FEDERAL COURT OF AUSTRALIA

Zetta Jet Pte Ltd v The Ship “Dragon Pearl” [2018] FCA 981

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| File number: |  |
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| Judge: | **MIDDLETON J** |
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| Date of judgment: | 19 June 2018 |
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| Catchwords: | ADMIRALTY – proposed action *in rem* –application for issue of a warrant to arrest a vessel after dismissal of earlier proceedings and previous arrest of vessel – proposed proprietary maritime claim application under the *Admiralty Act 1988* (Cth)PRACTICE AND PROCEDURE – abuse of process – arrest would be unjustifiably oppressive to party – arrest would bring administration of justice into disrepute  |
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| Legislation: | *Admiralty Act 1988* (Cth)  |
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| Cases cited: | *Batistatos v RTA (NSW)* (2006) 226 CLR 256 *Tomlinson v Ramsey Food Processing* (2015) 256 CLR 507*Zetta Jet Pte Ltd v The Ship “Dragon Pearl”* [2018] FCA 878*Zetta Jet Pte Ltd v The Ship “Dragon Pearl”* [2018] FCAFC 99  |
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| Date of hearing: | 19 June 2018 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 16 |
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| Counsel for the Plaintiffs: | Mr MD Wyles QC with Mr R Pintos-Lopez |
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| Solicitor for the Plaintiffs: | DLA Piper Australia |
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| Counsel for the Defendant: | Mr AM Stewart SC with Mr NJ Wallwork |
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| Solicitor for the Defendant: | Mills Oakley |

ORDERS

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|  | VID 737 of 2018 |
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| BETWEEN: | ZETTA JET PTE LTD (UEN 201529010W)First PlaintiffJONATHAN D KING IN HIS CAPACITY AS THE CHAPTER 7 TRUSTEE OF THE FIRST PLAINTIFFSecond Plaintiff |
| AND: | THE SHIP "DRAGON PEARL"Defendant |

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| JUDGE: | MIDDLETON J |
| DATE OF ORDER: | 19 JUNE 2018 |

THE COURT DIRECTS THAT:

1. The warrant for the arrest of the Ship “Dragon Pearl” not be issued.

**THE COURT ORDERS THAT:**

1. The costs of the application for the issue of the warrant for arrest be costs in the cause.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Revised from the transcript)

MIDDLETON J:

1. I have before me in this proposed proceeding an urgent application to issue a warrant for the arrest of the Ship Dragon Pearl. I was handed in Court a proposed amended Writ which was in all respects the same as the Writ that was originally sought to be filed in the proposed proceeding, other than the name of the Relevant Person, (as defined in the *Admiralty Act 1988* (Cth)(the ‘**Act**’)) was altered from “Dragon Pearl Limited (a company registered in the Republic of the Marshall Islands)” to “Linkage Access Limited (a company registered in the British Virgin Islands)”. Both those companies were the registered owners of the Dragon Pearl at the relevant time and I was told they were related entities.
2. I do not propose to deal with any issue as to the commencement of the proposed proceeding in the Federal Court of Australia in Admiralty, or the nature of the proposed amended Writ. I propose only to deal with the urgent matter which has brought the parties to the Court this afternoon, namely, the urgent application relating to the arrest of the Dragon Pearl. It seems to me that the other matters that have been raised that relate to the commencement of or continuation of any proceeding can be dealt with at a later time. This could be achieved either by a separate question (if that is appropriate), or at any trial if the proposed proceeding is commenced. Nothing I say is intended to prevent the filing and serving of the proposed proceeding or the amended Writ.
3. In opposition to the application for the issue of a warrant for the arrest of the Dragon Pearl, Mr AM Stewart SC who appeared with Mr NJ Wallwork of Counsel, raised a number of points dealing with *res judicata*, abuse of process, the operation of s 21 of the Act, and the question of the standing of the foreign trustee before the Court to bring and prosecute the proposed proceedings.
4. Yesterday the Full Federal Court in *Zetta Jet Pte Ltd v The Ship “Dragon Pearl”* [2018] FCAFC 99 (Allsop CJ, Rares and Middleton JJ) dealt with the same claim as is now sought to be brought in the proposed proceeding. The Full Court dismissed an appeal from orders made by the primary judge who set aside a writ *in rem* claiming proprietary rights to the Dragon Pearl, set aside the arrest warrant dated 13 October 2017 and made other associated orders including dismissing the proceeding: see *Zetta Jet Pte Ltd v The Ship “Dragon Pearl”* [2018] FCA 878. As the Full Court made clear, that proceeding was finalised by the primary judge’s orders. I will call these proceedings the earlier proceedings, and I will assume the readers of these reasons will be familiar with those earlier proceedings.
5. There is no doubt that the Court has the discretion, in proper circumstances, to refuse an application for the issue of a warrant for an arrest, even if the *prima facie* position on the material before the Court is that an arrest would otherwise be appropriate.
6. This is not an easy application to determine in the context of a proposed new *in rem* proceeding, even in the limited way in which I propose to deal with this application by focusing only on whether an arrest should occur. A number of matters in support of the application that Mr MD Wyles QC (who appeared with Mr R Pintos-Lopez of Counsel) were brought to the Court’s attention which were not matters that impacted upon the decisions of the primary judge or the Full Court in the earlier proceedings.
7. Mr Wyles QC commenced by submitting that if the Court did not now order the arrest of the Dragon Pearl, this asset could be immediately put beyond the reach of judicial authorities and the trustee. Therefore, there was a grave risk that the value of the Dragon Pearl would be irretrievably lost to the creditors of Zetta Jet. In addition, Mr Wyles QC referred to the fact that the Court should work on the basis that in the earlier proceedings the trustee had given all necessary instructions and steps to prepare for the trial; the trustee was caught off guard by the last minute change of position of key witnesses. This meant the trial in the earlier proceedings could not proceed, which led to its ultimate dismissal. In addition, Mr Wyles QC referred to the position of a potential witness, Mr James Seagrim, and his availability to now give evidence and described the evidence he could provide to the Court in the proposed proceedings.
8. The Dragon Pearl has been under arrest for a considerable period of time, with the inability of the owners to enjoy its use. This is an important consideration to recall, along with the previous history of the earlier proceedings. I do not need to rehearse this history, as the parties are well aware of that history and it has been described in the decisions of the primary judge and the Full Court in the earlier proceedings.
9. It is not a matter of laying blame upon the proposed plaintiffs, although if there were instances of deliberate forensic decisions or deliberate inappropriate behaviour, that would be a relevant consideration. I do not rest my decision on the basis of finding or even assuming that there had been deliberate behaviour in the previous proceedings which caused the circumstance to arise where the primary judge dismissed the proceeding. The fact is that the earlier proceedings have been dismissed relating to the same claim.
10. For the purposes of considering this matter, I call in aid the concept of an abuse of process having regard to the history of the earlier proceedings and take into account the fact that there will inevitably be a delay in the prosecution of the proposed proceeding. I accept that undertakings as to expedition were offered and were given in good faith. However, having regard to the history of the previous proceedings, having regard to the issues that may arise in the proposed proceedings, and taking into account the steps that will need to be taken as envisaged by the material currently before the Court, it may be some time before the Court and the parties are ready for or can accommodate a trial. If an arrest were to be made, the Dragon Pearl would remain under arrest for a significant period of time. I do not consider it is appropriate to allow the arrest on an interim basis or to assess the position from week to week or month to month depending on how the proposed proceeding progresses.
11. I should make it clear that I am not deciding whether the earlier proceedings have been determined after a trial on the merits and the appropriate application of the principles of *res judicata*. Whether a previous decision has been made on the merits is merely one circumstance in which a court may determine whether or not there is an abuse of process. The fact that there has been a trial on the merits may be a very important consideration to take in account in concluding that there was an abuse of process in agitating the same claim in new proceedings.
12. I am not deciding now that the proposed proceedings would be an abuse of process. I am merely exercising a discretion in relation to whether to issue a warrant to arrest the Dragon Pearl. It has been recognised that an abuse of process may not necessarily require or necessitate the striking out of or staying the whole of a proceeding. It may well be that the court would regard the prosecution of one or two claims in a proceeding as amounting to an abuse of process, and would not dismiss the whole proceeding but merely stay the prosecution of those claims.
13. The notion of abuse of process has been variously described by the courts. However, it can be accepted that the notion of abuse of process is capable of application in a variety of circumstances in which the use of the Court’s procedures would be unjustifiably oppressive to a party or bring the administration of justice into disrepute: see eg the comments in *Tomlinson v Ramsey Food Processing* (2015) 256 CLR 507 (French CJ, Bell, Gageler, Keane JJ), relevantly at [25] and *Batistatos v RTA (NSW)* (2006) 226 CLR 256 (Gleeson CJ, Gummow, Hayne and Crennan JJ) at [14]-[15].
14. Whilst the consequences of the Court not issuing a warrant for the arrest of the Dragon Pearl are significant, I consider that it would be unfair and inappropriate to the defendant to effectively allow the re-arrest of the Dragon Pearl to occur. It would also bring into disrepute the administration of justice, which is the touchstone of an abuse of process. Any consideration of whether there has been an abuse of process is founded upon considerations of finality and fairness. Ample opportunity has been given to the plaintiffs to present their claim in the earlier proceedings which have been finalised. Whether or not reference can be made to what “right-thinking people” may perceive to be the position in determining whether there has been an abuse, or whether the Court looks at the circumstances itself objectively, it seems to me that it would be regarded as an abuse of process for the Court to now issue a warrant for the arrest of the Dragon Pearl.
15. It also should not be forgotten that the Full Court yesterday in the earlier proceedings refused to order a further stay to enable the proposed *in rem* proceedings to be brought, as upon the making of the Full Court’s orders the Dragon Pearl no longer remained under arrest. The Full Court refused any stay on the basis that the plaintiffs in the earlier proceedings had the opportunity of arguing the matters before the Full Court as to the correctness of the primary judge’s orders, the arrest of the Dragon Pearl had been in continuation for some time, and the decision of the primary judge in the earlier proceedings was held by the Full Court to be final and correct.
16. For these reasons, I will direct that the warrant for the arrest of the Dragon Pearl not be issued.

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| I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Middleton. |

Associate:

Dated: 28 June 2018