FEDERAL COURT OF AUSTRALIA

Fuk Hing Steamship Co Ltd v Shagang Shipping Co Ltd
[2014] FCA 1200

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| Citation: | Fuk Hing Steamship Co Ltd v Shagang Shipping Co Ltd [2014] FCA 1200 |
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| Parties: | **FUK HING STEAMSHIP CO LIMITED v SHAGANG SHIPPING CO LIMITED** |
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| File number: | NSD 1001 of 2014 |
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| Judge: | **RARES J** |
|  |  |
| Date of judgment: | 24 October 2014 |
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| Legislation: | *Admiralty Act 1988* (Cth) s 34(1) *Federal Court Rules 2011* (Cth)r 10.43*Judiciary Act 1903* (Cth)*Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*  |
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| Cases cited: | *Shagang Shipping Co Ltd v Ship “Bulk Peace” as surrogate for Ship “Dong-A-Astrea”* [2014] FCAFC 48 referred to*Beluga Shipping GmbH & Co KS “Beluga Fantastic” v Headway Shipping Limited (No 2)* (2008) 251 ALR 620 applied*Ho v Akai Pty Limited (In Liq)* (2006) 24 ACLC 1526 applied  |
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| Date of hearing: | 24 October 2014 |
|  |  |
| Place: | Sydney |
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| Division: | GENERAL DIVISION |
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| Category: | No catchwords |
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| Counsel for the Plaintiff: | Mr E Cox |
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| Solicitor for the Plaintiff: | HWL Ebsworth Lawyers |
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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| in admiralty |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1001 of 2014 |

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| BETWEEN: | FUK HING STEAMSHIP CO LIMITEDPlaintiff |
| AND: | SHAGANG SHIPPING CO LIMITEDDefendant |

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| JUDGE: | RARES J |
| DATE OF ORDER: | 24 OCTOBER 2014 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The plaintiff have leave to serve the following documents on the defendant in Hong Kong in accordance with the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* done at the Hague on 15 November 1965:
	1. the originating application;
	2. the statement of claim;
	3. the plaintiff’s genuine steps statement; together with
	4. this order.
2. Costs of the interlocutory application filed on 23 October 2014 be reserved.
3. The proceedings stand over to 5 December 2014 for directions.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| IN ADMIRALTY |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1001 of 2014 |

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| BETWEEN: | FUK HING STEAMSHIP CO LIMITEDPlaintiff |
| AND: | SHAGANG SHIPPING CO LIMITEDDefendant |

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| JUDGE: | RARES J |
| DATE: | 24 OCTOBER 2014 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

**(REVISED FROM THE TRANSCRIPT)**

1. This is an interlocutory application for leave to serve the defendant, a Hong Kong company, Shagang Shipping Co Limited, in Hong Kong pursuant to r 10.43 of the *Federal Court Rules 2011* (Cth). The plaintiff, a British Virgin Island company, Fuk Hing Steamship Co Limited, was the disponent owner of *Bulk Peace*, under a charterparty in the New York Produce Exchange 1946 form, made on 18 August 2013 between it and Congo Shipping Limited, as disponent owner, for 24 months, plus about 12 months in owner’s option.

## *Bulk Peace*’s arrest and release

1. *Bulk Peace* was arrested in other proceedings commenced in this Court on 17 March 2014 by the present defendant, Shagang Shipping Co Ltd, as a surrogate ship for another vessel, *Dong-A-Astrea*. The arrest was effected on 18 March 2014 by a marshal at Dampier. The ship is a bulk carrier of about 176,000 deadweight tonnes. In the present proceedings, the plaintiff alleges that the ship was fixed on about 3 March 2014 under a voyage charter to **Rio Tinto** Shipping (Asia) Pte Ltd to carry a cargo of iron ore from Dampier to one or two safe ports in China. A clean recap of the terms of the voyage charter is in evidence, together with the standard terms and conditions of Rio Tinto, to which the clean recap referred.
2. On 19 March 2014, shortly after the ship was arrested, Rio Tinto sent an email to the plaintiff purporting to terminate the voyage charter on the ground that the vessel was no longer an acceptable vessel, and its nomination was cancelled. Rio Tinto also cancelled, in the same email, the nomination of another ship, *Bulk Genius*, and subsequently the nomination of a third ship, *Bulk Harvest*, of each of which the plaintiff claims to have been a disponent owner or have had the benefit of legal rights from the loss of which, if the terminations were valid, it suffered damage. It is not necessary to go into detail here about the basis on which the plaintiff made those claims in respect of the termination of the arrangements involving *Bulk Genius* and *Bulk Harvest*.
3. The arrest was challenged, for want of jurisdiction, under s 19 of the *Admiralty Act 1988* (Cth). The challenge to jurisdiction was returned before a Full Court on Saturday, 22 March 2014, comprising the Chief Justice, McKerracher J and myself. The Full Court heard argument and decided, at the conclusion of the argument, for reasons which it gave, that the arrest should be set aside and the ship released.
4. Essentially, the Full Court found that, while there was more than a suspicion that *Bulk Peace* was owned by the same owner as *Dong-A-Astrea*, for the purposes of s 19(b) of the Act, no inference on the evidence could be drawn, even tentatively, that that suspicion was the fact: *Shagang Shipping Co Ltd v Ship “Bulk Peace” as surrogate for Ship “Dong-A-Astrea”* [2014] FCAFC 48 at [32]-[35] and [41] per Allsop CJ, [45] where I agreed with his Honour and [52] where McKerracher J also agreed.

## Background

1. On the material before me on this interlocutory application, it appears that there was a dispute between the plaintiff, which was not a party to the arrest proceedings, and Rio Tinto as to whether each of the terminations of the voyage charter of *Bulk Peace* and the other voyage charters of *Bulk Genius* and *Bulk Harvest* was valid. The statement of claim alleged that, in procuring and maintaining the arrest, the defendant acted in a way that was unreasonable and without good cause within the meaning of s 34(1) of the *Admiralty Act*. That allegation was based on the findings of the Full Court as to the lack of evidence of the ownership of *Bulk Peace* by **HNA** Group Limited to support the arrest, leading to the failure of the defendant’s claim against HNA as owner of Bulk Peace in the Full Court.
2. There is no decision, of which counsel or I am aware, on any claim under section 34 of the Act. It provides, relevantly:

**34 Damages for unjustified arrest etc.**

(1) Where, in relation to a proceeding commenced under this Act:

(a) a party unreasonably and without good cause:

(i) demands excessive security in relation to the proceeding; or

(ii) obtains the arrest of a ship or other property under this Act; or

(b) a party or other person unreasonably and without good cause fails to give a consent required under this Act for the release from arrest of a ship or other property;

the party or person is liable in damages to a party to the proceeding, or to a person who has an interest in the ship or property, being a party or person who has suffered loss or damage as a direct result.

1. There is an issue as to whether or not it can be said that the plaintiff is a person who “has suffered loss or damage as a direct result” of the arrest, and there will also be issues as to whether the defendant did act unreasonably and without good cause to obtain the arrest or to fail to give consent for the release of *Bulk Peace* prior to the Full Court’s order that she be released.
2. The solicitors who acted for the defendant in the arrest proceedings have informed the plaintiff’s solicitors that they have no instructions to accept service in Australia. Hence, this application is for leave to serve the defendant in the special administrative region of Hong Kong under *The Hague Convention*, being the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* done at the Hague on 15 November 1965, pursuant to r 10.43 of the Rules.

## Consideration

1. The requirements for service out of the jurisdiction under the Rules are well settled: *Beluga Shipping GmbH & Co KS “Beluga Fantastic” v Headway Shipping Limited (No 2)* (2008) 251 ALR 620 at 627-628 [32]-[33] per myself. Finn, Weinberg and Rares JJ in *Ho v Akai Pty Limited (In Liq)* (2006) 24 ACLC 1526 at 1529 [10] summarised these as:

As has been observed on many occasions, the prima facie case requirement has to be met at the outset, usually on an ex parte basis, and without the advantage of discovery and other procedural aids to the making out of a case: see e.g. *Merpro Montassa Ltd v Conoco Specialty Products Inc* (1991) 28 FCR 387 at 390. It “should not call for a substantial inquiry”: *WSGAL Pty Ltd v Trade Practices Commission* (1992) 39 FCR 472 at 476; see also *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539 at 549. For present purposes it is sufficient to say that a prima facie case for relief is made out if, on the material before the court, inferences are open which, if translated into findings of fact, would support the relief claimed: *Western Australia v Vetter Trittler Pty Ltd (in liq)* (1991) 30 FCR 102 at 110. Or, to put the matter more prosaically as Lee J did in *Century Insurance (in provisional liquidation) v New Zealand Guardian Trust* [1996] FCA 376:

“What the Court must determine is whether the case made out on the material presented shows that a controversy exists between the parties that warrants the use of the Court’s processes to resolve it and whether causing a proposed respondent to be involved in litigation in the Court in Australia is justified.”

1. Thus, it is sufficient that there be a *prima facie* case for relief made out on material before the Court based on inferences that are open that, if translated into findings of fact, would support the relief claimed in respect of one of the causes of action relied on by the plaintiff.
2. Here, the plaintiff puts its case in two ways based on the email terminating the charter party from Rio Tinto of 19 March 2014. *First*, the plaintiff says that, if Rio Tinto had (which the plaintiff disputed as at the time of the termination) a legal right to terminate the charterparty, albeit that no express right was given under the voyage charter, then, it suffered various losses. The statement of claim particularised, and Jesper Martens, a solicitor for the plaintiff, explained in his affidavit of 23 October 2014, that those losses consisted of wasted expenses of allegedly USD134,648.52 for hire of *Bulk Peace* during the period of the arrest, loss of the benefit of bunkers consumed and loss of the benefit of the port expenses incurred during the arrest, together with further wasted expenses, totalling USD409,174.30, until a new fixture could be arranged on 3 April 2014, or alternatively, the loss of the anticipated profits that the plaintiff would have earned from the performance of her terminated voyage charter of USD322,462.45.
3. *Secondly*, the plaintiff alleges that even if Rio Tinto did not have the legal right to terminate the voyage charterparty, nonetheless, the loss it suffered was a direct result of the wrongful arrest, within the meaning of s 34(1).
4. There can be no doubt that the plaintiff lost the use of *Bulk Peace* for the period during which she was under arrest, and could not perform the voyage charter that Rio Tinto subsequently brought to an end. That is clearly a loss that it has suffered. The plaintiff says that it treated Rio Tinto’s actions at the time as a repudiation that it then accepted in respect of *Bulk Peace*, as well as the other two vessels.
5. I am satisfied that the plaintiff has established a *prima facie* case for relief for the purposes of the undemanding test that the authorities require. The Court has jurisdiction for the purposes of r 10.43(4)(a) because the proceedings are based on, at least, a cause of action arising in Australia, being the alleged wrongful arrest within the meaning of item 1 in the table to r 10.42 (proceeding based on a cause of action arising in Australia) and the plaintiff seeks relief under s 34 of the *Admiralty Act*, within the meaning of item 15 (proceeding seeking any relief or remedy under an Act, including the *Judiciary Act 1903* (Cth)). It is not necessary to consider the other multiple bases on which the plaintiff sought to establish jurisdiction, since I am satisfied the two bases that I have identified are amply established.
6. For these reasons, I am satisfied that it is appropriate to make orders in terms of the relief for the service of the defendant in Hong Kong sought in the interlocutory application.

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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 Rares. |

Associate:

Dated: 10 November 2014