security for his claim. The plaintiffs cannot also claim the port dues already incurred and continuing dues while the res is under arrest. "These will be for the account of the arresting party, although they will be paid first out of the proceeds of sale if the ship is sold by the court." On the other hand it is generally the policy that the arresting party should insure the ship against port risks for the amount of their claim.

In the circumstances, the Court being mindful that in an admiralty action the parties are usually resident abroad and that the normal counsel and client communications and the obtaining of documentary material would be expensive, order the defendants to deposit a sum of R100,000 in cash or by bank guarantee before the date of hearing of the case.

In view of the instant ruling, the motion for judgment by default filed by the plaintiffs is struck out. Ruling made accordingly.

Record: Civil Side No 59 of 1997