



Shearn Delamore & Co.

Kuantan Port Consortium Sdn
Bhd v MT HE XIE HAO v
Chem-Specialties Sdn Bhd (Suit
No. WA-27NCC-77-10/2019)

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In an admiralty action, can an intervener, not being the proper defendant, apply to set aside a warrant of arrest of a vessel on non-traditional grounds.

The traditional grounds of setting aside warrant of arrest are, *inter alia*:

- (i) in excess or lack of jurisdiction. (see **The Fordeco Nos 12 and 17; The Owners of and All Other Persons Interested in The Ships Fordeco No 12 and Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, The Owners of The Ship MV Xin Hua 10** [2000] 1 MLJ 449)
- (ii) wrongful arrest and wrongful continuance of the arrest of ship. (see **Ocean Gain Shipping Pte Ltd v Owner And/Or Charterer Of Demise Of Vessel Dong Nai Registered At Haiphong Port, Vietnam (The Dong Nai)** [1996] 4 MLJ 454)
- (iii) the plaintiff's failure to make full and frank disclosure of material facts in the affidavit leading to the arrest (see **Shivnath Rai Harnarain (India) Ltd v The Owners of The Ship or Vessel MV 'Win Moony' (Lr 8204846) of The Port of Valletta, Malta** [2005] 1 MLJ 141)
- (iv) the setting aside of a writ which removes the basis for the arrest. (see **Shanti Kant Jinghan v Owners or Other Persons Interested in The Vessel ' Indera Pertama' & Anor** [1989] 3 MLJ 58)
- (v) failure to comply with the mandatory requirement for service of writ and warrant of arrest. (see **Kertih Port Sdn Bhd v Owners of the Vessel ' Shema'** [2009] 2 MLJ 589)
- (vi) the action is unsustainable. (see **Vitol Asia Pte Ltd v The Owners of the Ship or Vessel 'Malik Al Ashtar' (IMO NO: 9525900) of the Port of Malta (ING Bank**

(ING Bank NV & Anor, interveners)
[2016] MLJU 692).

Facts

The Plaintiff is the operator of the Kuantan Port.

The Defendant is the owner of the vessel "MT HE XIE HAO" ("the vessel").

The Intervener is the owner of, and the person, entitled to the immediate possession of the cargo of approximately 1727,269 metric tonnes of Fuel Oil ("the cargo") presently laden on board the vessel.

On 17 August 2019, the vessel collided with a navigational beacon owned and maintained by the Plaintiff at the Kuantan Port. The Plaintiff later obtained the assistance of the Marine Department to detain the vessel and to prevent it from leaving the Kuantan Port until the Plaintiff's claim was resolved.

The Intervener loaded the cargo onto the vessel without any notice of the dispute between the Plaintiff and the Defendant.

On 15 October 2019, the vessel was arrested at the Port of Kuantan pursuant to a warrant of arrest issued by the Admiralty Court at the Plaintiff's behest.

On 21 October 2019, the Plaintiff applied to the Admiralty Court for an Omnibus Order pursuant to Order 70 rule 11 of Rules of Court 2012.

An Omnibus Order is an order made by the Admiralty Court during the advance stages of proceedings in relation to the preservation, management or control of a ship, vessel or maritime property that is under arrest.

On 31 December 2019, the Admiralty Court allowed in terms the Plaintiff's Application for an Omnibus Order pursuant to which the Plaintiff was obliged to obtain a Port Risk Insurance cover for the vessel under the Sheriff's name in order to properly maintain and preserve the interest of the vessel whilst under arrest. All costs and expenses connected or incidental thereto were to be treated as forming part of the Sheriff's costs and expenses under the Omnibus Order.

In early June 2020, the Intervener applied for leave to intervene in the Admiralty Proceedings. In the same application the Intervener applied to have the cargo onboard the arrested vessel discharged to it or its nominee. This application was allowed by the Court.

In mid-June 2020 the Intervener wrote to the Plaintiff asking if the Plaintiff had secured a Port Risk Insurance cover for the arrested vessel. The Intervener had also alerted the Plaintiff then that the vessel did not have a Protection & Indemnity Insurance cover. Neither was there a Hull & Machinery Insurance cover for the vessel. These were confirmed by the solicitors for the Defendant.

Without any insurance protection for the vessel, the Intervener was unable to discharge the cargo from the vessel by way of a ship to ship transfer of the cargo from the arrested vessel into a receiving vessel. It was a requirement of the Marine Department that the vessel involved in a ship to ship transfer must be insured due to the inherently risky adventure.

As late as October 2020, the Plaintiff had yet to obtain a Port Risk Insurance cover for the vessel. Thus, the Intervener was unable to discharge its cargo.

The Intervener filed an application to set aside warrant of arrest against the vessel on account of the Plaintiff's failure to obtain a Port Risk Insurance cover for the vessel.

Intervener's submission

The requirement to preserve the vessel by way of an Omnibus Order is set out in Order 70 rule 11 of Rules of Court 2012, in the Practice Direction No.2/2007 Admiralty Actions and in the Practice Direction No. 1 of 2012 Admiralty and Maritime Claims.

The Plaintiff is obliged under the Omnibus Order to obtain a Port Risk I insurance cover for the vessel under the Sheriff's name in order to properly maintain and preserve the interest of the vessel whilst under arrest.

The Intervener submitted that:

- (i) the Intervener possess the necessary standing to make the present application;
- (ii) the Intervener was not seeking to lift, discontinue or set aside the warrant of arrest under the traditional grounds of for setting aside an arrest; and
- (iii) the application to set aside the warrant of arrest was filed by the Intervener in recognition of the Court's inherent power to lift, discontinue or set aside the arrest where the arresting party fails or neglects or refuses to abide by an Order of the Admiralty Court.

The Intervener further submitted that:

- (i) the Plaintiff had failed to comply with the requirement in the Omnibus Order to obtain a Port Risk I insurance cover of the vessel.

- (ii) the Plaintiff had failed to disclose its failure to obtain a Port Risk I insurance cover to the Admiralty Court.
- (iii) the vessel has been lying arrested without any insurance cover since the date of the grant of the Omnibus Order.
- (iv) the vessel, its crew or the cargo was at risk without the insurance cover.
- (v) the vessel was also a risk to other vessels in the port in the absence of a Port Risk I Insurance cover.

The Intervener relied on an earlier judgment of the Admiralty Court delivered in **Majorole Shipping Sdn Bhd v Semua Bahagia v M & G Tankers (L) Pte Ltd** (Suit No. WA-27NCC- 68-11/2016).

Plaintiff's submission

The Plaintiff submitted that:

- (i) the Intervener did not have the legal standing to apply to set aside the arrest of the vessel as it was only an intervener with an interest in the cargo on board the arrested vessel. It had no interest in the vessel;
- (ii) the vessel was arrested as security for the Plaintiff's claim and therefore the arrest shouldn't be lightly set aside;
- (iii) this was not a situation where any of the traditional grounds for setting aside an arrest was applicable;
- (iv) the Intervener could have acted pursuant to the Omnibus Order to have its cargo discharged;
- (v) the Intervener had been granted leave to discharge its cargo from the vessel but had not acted upon it;
- (vi) the lack of insurance cover did not prevent the discharge of the cargo;

- (vii) the Intervener is to be faulted for not introducing an insurer to the Plaintiff who could have provided a Port Risk Insurance cover;
- (viii) the Plaintiff had tried its level best to secure a Port Risk Insurance cover. The fact it couldn't was not due to its fault;
- (ix) the Plaintiff should not be faulted for failing to obtain a Port risk Insurance cover during the COVID 19 pandemic; and
- (x) the Intervener's application was tainted with delay.

Court's Decision

In delivering the judgment of the Admiralty Court, Judicial Commissioner Atan Mustaffa Yussof Ahmad opined and ruled as follows:

- (i) There was a failure by the Plaintiff to comply with para. 7 of the Omnibus Order dated 31 December 2020. The Plaintiff is obliged under the Omnibus Order to obtain insurance for the vessel, in particular Port Risks Insurance cover, under the Sheriff's name in order to properly maintain and preserve the interest of the vessel whilst under arrest.
- (ii) The Plaintiff's non-compliance with the Omnibus Order is made worse when the Plaintiff failed to disclose its neglect or omission in taking out Port Risks Insurance cover for the vessel to the Admiralty Court. This was uncovered six months after the arrest only after the Intervener had alerted the Plaintiff on 17 June 2020 on the lack of Port Risks Insurance and other insurance cover.
- (iii) The Intervener has locus standi to apply to set aside the warrant of arrest although the application is not founded

on traditional grounds such as lack of jurisdiction or merits of the Plaintiff's grounds for arrest. There is precedent for an intervener to set aside a warrant of arrest. See: **Majorole Shipping Sdn Bhd v Semua Bahagia v M & G Tankers (L) Pte Ltd** (Suit No. WA-27NCC- 68-11/2016); **East Asia Supply Co Pte Ltd v The "San 003"** [1979] 2 MLJ 8. As stated by the learned Judge in **Semua Bahagia**, even if the Intervener has no locus to raise issues in relation to the Omnibus Order, this does not stop this court from taking issue with the Plaintiff of its non-compliance of the Omnibus Order. Therefore, the Court has inherent power to lift, discontinue or set aside the arrest where the arresting party fails or neglects or refuses to abide by an Order of the Admiralty Court.

- (iv) The failure of the Plaintiff to take out Port Risks Insurance cover has put the vessel, its crew and cargo at risk as the vessel has been lying arrested without any insurance cover since 31 December 2019. The vessel, its crew or the cargo, will be left unprotected and be left without any remedy should anything untoward happens to the vessel, its crew or the cargo. In this sense the vessel under arrest is not properly preserved.
- (v) Further, in the absence of Port Risks Insurance, other vessels are also put at risk. In the event of a collision, affected parties will be without redress from the Sheriff or Admiralty Court under whose custody, control and supervision the vessel was.
- (vi) The Plaintiff did not make reasonable efforts to take out Port Risks Insurance cover for the vessel. The Plaintiff did nothing from the date of the Omnibus Order dated 31 December 2019 to the point when the Intervener contacted the

Plaintiff on 17 June 2020 regarding insurance cover for the vessel. There was no explanation offered by the Plaintiff for this omission. The inquiry by the Plaintiff to one broker and one insurer after the absence of Port Risks Insurance cover was alerted by the Intervener cannot be viewed as adequate effort by the Plaintiff. The Plaintiff also did not correctly act when it sought for a Hull and Machinery in addition to a Port Risk cover in the Plaintiff's name when what was required was a Port Risk cover. Paragraph 10 of the Omnibus Order requires the insurance to be taken out in the name of the Sheriff who has legal interest in the vessel.

- (vii) Although the arrest of the vessel was pursuant to the Plaintiff's rights to obtain security, the Plaintiff as the arresting party has the duty to ensure that the vessel is preserved which includes taking out the Port Risks Insurance as stated in para. 10 of the Omnibus Order. Taking out insurance cover for the preservation of the vessel was averred by the Plaintiff's officer in the Plaintiff's affidavit in support of prayer 10 of the Notice of Application for Omnibus Order. The Court has the inherent power to lift, discontinue or set aside the warrant of arrest on account of the Plaintiff's failure to comply with the Omnibus Order dated 31 December 2019 even though the original purpose of the arrest was to obtain security.

In the upshot, the Admiralty Court set aside the warrant of arrest and ordered the vessel to be released.

Conclusion

The main takeaway points from this judgment are:

- (a) first, an intervener can be a party with the necessary locus standi to apply to set aside warrant of arrest executed against the vessel on non-traditional grounds.
- (b) secondly, the Admiralty Court has the inherent power to lift, discontinue or set aside the warrant of arrest on account of the arresting party's failure to comply with an Order of the Admiralty Court.

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