IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION: IN ADMIRALTY)

OA NO. 3/2021
PLAINT NO. 8/2021

BETWEEN **ROSE SHIPPING LIMITED,** a corporation incorporated under the laws of Liberia and registered to operate in the Hellenic Republic, Shipping Manager

Plaintiff/Applicant

AND **THE SHIP "LYUBOV",** registered in the Cook Islands under the Ship Registration Act 2007

First Defendant/Respondent

AND **CAMEO ASSOCIATES S.A,** a corporation incorporated under the laws of the Republic of Panama, Vessel Owner

Second Defendant/Respondent

Date of Hearing: 20 October 2021 (via Zoom)

Counsel: Mr D Greig for Plaintiff/Applicant
Mr PW David QC and Mr B Marshall for Second Defendant/Respondent

Date of Judgment: 9 November 2021

JUDGMENT OF HUGH WILLIAMS, CJ

[0192.dss]

A. The orders for injunction and ancillary relief made ex parte on 10 September 2021 are rescinded to the extent set out in paragraphs [78]-[80].

B. Costs and consequential matters are to be dealt with as set out in paragraphs [81]-[82].

Introduction

[1] On 9 September 2021 the applicant/plaintiff, Rose Shipping Limited[1] commenced this proceeding[2] seeking € 536,762.96 and USD 135,791.04 being the amount it claims it is owed under the terms of a now-terminated ship management agreement dated 19 July 2016[3] with the second defendant/respondent, Cameo Associates S.A[4] under which Rose would manage the first defendant/respondent, the ship "Lyubov"[5].

[2] On the same day Rose applied ex parte for an interim injunction to restrain the Registrar of Ships from exercising the powers conferred on the Registrar under ss 17, 26(4) and 35 of the Ship Registration Act 2007 in respect of the Lyubov, or any of the shares in the vessel, on the principal grounds that Rose had expended the sums sought in the statement of claim on termination of the agreement with Cameo and that:

> "[Cameo] has taken steps to evade legal proceedings against it by towing the vessel from Greece to Turkey, changing the shareholding of [Cameo] and taking steps to register the vessel in an alternative shipping registry."

[3] On 10 September 2021 the application for the interim injunction was heard ex parte on an urgent basis as Cameo was said to have applied to the Registrar for a Deletion Certificate from the Cook Islands' Register in respect of the Lyubov. An injunction was issued that day in terms of the application with the order for restraint ceasing to have effect on rescission, discontinuance or conclusion of Plaint 8/2021, or the first or second respondents depositing the sums sought, or their legal equivalent, in Court pending determination of the substantive case.

[4] With the application for the interim injunction Rose also sought ex parte orders for directions as to service and substituted service. The 10 September 2021 injunction order served a dual purpose as it also authorised service on the Lyubov and Cameo by email to the lawyers acting for the respondents in Istanbul, Turkey and for personal service on the Registrar.

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1 "Rose".
2 Plaint 8/21.
3 The "agreement".
4 "Cameo".
5 "Lyubov".

[5] On 24 September 2021 Cameo, but not the Lyubov, filed a notice of appearance under protest to jurisdiction, saying it was under R 11(1) of the Admiralty Rules 2005. The grounds of the protest were that this Court has no substantive jurisdiction to determine Rose's claim; that there were no grounds on which this Court could subject Cameo to the Cook Islands' jurisdiction; that the claim had no connection with the Cook Islands in respect of a foreign company; that in rem proceedings can only give rise to substantive jurisdiction if served within the Cook Islands' jurisdiction; and, importantly, that Rose's claim was pursuant to the agreement which provided:

> 13. Any controversy or claim arising out of relating to this Agreement, or the breach thereof, shall be put to the exclusive jurisdiction of the Courts of Piraeus;
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> 14. This Agreement shall be governed by the laws of Greece.

[6] Cameo followed its notice of protest to jurisdiction with an application dated 5 October 2021 to dismiss the entire proceeding and rescind the orders for interim relief, again pleading that this Court has no jurisdiction to hear and determine the claim. It relied on the Judicature Amendment Act 1991, pleading that it conferred no power to grant leave to serve proceedings outside the jurisdiction and, even if there were such power, Rose could show no proper basis for the granting of leave. Cameo relied on the jurisdiction and proper law provisions of the agreement; submitted that orders authorising substituted service of in rem proceedings could not properly be made as in rem proceedings can only be served within the jurisdiction; and pleaded that, in seeking its injunction on an ex parte basis, Rose failed in its duty to make full and frank disclosure of all matters relevant to the Court's discretion.

[7] Minute (No.2) in this matter[6] required Rose to file a notice of opposition by 19 October 2021. It complied, denying the claimed lack of power to grant leave to serve out of the jurisdiction and the allegation that there was no proper basis for the same. It admitted the claim was made under the agreement which included the exclusive jurisdiction clause but said no "provisions under the laws of Greece preclude or prevent the commencement of proceedings in the Cook Islands" and thus denied that any proceedings commenced in the Cook Islands offended the exclusive jurisdiction clause or the laws of Greece. Rose

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[6] Issued 18 October 2021.

denied failing to make proper disclosure in its ex parte interim injunction application but admitted that Cook Islands' in rem proceedings cannot be served out of the jurisdiction.

[8] Minute (No.2) directed a hearing on 20 October 2021 on the question whether the proceedings against Cameo could be maintained in the Cook Islands and therefore whether the orders restraining the Registrar should remain in place. The Minute said that resolution of the broader issues between these parties could be dealt with later, if remaining justiciable in this jurisdiction.

Evidence

[9] The evidence on which the 10 September 2021 interim injunction was made was in an affidavit, sworn on 9 September 2021, of a Mr Petrosian, the president and a shareholder of Rose, a Liberian-incorporated international ship management company which has been operating since 1995. He said the Lyubov is a general cargo vessel built in 2014, approximately 140 metres in length and owned by Cameo, which was incorporated specifically to be her ownership vehicle. He said Lyubov's, and Cameo's, beneficial owner is a Mr Khmarin, a Russian national.

[10] Mr Petrosian's affidavit exhibited the ship management agreement dated 16 July 2016 under which Rose took over Lyubov's management from the previous managers following her arrest by creditors. While exhibiting the agreement, the affidavit did not draw attention to the exclusive jurisdiction and proper law provisions and almost wholly omitted mention of the detail of the Greek Court proceedings later recounted.

[11] Once the agreement commenced operation on 31 December 2016, Rose managed and maintained the Lyubov on behalf of her owner, sourcing cargo, arranging voyages, providing crew, victualling and bunkering the vessel, meeting the fees and expenses for her running and maintenance, and reporting, Mr Petrosian said, to the owners and their lawyers quarterly.

[12] Mr Petrosian said Mr Khmarin advised him in November 2019 of his intention to sell Lyubov. As a result, Rose arranged and paid for a special survey and dry-docking, accounting to Rose's principals on 4 May 2020 for the sum of € 542,881. Payment was not forthcoming.

[13] Cameo gave notice of termination of the agreement on 5 May 2021 with instructions to deliver the vessel to Tuzla or Izmir in Turkey and with parties appointed to negotiate and conclude settlement. That, however, was unsuccessful and, when the agreement terminated on or about 5 July 2021, Mr Petrosian said Rose was owed € 587,301.26 and USD 187,232.01. Since termination of the agreement, Cameo and its associates have paid some of Rose's third party creditors for services provided to the Lyubov, thus reducing Rose's claims to the sums sought in its statement of claim.

[14] Payment was not received, the Lyubov remained berthed in Piraeus, Greece and, in Mr Petrosian's only mention of the litigation, he said that Rose instituted Greek "Security Measures proceedings seeking the conservatory detention of the ship"[7]. The affidavit omitted to mention that, as Cameo's evidence later disclosed, Rose was successful in obtaining an ex parte order on 16 July 2021, extended on 20 and 29 July 2021, from the Court of First Instance in Piraeus forbidding the Lyubov from sailing. The affidavit merely said that the proceedings were scheduled for hearing on 17 September 2021.

[15] Despite the litigation, on what now appears to have been 27 August 2021, Cameo had the Lyubov towed to Tuzla where, at the date of the affidavit, he said she remained.

[16] Mr Petrosian supported his allegation that Cameo was taking action to evade its creditors by pointing to a transfer of Cameo's shares executed on 5 July 2021 by a Russian company called Merkury Asset Management Limited, which transferred ten shares in Cameo to a Panamanian company, Tiber River Shipping SA. Cameo also executed a standard BIMCO Ship Management Agreement dated 23 July 2021 under which a Turkish company, Rivers Group Denizcilik Limited SPI, was appointed Lyubov's manager on what Mr Petrosian avers include non-standard industry provisions. He also pointed to the Lyubov being provisionally registered on 2 September 2021 in Panama under the name "Tiber River" with the owner being listed as Tiber River Shipping SA.

[17] All of that led Mr Petrosian to conclude:

> 36. It is my reasonable belief that the second respondent and the beneficial owners of LYUBOV are seeking to evade their obligations, by putting the vessel both out of physical reach of effective legal jurisdictions and, by the transfer of the registered ownership, putting the vessel outside the ownership of the second respondent and therefore making it difficult to fulfil the requirements that will

[7] At 27.

> exist in most jurisdictions in order to obtain an arrest. From my knowledge of the beneficial owner of the first and second respondents I fear that the LYUBOV could seek refuge in the disputed territory of Crimea which is currently beyond any effective legal recourse.
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> 37. It is for this reason the applicant makes this application in the Cook Islands and seeks an interim injunction as this is the only way to secure the applicant's interests.

[18] Mr Petrosian's version of events was rebuffed in detail in two affidavits filed on Cameo's behalf, one from a Mr Ünlü, its Turkish lawyer, and one from a Ms Kossena, the lawyer acting for Cameo in Greece.

[19] After recounting the background Mr Ünlü said his annexed correspondence showed that "after initially appearing possibly to agree with [a proposal for independent audit] Rose did not provide the accounting records as requested or agree to any independent audit of the accounts," though the "correspondence shows Cameo stating that it would pay Rose the debts claimed if those debts were borne out for an audit of the accounts", something which could not be carried out as Rose failed to provide proper records and accounts.

[20] He detailed direct payments to suppliers by Rivers Group of € 224,610.18 and $321,456.34 and continued:

> "I believe that the approach taken by Rose in its court proceedings and in urging suppliers to seize the ship was directed at making Cameo give in to its demands for payment of its claims which Cameo did not consider were well founded and which Rose was not prepared to provide accounting documents for audit … as a result of Cameo paying outstanding claims by suppliers from the period of Rose's management, and the dismissal of Rose's petitions to detain the ship by the court in Greece, the ship could be towed to Turkey which was the requested point of redelivery at the time of termination … The LYUBOV left Piraeus on 27.8.21. She is now in the Port of Yalova undergoing repairs."

[21] Ms Kossena gave considerable detail of both Rose's claim against Cameo in the Chamber of Interim Measures in the Single Member Court of First Instance of Piraeus, commenced on 15 July 2021, and Cameo's claim against Rose in the Multi-Member Court of First Instance at Piraeus, commenced on 6 September 2021.

[22] She said[8] Rose's claim against Cameo sought a provisional order for seizure of the Lyubov up to the amount of € 1,000,000, claimed to be the "financial balance of the management of the vessel," until the issue of a judgment on the request for provisional seizure and additional orders to stop Lyubov leaving Piraeus and "prohibiting Cameo from taking any action that would result in a change in the legal status" of the vessel. It was Ms Kossena's affidavit which exhibited the ex parte orders forbidding Lyubov's sailing.

[23] In its claim Cameo seeks orders that Rose accounts to its principal with full records of the vessel's income and expenses and pays Cameo any balance.

[24] The "imminent provision" application was brought ex parte and heard, after adjournments, on 4 August 2021. Both parties were legally represented with Cameo challenging Rose's claim on a number of fronts. Ms Kossena said that, for Rose's petition to be successful, it needed to establish there was a proper foundation for its claim and an "imminent danger' the claim would not be satisfied.

[25] After hearing the parties the application for the interim order was dismissed on 4 August 2021. That, presumably, terminated the non-sailing orders. The substantive hearing of the petition was set for 17 September 2021.

[26] However, on 13 August 2021, Rose filed a further petition for interim orders on the same terms, alleging a change of circumstances since the earlier hearing through the filing of third party petitions for Lyubov's attachment and Cameo's efforts to delete her from the Cook Islands Register, something of which Rose was given knowledge by an email from the Deputy Registrar of Maritime Cook Islands on 4 August 2021.

[27] Rose's second petition was heard on 18 August 2021. Again both parties were represented and made submissions to the Court President. Again the application for interim orders was dismissed, which, if they had not been terminated on 4 August 2021, must have ended the non-sailing orders so did not prevent Lyubov being towed to Turkey on 27 August 2021. The substantive hearing was set for 10 September 2021. That was adjourned by consent, first to 17 September 2021, when an adjournment was sought as new lawyers had been engaged, and then to 15 October 2021.

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[8] At 5-7.

[28] The later litigation history between those parties was covered in an affidavit from a Mr Dimitriou, the substitute lawyer for Rose. The affidavit contains an interesting summary of the applicable Greek maritime law including that "all actions provided by the Greek substantial and procedural law are in personam and there is no such thing as an action, suit, injunction or motion in rem".

[29] As to the seizure of sea-going vessels, Mr Dimitriou explained the Greek provisions for "conservative seizure", one of the security measures provided for by Greek law, and "imminent danger" orders and when such apply to seagoing vessels. He also covered the question of provisional orders.

[30] After offering the opinion that Rose's 15 July 2021 application for the conservative seizure of the Lyubov was well-founded, Mr Dimitriou turned to his being instructed to act for Rose and the submissions he made to the Piraeus Multi-Member Court of First Instance on 14 October 2021, including relying on the exclusive jurisdiction provision of the agreement as justifying commencement of the proceedings. He said that, in Greece, commencement of proceedings on the merits "does not preclude the claimant from seeking injunctive relief from any other Court both in Greece and abroad, despite the existence of a valid contractual exclusive jurisdiction clause" and that therefore the injunction proceedings in this jurisdiction "do not offend the Greek jurisdiction clause and are neither offensive to the Greek Court in the light of the substantive proceeding".

[31] Despite all of that, and Mr Dimitriou's opinion that Rose had fully satisfied its obligations to provide accounts, on 15 October 2021 Rose's application to the Piraeus Court of First Instance was withdrawn. Mr Dimitriou said continuation was "pointless", Lyubov then being outside Greek waters.[9]

[32] Mr Petrosian provided a second affidavit just before this hearing[10]. It dealt in considerable detail with the allegations that Rose had not provided sufficient financial information to Cameo, the reasons for it not accepting Cameo's offer for the sums in dispute to be placed in escrow and the allegation that Rose encouraged unpaid suppliers to arrest the vessel. It said nothing about the Greek litigation, or the fate of the ex parte interim

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[9] At 22. It is somewhat unclear from Mr Dimitriou's affidavit whether what was withdrawn was the application for the security measures or the claim itself, but, given the remarks about pointlessness, the Lyubov's departure and the amount of the claim, the former seems more likely.

[10] Read as part of the hearing though unsworn at the date of the fixture.

detention application and orders, or why it was withdrawn or why no detail – bar that cited – was included in his first affidavit.

[33] The affidavit traced the ownership of the vessel[11] and averred:

> 13. Despite the change in shareholding of Cameo, Cameo remain the legal/registered owner of "Lyubov" and will do so until they can register that change of ownership. This is what RSL seek to prevent, by the present injunction.
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> 14. Cameo does indeed seek the transfer of the registered ownership of "Lyubov" to Tiber, and has applied to the Cook Islands Registry to issue a Deletion Certificate on that basis and has established a provisional registration of "Lyubov" in Panama … Cameo seeks to transfer the registered ownership of "Lyubov" to its own shareholder.
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> 15. The obvious danger that this presents to RSL is that once the registered ownership of "Lyubov" transfers from Cameo to another party, RSL's entitlement, in most jurisdictions, to arrest "Lyubov" as security for its claim for unpaid management fees and disbursements will be lost (subject to arguments that a transfer of ownership from Cameo to its own shareholder is a sham transaction and not a beneficial change in ownership).
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> 41. If RSL loses the benefit of the present injunction Cameo's only asset will be transferred and RSL will not be able to recover the sums that it claim

Discussion and Decision

Issues

[34] The issues for consideration in resolving this matter include:

(a) Whether this Court has power to make orders for service of its proceedings outside the Cook Islands' jurisdiction;

(b) This being a claim brought in Admiralty whether any power to order service out of the jurisdiction is affected by the provisions of the Admiralty Act 2004 and the Admiralty Rules 2005;

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[11] And its sister ships.

(c) Depending on the answers to those questions, whether the power was exercised on a correct footing in this instance;

(d) Whether Rose's ex parte application for an injunction complied with the rules for ex parte applications and, in particular, the obligations on applicants of full disclosure of all matters bearing on the application.

General

[35] It is important, as Mr David QC, senior counsel for Cameo submitted, to note that Rose's claim, though intituled in Admiralty, is, on its face, a claim for amounts alleged by Rose to be due to it by Cameo under the agreement of 19 July 2016 arising out of actions and expenditure by Rose up to the termination of the agreement on or about 5 July 2021. The claim's basis is the agreement alone. Therefore, apart from the fact that one of the parties is a Cook Islands registered ship, against which judgment is sought, and the others, companies incorporated outside the Cook Islands, it is a normal claim, brought in accordance with the Code of Civil Procedure 1981, especially R 126, for monies claimed due under a contract.

[36] Secondly, the application for the interim injunction was ancillary to the substantive claim, not a separate proceeding, but one brought under s 9 of the Judicature Act 1980-81 and R 132 of the Code on grounds largely repetitive of the relief sought in the statement of claim, though directed to the Registrar, a non-party[12].

Service of proceedings outside the Cook Islands' jurisdiction

[37] Dealing first with this Court's capacity to direct service of its proceedings out of the Cook Islands jurisdiction, because service of one country's proceedings in another country is necessarily an incursion into the latter's sovereignty, most countries provide a statutory basis for the procedure and detailed rules for its implementation. It is not an aspect of the

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[12] Mr Greig, counsel for Rose, explained that, though the Registrar is a statutory official appointed by the Administrator who is appointed by contract with the Minister of Shipping, the appointed Administrator is a private company. He therefore submitted that the injunction sought by Rose did not offend the well-settled rule that injunctions cannot be made against the Crown. Cameo did not argue the point, and it I accepted for the purposes of this judgment.

inherent jurisdiction and there is ample authority that caution must be exercised before such orders are made[13].

[38] The Cook Islands has enacted the statutory basis but not, to date, the rules.

[39] The statutory foundation was enacted by ss 8A and 8B[14] of the Judicature Act 1980-81 which read:

> 8A. <u>Rules and Regulations as to Service</u> – (1) The Queen's Representative may from time to time by Order in Executive Council made with the recommendation of at least two members of the Rules Committee prescribe rules for the purpose of facilitating the expeditious, inexpensive, and just service of Process out of the Cook Islands.
> (2) Without affecting the generality of subsection (1) of this section, rules made pursuant to that subsection may provide:
> (a) As to the circumstances if any in which service may be effected without leave of the Court and the terms of such service;
> (b) As to the circumstances if any in which service shall be effected by leave of the Court;
> (c) For time limits which are to have application in particular circumstances;
> (d) For service of Process by direction of the Court where personal service cannot be effected for any sufficient reason;
> (e) For any party serving or served with a Process to file an address for service on the same island as that from which the Process was issued.
> (3) Nothing in this Act or any rules made pursuant to this section shall affect the right of the person served to apply to the Court to exercise its discretion to stay any proceedings on the ground of forum non conveniens or any other ground.
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> 8B. <u>Past and Future Service</u> – (1) …
> (2) In any case to which the rules referred to in section 8A(1) do not apply (or if such rules shall not have been made) the High Court may grant leave for service to be effected out of the Cook Islands on such terms and conditions as it may direct.

[40] Parliament having seemingly, in s 8B(2), recognised the pace of law reform in the Cook Islands and as a result of no rules as to service out of the jurisdiction having being made by the Rules Committee under s 8A(1)(2), in order to effect such service "on such terms and conditions as [the Court] may direct" and recognising that service of Cook Islands proceedings out of the jurisdiction is necessary to maintain the Cook Islands' position in international commercial law, especially international trusts and under the Ship Registration Act 2007, the practice has grown up of all[15] overseas service being effected by

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13 eg. *Eyre v Nationwide News Proprietary Ltd* [1967] NZLR 851.
14 Enacted by the Judicature Amendment Act 1991.
15 "may" in s 8B(2) being normally regarded as mandatory rather than permissive.

leave on a case by case basis with the terms and conditions imposed being tailored to the circumstances of the individual case. Though orders are often modelled on New Zealand's detailed rules on the topic, improvements in modern communication technology are also taken into account as are, hopefully temporarily, service difficulties stemming from the current worldwide pandemic.

[41] The result, in this case, was the making of the order for interim injunction and the associated orders for directions as to service of the proceeding as are detailed in the order of 10 September 2021.

[42] Against the provisions of ss 8A and 8B and the practice outlined, the orders made on 10 September 2021 are to be seen as having been made in conformity with the Court's powers, though whether they were exercised on a correct basis in the making of the interim injunction and other orders requires further consideration.

Possible effect of the Admiralty Act 2004 and the Admiralty Rules 2005

[43] Does the fact that this claim is brought in Admiralty affect that view?

[44] Mr Greig submitted that the approach on this question should be tempered by the fact that this is a claim brought in rem and in personam under ss 3(1) and 4(1)(b)(h) of the Admiralty Act 2004 and accordingly the Admiralty Rules 2005 apply. He drew attention to the notice of proceeding and the statement of claim being intituled both in rem and in personam and following Form 5 of the Admiralty Rules.

[45] Though accepting that, to the extent that these proceedings are in rem, R 9(4) debars their being served out of the jurisdiction, he relied on the fact that the substantive proceeding is brought both in rem and in personam and R 9(4) provides for Admiralty proceedings to be served out the jurisdiction to the extent of the in personam claim.

[46] The operation of R 9(4) certainly means that the orders made for service out of the jurisdiction are ineffectual to the extent of the in rem claim. The Lyubov can only be served in the prescribed way should she enter Cook Islands' waters, but that possibility does not affect the decisions to be made in relation to this application.

[47] Mr Greig also relied on RR 4 and 5 which give the Admiralty Rules 2005 priority over the Code of Civil Procedure 1980-81 and the Court's general practice and parties the power to seek directions if the required form of procedure is not set out in the Rules. Hence, he submitted, the application for service out of the jurisdiction, and the terms on which it was made, both came within the enabling provisions of s 8B(2). He further submitted that service overseas in this case did not subject Cameo to the jurisdiction of this Court given its right, which it has exercised, to appear under protest and seek dismissal of the proceeding.

[48] He submitted that Cameo's appearance under protest was not, according to the form used, conditional under R 11(6) and, because of that, Cameo's application for dismissal could not be granted under R 11(7).

[49] It is a fact that Cameo's notice of appearance under protest does not follow the required form, Form 6, so Mr Greig is correct that Cameo's appearance must be regarded as unconditional under R 11(6) and amounting to submission to the jurisdiction of the Cook Islands Courts, but that only affects its present situation to the extent of enabling it to apply for the order for dismissal, in effect one of the applications envisaged by R 11(7), so the ultimate effect does not preclude the making of the orders Cameo seeks.

[50] Mr Greig also submitted that, in respect of this proceeding, the Lyubov is a Cook Islands entity pursuant to s 15(3) of the Ship Registration Act 2007. That provides that, on issue of a certificate of registration on the Cook Islands Register, a vessel can fly the Cook Islands' flag, has "Cook Islands nationality" and the subsection has the effect that the Cook Islands is the "competent authority to exercise exclusive jurisdiction and control over the vessel in accordance with the laws of the Cook Islands".

[51] That argument is, however, somewhat circular in this case in that, if the laws of the Cook Islands did not, or do not, justify the orders made to date or to permit these proceedings to continue, the fact that the Lyubov is of Cook Islands nationality is of little avail. That is particularly the case given the injunction was directed at a third party, not directed at the ship. In addition, as Mr David submitted, registration is no more than that. It is not the equivalent of title.

[52] Given the facts previously referred to, the twin issues of whether this Court has jurisdiction to serve its proceedings out of the Cook Islands and whether the orders to that

effect should have been made in this Admiralty claim become, to an extent, merged with the issues remaining for discussion as, if the ex parte application and the disclosure given complied with the requirements of authority, then there was jurisdiction to injunct the Registrar by restraining the exercise of the powers under the Ship Registration Act 2007, but, if the application and disclosure were not such as is required by the authorities, there can have been no justification for the making of the application for service outside the jurisdiction on an ex parte basis or the making of the injunction.

[53] That, therefore, leads into discussion of the other issues identified at the head of this section of the judgment, though it also results in reconsideration of some of the matters earlier discussed.

Was the injunction made on a correct basis?; Did Rose comply with applicants' obligations on making ex parte and injunction applications?

[54] It is well-settled that Courts have power to grant interlocutory or interim injunctions pursuant to relevant statutory provisions and in the exercise of their inherent jurisdiction and do so when applicants can demonstrate that there is a serious question to be tried and that the balance of convenience and overall justice favour the making of the injunction sought.[16] Factors taken into account by Courts on the balance of convenience issue relevant to this case include the consequences for third parties such as the Registrar of the making of the injunction – where the authorities make clear that such may be accorded "considerable weight" against granting an injunction – and maintenance of the status quo, which can be difficult to define and is influenced by the circumstances of the parties.

[55] As far as ex parte applications are concerned, applicants' obligations include providing full disclosure of "any defences to the claim the defendant might have or other facts that may be material to the exercise of the Court's discretion to grant an injunction"[17].

[56] In addition to those discussed elsewhere, specific obligations of disclosure apply to ex parte applications for leave to serve proceedings out of the jurisdiction, and, in that respect, Mr David relied on *Eyre v. Nationwide News Proprietary Ltd*[18] where the New

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16 See generally *McGechan on Procedure* paras HR.53,03,04 and authorities there cited.

17 *United Peoples' Organisation (World Wide) Inc v Rakino Farms (No.1)* [1964] NZLR 737, 738 and see generally *Civil Remedies in NZ* 51.6.1.5 and authorities there cited.

18 [1967] NZLR 851, 852-4.

Zealand Supreme Court[19] said "it is clear that there is no jurisdiction to allow service of process out of the jurisdiction except by statutory amendment or Rule of Court and the Court has no power to grant leave unless the case comes within the terms of the Rule", going to hold:

> The necessity for full disclosure on an ex parte application has been emphasised in numerous cases. In *Pilkington v. McArthur Trust Ltd* [1938] G.L.R. 88, Fair J remarks: "It is well established that in applications under R.48, as in all ex parte applications, the utmost good faith must be observed, and that full and fair disclosure must be made of all the facts which should be considered. Where the order has been made after such disclosure, the exercise of the discretion will not be interfered with unless it has been exercised upon a wrong principle: *Dunlop Rubber Co. Ltd v. Dunlop* [1921] AC 367; [1920] All ER Rep 745. But where there has not been such disclosure the Court is justified in discharging the order, even although the party might afterwards be in the position to make another application; Farwell L.J., in *The Hagen* [1908] P.189; [1908-10] All ER Rep 21,

[57] In *Eyre* the Court held that the matter in issue "must be one of substance in this country" and that "it is also well established that whether it is necessary for the jurisdiction of the Court to be invoked and whether the Court ought to put a foreigner, who knows no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country is a very serious question and the Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction."

[58] Mr David also referred to *Advanced Cardiovascular Systems Inc v. Universal Specialities Limited*[20] which involved a contract with an exclusive jurisdiction clause in favour of California, USA[21].

[59] The New Zealand Court of Appeal held that because the contract gave exclusive jurisdiction to the Courts of California:

> "Prima facie therefore the New Zealand Courts lack jurisdiction to entertain the proceeding because the parties have so agreed. However it is settled law that the Court nevertheless has a discretion to exercise jurisdiction if it otherwise exists. It can also be regarded as settled law that the discretion will not be exercised unless there is strong cause or the existence of exceptional circumstances for denying the contractual provision its operative effect. The principle is equally applicable to an

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19 Now the High Court.

20 [1997] 1 NZLR 186, 190.

21 Though Universal Specialties, a New Zealand company, had the contractual right to sue in the New Zealand Courts.

application for stay under R.477. In *Society of Lloyd's & Oxford Members' Agency Ltd v Hyslop* [1993] 3 NZLR 135, Richardson J observed at p 142:

> The existence of an exclusive jurisdiction clause places a heavy burden on the party seeking to oppose the clause. While the Court has a discretion, a stay should be granted unless strong cause for not doing so is shown by the plaintiff.

In *Owners of Cargo Lately Laden on Board The ship or vessel Eleftheria v The Eleftheria (Owners) The Eleftheria* [1970] P 94, Brandon J said that a stay would be granted in such case unless strong cause is shown by a plaintiff.

[60] Factors bearing on whether adequate disclosure has been made on an ex parte application were helpfully collected by Ralph Gibson LJ, in *Brink's-MAT Limited v. Elcombe*[22]:

> In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (i) The duty of the applicant is to make 'a full and fair disclosure of all the material facts': see *R v Kensington Income Tax Comrs, ex p Princess Edmond de Polignac* [1917] 1 KB 486 at 514 per Scrutton LJ. (ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers; see the *Kensington Income Tax Comrs* case [1917] 1 KB 486 at 504 per Lord Cozens-Hardy MR, citing *Dalglish v Jarvie* (1850) 2 Mac & G 231 at 238, 42 ER 89 at 92, and *Thermax Ltd v Schott Industrial Glass Ltd* [1981] FSR 289 at 295 per Browne-Wilkinson J. (iii) The applicant must make proper inquiries before making the application: see *Bank Mellat v Nikpour* [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order in *Columbia Picture Industries Inc v Robinson* [1986] 3 All ER 338, [1987] Ch 38, and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *Bank Mellat v Nikpour* [1985] FSR 87 at 92-93 per Slade LJ. (v) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains … an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty …': see *Bank Mellat v Nikpour* (at 91) per Donaldson LJ, citing Warrington LJ in the *Kensington Income Tax Comrs* case. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require

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[22] [1988] 3 All ER 192-3.

> immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': see *Bank Mellat v Nikpour* [1985] FSR 87 at 90 per Lord Denning MR. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:
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>> '… when the whole of the facts, including that of the original non-disclosure, are before it, [the court] may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.'
>
> (see *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party)* [1983] 3 All ER 178 at 183 per Glidewell LJ.)

[61] Before completing that review of the applicable authorities it is appropriate to note the recent judgment of the Privy Council, *Convoy Collateral Ltd v Broad Idea International Ltd*[23], on which Mr Greig placed considerable reliance. While principally concerned with elucidating the law relating to freezing orders or *Mareva* injunctions, the decision contains a number of dicta relating to injunctions generally[24] "to assist enforcement through the court's process of a prospective (or existing) foreign judgment" and it will likely become a major point of reference in those areas. However, as will be seen, this application is capable of determination on more traditional grounds, where *Convoy Collateral* decrees nothing to the contrary, and accordingly no detailed consideration of the decision is called for.

[62] Applying those authorities, it is apparent that the justification for, and the disclosure in, Rose's ex parte application to serve these proceedings out of the jurisdiction was tenuous.

[63] There is statutory power so to do in accordance with ss 8A, 8B and the practice which has emerged but it is clear on the authorities that full disclosure of all material facts must be made, including facts adverse to the application. Beyond Lyubov's entry on the Cook Islands Register, it is difficult to characterise the claim as one of "substance in this

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23 [2021] UKPC 24 Given the judgment was only delivered on 4 October 2021, Mr Greig's diligence was laudable.

24 Eg: At 101, 121.

country", especially when Rose has sought unsuccessfully on two occasions in the Greek Courts to retain the vessel or its ownership within reach of whatever judgment Rose might ultimately obtain in the those Courts. As *Advanced Cardiovascular Systems* held, when the parties have agreed that their disputes should be exclusively adjudicated in another jurisdiction there has to be "strong cause or the existence of exceptional circumstances for denying the contractual provision its operative effect". Neither is immediately apparent in this case.

[64] That also brings into play whether the general obligations of ex parte applicants were satisfied in this case. Did the evidence show a serious question to be tried, and satisfy the balance of convenience and the overall justice of the case?

[65] In these proceedings Cameo did not seriously contest the serious question issue but Mr David QC submitted that, the parties having agreed to submit their disputes to the jurisdiction of the Greek Courts, the balance of convenience strongly favoured Cameo as did the overall justice of the case.

[66] A salient factor in that respect is that the Registrar is not a party to the substantive proceedings and it is not uncommon in other jurisdictions for Courts to be guarded about issuing mandatory injunctions enjoining non-parties. Given the bespoke nature of orders granting leave to serve Cook Islands proceedings outside the jurisdiction, that might be a factor in relation to future such applications. Cameo did not take the point, presumably because the injunction application might have been phrased in positive terms requiring action by Cameo rather than, as it was, in prohibitive terms directed at a non-party and a statutory official at that, but it is nonetheless a potent factor pointing against continuation of the 10 September 2021 orders. Injuncting a statutory official from acting in accordance with a statutory scheme to effect a statutory outcome is not a step to be taken lightly.

[67] Further, it is well settled that Courts will not issue interim injunctions against overseas defendants pending substantive determination of claims if it is clear that the Court will not exercise jurisdiction to entertain the substantive claim itself[25]. Given the claims already commenced in the Greek Courts and the proper law and jurisdiction clauses in the

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[25] *Commerce Commission v. Viagogo AG* [2019] 3 NZLR 559, at [36].

agreement, it is unlikely that this Court will be called upon to adjudicate on the substantive claims themselves. That, too, points against maintaining the injunction.

[68] The overriding issue is, however, whether the evidence adduced in support of Rose's ex parte application satisfied the requirement for such.

[69] Focussing on the criteria in *Brink's-MAT*, Mr Petrosian's obligation for full and fair disclosure applied to the facts known to him at the date of swearing his first affidavit and those discoverable on proper inquiry. The facts which were required to be disclosed had to be material, as determined by the Court, and, as is well-settled in ex parte applications, extended to include facts known to the applicant which might be regarded as adverse to thew outcome of its ex parte application coupled with an obligation to make due inquiry.

[70] Assessing Mr Petrosian's first affidavit against those criteria, while he exhibited the Ship Management Agreement to his affidavit, he did not mention the exclusive jurisdiction and proper law causes. However, they were discoverable – even though the affidavit was bulky. That might have indicated that the omission should not weigh too heavily against continuation of the injunction were it not for the fact that Rose, through Mr Greig, accepted that the existence of the exclusive jurisdiction clause might be regarded as material and 'for that reason the plaintiff accepts that the order [for service overseas] should be set aside"[26].

[71] However, despite that limited concession what was significant and should undoubtedly have been disclosed in Mr Petrosian's 9 September 2021 affidavit was the then state of the litigation in the Court of First Instance at Piraeus Rose itself had initiated on 15 July 2021 covering the very issues pleaded by Rose in this litigation, including its efforts, by then twice unsuccessful, to obtain an order prohibiting Cameo from taking any action to affect the Lyubov's legal status, coupled with its efforts, by then also twice ultimately unsuccessful, to obtain, or maintain, imminent provisional orders preventing the Lyubov from leaving Piraeus. The affidavit should have disclosed the Court's granting, and then dismissing, those applications on 4 August 2021 and again on 18 August 2021. Saying, on 9 September 2021, that Rose's proceedings were for hearing on 17 September 2021 without mentioning the dismissals of its imminent provisional seizure applications was misleading and in breach of Rose's obligation of full disclosure, including of all matters adverse to it.

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[26] Greig submissions, at 34.

[72] By its applications to the Greek Courts Rose was not only complying with the exclusive jurisdiction clause of the agreement, it was submitting to the exclusive jurisdiction of Greece to adjudicate on the very issues on which it sued in this Court on 9 September 2021 and, by omitting essentially all reference to the Greek litigation and the ultimately failed applications for security or imminent provision orders, it seriously misled this Court in its consideration of its ex parte application for the injunction issued on 10 September 2021.

[73] The facts of the matter were known to Mr Petrosian when he swore his 9 September 2021 affidavit and at that time Rose had retained Cook Island solicitors who would no doubt have advised of the necessity for full and fair disclosure of all the facts known to him.

[74] There can be no doubt that disclosure of all aspects of the Greek litigation, and especially dismissal of the interim applications, was material to a consideration of the ex parte application for the injunction. Had the missing material been disclosed for the hearing of that application, it is highly likely that the application would have been refused on the basis that, if the Court, expert in the contractually applicable law and properly and contractually seized with the exclusive jurisdiction to adjudicate over effectively the same dispute as in this proceeding, did not conclude that Rose had made out a sufficient case for continuing its orders retaining the Lyubov in Greek waters and maintaining Rose's access to her, there could be no justification for making orders aimed at producing an effectively similar result in the Cook Islands.

[75] Mr Petrosian's omission as just discussed was compounded by the fact that, in his second affidavit provided just before this hearing, he again omitted mention of the litigation, particularly Mr Dimitriou's withdrawal of Rose's applications on 15 October 2021, after the Lyubov had left Greek waters.

[76] Mr Dimitriou's evidence provides a certain measure of support for Rose being justified in having launched its litigation and carried it to that point. But when Rose's litigation under the agreement in the Courts of Piraeus had, no doubt on Rose's instructions, been withdrawn a day or so before this hearing, at least as far as it sought to retain the Lyubov and Rose's access to her in Greece, there can be no doubt that the full history of the litigation to date should have been disclosed in Mr Petrosian's first affidavit and should have affected its stance in relation to its Cook Islands proceedings. Put another way, when the plaintiff had abandoned its attempts in the Greek Courts to obtain orders against the

Lyubov and endeavouring to retain access to her, it was in breach of its obligations under the ex parte procedure to continue to try to obtain, and retain, orders against the Registrar relating to the Lyubov in the Cook Islands on inadequate disclosure.

[77] *Brink's-MAT* and the other authorities cited make clear that not all failures to provide full disclosure will result in rescission of orders obtained ex parte and that a second injunction may sometimes be granted. This is not such a case. The plaintiff has abandoned resort to interim relief in the Court it contracted to use and breached its obligations in relation to the orders it obtained ex parte in this Court. As explained with reference to s 15(3)(b) of the Ship Registration Act 2007, the fact that the Lyubov has Cook Islands nationality and this Court has jurisdiction over her is only in accordance with the laws of the Cook Islands and, for the reasons explained, the laws of the Cook Islands do not permit retention of the injunctive orders made against a non-party.

Result

[78] In the result, although Cook Islands Courts have power to make orders for service of proceedings outside the jurisdiction, including in personam claims in Admiralty, for the reasons in this judgment, particularly its contracting for disputes between these parties to be litigated in the Greek Courts and in accordance with Greek Law and its deficient disclosure of the circumstances of the matter, the appropriate conclusion is that all the orders made on 10 September 2021 should be rescinded.

[79] That should become operative on the determination of any appeal against this judgment or the expiry of the time for appeal if no appeal is lodged.

[80] It has been noted that Cameo overstated its case in seeking dismissal of the entire proceedings. They may remain on foot, though unserved, until clarification as to whether the substantive claims between Rose and Cameo are to be tried in this country.

[81] If costs are sought, memoranda may be filed with that from Cameo due within 35 days of final rescission of the orders 10 September 2021, and those from Rose within 21 further days. Any costs applications will be determined on the papers unless counsel express the wish to be heard in person.

[82] A copy of this judgment is to be forwarded by Rose to the Registrar of Ships.

Hugh Williams, CJ