

WASAWASA FISHERIES LIMITED & 2 OTHERS

v.

KARIM's LIMITED & OTHERS

[HIGH COURT, 1998 (Pathik J) 18 September]

Admiralty Jurisdiction

Admiralty- right of intervention by interested party following arrest of vessel- High Court (Admiralty) Rules (Cap – Subs) Order IV rule 4 and Rules of the Supreme Court 1965 (E & W) Order 75 r 17.

The Applicant, the guarantor under a sale and purchase agreement involving an arrested vessel, sought to intervene on the ground that he was interested in the vessel. The High Court HELD: dismissing the application, that since the vessel was no longer under arrest and there were no longer proceedings *in rem* there were no grounds to justify intervention.

Cases cited:

The Dowthorpe (1843) 2 W. Rob 73, 77

The Mardina Merchant [1975] 1 W.L.R. 147; [1974] 3 All E.R. 749;
[1974] 2 Lloyd's Rep. 424

Interlocutory application in the High Court.

M. Young for the Plaintiffs
Applicant in Person

Pathik J:

This is a Motion by Karim Buksh for an order that he be granted leave to intervene in the proceedings in this action under Order 75 Rule 17 of the High Court Admiralty Rules of the United Kingdom. In support of his application he has filed an affidavit sworn 3 June 1998.

On the Motion *ex parte*, as required under the said r17 to be made, an interim Order to intervene was granted by me on 26 January 1998 returnable for 16 July 1998. The parties made written and oral submissions and I have given due consideration to their arguments. The Respondents (the "Plaintiffs") oppose the application.

Background facts

In so far as it is relevant to this application a brief outline of the facts is important.

The Second Defendant (In Rem)(the ship "Venturer") was still under arrest by the Admiralty Marshal when Peter Levestam was joined as Intervener in this action.

A Various applications were made to this Court by the three parties to this action and I delivered my decision on them on 26 May 1998 (see (1998) 44 FLR 85) details whereof, in so much as they concern the present application, are given hereafter.

B Now that the decision has been given the Applicant Karim Buksh has come to Court wishing to be an Intervener for the reasons he gives in his affidavit in support of his application. I should perhaps mention at this stage that the Applicant is a director in Karim's Limited which is in receivership. It is the First Defendant in this action.

Applicant's submission

C The Applicant submits that because of the financial implications of the Court's said decision he could be made liable for all the liabilities to the Intervener Mr. Levestam on the vessel "Venturer". He says that he has an interest in the action as a guarantor under an agreement entered into between Levestam and Karim's Limited on 23 February 1995 in respect of the sale and purchase of the vessel to Karim's Limited.

D He further submits that he now knows that after the Court's said decision what his liabilities are likely to be as a guarantor and he intends to seek certain orders from the Court once his application is granted.

The Respondents' (the Plaintiffs') submission

E The Respondents oppose the application mainly on the ground that the said Order 75 r17 does not permit the Applicant to be an Intervener at this stage of the proceedings and particularly because the vessel is no longer under arrest.

I shall deal with these aspects when I consider the issue before me.

Consideration of the issue

F The issue for Court's determination is whether the Applicant should be allowed to be joined as an Intervener. There already is one in this action in the person of Peter Levestam but he was joined at the time when the vessel "Venturer" was under arrest.

The application is made under Or 75 r17 of the Admiralty Rules (The Supreme Court Practice 1979 Vol I 75/17 p.1187) which is as follows:

G "17. - (1) Where property against which an action in rem is brought is under arrest or money representing the proceeds of sale of that property is in court, a person who has an interest in that property or money but who is not a defendant to the action may, with the leave of the Court, intervene in the action.

(2) An application for the grant of leave under this rule must be made ex parte by affidavit showing the interest of the applicant

in the property against which the action is brought or in the money in court.

(3) A person to whom leave is granted to intervene in an action must enter an appearance therein in the registry or, if the action is proceeding in a district registry, that registry within the period specified in the order granting leave; and Order 12, rules 1 to 4, shall, with the necessary modifications, apply in relation to the entry of appearance by an intervener as if he were a defendant named in the writ.

(4) The Court may order that a person to whom it grants leave to intervene in an action shall, within such period as may be specified in the order, serve on every other party to the action such pleading as may be so specified."

(underlining mine for emphasis)

These Rules are applicable to Fiji under Section 21 of the Supreme Court Act (now High Court Act) (Cap. 13). It provides:

"21. The Supreme Court (now High Court) shall be a Colonial Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1870 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."

It is against the following background to the case as contained in my said decision (in part) which I state hereunder that I propose to consider this application:

(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.

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.

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A 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.

B 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: *Admiralty Jurisdiction and Practice* (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.

(f) Effect of finding on Plaintiffs

C 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).

D 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

E 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 the Defendant (D1) and the Intervener for the sale of the vessel to the Defendant.

F 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.

G 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.

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

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.

Orders

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.

In view of my said decision and bearing in mind particularly the provisions of r17 (supra) the Applicant has no leg to stand on in his application to be joined as intervener.

Rule 17(1) relates specifically to "property against which an action *in rem* is brought is under arrest" I have found that the Intervener Levestam is the "beneficial owner" of the property. No doubt the action commenced both as an action in rem and in personam. The decision has meant that the *in rem* action has gone by the board leaving the claim under the Writ of Summons intact with the result that if any further proceedings are to be taken it will be under the writ. It should also be noted, as my decision says, the vessel is no longer under arrest.

Hence because there is no longer an action *in rem* and the vessel not being under arrest, Or 75 r17 does not apply to enable the Applicant to make this

application.

- A The following note to the r17 would only apply if the Applicant has a substantial interest in the *res* to intervene which I find he does not have:

“Object of rule - The object of this rule is to enable a person who has a substantial interest in the *res* to intervene, if this interest may be injuriously affected by the action against the *res* and to protect his interests (The Dowthorpe (1843) 2 W. Rob 73, 77).

- B The rights of the intervener are limited to the protection of his interest in the *res*, and he has no locus standi to raise issues which are not material to his purpose (The Lord Strathcona [1925] P. 143; see also the Bysantion (1922) 16 Asp. 19, as to defences which an intervener may and those which he may not set up”).

- C As the note further goes on to state under the caption “inherent jurisdiction” the property has to be under arrest. The note states:

“Inherent jurisdiction - The Court has inherent jurisdiction to allow a person who has no interest in the property under arrest to intervene, if the effect of the arrest: is to cause him serious hardship, difficulty or danger (The Mardina Merchant [1975] 1 W.L.R. 147; [1974] 3 All E.R. 749; [1974] 2 Lloyd’s Rep. 424, in which the interests of a harbour authority were adversely affected by the presence of the arrested ship at one of their quays.)”

- D
E In view of what I have stated hereabove, I find that this application is misconceived and the Applicant has been ill-advised. As to what action he can take to safeguard his own interest as the guarantor, it is for him to obtain appropriate legal advice in the matter.

- F For the reasons given hereabove there is no merit whatsoever in the Application. It is therefore dismissed with costs against the Applicant in the sum of \$150.00.

(Application dismissed.)

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