JUDGMENT No. 242 / 91

C A T C H W O R D S

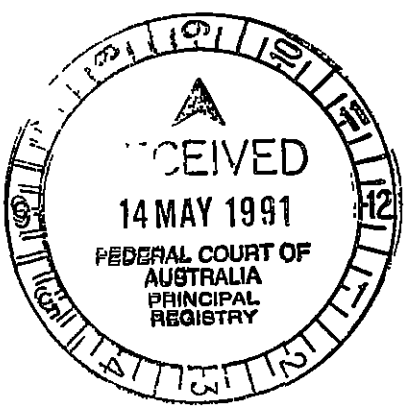
ADMIRALTY - proprietary maritime claim - claim by Saudi Arabian purchaser for specific performance of contract for sale by Panamanian owner of Panamanian registered ship - denial of existence of contract - arrest - application for release from arrest - release granted on terms.

Judiciary Act 1903
Admiralty Act 1988, s. 4
Admiralty Rules, 52, 53.
Federal Court Act 1970 (Can.)

Aichhorn & Co. K.G. v The Ship MV 'Talabot' (1974) 132 CLR 449
Penn v Lord Baltimore (1750) 1 Ves. Sen. 444; 27 ER 1132
Hart v Herwig (1873) LR 8 Ch App 860
Hughes v Morris (1852) 2 De G M & G 349; 42 ER 907
Masters v Cameron (1954) 91 CLR 353
G.R. Securities Pty Limited v Baulkham Hills Private Hospital Pty Limited (N.S.W. Court of Appeal, unreported, 2 December 1986)
Sinclair, Scott & Company Limited v Naughton (1929) 43 CLR 310
The Jupiter [No. 2] [1925] P 69
Shanahan v Fitzgerald [1982] 2 NSWLR 513
Antares Shipping Corporation v The Ship "Capricorn" 111 DLR (3d) 289 (1979)

BAKRI NAVIGATION COMPANY LIMITED v
SHIP "GOLDEN GLORY"
GLORIOUS SHIPPING S.A. (OWNERS OF)
No. G199 of 1991.

GUMMOW J.
SYDNEY.
2 MAY 1991.



IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY)
GENERAL DIVISION) No. G199 of 1991
IN ADMIRALTY)

BETWEEN: BAKRI NAVIGATION COMPANY LIMITED
Plaintiff

AND: SHIP "GOLDEN GLORY"
GLORIOUS SHIPPING S.A.
(OWNERS OF)
Defendant

BEFORE: GUMMOW J.
PLACE: SYDNEY.
DATE: 2 MAY 1991.

MINUTE OF ORDERS

THE COURT ORDERS:

That the application for release stand over to 2.15 p.m. on 3 May 1991 for the giving of undertakings and making of orders in accordance with the reasons for judgment delivered today.

Note:

Settlement and entry of orders is dealt with by Order 36 of the Federal Court Rules.

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BETWEEN: BAKRI NAVIGATION COMPANY LIMITED
Plaintiff

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(OWNERS OF)
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BEFORE: GUMMOW J.
PLACE: SYDNEY.
DATE: 2 MAY 1991.

REASONS FOR JUDGMENT (EX TEMPORE)

HIS HONOUR: This proceeding was commenced by writ filed 27 April 1991. The plaintiff is a corporation formed under the laws of the Kingdom of Saudi Arabia. The defendant is a corporation formed under the laws of the Republic of Panama. Its parent company is, I am informed, a large and reputable Japanese corporation Sanko Unyu KK.

The proceeding is in the nature of an action in rem on a proprietary maritime claim within the meaning of s. 6 of the Admiralty Act 1988 ("the Act"). In particular, the proprietary maritime claim is said to be one relating to possession of a ship, or more strongly title to or ownership of a ship, within the meaning of para. 4 (2) (a) of the Act.

The ship in question, the Golden Glory, is registered in Panama in the name of the defendant, and sails under the Panamanian flag. The relief sought by the writ is a declaration that a contract for sale of the ship from the defendant to the plaintiff is valid and binding, and an order for specific performance of that contract. The particulars appended to the writ state that the plaintiff negotiated with the defendant for the sale of the ship over the period 1 February 1991 to mid April 1991 and that a contract for sale was concluded on or about 8 April 1991. It is also said that on or about 16 April 1991, the defendant purported to repudiate the contract and that the plaintiff does not accept that purported repudiation. The time for delivery of the ship under the contract is said by the plaintiff to be in the period 26 May - 26 June 1991.

An arrest warrant addressed to the Marshal was taken out on 27 April 1991 and the arrest was effected on the next day in Port Botany. The ship remains under arrest and is presently in Port Jackson. Although the jurisdiction which is invoked is one to administer a remedy in the nature of specific performance, it is important to bear continually in mind that jurisdiction is founded by the presence of the ship within Australia or limits of the territorial sea of Australia, and that the action is in rem in accordance with the well-known principles explained by the High Court in Aichhorn & Co. K.G. v The Ship MV 'Talabot' (1974) 132 CLR 449 at 455. The present proceeding thus is to be distinguished

from what is involved in the exercise of jurisdiction in the usual specific performance case; there the remedy is essentially one in personam, as indicated by the cases following the fundamental decision of Penn v Lord Baltimore (1750) 1 Ves. Sen. 444; 27 ER 1132.

Rule 52 of the Admiralty Rules provides that a party to a proceeding may apply to this Court for release of a ship that is under arrest in the proceeding, and that on such an application the Court may order the release from arrest of the ship on such terms as are just. Rule 53 makes provision for arrangements as to payment of the Marshal's fees and expenses. What is before me this afternoon is an application for release of the ship on the footing that the plaintiff has no claim which is a claim relating to the title to or ownership of the ship.

The case put by the defendant in support of the application is that there is clearly no concluded agreement of the nature alleged in the particulars to the writ, and that secondly, even if so, the current proceedings do not fall within the description of para. 4 (2) (a) of the Act.

In a sense, the determination of that first question, as to the existence or otherwise of a concluded agreement, will carry with it the determination of a large portion of the issues in the proceeding. In that regard, I should state at the outset that the Court has available three days for early

final hearing of the proceeding, to commence on Wednesday 15 May 1991.

The evidence before the Court on the present application to a considerable degree has been hearsay in form. The evidence is concerned principally with three issues. The first is the existence or otherwise of the contract. In that regard, and pursuant to s. 79 of the Judiciary Act 1903, I have proceeded on the footing that the law of New South Wales, the State in which the Court is sitting, applies to determine the question of whether or not there is a contract. No submission to the contrary was made. No evidence was given of any applicable foreign law.

The second issue concerns the special character of the ship as making it susceptible to an order for specific performance of the contract rather than an order merely for payment of damages. That is a matter of some significance because, as has been pointed out in argument, the procedure whereby release from arrest is effected upon the giving of security is more readily adapted to the situation where the substance of the proceeding is the recovery of money, rather than delivery in specie.

The third issue to which the evidence goes concerns the disruption presently suffered and which would continue, so it is said, to be suffered by the owner, the defendant, by the arrest of the vessel.

In relation to the third matter, the affidavit of Mr Davis sworn today shows that the ship currently has aboard it cargoes of creosote oil, cotton seed oil and tallow for discharge at ports in South Korea and Taiwan. The ship is scheduled to load from the bulk liquids berth at Botany Bay further cargoes for discharge in Japan. As matters now stand, the earliest time at which it will be able to berth there would be the afternoon of Monday, 6 May 1991. After proceeding to ports in Taiwan and to ports in South Korea, the ship is to proceed to two Japanese ports. It is then to take on cargoes in Japan for discharge in Auckland and Wellington in New Zealand.

The ship is chartered by the owner to a Japanese corporation, which time-charters the vessel to another Japanese corporation, which in turn time-charters it to Dorval Tank Ships Pty Limited of Melbourne. The evidence is that if the vessel is not released in the next day or two, Dorval Tank Ships Pty Limited expects to receive claims for considerable damages from each cargo interest concerned. The amount of the damages cannot at present be estimated. I am invited to infer that some or all of those claims will then be passed back to the other charterers and ultimately to the owner.

The second of the evidentiary matters concerns the special nature of the ship. In that regard, it is said for the plaintiff that the vessel is an oil/molasses/chemical carrier, which is unusual in two particular respects. First,

it has stainless steel centre tanks so that it is capable of carrying almost any chemical cargo. Then it is said that the ship is capable of carrying 24 grades of cargo at the same time, which is a significant advantage over many other carriers, they being merely able to carry 12 different grades at any one time.

Clearly, there is an issue on the evidence as it presently stands as to the unique character of the vessel. However, I should indicate that there is authority that the Court of Chancery entertained suits for specific performance of contracts made outside England for the sale of foreign ships, and it seems to have been assumed without particular debate that any sea going ship would have been treated as having sufficiently unique characteristics to attract this special remedy. The decision is Hart v Herwig (1873) LR 8 Ch App 860. Different considerations obtained where the ship was one to which the British shipping registration laws applied; that registration system covered the field, to the exclusion of equitable doctrines and remedies: Hughes v Morris (1852) 2 De G M & G 349; 42 ER 907.

I come now to the first of the matters to which the evidence has been presented. In para. 7 of the affidavit of 13 paragraphs sworn by Mr R.M. Thompson, the solicitor for the plaintiff, it is said that the contract relied upon comprises a bundle of documents and includes, in particular, the

documents which are annexed as RMT1-RMT12, these bearing dates commencing 4 April 1991 and ending 17 April 1991.

In understanding these materials, it is important to bear in mind that three brokers have been involved: for the plaintiff, Portshire Limited; for the defendant, Far East Shipping & Trading Co. Limited. There is also what is described as a middle broker, Cairnhope Shipping Co. Limited. I was invited by counsel for the defendant to proceed on the footing that Cairnhope Shipping Co. Limited had acted with the authority of his client in this correspondence. For the purposes of this application I should do so. Counsel took me through the materials I have described and also referred to supplementary telexes and facsimiles annexed as RMT14-RMT35 to para. 3 of an affidavit of 20 paragraphs sworn by Mr Thompson on 1 May 1991.

The defendant's submission was that the parties were not at any time ad idem as to either the identity of the buyer or the price that was to be paid. It was submitted that there were other matters outstanding as well. In response, counsel for the plaintiff relied upon evidence indicating the existence of practices in the trade and the understanding given to particular expressions used in the telexes. This was said to produce the result that the issue of the existence or non-existence of the contract is not simply to be judged by a direct and unsophisticated application of rudimentary common law rules of offer and acceptance.

Counsel for the plaintiff also submitted that, on its proper construction, the material I have described would be seen to fall perhaps within the first of the classes of binding contract described by the High Court in Masters v Cameron (1954) 91 CLR 353 at 360-361. Alternatively, and this was counsel's preferred submission, the facts properly understood could fall within what he said was an additional category discussed in the judgment of McHugh J.A. in G.R. Securities Pty Limited v Baulkham Hills Private Hospital Pty Limited (N.S.W. Court of Appeal, unreported, 2 December 1986). That particular passage is at p. 5 of the judgment. McHugh J.A. there said, with reference to Sinclair, Scott & Company Limited v Naughton (1929) 43 CLR 310 at 316-317 per Knox C.J., Rich, Dixon JJ., as follows:

> "Even when a document recording the terms of the parties' agreement specifically refers to the execution of a formal contract the parties may be immediately bound. Upon the proper construction of the document, it may sufficiently appear that the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms."

There is, in my view, a real question as to the existence or non-existence of the contract. For satisfactory determination of that question, it will be necessary to have regard to evidence tendered in a manner appropriate at a trial with the opportunity for cross-examination as to the trade practices and special usages of terms to which I have referred. I would

not at this stage conclude, as I was invited to conclude, that the arrest was clearly unjustified on the footing that there was no case of any substance that could be made for the existence of the contract alleged.

Then it was said for the defendant that even on the assumption against it on that branch of the case, nevertheless there should be a release because the arrest could not be in respect of a claim falling within the relevant terms of the Act. It was said that when in sub-s. 4 (2) of the Act the words "a claim relating to title to or ownership of a ship" are used, what is identified by those words is an existing proprietary entitlement. Then it was submitted that on the case put for the plaintiff, there could be no such present entitlement. In a sense, the debate is whether the form of words used in the legislation embraces more than the possessory or petitory claim as traditionally understood in Admiralty.

It may be observed that the traditional Admiralty jurisdiction in possessory actions has been treated in England as extending to claims for possession by one foreigner against another foreigner in respect of a ship that is within the territorial jurisdiction. In The Jupiter [No. 2] [1925] P 69 at 77, Atkin L.J., as he then was, said that he thought there was jurisdiction to entertain such a claim even before the English legislation of 1840.

However, what is involved here does go beyond a possessory claim involving as it does the taking of steps to implement the contract, which steps would ordinarily be considered as an incident of an order for specific performance. Counsel for the defendant emphasised that the present contract was executory in the sense that delivery, on the case made against him, would not be called for until, at the earliest, 26 May 1991. He relied, with reference to the decision of McLelland J. in Shanahan v Fitzgerald [1982] 2 NSWLR 513, a case involving vendor and purchaser of land, upon the proposition that the purchaser will not generally acquire an equitable interest in the subject land pending completion, so long as the vendor's obligation is subject to any unfulfilled condition, other than a condition which the vendor himself is obliged to fulfil.

Therefore, it was said, there was no claim relating to title in the sense of a presently subsisting title of the plaintiff, as required by sub-s. 4 (2) of the Act. But very similar words appearing in sub-s. 22 (2) of the Federal Court Act 1970 (Can.) were treated by the Supreme Court of Canada as permitting the Federal Court of Canada to entertain an action for the specific performance of a concluded contract for the sale of a ship, by requiring delivery and then execution of a bill of sale thereof. The decision is Antares Shipping Corporation v The Ship "Capricorn" 111 DLR (3d) 289 (1979). It is that decision which was avowedly relied upon in the preparation of its recommendations by the Australian Law

Reform Commission in its Report No. 33 on Civil Admiralty Jurisdiction. The relevant paragraph in the report is par. 149.

Accordingly, whilst there remains a legal issue for final decision at the trial, it would appear at this stage that the plaintiff has the better of the case on this particular issue.

The question then is: what in all these circumstances should now be done? I have referred to the likely disruptive economic effects of the continuation of the arrest, with particular reference to the position of the owner. I would be disinclined to continue the arrest unless it was on terms accepted by the plaintiff that it undertook an obligation to pay compensation in the nature of an undertaking as to damages for the continuation of the arrest. No such undertaking is proffered. On the other hand, if the ship is released from the arrest, the strength and circumstances of the plaintiff's case require some measure of protection for its position pending the outcome of the litigation. In that regard, I note that the parent company of the defendant, whilst not before the Court, is a Japanese corporation of substance and reputation.

In all the circumstances, I would be prepared to order a release but in a qualified fashion. I would be prepared to order that the ship, Golden Glory, be released from arrest

upon (A) the defendant by its counsel undertaking to the Court as follows:

1. To take all steps on its part as are properly necessary for the preparation of this proceeding for trial on 15, 16 and 17 May 1991,
2. Not without prior written consent of the plaintiff to sell, transfer title to, mortgage or otherwise encumber the ship in any manner whatsoever pending the determination of the proceeding, including any appeals and applications for leave to appeal,
3. To comply (subject to its rights to seek variation or discharge thereof and to appeal therefrom) with any orders made against it in this proceeding, and
4. To procure the delivery to the plaintiff's London or Sydney solicitors of a deed (including facsimile counterparts) in the form a draft which is exhibit C to this application or in a form otherwise agreed between the parties and

(B) upon the delivery of the said deed.

The draft deed in question has been prepared by the plaintiff and makes provision for three parties, the plaintiff, the defendant and the parent of the defendant. It contains a covenant whereby the parent guarantees the performance by its subsidiary, the defendant, of covenants contained in cl. 1 thereof. Those covenants largely reflect the undertakings I have earlier indicated. There is also a provision in cl. 5 that, in consideration of the covenants in

its favour, the plaintiff, pending the outcome of the proceeding, including any appeal, will not cause the ship to be arrested in any port which it might visit. That covenant would be given without prejudice to the plaintiff's right to arrest the ship in connection with any claim for damages which might hereafter arise. The proper law is stated to be that of England.

Accordingly, I should adjourn the proceedings for a short time to enable sufficient opportunity for instructions as to the giving of the undertakings I have indicated and for the delivery of the deed.

[Counsel Addressed]

HIS HONOUR: I adjourn the proceedings until 2.15 tomorrow on the footing that at that time I would be prepared to make orders in the form I have indicated. I will then give directions for preparation of the matter for final hearing.

I certify that this and the preceding twelve (12) pages are a true copy of the reasons for judgment of the Honourable Mr Justice Gummow.

Associate: Paul Sinos

Date: 13/5/91

Counsel and solicitors for the plaintiff:	Mr J.C. Campbell Q.C. and Mr N.C. Hutley instructed by Michell Sillar McPhee Meyer.
Counsel and solicitors for the defendant:	Mr A.J. Sullivan Q.C. and Mr J.W.J. Stevenson instructed by Messrs Ebsworth & Ebsworth.
Dates of hearing:	1 and 2 May 1991.
Date of judgment:	1 May 1991.