THE "VOSELEAI"

[HIGH COURT, 1994 (Fatiaki J), 28 October]

Admiralty Jurisdiction

Admiralty-action in rem-jurisdiction of the High Court-security for release of arrested vessel-adequacy of bankers undertaking.

The vessel was arrested at the instance of the master and crew. On application for the warrant to be discharged the Court reviewed the jurisdiction of the High Court of Fiji to arrest foreign vessels, considered the requirement for bail and ordered the vessel's release upon provision of adequate specified security.

Cases cited:

Edward Owen Ltd v Barclays Bank [1977] 3 W.L.R. 764
The "Cap Bon" (1967) 1 Lloyds Rep. 543
The "Christianborg" (1885) 10 PD 141
The "Gay Tucan" (1968) 2 Lloyds Rep. 245
The "Haima 747" Admiralty Action No. 1 of 1985
The "Kalamazoo" (1851) 15 Jur. 885
The "Moschanthy" (1971) 1 Lloyds Rep. 37
The "Polo II" (1977) 2 Lloyds Rep. 115
The "Ripon City" (1897) P 226
The "Tacoma City" (1990) 1 Lloyds Rep. 330
The "Tolten" (1946) P 135

Application for release of arrested vessel.

G.M.G. Johnson for Plaintiffs
I. Fa for Defendants

Fatiaki J:

The M.V. "Voseleai" (the vessel) is a Solomon Islands registered vessel which was sailed from Honiara by a Solomons Islands master and crew to Suva, where she was to undergo extensive repairs. The vessel arrived in the port of Suva on the 15th of August 1993 and has been here since.

On the 30th of June 1994 (some 10 months after her arrival in Suva) the Master and 10 crew members issued an action in rem claiming unpaid wages and allowances. The vessel was arrested by the Admiralty Marshal pursuant to a warrant issued by the Court on the same day and an inventory of all equipment furniture and fittings was taken and lodged with the Court on the 1st of July 1994.

On the 13th of July 1994 without an entry of appearance the owners of the

vessel issued through their solicitors a motion seeking the discharge of the arrest warrant and supported by an affidavit deposed by the Chief Engineer of the vessel and in which he alleges inter alia that the actions of the master and crew "... are in fact illegal and in breach of Sections 23 & 24 of the Shipping Act" and also that they had unlawfully sold 10 specific items of the vessel's equipment.

The affidavit however contains the following relevant concession :

> "7. The owners of the vessel M.V. Voseleai do not dispute owing the crew monies but the owners have advised that these monies should be collected in the Solomons once the vessel departs Suva on its voyage back home."

and

> "19. The proper forum for the Crews if they dispute the amounts stated by the owners of the vessel to be owing is the Courts in the Solomon Islands."

This latter statement has not been formally pursued by the lodgment of an appropriate application in his Court by the defendants who have regularised their position and voluntarily submitted unconditionally to the Court's jurisdiction by the filing of an Acknowledgement of Service dated the 10th of August 1994.

At this stage although the jurisdiction of the Court has not been questioned it is helpful to traverse the same and as a starting point reference may be made to Section 21 of the High Court Act (Cap. 13) which provides :

> "The Supreme Court (now High Court) shall be a Colonial Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890, of the United Kingdom and shall have and exercise such Admiralty Jurisdiction as is provided under or in pursuance of subsection 2 of Section 56 of the Administration of Justice Act, 1956 of the United Kingdom or as may from time to time be provided by any Act, but otherwise without limitation, territorially or otherwise."

The relevant Order in Council applying the provisions of the Administration of Justice Act 1956 to Fiji is reproduced in the subsidiary legislation to the Supreme Court Act Cap.13 at pp.84 to 86 of Vol. II of the Laws of Fiji (Black Vols.) and provides in Articles 2 and 3 :

> "(2) The Colonial Courts of Admiralty Act ; 1890 shall, in relation to the Supreme Court of Fiji, have effect as if for the reference in subsection (2) of Section 2

> thereof ... there were substituted a reference to the Admiralty jurisdiction of that Court as defined by Section 1 of the Administration of Justice, Act, 1956 ..." A

and

> "(3) The provisions of Sections 3, 4, 6, 7 and 8 of Part I of the Administration of Justice Act 1956, shall extend to Fiji ..." B

In the present context the omission of Section 5 of the Administration of Justice Act 1956 which recognises the "... jurisdiction of the Court to refuse to entertain an action for wages by the master or a member of the crew of a ship, not being a British ship ...", is significant.

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The provisions of Part I of the Administration of Justice Act 1956 is conveniently reproduced in Vol.2 of the Supreme Court Practice 1967 (The White Book) pages 3546 to 3564 and the relevant jurisdiction invoked in this case by the plaintiffs reads : (as modified)

> "1 - (1) The Admiralty Jurisdiction of the Supreme Court of Fiji shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims - D
>
> > (o) any claim by a master or member of the crew of a ship for wages and any claim by or in respect of a master or member of the crew of a ship for any money or property which, under any of the provisions of the Merchant Shipping Acts, 1894 to 1954, is recoverable as wages or in the Court and in the manner in which wages may be recovered;" E F

Section 3(2) of the Administration of Justice Act 1956 however impliedly excludes a claim for wages from an action in rem against the ship unless the person "... liable on the claim ... was, when the cause of action arose, the owner of the ship." In this case it is undisputed that the owners of the M.V. Voseleai were the persons ultimately liable on the plaintiffs claim [See : Section 3(4)] ; or where the claim gives rise to a maritime lien [See : Section 3(3)]. G

In this latter regard Gorell Barnes J. in "The Ripon City" (1897) P 226 after an extensive review of the history of the development of the maritime lien said at p.241:

> "It is a privileged claim upon a thing in respect of service done on it ... to be carried into effect by legal process ... The law now recognises maritime liens in certain classes of claims, the principal being bottomry, salvage, wages, master's wages, disbursements and liabilities and damage."

Further in The "Tolten" (1946) P 135 Scott L.J. said of a martime lien at p.145

> "... the lien consists in the substantive right of putting into operation the admiralty court's executive function of arresting and selling the ship so as to give a clear title to the purchaser, and thereby enforcing distribution of the proceeds amongst the lien creditors in accordance with their several priorities ..."

Finally in The "Tacoma City" (1990) 1 Lloyds Rep. 330 The Court of Appeal (U.K.) although rejecting a maritime lien in that case for severance pay :

> "Held : (3) a maritime lien gave the seaman a claim on the ship for service done to the ship; it arose independantly of contract and gave security for remuneration due to a seaman for services rendered in and to the particular vessel to which the lien attached;"

So much then for the jurisdiction of the Court to entertain the plaintiffs claim in rem.

It may be recorded that since the arrest of the vessel and the appearance of the defendants by their counsel in July 1994 there have been numerous adjournments of the case with the view to a settlement of the action. Unfortunately, all attempts appear to have failed and finally on the 4th of October 1994 the defendants issued a praecipe and a summons under Order 75 r.13(4) of the White Book seeking the release of the vessel.

Time does not permit me in this interlocutory application to canvass the applicability to Fiji of Order 75 of the White Book. I have however been referred to an interesting judgment of Cullinan J. in "The Haima 747" Admiralty Action No. 1 of 1985 in which his lordship concluded that : "... Order 75 still applies (in Fiji) in default of the Admiralty Rules and where not inconsistent therewith." I am content to adopt the same conclusion in this case.

Order 75 r.13 provides so far as relevant :

> "(1) Except where property arrested in pursuance of a warrant of arrest is sold under an order of the Court, property which has been so arrested shall only be

> released under the authority of an instrument of release ... issued out of the registry, ..."

A

and

> "(4) A release may be issued at the instance of a party interested in the property under arrest if the Court so orders, ..."

It is sufficiently clear from the terms of the rule that the Court has an unfettered albeit judicial discretion to order the release of an arrested ship. (per. Cairns J. in "The Gay Tucan" (1968) 2 Lloyds Rep. 245 at 246). B

At this stage it is convenient to consider the nature and purpose of arresting a vessel in an admiralty action in rem and the law relating to its release.

In "The Cap Bon" (1967) 1 Lloyds Rep. 543 Brandon J. in dealing with the former question said at p.546 : C

> "In my view, when an action in rem is brought the security thereby obtained is security in respect of any judgment which may be given by the Court after hearing and determining the claim. The security so obtained also covers the payment of any sum which may become due under an agreement whereby the action is settled. But ... not ... for ensuring payment of the judgment of some other Court or ... the award of an arbitration tribunal." D

Then after referring to the provisions of Section 1(1) of the Administration of Justice Act 1956 (U.K.) the learned judge continued at p.547 : E

> "It is to be inferred from that that the object of the process in rem is to provide security for a plaintiff in respect of any judgment which he may obtain as the result of the hearing and determination of a claim."

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and later in regard to bail he said :

> "Bail in an Admiralty Action in rem represents the res, and it follows, in my view that the Admiralty Court has no jurisdiction to require bail as a condition of release." (See also : per Fry L.J.in "The Christianborg" (1885) 10 PD 141 at 155 et.seq.) G

That the provision of bail is a hallowed means of obtaining the release of an arrested vessel in an admiralty action in rem is beyond question (per Dr. Lushington in "The Kalamazoo" (1851) 15 Jur. 885). It is also plainly available in terms of Order 75 r.16 and the Bail Bond Form 11 (reproduced at p.128 Vol

2 White Book 1967).

A Various other means for obtaining the release of the vessel are also contemplated in Order 75 such as, where the arresting party withdraws the warrant of arrest [r.13(2)] ; or where all parties to the action consent to the issuance of a release [r.13(4)] ; or in a less direct way by the payment into Court of a sum of money sufficient to satisfy the plaintiffs claim.

As is succinctly stated in para. 377 of Vol.1 of Halsburys Laws of England
B (4th edn.) :

> "The usual step following an appearance in an action in rem is for the owner of the property arrested to procure its release by giving security for the plaintiff's claim. This may be done either by paying the amount of the plaintiff's claim into Court,
C or providing bail in a sufficient amount, or by furnishing a guarantee acceptable to the plaintiff. The third method is nowadays the most common in practice."

The defendants summons seeking the release of the vessel is supported by an affidavit deposed by a Legal Executive in the defendants solicitors office and
D exhibits a copy of a Bankers Undertaking issued by the Westpac Banking Corporation, Honiara at the request of the defendant's and drawn in favour of the Chief Registrar, High Court of Fiji (the favouree) and intended :

> "To cover claims by the crews in order for M.V. Voseleai to be released."

E More particularly, the undertaking which has no expiry date, provides :

> "Westpac Banking Corporation (the Bank) unconditionally undertakes to pay on demand any sum or sums which may from time to time be demanded by the favouree to a maximum aggregate sum of $SBD25,000.00 (Twenty Five Thousand
F Solomon Dollars Only)."

Section 88(1) of the Bills of Exchange Act (Cap.227) defines a 'promissory note' as :

> "... an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand ... a sum certain in money, to, or to the order of, a specified
G person or to bearer."

In the circumstances it is sufficiently plain that a Bankers Undertaking is in effect a promissory note and in defence counsel's submission is the equivalent of cash or, to use a comparison more familiar in international trade, a bankers, irrevocable letter of credit, or performance guarantee or bond.

In this latter regard Denning M.R. speaking of the nature of a performance bond and equating it with a letter of credit said in Edward Owen Ltd. v. Barclays Bank [1977] 3 W.L.R 764 at p.772, 773 : A

> "... these performance guarantees are virtually promissory notes payable on demand ... the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms ... The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice." B

Learned counsel for the plaintiffs however, whilst accepting the rather special nature and effect of the Bankers Undertaking, nevertheless asserts : C

> "... that the guarantee is unacceptable because it is wholly inoperative. The plaintiffs are not party to the guarantee and have no access to the proceeds which will arise if the guarantor is called upon to make good his guarantee. It may also fail for other reasons e.g. want of exchange control approval, stamp duty etc." D

With respect the submission is wholly misconceived. In the first place, although in form the undertaking is not an admiralty bail bond, like a bond it is given to the Court and enforceable by it. Secondly, the undertaking by its clear terms, like the bond, is referable to the plaintiff's claim but, unlike the bond, is not dependant on the success of the claim and lastly, and by no means least, the acceptability of the undertaking to the plaintiff is but one inconclusive factor to be considered by the Court in the exercise of its discretion. E

Needless to say in an admiralty action in rem the res is never directly accessible to the plaintiff to do with as he pleases except by way of Court order and, if counsel's submission were to be acceded to the plaintiffs in this case would not only have a greater security than they are entitled to under the law but, theoretically speaking, they would be able to encash the unconditional undertaking without recourse to the Court or even pursuing their claim upon which the res was arrested at the outset. F

Then learned counsel doubts the adequacy of the amount provided for in the bankers undertaking and submits that "... since these are interlocutory proceedings it is not for the Court to impose an amount now which might shut out the plaintiff's later." Again I cannot agree. G

The plaintiffs claim in the present action is not one for unspecified general damages as might arise out of a collision or fatality at sea, rather the plaintiffs endorsed writ claims itemised liquidated amounts in Solomon Island Dollars

(SID$) for wages and allowances for each of 11 named crew members up to the date of the writ together with unspecified repatriation expenses.

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The principle that guides the exercise of the Court's discretion where the quantum or amount of security is in dispute was comprehensively discussed by Brandon J. in The "Moschanthy" (1971) 1 Lloyds Rep. 37 and later reinforced in The "Polo II" (1977) 2 Lloyds Rep. 115 where the learned judge said at p.119 :

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> "... The Court had power to control the amount of security demanded by a plaintiff in an action in rem and ... control should be exercised on the principle that a plaintiff was only entitled to demand such an amount as security as would cover his reasonably best arguable case, that is to say cover the amount of the claim, the amount of any interest that might be recoverable, and the amount of any costs ... And the power to insist that (a ship) shall remain under arrest unless security of a certain amount is given is equally a drastic power ... that must not be exercised oppressively ... At the same time the Court must make sure that the plaintiff is not left without sufficient security to cover his reasonably best arguable case."
>
> (my underlining)

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In this regard learned counsel for the defendants submits:

> "... the plaintiffs original claim was for SID$28,786. The plaintiffs have acknowledged receiving FID$6,605.20 ... using the figures acknowledged by Wilson Hana (the Second Mate of the M.V. Voseleai) in his affidavit (deposed on 7.9.94) as being received (and without taking into account any counterclaim that the defendants may have for the illegal sale of the vessels equipment), the balance owing on the plaintiff's claim is approximately SID$16,000 or at the very best SID$22,180.08."

E

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On being pressed with what appeared to be a fairly straight-forward mathematical computation of the plaintiffs own figures, counsel for the plaintiffs sought to rely upon an extended definition of the term "wages", costs and interests and, although not claimed, damages for breach of the plaintiffs contracts of employment. Be that as it may counsel frankly conceded that he was unable then to provide a dollar figure or amount for the totality of the plaintiffs claim and complained that the defendant shipowner had better records than his clients who were simple seafaring people. A full days adjournment was accordingly granted to counsel for the plaintiffs in order to enable him to obtain the necessary details but this was unavailable when the Court resumed. Even what was available was not deposed in an affidavit and could not be accepted by the

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Court over defence counsel's objection.

On this particular aspect Brandon J. said in The "Polo II" (ibid) at p.119 : A

> "It is for the plaintiffs to put a figure on the amount of security which they require. It is not for the defendants to do so. It is the plaintiffs who know what the details of their claim are, what facts the claim is based on and what the extent of the claim is on the best arguable case. It is impossible for the defendants at this stage of the proceedings to have anything like the knowledge about the plaintiff's claim which the plaintiffs have." B

and later :

> "I indicated in the Moschanthy that when a dispute of this kind arises, it is desireable that the plaintiffs should put their cards on the table and explain to the defendants on what basis it is that they are asking for the amount for which they are asking ; and if they do that and if they provide the defendants with all necessary information, then the knowledge of the parties may become more equal as a result of such process. It may be that, when the defendants have been sufficiently informed about the nature and basis of the plaintiffs claim, they will be in a position to make an assessment themselves of what the amount should be. Even so I cannot see that the defendants are under any obligation in law to make a counter-offer." C D E
>
> (my underlining)

In the present case not only have the plaintiffs not been able to fully and accurately quantify their claim but having failed to do so they assert (contrary to the above dicta of Brandon J.) that the defendants are better equipped than they are to carry out the exercise. F

In my view once an application for the release of an arrested vessel is made it is incumbent on the plaintiff to quantify the amount of security which he requires to meet his best arguable case and it is wholly insufficient to merely assert as the plaintiffs appear to have done in this case, that the security offered is inadequate and then to plead inability to quantify as the basis for the continued arrest of the res. This Court will not permit its discretion to be so easily hamstrung. G

Finally counsel for the plaintiffs submits that the release of the vessel would place the plaintiffs "to a severe disadvantage if the vessel were released and put to sea with the plaintiffs manning her before they could have their case

heard." I confess that such a submission sits uncomfortably in the mouth of the plaintiffs who themselves chose the forum in which to bring their action but in any event their disadvantage is a fairly common one where an action is instituted by foreign litigants. Needless to say the plaintiffs failure to deliver a proper Statement of Claim can only be to their detriment. Furthermore, the submission ignores the power of this Court to order the examination of witnesses before an action has been set down for trial or to issue letters of request for the examination of witnesses

abroad. Learned defence counsel also submitted that there was "nothing in principle to stop the crew remaining in Fiji or returning to Fiji to testify" at the trial of their action, but in any event, the defendants have been denied the use of a profit-earning asset for over 4 months and at the same time been forced to incur expenses through the plaintiffs exercise of a drastic power in circumstances that the defendants claim are both unmeritorious and oppressive.

Having carefully considered the matter I am satisfied that it is appropriate to order the release of the "M.V. Voseleai". Mindful however that the Bankers Undertaking is issued by a bank in the Solomon Islands albeit with a branch in Fiji, the release is hereby ordered to lie in the Court's registry until such time as the sum of SID$25,000 (or its Fiji dollar equivalent at the prevailing exchange rate) has been paid into Court or a similar undertaking from a Fiji bank has been lodged with the Chief Registrar.

The defendant is awarded the costs of this application.

(Application granted.)