

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (ADMIRALTY)

PURCELL BROS LIMITED

Plaintiff

v

**THE OWNERS/DEMISE CHARTERERS AND ALL PERSONS CLAIMING TO
BE INTERESTED IN THE MOTOR VESSELL STAR VIKING**

Defendants

WEATHERUP J

[1] This is an application by the defendant for release from arrest of the MV Star Viking. Mr Spence appeared on behalf of the defendant and moving party and Mr Dunford appeared on behalf of the plaintiff.

[2] I made an Order on 10 December 2012 that a warrant of arrest should issue in respect of the Star Viking. The plaintiff's application was grounded on the affidavit of Joanne Moody who set out that the plaintiff company is registered in Dublin and claims that Rossmarine Ltd is in breach of the terms of a contract of affreightment made between the plaintiff and Rossmarine on 19 December 2013.

[3] The plaintiff claims that Rossmarine is the owner or demise charterer of the Star Viking and that by the contract of affreightment Rossmarine agreed with the plaintiff to transport cargo in the form of livestock and feed from Waterford or Cork to North Africa for a minimum of 10 voyages and a maximum of 24 voyages per year over a two-year period. Rossmarine indicated that the vessel would arrive in Waterford on 12 October 2014 and that she would be passed and ready for loading within dates that had previously been specified by the plaintiff. The plaintiff therefore had cattle ready for export from Waterford to North Africa on that date and the vessel arrived in Waterford but left within 24 hours without being inspected and without being made available to the plaintiff. The vessel subsequently sailed

into the port of Belfast. The plaintiff claims to have suffered a loss of €141,000 as a result of the defendant not honouring the first voyage under the contract and further claims loss of profit per voyage with the total loss of some €3.4m.

[4] The dispute between the plaintiff and Rossmarine has been referred to arbitration in Dublin pursuant to the contract of affreightment. Ms Moody averred that beneficial ownership of the vessel resided with Rossmarine. She had undertaken an examination of the Register for Maritime Registration at St Vincent in the Grenadines which showed that on 1 August 2014 the registered ownership of the vessel had been transferred to Zinnia Holdings Ltd of Gibraltar and that this transfer had been recorded on 5 August 2014.

[5] Ms Moody, relying on solicitors in Dublin who have conduct of proceedings in that jurisdiction, referred to undertakings given by Daniel Joseph Hanley, solicitor, and Hugh Noel Hanley on behalf of Rossmarine in High Court proceedings in Dublin between Ballagh Holdings Ltd and Rossmarine and Hugh Noel Hanley and related proceedings between Rossmarine and Ballagh Holdings. This undertaking required that, during the period of the undertaking or the currency of the contract, notice would be given by email and registered post of any negotiations pertaining to the sale or proposed sale of the vessel. No such notice had ever been given on foot of that undertaking in relation to any proposed transfer of the ownership of the vessel.

[6] By letter of 5 September 2014 Rossmarine stated that the sale of the vessel was presently being negotiated. The Dublin solicitors for the plaintiff by letter of 8 September 2014 asked for confirmation that any alleged negotiations that would proceed to a sale would be subject to the contract of affreightment. A letter from Hanley & Lynch, Solicitors for Rossmarine, on 9 September 2014 stated that Rossmarine would continue to operate the vessel under a bareboat charter.

[7] On 5 September 2014 the plaintiff applied to the High Court in Dublin for the committal of David Joseph Hanley for breach of his undertaking. By a replying affidavit sworn by David Joseph Hanley he averred that the vessel had not been sold and nor were there negotiations for her sale. The application was dismissed on consent. Mr Hanley did not refer to the Register, which, some 6 weeks earlier had stated the ownership of the vessel to have been transferred from Rossmarine to Zinnia.

[8] The plaintiff obtained an interim injunction in the High Court in Dublin restraining Rossmarine from signing, transferring or dealing with the vessel. Mr Hanley swore an affidavit on 16 September 2014 and again made no reference to the entry in the Register that Rossmarine no longer owned the vessel or that ownership had been transferred to Zinnia.

[9] On 7 October 2014 the solicitors for Rossmarine stated that the vessel had not been sold. The letter sought to draw a distinction between the sale of the vessel and

the transfer of ownership. The letter accepted that ownership of the vehicle had moved to Zinnia. Zinnia was beneficially owned by the Hanley family. It was stated that the purpose of the transfer of ownership was to try and secure a loan from an investor who was unwilling to make the loan to Rossmarine. It was also stated that the transfer of ownership was with express notice of the contract of affreightment and that a bareboat charter was given by Zinnia to Rossmarine so as to preserve the contract and to ensure that Rossmarine remained the 'disponent owner'.

[10] The amount of security for the claim sought by the plaintiff was stated to be €3.5m.

[11] The defendant applies to set aside the arrest of the vehicle relying on the affidavit of Daniel Joseph Hanley. In that affidavit Mr Hanley states that he is a partner in the firm of Hanley & Lynch solicitors and is beneficial owner of Zinnia Holdings Ltd with his wife and sister. He refers to Ballagh Holdings Ltd as an Isle of Man company which in December 2013 entered into a mortgage agreement to provide €1m to Rossmarine to fund a conversion of the vessel. It is stated that under the contract of affreightment the period of the contract is defined as two years from the vessel being delivered from Hidrodinamik Shipyard and being ready in all respects to load a cargo ex Waterford.

[12] Mr Hanley states that the two actions in Dublin involving Ballagh Holdings were resolved in July 2014 and that part of the settlement was that the mortgage of Ballagh Holdings was cleared off the vessel. This allowed Rossmarine to enter into a mortgage with Greenstar Shipping Ltd whereby Greenstar provided monies to continue the conversion of the vessel. In August 2014 it is stated that ownership of the vessel was transferred from Rossmarine to Zinnia. It is stated that Zinnia and Rossmarine are both owned by members of the Hanley family and that the transfer of ownership was to raise further monies to allow the conversion of the vessel. The transfer of ownership from Rossmarine to Zinnia is stated to be subject to the agreement that Zinnia will grant a bareboat charter of the vessel to Rossmarine when the performance of the contract of affreightment is due to commence.

[13] On leaving Waterford the vessel transferred to San Nazaire in France where she was inspected by the Irish Department of Agriculture Veterinary Authority in November 2014. A schedule of works was drawn up to be completed before the vessel could be certified as fit to carry the livestock to Libya. The vessel therefore sailed to Belfast in order to have the works carried out. The schedule of works has nearly been completed and the vessel will be available to be inspected and be ready for the first time since entering the contract of affreightment to load cargo ex Waterford. The affidavit states that it remains for the plaintiff to serve the appropriate provisional and definitive notices under the contract and for the vessel to sail to Waterford for loading.

[14] Mr Hanley states that at all times Rossmarine has been prepared to perform the contract but could not do so until the vessel was ready to load cargo. There was

no time limit within which the vessel had to be made ready. According to Mr Hanley the period for commencement of the contract has not yet arrived because the vessel has not been certified as suitable to carry the cargo agreed by the contract of affreightment.

[15] A second affidavit from Joanne Moody refers to Ballagh Holdings involvement in the proceedings in Dublin and states that Mr Hanley as a solicitor and officer of the Court was ordered by Mr Justice Gilligan to undertake to the Court that Rossmarine must immediately give notice of any sale or charter of the vessel. She refers to Rossmarine's new mortgage of the vessel to Greenstar and states that what Mr Hanley does not state is that the beneficial owner of Greenstar is Hugh Noel Hanley who is also said to be the beneficial owner of Rossmarine.

[16] Further, Ms Moody refers to the affidavit Mr Hanley where he states that no bareboat charter of the vessel will exist until performance of the contract is due to commence and contrasts that with Mr Hanley's letter of 7 October 2014 by which it is stated that there was a bareboat charter. She concludes by stating that none of the matters raised by Mr Hanley go to impeach the arrest of the vessel.

[17] Finally, a second affidavit from Mr Hanley. He states that the beneficial owner of Greenstar is his brother, Hugh Noel Hanley. He refers to a Declaration of Trust dated 11 June 2014 stating that he holds all the issued shares of Greenstar and to a Power of Attorney appointing him Attorney of the company. He also exhibits a Power of Attorney of 16 December 2014 in his favour by Zinnia Holdings Ltd and states that the beneficial owners of Zinnia are himself, his wife and his sister. He refers to the transaction transferring the ownership of the vessel from Rossmarine to Zinnia as being at arms-length. Further, he states that it is not a simple matter to provide security for the plaintiff's claim. The vessel is entered with the Shipowners Mutual Club for Freight, Demurrage and Defence, meaning that, inter alia, defence costs are covered. However, the cover does not extend to potential liability under a contract of affreightment.

[18] The Admiralty jurisdiction of the High Court is set out in schedule 1 of the Administration of Justice Act 1956. Paragraph 3(1) provides that the jurisdiction may be invoked by action in personam. The plaintiff is proceeding against Rossmarine in personam by arbitration in Dublin claiming breach of contract. Paragraph 3(4) provides that the jurisdiction may be invoked in rem if the person liable in personam was, when the cause of action arose, the owner or charterer of, or in possession or control of the ship. The present proceedings are by action in rem against the vessel in respect of a breach of contract between the plaintiff and Rossmarine. It is well recognised that an action in rem can serve to provide security for the damages claimed in an action in personam by the arrest of a ship to provide security for the claim or a judgment that has been entered, even though the arrest is effected in a different jurisdiction.

[19] Order 75 Rule 5 of the Rules of the Court of Judicature provides that after a Writ has been issued in an action in rem a warrant for the arrest of the ship against which the action is brought may be issued at the instance of the plaintiff. Rule 5(7) provides that every affidavit in an action in rem brought against a ship under paragraph 3(4) of the first schedule to the Administration of Justice Act 1956 must state:

(a) whether the ship against which the action is brought is the ship in connection with which the claim in the action arose;

(b) that in the belief of the deponent the person who would, apart from paragraph 4 of the first schedule to that Act, be liable on the claim in an action in personam was when the cause of action arose, the owner or charterer, or in possession or control, of the ship in connection with which the claim arose and was also, at the time of the issue of the Writ, the beneficial owner of all the shares in the ship against which the action is brought; and

(c) the grounds of the deponent's belief.

[20] The conditions for the issue of a warrant of arrest were satisfied and the Order made on 10 December 2014. The Admiralty Marshall effected the arrest of the ship.

[21] The defendant contends that Rossmarine is not the beneficial owner of the Star Viking. On 1 August 2014, according to the relevant Register, there was a transfer of ownership of the vessel from Rossmarine to Zinnia. However in September 2014 it was stated on behalf of Rossmarine that a sale was being negotiated and that any transferee would operate subject to the contract of affreightment agreed between the plaintiff and Rossmarine. In October 2014 it was stated on behalf of Rossmarine that the vessel had not been sold but that there had been a transfer of the vessel and also a charter back to Rossmarine. In the first affidavit of Mr Hanley it was stated that there was a transfer to Zinnia and that there would be a charter to Rossmarine when performance was due under the contract of affreightment.

[22] In The MV Inessa Armand [1997] NIJB 203 Carswell LCJ considered the issue of beneficial ownership. The plaintiff claimed that the vessel arrested was owned by a company indebted to the plaintiff. The Republic of Ukraine intervened to claim ownership of the vessel. It was held that the vessel was not beneficially owned by the company and the vessel was released from arrest.

[23] The Court is entitled to look behind the formal registration of the vessel to determine where lies the beneficial ownership of the vessel. In The Aventicum [1978] 1 Lloyds Law Reports 184 the plaintiffs were consignees of a cargo of newsprint and during the voyage there was damage to the cargo resulting in the plaintiff issuing a Writ against the defendants as owners of 'The Aventicum'

claiming damages and the arrest of the vessel. The affidavit evidence indicated that when the cause of action arose the vessel belonged to Armadora, a Panamanian company, which was owned by a company called Scalottas. The vessel was transferred to Longon Shipping Ltd, which was also owned by Scalottas. Longon was purchased by Anglo Norse and the vessel was transferred to Loquat Shipping Ltd a company created by Anglo Norse. It was held that the Court in all cases could, and in some case should, look behind the registered owner to determine the true beneficial ownership. Further, in a case where there was a suggestion of trusteeship or a nominee holding, there was no doubt that the Court could investigate. Although Armadora and Longon, at the time of the transfer of Longon, were owned by Scalottas and although Anglo Norse owned Longon at the time the vessel was transferred to Loquat, the plaintiffs on the evidence could not successfully establish that the vessel was beneficially owned by the same person. The vessel was released from arrest.

[24] A case going the other way was The Saudi Prince [1982] 2 Lloyds Reports 255. The plaintiff cargo owners claimed damages from the defendant carriers. 'The Al Dhahran' was owned by a Mr Ori who traded under the business name Saudi Europe Line (SEL). 'The Saudi Prince' appeared from the register to be owned by SEL. A Writ in rem was issued against The Saudi Prince and she was arrested. The owner of Saudi Prince gave security for the plaintiff's claim and then applied to set aside the Writ. Mr Ori argued that during 1979 and before the issue of the Writ the ownership of The Saudi Prince had been transferred to Saudi Shipping and Sea Transport Shipping Company Limited (SSST). Mr Ori claimed that he owned 80% of the shares in SSST with the remaining 20% held equally by his son and his daughter. The Court found on the balance of probabilities that the shares were put in the names of the children by Mr Ori as his nominees merely to divest himself of shares in name only and he remained the beneficial owner. The application to set aside the Writ was dismissed.

[25] The present application does not extend to the Writ in rem being set aside. The application is for the release from arrest of the vessel. The application is made on behalf of Zinnia. Ownership of the vessel is said to have transferred to Zinnia in August 2014 prior to any claimed cause of action arising. The defendant therefore contends that the plaintiff is not entitled to proceed in rem against the vessel owned by Zinnia as the person liable in personam is not Zinnia but Rossmarine.

[26] The Court may look behind the Register. I am satisfied on the balance of probabilities that Rossmarine remains the beneficial owner or the charterer or has possession or control of the vessel despite the machinations of the various Hanley companies and the Hanley's themselves, to which I have referred. On 7 October 2014 solicitors for Rossmarine sought to offer reassurance by stating that Rossmarine was 'the disponent owner'. At the very least, it was being stated that the transfer to Zannia was subject to a charter back to Rossmarine to complete the contract of affreightment and Rossmarine was the charterer or in possession or control of the vessel.

[27] The defendant contends that the plaintiff does not have a cause of action in respect of the contract of affreightment. It is said that the pre-conditions for the contractual obligations have not been satisfied and there has been no breach on the part of the defendant, the required notices have not been given and the contract has not commenced. The plaintiff claims on the other hand that notice to carry the freight from Waterford was given and that the cargo was ready to board. The defendant also challenges the presence of a ready cargo.

[28] These are issues in personam in the arbitration in Dublin. I am satisfied there is a dispute on the issue of the breach of contract and I am satisfied that the defendant has a case to answer and I am satisfied that that case will be made and contested in the arbitration, which will determine where responsibilities lie.

[29] The defendant seeks the release of the Star Viking from arrest. Section 26 of the Civil Jurisdiction and Judgments Act 1982 provides that where in Northern Ireland a Court stays Admiralty proceedings on the ground that the dispute in question should be submitted to the determination of the courts of a country outside the United Kingdom, the Court may, if in those proceedings property has been arrested, order that the stay be conditional upon the provision of equivalent security for the satisfaction of any such award or judgment. When the Court makes such an Order it may attach such conditions to the Order as it thinks fit, in particular conditions with respect to the institution or prosecution of the relevant legal proceedings, which for these purposes are the arbitration proceedings under way in Dublin.

[30] The usual situation would be that security might be provided for the claim by the defendant. *Modern Admiralty Law by Aleka Mandaraka-Sheppard* at page 130 under the title 'Provision of security for the claim and release from arrest' states that the owner of the property may arrange for security to be placed for the amount of a claim plus interest and costs in lieu of the release of the ship from arrest. There are standard letters of undertaking provided either by the owner's P&I Club or by his bank which include an undertaking that solicitors will be instructed to accept service on the owner's behalf and the owners will submit to jurisdiction... The amount of security for release of a ship must be reasonable and its assessment approximate.

[31] There are issues about the availability of undertakings from the owners P&I Club. The defendant approaches the matter on the basis that there is a general discretion in the Court to order the release of the ship if to maintain the arrest would be unjust. In The Varna [1993] 2 Lloyd's Law Reports 253 the plaintiffs were the consignees of cargo and sued the defendants as owners of the vessel for damage and obtained a warrant for the arrest of a sister ship 'The Varna'. The defendant objected to the failure of the plaintiff to make full disclosure of the existence of other proceedings ongoing in Bulgaria. The defendant's application was made under the new form of Order 75 Rule 5 which has applied in England since 1986. In Northern Ireland we operate under the old rules. Believing this case to be one to which the old

rules still applied the High Court and Court of Appeal set aside the Writ by reason of the non-disclosure of the other proceedings. However, when it was drawn to the attention of the Court of Appeal that the rule had been amended the matter was reviewed and the defendant's application dismissed. The new rules provided a new form of regime for the issue of a warrant of arrest of a ship. Scott LJ stated –

“Nothing I have said in this judgment is intended to touch upon the question whether, in the circumstances set out in [the] affidavit, the defendants would succeed in having the writ in rem struck out or whether, if the defendants succeed in having the proceedings stayed on *lis alibi pendens* or any other grounds, they might for that reason be able to have a warrant of arrest set aside. Nor does this judgment touch upon the question whether on an inter-partes application to the Admiralty Court to set aside a warrant of arrest, the Court may not have a general discretionary power to do so if, in all the circumstances, the view is taken that the continuance of the arrest would be unjust.”

[32] I accept that the same ought to apply to the operation of the old rules as they continue to apply in Northern Ireland. *Mandaraka-Sheppard* at page 131 states that where a claim is subject to an arbitration agreement and in rem proceedings have commenced, the Court will stay the proceedings upon the application of the defendant and may order the release from arrest, provided sufficient security for the claim is given, citing section 26 of the Civil Jurisdiction and Judgments Act 1982. Prior to section 26 a vessel could be arrested for the purposes of the provision of security to satisfy a judgment and not an arbitration award. If the proceedings were stayed in favour of arbitration the Court had a wide discretion whether or not to maintain the arrest. If the Court took the view that the proceedings would result in a judgment the arrest could be maintained as security for the judgment. Such a wide discretion is no longer needed. Section 26, coupled with the Arbitration Act, give the Court power either to maintain the arrest as security for the arbitration award or to order the release from arrest upon provision of security for the satisfaction of any such award.

[33] The plaintiff claims €140,000 loss in respect of the first journey as at 10 December 2014. The plaintiff claims security for the full potential of the contract at €3.5m as the loss on all the voyages. The plaintiff has a duty to mitigate and alternative arrangements might be made. There has been no breakdown of a loss of profit claim on the proposed voyages.

[34] I propose to assess the security required at €300,000 for the release of the vehicle and therefore I will discharge the arrest upon the defendants providing security for the damages, interest and costs to a figure of €300,000.