JUDGMENT No. 681 of 89

CATCHWORDS

Admiralty - applications to set aside arrest warrant and for release of vessel from arrest - warrant alleged to have been improperly issued because owner of vessel not the owner at the time the cause of action arose - arrest said to be an abuse of process by reason of the submission of the dispute between the parties to arbitration prior to the commencement of the proceedings in admiralty.

Admiralty Act 1988, ss. 3, 17 and 29

ALLONAH PTY. LIMITED v. THE SHIP "AMANDA N" and KEN WARFORD

No. NT24 of 1989

Sheppard J.

6 November 1989

Sydney

IN THE FEDERAL COURT OF AUSTRALIA )
)
NORTHERN TERRITORY DISTRICT REGISTRY ) No. NT24 of 1989
)
GENERAL DIVISION )
)
IN ADMIRALTY )

BETWEEN:

ALONNAH PTY. LIMITED

Plaintiff

AND:

THE SHIP "AMANDA N" and KEN WARFORD

Defendants

MINUTES OF ORDER

CORAM: SHEPPARD J.

DATE : 23 OCTOBER 1989

PLACE: SYDNEY

THE COURT ORDERS THAT:-

1. The notice of motion filed on 20 October 1989 and the application filed on 23 October 1989 be dismissed.

2. The costs of such notice of motion and application be reserved.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA )
)
NORTHERN TERRITORY DISTRICT REGISTRY ) No. NT24 of 1989
)
GENERAL DIVISION )
)
IN ADMIRALTY )

BETWEEN:

ALLONAH PTY. LIMITED

Plaintiff

AND:

THE SHIP "AMANDA N" and KEN WARFORD

Defendants

CORAM: SHEPPARD J.

DATE : 6 NOVEMBER 1989

REASONS FOR JUDGMENT

HIS HONOUR: On 20 October last the ship "Amanda N" was arrested in Darwin pursuant to a warrant dated 19 October 1989 taken out by the solicitors for the abovenamed plaintiff. Also on 20 October 1989 there was taken out a notice of motion seeking, inter alia, orders that the arrest warrant be set aside and the ship be released. The notice of motion was signed by a solicitor as "solicitors for the respondent (sic.)". On 23 October 1989 the solicitor filed an appearance on behalf of the second defendant. The appearance said that the second defendant's relationship with the ship was as master. On the same day an

application was made by the second defendant for the release of the ship. Amongst the grounds stated in the application were grounds stating that the second defendant was not the owner of the ship and that the arrest of the ship was an abuse of process.

The notice of motion and the application for release of the ship were heard by me in Sydney on the afternoon of 23 October 1989. Counsel were unable to be present in Sydney and the hearing was conducted over the telephone, counsel being in Darwin. At the conclusion of the hearing I decided that both the notice of motion and the application should be dismissed. I made orders to that effect and said that I would publish my reasons at a later time. What follows are those reasons.

In the result the applications were pressed on two grounds. As I understand the first, it was that the second defendant was not the owner of the vessel at the time of its arrest; see s. 17 of the Admiralty Act 1988 ("the Act"). The second ground was that the issue of the warrant was an abuse of process of the Court. I shall indicate the basis of this ground in due course. I deal firstly with the matter of ownership.

Section 17 of the Act provides that, where, in relation to a general maritime claim concerning a ship or other property, a relevant person was, when the cause of action arose, the owner or charterer of a ship and is, when the proceeding is commenced, the owner of the ship, a proceeding on the claim may be commenced as an action in rem against the ship. "Relevant person" is defined in s.3 of the Act to mean, in relation to a maritime claim, a

person who would be liable on the claim in a proceeding commenced as an action in personam.

The facts of the matter as deposed to in an affidavit sworn by Mr. T.J. Coleman on 19 October 1989 were that, on or about 9 May 1989, the second defendant as owner of the ship, which is a fishing vessel,entered into an agreement with the plaintiff whereby the second defendant agreed to charter the ship to the plaintiff for a period of six months in consideration of the payment of certain moneys which were to be paid by four equal instalments of $13,725 each. The first instalment was paid on 22 May 1989 and the plaintiff commenced the charter of the ship on the following day. The plaintiff claims that on 16 June 1989 the second defendant, in breach of the agreement, wrongfully excluded the plaintiff's employees from the ship. Damages are claimed for breach of the agreement.

In a second affidavit sworn on 23 October 1989 Mr. Coleman deposed to the negotiations with the second defendant which led to the making of the agreement. Eventually a draft agreement was prepared. Mr. Coleman said that the second defendant at all times referred to the ship as "my ship" and at no time suggested that anyone other than himself was the owner. Mr. Coleman prepared notes of the agreement, a copy of which is in evidence. The notes are consistent with the negotiations being conducted upon the basis that the second defendant was the owner of the vessel.

In support of the notice of motion and the application the

were filed affidavits by the second defendant and a Mr. Mark Reynolds. The second defendant said that he did not admit the matters set out in Mr. Coleman's affidavit. He said that an application to the Supreme Court of the Northern Territory had led to the appointment by consent of Mr. Mildren, Q.C., as arbitrator to hear and determine the dispute between the parties. Mr. Mildren was appointed arbitrator by order of the Supreme Court made on 21 September 1989. The hearing of the arbitration commenced on 23 October 1989.

The second defendant said that he was not the owner of the vessel. The owner was said to be Mr. Mark Reynolds to whom he claimed to have transferred the vessel by agreement in writing dated 14 April 1986. A copy of the agreement is annexed to the affidavit.

In his affidavit Mr. Reynolds said that he was the owner of the vessel. He also referred to the agreement of 14 April 1986.

In response to these affidavits, the plaintiff's solicitor swore an affidavit on 23 October 1989. To his affidavit he annexed a document entitled "Outline of Case" by K. Warford and M. Warford, that being a reference to the second defendant and his wife and a statement by Mr. Reynolds. The outline of case and the statement were served on the plaintiff's solicitors by the solicitor for the second defendant pursuant to directions made by Mr. Mildren. I do not find it necessary to set out the detail of the outline of case. All that it is necessary to say is that there is not one word in it about the sale of the vessel

to Mr. Reynolds, or of the allegation that Mr. Reynolds has been the owner of the vessel since 1986. In this respect it should be noted that the proceedings in which the order for the appointment of the arbitrator was made were between the present plaintiff and the second defendant. Mr. Reynolds was not a party.

In the statement which he made for the purposes of the arbitration proceedings there is no claim by Mr. Reynolds to be the owner of the vessel. He said that about the middle of May 1989 he agreed to be the relief skipper on the ship "in a catfishing venture that Ken and Margie [the second defendant and his wife] had negotiated with Tom Coleman."

The hearing was to a degree unsatisfactory because there was no cross-examination of witnesses. This may have been because it would have been impractical for witnesses to be cross-examined over the telephone. Be that as it may, there was no application made by any party to cross-examine any witness.

Counsel for the plaintiff submitted that it was immaterial to reach a conclusion on the question whether the second defendant or Mr. Reynolds was the owner of the vessel. On the face of the evidence one or the other was the owner. If the owner were in fact Mr. Reynolds, he had owned the vessel since 1986. His statement made it clear that he was well aware of the arrangement into which the second defendant and the plaintiff had entered. Plainly he approved of the arrangement. In those circumstances he must have been, if indeed he were the owner, an undisclosed principal for whom the second defendant had authority to act. If

one then returns to the provisions of s. 17 of the Act, it is to be seen that at the two relevant times selected by the section, namely the date when the cause of action arose and the date of arrest, the vessel must have been owned by the one person, whether that person were the second defendant or Mr. Reynolds. I accepted these submissions and it followed that the ground based on lack of ownership by the second defendant had to fail.

I turn to the second ground. It was based on the fact that the parties by consent referred their dispute to arbitration and that it would be an abuse of process to allow proceedings to be maintained in this Court at least until the arbitration is at an end. The essential complaint made by the counsel for the defendant was that the commencement of the action in rem in admiralty was a device to obtain security for any award which the arbitrator might make in the plaintiff's favour.

In order to deal with this submission, it is necessary to refer to s. 29 of the Act. So far as relevant, s. 29 provides as follows:-

> "29. (1) Where:
>
> (a) it appears to the court in which a proceeding commenced under this Act is pending that the proceeding should be stayed or dismissed on the ground that the claim concerned should be determined by arbitration (whether in Australia or elsewhere) or by a court of a foreign country; and
>
> (b) a ship or other property is under arrest in the proceeding;
>
> the court may order that the proceeding be stayed on condition that the ship or property be retained by the court as security for the satisfaction of any award or judgment that may be made in the

> arbitration or in a proceeding in the court of the foreign country.
> (2) Subsection (1) does not limit any other power of the court."

Section 29 was taken from s. 26 of the Civil Jurisdiction and Judgments Act 1982 (U.K.). In The Jalamatsya [1987] 2 Lloyds Rep. 164 Sheen J. was concerned with a case where disputes had arisen under a charterparty. The matter was referred to arbitration. The arbitration commenced. The defendants had not given security for any award the plaintiffs might obtain in the arbitration. The defendants were the owners of The Jalamatsya. The plaintiffs learned that it was coming into territorial waters. They issued a writ in rem against the vessel and it was arrested. The defendants applied to set aside the arrest on the grounds that the issue of the writ and the arrest of the vessel were an abuse of the process of the Court. Sheen J. said (pp. 164-5):-

> "This action is properly founded upon a claim within the Admiralty jurisdiction. No complaint can be made about the issue of the writ. There is not before me an application to stay the action. But there is an application on behalf of the defendants to set aside the arrest of the ship on the grounds that the issue of the writ, and the arrest of the ship, is an abuse of the process of the Court. The defendants say that in the light of what was said by Lord Justice Robert Goff in The Vasso, [1984] 1 Lloyd's Rep. 235; [1984] Q.B. 477, the defendants are entitled to the release of the ship. But as was pointed out by Mr. Gaisman, the substance of what was said by Lord Justice Robert Goff was said on the basis of the law as it then stood. But the law has been changed by the bringing into force of s. 26 of the Civil Jurisdiction and Judgments Act 1982."

His Lordship went on to refer to the section and to a submission made to him by counsel for the defendants that the words of the English section were, "the dispute in question should be submitted to arbitration" and not "has been submitted to arbitration". It may be noted that similar language is used in s. 29. The words used are, "that the claim concerned should be determined by arbitration".

After referring to the submission Sheen J. continued (p. 165):-

> "If that point were valid it would follow that there would be crucial distinctions to be drawn between those cases in which an arbitration had been commenced, and those cases in which, although there was an arbitration agreement, the arbitration had not been commenced. Such a construction would place upon solicitors practising in this field of litigation an intolerable burden. One does not have to draw very much on one's imagination to see that it would be vital before nominating an arbitrator to find out whether a ship belonging to the defendants or respondents in the arbitration, was on the verge of coming to this country. Equally, shipowners might be tempted to divert a ship rather than come within the jurisdiction and have their ship arrested, at least until arbitration had been commenced, when they could come in with impunity. To my mind such a construction is entirely contrary to the whole concept which was envisaged when s. 26 was enacted. That section was enacted to enable claimants (I use a neutral expression) to obtain security if they proceeded by way of arbitration rather than by action. In my judgment s. 26 applies whether or not an arbitration has already been commenced. It follows that if an arbitration has been commenced, and if the claimants in the arbitration have not obtained security for any possible award, they can quite properly issue a writ in rem if they know that a ship belonging to the respondents in the arbitration is coming within the jurisdiction, and they may arrest

that ship in order to obtain security."

Having considered what his Lordship said, I have reached the conclusion that the same approach should be adopted to the construction of the Australian section. In my opinion the use of the words, "should be determined by arbitration", has nothing to say on the question whether the arbitration has already commenced or is to commence in the future. What the section is referring to is the question whether the dispute should be determined by arbitration in the sense that that is the appropriate method whereby the dispute between the parties is to be resolved. There is no issue about that question in this case.

The Court, of course, retains a discretion to decide whether to retain the vessel as security. But there was evidence here that the second defendant is without means. It would appear that Mr. Reynolds, who, in any event, is not a party to these proceedings or to the arbitration, is in a similar position. In those circumstances I reached the conclusion that no abuse of process was involved and that I ought not to exercise my discretion adversely to the plaintiff so as to order the release of the vessel.

It was for these reasons that the two applications made by the second defendant were dismissed.

I did not at the conclusion of the hearing, make any directions for the future conduct of the proceedings. The only appearance in the matter is that entered by the second defendant

on his own behalf and as master of the vessel. The proceedings will take their course according to the rules, but if either party wishes the matter restored to the list, notice to the Registry or to my associate of a request in that behalf will be sufficient for this purpose.

I certify that this and the 9 preceding pages are a true copy of the reasons for judgment herein of The Honourable Mr. Justice Sheppard.

Susan Hutchison
Associate

Dated 6 NOVEMBER 1989

| | |
|---|---|
| Counsel for the Plaintiff: | Ms. J. Kelly |
| Solicitors for the Plaintiff: | Morris Fletcher & Cross |
| Counsel for the Second Defendant: | Mr. N.J. Henwood |
| Solicitors for the Second Defendant: | Cridlands |
| Date of Hearing: | 23 October 1989 |
| Place of Hearing: | Sydney, by telephone link with Darwin |