

**La Digue Island Cruising (Pty) Ltd v
The Owners of the Fishing Vessel Demosfen
(2002) SLR 149**

Kieran SHAH for the Plaintiff
John RENAUD for the Intervenor

Ruling delivered on 2 August 2002 by:

PERERA J: The Plaintiff, La Digue Island Cruising (PM) Ltd, filed this action in rem on 13th November 1996 against the owners of the Fishing Vessel "Demosfen" claiming a sum of US dollars 54,346 in respect of damages caused to their vessel "Assumption" on 6th July 1996 at Port Victoria.

The said owners of "Demosfen" defaulted appearance. However Moscow Narodny Bank Ltd, intervened as the mortgagee of that vessel. The vessel, which was arrested by this Court on 8 November 1996 was released upon the intervener furnishing a bank guarantee dated 8th November 1996 from Barclays Bank, Seychelles for a maximum sum of US dollars 75,000.

On 28 August 1998, the intervener, sought "further and better particulars" of the claim. These particulars were furnished by the Plaintiff on 15th January 2001. The Plaintiff disclosed that the collision alleged occurred around 9.50p.m on 6 July 1996 at the Inter Island Quay, Port Victoria when a skiff of the "Demosfen" operated by two crew members collided into the "Assumption" which was moored alongside the quay. For purposes of an Admiralty claim, a skiff is considered as an accessory of the registered mother ship or vessel.

The present ruling arises from a preliminary objection raised in the defence of the intervener, that the Plaintiff has not filed a "preliminary act" as required by RSC Order 75 Rule 18 within two months of service of the writ, and that hence the action should be struck out.

The initial issue is whether Order 75 Rule 18 which provides for the filing of a Preliminary Act has been extended to apply to Seychelles by the Admiralty Jurisdiction Rules (S.I. 60 of 1976) (Cap 52). These Rules provide that Sections 1, 3, 4, 6, 7 and 8 of the Administration of Justice Act 1956 of the United Kingdom Parliament, shall have force and effect in Seychelles subject to the modification in column II of the Schedule thereto. Section 2 and 5, and Parts II to V and the Schedules of the UK Act have been omitted.

Section 4(6) which applies to Seychelles is as follows-

The claims to which this Section applies are claims for damage.
loss of life or personal injury arising out of a collision between ships

or out of the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships or out of non-compliance, on the part of one or more of two ships, with the collision regulations.

"Collision Regulations" are defined in Section 8 as meaning Regulations under Section Four Hundred and Eighteen of the Merchant Shipping Act, 1894 or such rules as are mentioned in Subsection (1) of Section 421 of that Act or any rules made under Subsection 2 of the said Section 421.

This identical provision is contained in Order 75 Rule 2 under the heading "certain actions to be assigned to admiralty". That rule provides that claims arising under Rule (1) (same as Rule 4(b) of the Seychelles Rules) shall be assigned to the Queen's Bench Division and taken by the Admiralty Court. The Queen's Bench Division, is a division of the High Court of Justice. In the Rules adopted, reference to High Court of Justice has been substituted by the words "Supreme Court of Seychelles". The reference to "Collision Regulations" in Order 75 Rule 2(2) has been defined, inter alia as Regulations under Section 418 of the Merchant Shipping Act 1894. Accordingly, pursuant to Rule 4(6) of the Admiralty Jurisdiction Rules of Seychelles, the filing of a Preliminary Act is a procedural requirement.

Dr Lushington stated in *The "Vortgern"* (1859) SWA 518 that:

Preliminary Acts were instituted for two reasons, to get a statement from the parties of the circumstances *recenti facto*, and to prevent the Defendant from shaping his facts to meet the case put forward by the Plaintiff.

The object of preliminary acts is to obtain from the parties, statement of the facts at the time when they are fresh in their recollection (per Sir Robert Phillimore in *The "Frankland"* (1872) LR 3 A & E 511). Order 75 Rule 18(2) sets out 16 items which should be disclosed in the first part of preliminary act. A preliminary Act is in two parts. The first part consists of a series of questions concerning the circumstances in which the collision occurred and the manoeuvres of, and observations made, by the ship owned by the party on whose behalf it is filed. These questions cover a wide range of details from the measurements, tonnage, horse power of the ship, the direction and force of the wind, the state of weather, the state of the lights on the ship, sounds and signals and the course taken by the ship before and after collision and a specification of the parts of the ship which first came into contact, and the approximate angle between the two ships at the time of the collision. The second part consists of any other facts and matters relied upon, together with the allegations of negligence made by the party on whose behalf it is filed and the remedy or relief which the party seeks.

A claim for damages resulting from a collision arises when two ships in motion collide. Hence was held in the case of the *"Craig Hall"* (1910) Probate Division - 207 preliminary acts are not required in an action arising out of a collision between a ship and a fixed or

floating structure such as a landing stage. A skiff is a small light boat propelled by oars, sail or motor. Although it is not averred as to how the skiff in the present case was propelled, the Plaintiff has disclosed that it was "*operated by two crew members*" of "*Demosfen*" at the time of the collision. In any event Section 8 of the Admiralty Jurisdiction Rules (*Cap 52*) defines the word "*ship*" as including any description of vessel used in navigation. Hence a skiff whether propelled by an oar, sail or motor would fall within that definition.

However a collision with a vessel moored to a quay is considered as a collision between ships for purposes of Section 4(6) of the Admiralty Jurisdiction Rules, as by definition a ship includes any description of vessel used in navigation, and as such vessel was in navigable waters.

What then would be a consequence of failure to lodge a preliminary act? RSC or 75 Rule 19(1) provides that -

Where in such an action as is referred in Rule 18(1), the Plaintiff fails to lodge a preliminary act within the prescribed period, any Defendant who has lodged such an Act may apply to the Court by summons for an order to dismiss the action, and the Court may by order dismiss the action or make such other order on such terms as it thinks just.

In "*El Ose*" (1925) Lloyds reports 216 it was held that:

The Rule (as to filing of a preliminary act) applies in full force in cases where the owner of one vessel sues the owner of the offending vessel. Discretion is exercised in claims by third parties or cargo owners.

The filing of Preliminary Acts applies to the two owners of the vessels in collision and who are the Plaintiffs and Defendants in the action in rem. In the present case, the collision claim is by the owners of the damaged vessel against the owners of the offending vessel. Moscow Narodny Bank Ltd is not a party to that dispute, but only a party who has an interest in the property arrested, and subsequently released on a bank guarantee. As was held in the "*Lord Strathcona*" the right of an intervener is limited to the protection of his interest in the "*Res*" and the Court will not permit him to raise extraneous issues. In that case, the mortgagees sued the mortgager on a charter party. The charterers intervened and, inter alia, challenged the validity of the mortgage.

The Court held that they were only entitled to be heard on the question whether the Plaintiffs ought to be restrained from exercising their rights in such a way as to interfere with the intervener's contractual rights under the charter party.

Hence defects in pleadings or failure to lodge pleading such as preliminary Acts are not matters which an intervenor can rise to seek to strike out an action in rem against an owner of a vessel over which it has only a pecuniary interest as a mortgage, and as the pleadings of an intervener are different to what a Defendant is required to plead. The

particulars to be supplied in a preliminary act are irrelevant to all his limited interest. Hence such an application could have been made by the vessel, in their capacity as Defendants. But they have not done so. Hence the preliminary objections based on paragraphs 8 are dismissed.

It is the duty of the court to safeguard the interests of the vessel by the owners of the vessel. The appearance of the vessel is a matter of the defence are

Costs in the cause.

Record: Civil Side No 353 of 1996