

**WASAWASA FISHERIES LIMITED & TWO OTHERS**

v.

**KARIM'S LIMITED & OTHERS**

[HIGH COURT, 1998 (Pathik J) 26 May]

Admiralty Jurisdiction

*Admiralty- action in rem- right of arrest- whether available when debtor not beneficial owner of the vessel. – High Court Act (Cap. 13) Section 21 – Administration of Justice Act (E & W) 1956.*

Following commencement of proceedings *in rem* and the arrest of “the *Venturer*” an intervener established that he, and not the Defendant was the beneficial owner of the vessel. The Defendant denied owing the Plaintiff anything at the time the vessel was arrested. In the absence of any demise charter the High Court HELD: an action *in rem* was not available by the Plaintiff against the vessel.

Cases cited:

*Donald Pickering & Sons Enterprises Ltd & Anor. v. Karim's Ltd & Ors* (1997) 43 FLR 41

*The Bineta* (1966) 2 LL.L. Rep.419

*The Cristina* (1938) 60 Ll.L.Rep.147

*The Halcyon Skies* (1976) All.E.R. 859

*The Indian Grace* (1998) 1 Ll. L Rep 1

*The Pointer Apitong* (1991) 2 HKC 503

*The Tervaete* (1922) 12 Ll .L. Rep.252

*The Varna* (1993) 2 LL.L. Rep. 253

Interlocutory applications in the High Court.

*M. Young* for the Plaintiffs

*Inoke* for the Defendants

*D. Sharma* for the Intervener

**Pathik J:**

There are three interlocutory applications before the Court details whereof are set out in the document “Statement of Agreed Facts and Issues” (the “Statement”) which was ordered to be filed by consent. For a clear understanding of the nature of the applications and the issues for Court’s consideration and determination I have decided to set out the Statement in full hereafter.

As I understand, these applications are made to decide whether the “*Venturer*” (the “vessel”) ought to be released from arrest either to the Plaintiffs, the Defendants or the Intervener. This decision will not dispose of the issues the

subject-matter of the Writ of Summons issued herein simultaneously with the Warrant of Arrest.

A Background to the case

Very briefly I give a summary of events leading to the matters before me for consideration. The Warrant to arrest the vessel, which was in possession of the Defendant (D1), was issued on 9 January 1996. The Plaintiffs filed affidavits in support of the application for Arrest followed by reply to affidavits by the Defendants.

Simultaneously a Writ of Summons No. 1 of 96 was filed against the Defendants.

C An Order was made on 9 January 1996 for Arrest, consequently the vessel had been in custody of the Admiralty Marshal until it was released from arrest on the Marshal's application on 23 April 1998 because fees payable to him had accumulated without any payment whatsoever by the Plaintiffs despite their undertaking to pay in writing.

D On 2 February 1996 the Defendant (D1) filed a Motion to set aside the Warrant of Arrest until the hearing and determination of this action.

E On 15 August 1996 the Intervener Peter Levestam ("Levestam") filed a motion seeking order (a) for the release of the vessel to him or (b) alternatively, judgment be entered in his favour in the sum of \$92,000.00 plus 13.5% interest per annum from 23 March 1995 and a declaration that his claim take priority over all other claims and an order that the vessel be sold and his claim be satisfied from the proceeds of sale.

Thereafter there was a Motion filed 3 September 1996 by the Plaintiffs supported by affidavits seeking Orders that the vessel be released to the custody of the Plaintiffs for the sole purpose of appraisal and sale and in the alternative to the custody of Admiralty Marshal for the same purpose.

F Statement of Agreed Facts and Issues

The parties to these proceedings agree on the following:

- G
1. THAT the plaintiffs have filed and served on the defendants a Writ of Summons endorsed with a Statement of Claim.
  2. THAT it is alleged that:
    - i. the first plaintiff is owed \$3,663.35 for fuel supplied to the second defendant;
    - ii. the second plaintiff is owed \$64,193.62 for fuel, bait and ice supplied, engineering works provided to the second defendant and wages paid to the

- second defendant crew;
- iii. the third plaintiff is owed \$5,565.74 for ice and fishing gear supplied to the second defendant. A
3. THAT the plaintiffs seek:
- i. an injunction restraining the defendants from removing from the Lami Wharf or disposing of and or dealing with the ship "Venturer" except with the consent of the plaintiffs; B
- ii. that the said injunction be granted until the hearing and final determination of this action for recovery of monies owed to the plaintiffs by the defendants;
- iii. an order that the ship "Venturer" be sold subsequent to its arrest on such terms as this Honourable Court deems just and that after deducting the costs of sale that from the net proceeds of sale the sum of \$73,422.71 and interest thereon at the rate of 13.5% per annum or such other rate as to this Court seems just as of 26 May, 1995 be paid to the plaintiffs by the defendants; or C
- iv. judgment against the ship her tackle apparel and furniture and freight for the sum of \$73,422.71 together with interest. D
4. THAT the defendants have filed and served on the plaintiffs a Statement of Defence essentially denying liability and a Counter-Claim seeking: E
- i. that the plaintiffs' claim be dismissed;
- ii. that judgment be entered in favour of the first defendant in the sum of \$525,000.00; F
- iii. damages;
- iv. costs;
- v. such other orders and further relief this Honourable Court may deem just. G
5. THAT by a request dated 16 February, 1996, the plaintiffs have sought particulars of the Counter-Claim.
6. THAT the defendants have to date failed to provide particulars requested by the plaintiffs.

7. THAT the parties to these proceedings are the plaintiffs, the defendants and an intervening party, Peter Levestam.
- A 8. THAT pursuant to a Notice of Motion dated 9 January, 1996 supported by an Affidavit of James Andrews sworn on 9 January, 1996, the plaintiffs sought and obtained an order on 9 January, 1996 from the Honourable Mr. Justice Pathik that a Warrant of Arrest be issued to arrest the ship "Venturer".
- B 9. THAT pursuant to the order of this Honourable Court of 9 January, 1996, the ship "Venturer" was arrested.
10. THAT by way of Notice of Motion dated 5 February, 1996 supported by an Affidavit of Karim Buksh sworn on 2 February, 1996, which documents have been served on the plaintiffs, the defendants have applied for an order that the order of 9 January, 1996, being the order for the arrest of the ship "Venturer", be set aside until the hearing and final determination of the substantive action.
- C 11. THAT the plaintiffs rely on the Affidavits of James Andrews sworn on 9 January, 1996 and 25 March, 1996 in opposition to the defendants' application.
- D 12. THAT the defendants have filed and served on the plaintiffs their submissions (dated 17 July, 1996) in support of their application and reserve the right to make further oral submissions.
- E 13. THAT the plaintiffs have filed and served on the defendants their submissions (dated 25 July, 1997) in opposition to the defendants' application and reserve the right to make further oral submissions.
- F 14. THAT the issues in respect of this application are outlined in Annexure "A". They are:
- Issues raised by the defendants' application:
- G 1. Whether the arrest was lawful because:
- (a) the alleged debts (paragraphs 4 & 6 of Andrew's Affidavit of 9 January, 1996) were not due at the time;
- (b) the alleged debt (paragraph 5 of Andrew's Affidavit of 9 January, 1996) is a "loan" to the Defendant and not expenses relating to the vessel at all and therefore cannot invoke the "in rem"

jurisdiction of the Court.

2. If there was a proper basis for the arrest, should the warrant issue because:
  - (a) the Plaintiffs have waived or are estopped from enforcing their rights in respect of the alleged debts (paragraphs 4 & 6) having agreed to defer payment; A
  - (b) the Plaintiffs had failed to fully disclose material facts. B
  
15. THAT by way of Notice of Motion dated 19 July, 1996 supported by an Affidavit of Peter Levestam sworn on 16 July, 1996, which documents have been served on the other parties, the intervening party, has applied for the following:
  - i. an order releasing the vessel "Venturer" to Peter Levestam; C
  - ii. (a) alternatively, judgment in favour of Peter Levestam in the sum of \$92,000.00 plus 13.5% interest per annum since 23rd day of March, 1995; D
  - (b) a declaration that Peter Levestam's claim takes priority over all other claims;
  - (c) an order that the vessel be sold and that Peter Levestam's claim be satisfied from the sale proceeds. E
  
16. THAT the plaintiffs rely on an Affidavit of Graham Southwick sworn on 24 September, 1996 in reply to the Affidavit of Peter Levestam.
  
17. THAT the defendants rely on an Affidavit of Karim Buksh in reply to the Affidavit of Peter Levestam. F
  
18. THAT the issues in respect of this application are outlined in Annexure "B". They are as follows:
  
- 4.01 The issues with Levestam's claims are as follows:- G
  - (a) Whether Levestam has a right in rem against Venturer
  - (b) In the event that the Court orders that the Plaintiff's arrest was unlawful whether the vessel ought to be released to Levestam;
  - (c) In the event that the vessel was lawfully arrested, and the Court orders that the vessel be appraised and sold whether

Levestam's claim takes priority over the Plaintiff's claims

- A 19. THAT by way of Notice of Motion dated 30 August, 1996 supported by an Affidavit of Colin Dunlop sworn on 30 August, 1996, which documents have been served on the other parties, the plaintiffs have applied for orders:
- B i. that the ship "Venturer" ("the ship") being a ship under arrest, be released forthwith to the custody, care and control of the first, second and third plaintiffs for the sole purpose of appraisal and sale;
- ii. that in the alternative, the ship be released forthwith to the custody, care and control of the Admiralty Marshal for the purpose of appraisal and sale;
- C iii. that upon release from arrest, the ship be appraised by the first, second and third plaintiffs, or in the alternative, the Admiralty Marshal and sold;
- iv. that upon sale of the ship the proceeds of such sale be paid into Court;
- D v. that after deducting the costs of the sale from the net proceeds of the sale, the sum of \$73,422.71 and interest thereon at the rate of 13.5% per annum or such other rate as to this Court seems just be paid to the first, second and third plaintiffs in the event that judgment is obtained by them against the defendants;
- E vi. that the remaining balance of the proceeds of the sale, if any, be paid to the defendants.
- F 20. THAT the defendants and the intervening party have not filed Affidavits in Reply to the Affidavit of Colin Dunlop.
21. THAT the Plaintiff's issues in respect of this application are:
- G i. was the arrest of the "Venturer" effected properly and in accordance with the applicable Rules and laws?
- ii. a. if yes, is the application for appraisal and sale properly brought in accordance with the applicable Rules and laws and to whom should the proceeds of sale of the vessel be applied?
- b. if no, then does the First Defendant or

intervening party have the right to apply for the release of the vessel?

- iii. THAT by order made on 27 January, 1997, Mr. Justice Fatiaki ordered that the first defendant be wound up and that the Official Receiver be constituted provisional liquidator of the company's affairs.

A

23. THAT there are no further Affidavits or submissions to be filed or served.

B

24. THAT the applications ought to be heard in the following order:

- i. defendant's application dated 2 February, 1996;  
 ii. intervening party's application dated 19 July, 1996;  
 iii. plaintiffs' application dated 30 August, 1996.

C

(Sgd) HOWARDS  
 Solicitors for the plaintiffs  
 Dated:

D

(Sgd) INOKE  
 Solicitors for the defendants

Subject to paragraph 21(iii) is  
 not agreed by the Defendants

E

Dated:

(Sgd) Devanesh Sharma  
 JAMNADAS, JALAL  
 Solicitors for the intervener

F

Dated:

### Consideration of the Issues

I shall now commence to deal with the issues before me but not in the order referred to in item 24 hereabove in the Statement because it is very important that I decide on the "beneficial ownership" of the vessel first; and depending on my decision on this, if need be, consideration of the other two applications will follow.

G

I have given due consideration to the written and oral submissions of counsel representing the respective parties. The oral arguments were quite lengthy.

A A lot of issues were raised as can be seen from the Statement. The hearing concluded on 27 March 1997. At the close of the hearing nothing was decided by the parties about the use or otherwise of the vessel while under arrest; the Court pointed out that the vessel would be lying idle for some time awaiting decision and it would be better if it earned income.

The Court asked counsel:

B Court: Is vessel under arrest.  
 Young: Yes.  
 Court: In Plaintiff's charge.  
 Young: Admiralty Marshal still has charge - still at Plaintiff's wharf.

C Now before considering Levestam's claim which I decided to do first I will also set out in brief the parties' submissions on the applications herein.

(a) Levestam's (Intervener's) contention

Facts relating to intervener (Levestam)

D The facts relating to the Intervener are as follows (as set out in the written submissions):

1.01 The Intervener, Peter Levestam ("Levestam") claims that he beneficially owns the vessel "Venturer".

E Levestam entered into a Sale and Purchase Agreement with Karims Limited and Karim Buksh in order to sell the vessel for \$102,000.00.

However, it is submitted that ownership in the vessel could only pass once the final payment was made.

F The First Defendant defaulted in its payments to Levestam. Levestam claims that \$92,000.00 remains unpaid. Under the Agreement the Defendant is obliged to return possession of the vessel to Levestam in the event of a default. The First Defendant was advised of the default and it has persistently failed to remedy the defaults.

The issue

G Talking of the issues before the Court Mr. Sharma submits, as stated below (in his own words at 1.02 of his submission):

1.02 It is submitted that the Court must firstly rule on the issue of ownership because this ruling will affect both the Plaintiffs' as well as Levestam's claim. If the Court rules that Levestam is the beneficial owner of the vessel then this will destroy the Plaintiffs' claim by virtue of the provisions of section (3)(4) of the Administration of Justice Act, 1956 which makes it clear that an action in rem can only be sustained



under that section if the defendant is indeed the beneficial owner of the vessel. The Plaintiffs' action will have to be struck out.

1.03 In the event that the Court rules that Levestam was not the beneficial owner then it is submitted that he still has, at best, a maritime lien and at worst an action in rem against the Res under section 1(1)(a) of the Administration of Justice Act, 1956 since Levestam's claim relates to the ownership of the vessel or as a charge holder. A

The issue therefore is he says: B

(a). Whether Levestam is the beneficial owner of the vessel;

(b). If the ruling on (a) is yes then what are the consequences of such a ruling with effect to Levestam's claim and the Plaintiffs' claim C

(c). In the event that the Court orders that the Plaintiffs' arrest was unlawful whether the vessel ought to be released to Levestam;

(d). In the event that the vessel was lawfully arrested, and the Court orders that the vessel be appraised and sold whether Levestam's claim takes priority over the Plaintiffs' claims. D

Mr. Sharma submits that D1 are in default under the Sale and Purchase Agreement (the "Agreement") and monies are due and owing under it. This entitles Levestam to have the res arrested, appraised and sold.

Levestam he says would prefer an order that the vessel be sold. The issues as far as Levestam is concerned are stated in the Statement. E

Levestam maintains that he has priority over any claim that the Plaintiffs may have against the vessel on the grounds, firstly, that the Plaintiffs do not have an action in rem and secondly, Levestam's claim would have priority against the Plaintiffs' claim even if they did have an action in rem. F

Mr. Sharma sets out in his submission how the Intervener's claim for ownership of the vessel arises. He says that it stems from the Agreement under which the vessel was purchased by the defendant on 23 February 1995 for a price of \$102,000.00. An initial deposit of \$10,000.00 was paid by D1. D1 were supposed to pay \$10,000.00 per month for 8 weeks and then a final payment of \$12,000.00. G

The learned counsel submits that the Agreement clearly and unequivocally reserved the ownership of the vessel (clause 2) in Levestam and that D1 voluntarily executed the Agreement and they are bound by it.

He further submits that D1 has not produced any Bill of Sale or ownership papers which confirm that Levestam transferred the vessel to D1. The fact

A that D1 got themselves registered as owner in the "Survey Certificate" does not defeat the contents of the Agreement. The intention was to allow D1 to fish, that was why it obtained possession. The mere fact that it held itself out as the owner does not mean that it was in fact the "beneficial owner".

B Mr. Sharma further submits that the beneficial as well the legal ownership of the vessel at all material times remained with Levestam. Therefore he has a prior right to the vessel. In any case, he says, Clause 7 of the Agreement clearly stipulates that in the event of default D1 has to deliver possession of the vessel to Levestam and as D1 has continued to be in default since June 1995 the vessel ought to be returned to Levestam. The affidavit of Karim Buksh in Clause 6(1) acknowledges that D1 remains indebted to Levestam.

C Mr. Sharma concludes his submission as follows. If the Court rules that the legal and/or beneficial ownership at all material times remained with Levestam then:

The Plaintiffs action would have to be struck out since their jurisdiction to bring an action in rem depends on the provisions of the Administration of Justice Act, 1956. This jurisdiction can only apply if Karims Limited was the beneficial owner of the vessel at the material time.

D The Plaintiffs do not have a maritime lien, their claim is based on sections 1(m) and (r) of the Administration of Justice Act 1956. Counsel for the Plaintiffs has at no stage argued that his clients have a maritime lien.

E As such the only claim before the Court is Levestam's claim. The Court can then either release the vessel to Levestam or order that the vessel be sold and proceeds paid to Levestam.

Intervener's (Levestam's) alternative claim

Levestam makes an alternative claim if the Court rules that Levestam does not retain ownership then his claim arises from one of the following:

- F
- (a) a maritime lien; or
  - (b) an equitable mortgage or chargeholder; or
  - (c) an action in rem pursuant to section 1(a) of the Administration of Justice Act 1956.

G Mr. Sharma goes on to cite a number of authorities in support of his arguments. He seeks an order that the vessel be either released to Levestam or the vessel be appraised and sold and the proceeds distributed whereby Levestam's claims take priority over the claims by the Plaintiffs or the Defendants.

(b) Defendants' application and submission

Mr. Inoke, learned counsel for the Defendants, submits that the Plaintiffs had no lawful right to arrest the vessel as the right to arrest must be based on a maritime lien. He says that in respect of the First and Third claims at the time

of arrest, the Plaintiffs had, at best, only contractual claims with no proprietary rights in the vessel. He said that such claims could not have, at the time of arrest, created a maritime lien and the right to arrest. He says that even if the Plaintiffs had acquired a maritime lien, they have waived their rights in respect of such a lien and were estopped from enforcing it.

A

On the first claim of \$3663.35 D1 says that at the time of arrest of the vessel on 9 January 1996 nothing was due to First Plaintiff. As for the second claim of \$64,193.62 the Defendant says that they are owed more than what was alleged to be owed to the Second Plaintiff. As for the third claim of \$5,565.74 the Defendant admits that this was owed but that the parties had entered into the agreement on 20 December 1995 allowing the Defendant to pay the debt by 20 May 1996. Hence at the time of arrest nothing was due to the Third Plaintiff.

B

(c) Plaintiffs' contention

C

The Plaintiffs' contention and argument are contained in the written submissions and oral submissions made by their Counsel Mr. Miles Young.

They rely on the Affidavits of James Andrews sworn 5 January 1996 (1st Affidavit) and 25 March 1996 (2nd Affidavit).

D

Mr. Young submitted that the Court should take a liberal approach on the concept of "wages" with respect to the invoking provisions of the Administration of Justice Act of the United Kingdom and he referred the Court to two cases, namely, The Halcyon Skies [1976] All.E.R. 859 and The Pointer Apitong (1991) 2 HKC 503. He further submitted that there is no requirement for a maritime lien to effect an arrest and to initiate an action in rem under the Court's Admiralty jurisdiction and he referred to the decision of Fatiaki J in Donald Pickering & Sons Enterprises Limited & Anor. V. Karim's Limited & Ors (1997) 43 FLR 41. D1 however argued that the three claims (referred to in paragraphs 4, 5 & 6 of Andrew's affidavit) do not invoke the Admiralty jurisdiction of the Court and in this regard I have already stated hereabove their contention.

E

F

On the issue of non-disclosure the Plaintiffs argue that there was no need to disclose the agreement of 20 December 1995 to Court regarding the alleged extension of time for the reason that the Defendant had failed to pay the \$64,000 debt by that date. They said that the debts were due and payable at the time the application for the arrest was made and that was all the Court needed to know. Mr. Young submits that a full and fresh disclosure is no longer required under the current English Admiralty Rules and cites The Varna (1993) 2 LL.L. Rep. 253 (C.A.) as the authority for this proposition. Mr. Young submits that the Plaintiff did provide full disclosure to the Court of all material and relevant matters and on being satisfied it made an Order for the arrest of the vessel.

G

The defendants he says have failed to satisfy the Court that the said order ought to be set aside and that the vessel be released.

A (d) Court's findings on the parties' contentions

Since reference has been made to the English Act in relation to admiralty jurisdiction it is to be noted that the Admiralty jurisdiction of the Court is contained in Section 21 of the Supreme Court (now High Court) Act Cap 13 which provides:

B "21. The Supreme Court (High Court now) shall be a Colonial Court of Admiralty within the meaning of the Colonial Court of Admiralty Act, 1891, 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."

C Upon a careful analysis of the numerous affidavits, lengthy written submissions and oral arguments I have made certain findings and observations in respect of the parties' respective claims.

D In regard to Levestam's claim it is not in dispute that there was the Sale and Purchase Agreement dated 23 February 1995 between D1 and Levestam for the sale of the vessel. The purchase price has not been paid to Levestam which D1 admits. In these circumstances under the provisions of the Agreement, and as argued by Mr. Sharma, the "beneficial ownership" of the vessel still remains in Levestam. It is relevant to note the provisions of clause E 2 of the Agreement in regard to the transfer of ownership. It provides:

F "2. Upon payment to the Vendor of the purchase price of \$102,000.00 (One Hundred and Two Thousand Dollars) and any other monies (if any) due hereunder by the Purchaser the Vendor shall give and execute in favour of the Purchaser a valid Bill of Sale for the vessel free from all mortgages, charges, liens and any other encumbrances whatsoever."

G In law certain claims are limited by consideration of "ownership"; claims such as those of the Plaintiffs may only be sought in rem against the ship in connection with which the claim arises if the following conditions are satisfied (quoting from text book *Admiralty Jurisdiction and Practice* by Nigel Meeson (1993) at p74):

- "(i) the claim must have arisen in connection with a ship; and
- (ii) the person who would be liable on the claim in an action in personam must have been the owner or

the charterer or in possession or control of the ship when the cause of action arose; and

- (iii) at the time when the action is brought, i.e. when the writ is issued, the person who would be liable on the claim in an action in personam must be the beneficial owner of all the shares in the ship or the charterer of it by demise." (emphasis added)

A

As to the meaning of "beneficial owner" Meeson at p76-78 dealt with it at length. In so far as I consider relevant for the purposes of this case I quote below from his book.

B

At p76 the author says:

"Except in the case of claims which may be brought irrespective of ownership, or where the claim may be brought against a ship which is under demise charter, it is necessary for the court to identify the beneficial owner of all the shares in the ship which is sought to be proceeded against in rem in order to determine whether the claim may be brought against that ship. This process has given rise to controversy as to precisely what is meant by the phrase "beneficial owner".

C

D

He goes on to state:

"In the "I Congreso del Partido" Mr Justice Robert Goff held that the words "beneficially owned" in the corresponding provisions of the Administration of Justice Act 1956, referred only to cases of equitable ownership, whether or not accompanied by legal ownership, and are not wide enough to include cases of possession or control without ownership, however full and complete such possession may be and however much control over the ship he may have."

E

The cases referred to the 1956 Act and the wording of that Act provided that an action in rem could be brought against: "(a) that ship, if at the time when the action is brought is beneficially owned as respects all the shares therein by that person; or ....." (emphasis added).

F

I accept Mr. Sharma's argument regarding the necessity for the person who would be liable on the action in personam must be the beneficial owner of the vessel. In this regard I refer to the House of Lords case of Republic of India and the Government of the Republic of India (Ministry of Defence) v India Steamship Co., Ltd (The "Indian Grace")(No 2)(June to October 1977) 1998 1 LL.L.Rep. p1 where at pp 6-7 Lord Steyn traced the historical development of an Admiralty action in rem and emphasized the need for the defendant to be the beneficial owner in an action in rem.

G

He said at p.6

- A “..... By 1883 the modern forms of process, which named the owners defendants, had evolved. This development made it easier to regard an action in rem as an action against the owners of the vessel.”

Further at p.7 Lord Steyn said:

- B “..... until the Judicature Acts, it was not possible to combine an action in rem with an action in personam in the Admiralty. Since ‘the Dictator’ was decided in 1892 the law has been that once the owners enter an appearance (or in modern phraseology when they acknowledge issue of the writ) there are two parallel actions: an action in personam and an action in rem. From that moment the owners are defendants in the action in personam.”
- C

A more realistic view of the nature of ‘action in rem’ case is The Dictator (1892) P.304 where Sir Francis Jeune (President of PDA Division) concluded that when the owners do appear the action in rem (at p.320):

- D “... not only determines the amount of liability, and in default of payment enforces it on the res, but is also a means of enforcing against the appearing owners, if they could have been made personally liable in the Admiralty Court, the complete claim of the plaintiff so far as the owners are liable to meet it”.

- E Also in The Tervaete (1922) 12 Ll.L. Rep.252 at 254 Lord Justice Scrutton with whom Lord Atkin at p.255 agreed said referring to the liability of the owner:

- F “..... that it was established that an action in rem was not based upon the wrongdoing of the ship personified as an offender but was a means of bringing the owner of the ship to meet this personal liability by seizing his property.” (emphasis added)

Finally in The Cristina (1938) 60 Ll.L.Rep.147 the House of Lords “unambiguously rejected the personification theory, and adopted the realist view that in an action in rem the owners were the defendants” quoting from the “Indian Grace” (supra) at p.7.

- G As to how the Court ascertains the beneficial owner the following interesting passage appears at pp 77-78 of Meeson’s book and this is pertinent to the issue before me particularly when there was a mention that the defendant had the vessel registered in its own name for fishing purposes. He says that the Court may look behind the registered owner and states:

“Another aspect of beneficial ownership that has given rise to controversy is the extent to which it is permissible to look beyond the registered owner of a ship in order to find the beneficial

owner. It is plain from the wording of the Act that Parliament did not intend the investigation simply to be limited to the identification of the registered owner, as Mr Justice Robert Goff observed in *The "I Congreso del Partido"*. Moreover in *The "Aventicum"* there was a dispute as to the beneficial ownership of a vessel and Mr Justice Slynn said: "Where damages are claimed by cargo owners and there is a dispute as to the beneficial ownership of the ship, the Court in all cases can and in some cases should look behind the registered ownership to determine the true beneficial ownership." He went on to say: "it is plain that ... the Act intends that the Court shall not be limited to a consideration of who is the registered owner or who is the person having the legal ownership of the shares in the ship: the directions are to look at the beneficial ownership. Certainly where there is a suggestion of a trusteeship or nominee holding, there is no doubt that the Court can investigate it..." (emphasis mine)

It is alleged that the vessel was registered in the name of D1, and as I said earlier that does not confer beneficial ownership in D1 as can be seen from the decision in *The Bineta* (1966) 2 LL.L. Rep.419. The facts and what was held in that case are as follows:

"S sold the motor yacht *Bineta*, of which he was the registered owner, to G.G who was registered as owner, but S retained possession pending payment of the purchase price; that is, he exercised the unpaid seller's lien under s.48, Sale of Goods Act 1893 [now 1979]. Eventually, since G failed to pay, S, as he was entitled to do under that section, sold the yacht to the plaintiff; but G, relying on the fact that he was the registered owner, objected to the plaintiff's registration.

Held: Although S was no longer the registered owner he had conferred a good title on the plaintiff, who was entitled to registration as owner in place of G."

Here we have a case in which from the affidavit evidence before me and on the authorities referred to hereabove I find that the intervener is the beneficial owner of the vessel except that the first defendant had possession of it pursuant to the Agreement. There is admission that money is owed by the Defendant under it and the Intervener is entitled to exercise the powers vested in him under the Agreement because of default in payment of the purchase price.

(e) Effect of finding on defendant (D1)

Having found as above in regard to beneficial ownership in the Intervener, the Defendant cannot have claim to the vessel particularly because money is owed by it to the Intervener despite the fact that it was in its possession prior to the arrest.

A If the Defendant is of the view that it has a claim on the vessel, which does not seem to be the case, then it can still pursue it in the substantive action when it comes up for trial. However, what steps it takes is entirely up to it and these have to be considered by it in the light of the fact that it is in liquidation with a winding-up Order having been made on 24 January 1997 with notification of it to the Official Receiver/Provisional Liquidator on 10 March 1997. The assets of the Defendant will now go in the hands of the Official Receiver/Liquidator.

B By the same token the Plaintiffs will have to reconsider their further line of action, namely, whether they should continue with this action in the face of the winding up Order or file Proof of Debt with the Provisional Liquidator. However this is for the Plaintiffs to decide.

C I might mention at this stage that the provisions of the Companies Act Cap.247 in relation to winding up applies to proceedings in the Admiralty jurisdiction of this Court as much as it applies to any other proceedings [See Meeson (supra) at p.84]. It is not required of me to go into this aspect of the matter for it is another issue which has to be resolved by the parties themselves in consultation with the Liquidator, but for further reading on the subject vide Meeson (supra) p.82-89.

D (f) Effect of finding on Plaintiffs

E That leaves for consideration the Plaintiffs' claim. The defendants denied that any moneys were due at the time of the arrest, details whereof are set out hereabove. It boils down to this that there has to be a trial of the action under the writ (subject to what I have said about the effect of the winding-up order).

F Having held that the beneficial owner is the Intervener, the Plaintiffs do not have any claim in the rem (the vessel). Therefore the order for arrest should not continue and it should be dissolved. The Plaintiffs can pursue their claim in the substantive action without the need for the vessel being under arrest, but before proceeding further they will have to reconsider their future line of action in view of the winding-up referred to hereabove.

#### Conclusion

G To sum up, I find that the Intervener (Levestam) is the beneficial owner of the vessel within the meaning ascribed to the term under the relevant said section of the Administration of Justice Act applicable to Fiji. This ownership emanates from the Sale and Purchase agreement entered into between D1 and the Intervener for the sale of the vessel. This Agreement, inter alia, gives certain rights to the Intervener in case of default in payment of the purchase price and it is clear from the evidence that there has been a default and the Defendant admits that money is still owed to the Intervener. The ownership of the vessel had not at any time passed to the Defendant except that it had possession of it for the purpose of fishing before the arrest.



Whether the Court would have made an Order for arrest had the said Agreement been disclosed by the Plaintiffs when they obtained the Order is not for me to say now. In view of my finding on the ownership the Plaintiffs are left to pursue their claim in personam against the Defendant (in liquidation) under the Writ issued by them should they so wish bearing in mind the winding-up order against the first defendant. The defendant is also in the same boat as the Plaintiffs and has to now pursue its defence and claim, if any, in this action begun by Writ in so far as the winding-up allows it to do so.

A

In these circumstances as far as the vessel is concerned now that I have found the ownership in the Intervener and the Plaintiffs' claim being in dispute, they cannot proceed in rem against the vessel.

B

Before I make the order on the applications before me, it should be stated that one thing is clear from affidavit evidence that both the Plaintiffs and the Intervener want the vessel to be appraised and sold except that the latter wants the proceeds go to meet his claim first and any surplus to go to the Plaintiffs. It is also to be noted that the vessel was on the application of the Admiralty Marshal released into the custody of the Plaintiffs for non-payment of his fees and charges and the vessel is still with them.

C

#### Orders

D

For these reasons it is ordered as follows:

- (a) that the vessel "Venturer" be appraised and sold in the manner to be determined after Court hears all parties;
- (b) that the proceeds of sale of the vessel, after deduction of costs and expenses incidental to sale, be deposited in Court pending the hearing and determination of the Plaintiffs' claims under the Writ of Summons issued herein or until further order of this Court;
- (c) that the Plaintiffs pay the Admiralty Marshal his fees and charges as undertaken by them or their solicitors in writing;
- (d) that the respective Counsel are required to address me on the question of costs of these applications;
- (e) that liberty be reserved to parties to apply generally.

E

F

*(Order for sale.)*

G

(Editor's note: Sections 20-24 of the Supreme Court Act 1981 (E & W) have replaced the corresponding provisions in the Administration of Justice Act 195. It seems therefore that the governing legislation (see High Court Act - Cap 13 - Section 18) is the 1981 Act, rather than the 1956 Act)