

1982 September 8

[A. LOIZOU, J.]

TAKIS ECONOMIDES,

Plaintiff.

v.

1. M/V "COMETA—23",
2. BLACK SEA SHIPPING CO.,

Defendants.

(Admiralty Action No. 171/82).

*Admiralty—Arrest of ship—Made on ex parte application of plaintiff's
—No cause of action disclosed when totality of the material
adduced before the Court—Warrant of arrest discharged.*

5 By means of a written agreement dated the 5th May, 1982
the plaintiff agreed with defendants 2, to charter the defendant 1
ship belonging to them for the period of the 1st June, 1982
to the 30th November, 1982 for sailing inter alia, to Latakia,
Beirut and Jounieh. After filing an action for specific perform-
10 ance by the defendants of the above charterparty the plaintiff's
on an ex-parte application obtained a warrant of arrest of the
defendant ship.

15 Upon an application by the defendants for the discharge
of the warrant of arrest it was contended that the charter-
party in question was amended by a series of telexes, between
the parties to the effect that for the first 60 days from delivery
of the vessel to plaintiff no calls at Lebanese ports should be
made because of the prevailing situation there and that, therefore,
there was no cause of action as a result of which the warrant of
arrest could be issued.

20 *Held*, that having gone through the telexes exchanged between
the parties, this Court has come to the conclusion that the new
agreement concluded between the parties refers to the agreement
of the 5th May, 1982 with its amendments regarding the ports
of calls, which existed on the 20th August and which excluded

the Lebanese ports because of the prevailing situation there; that that being so, there is no cause of action disclosed on the material before this Court now that the totality of it has been adduced and as there was no cause of action the warrant of arrest issued cannot be sustained and is hereby discharged. 5

Application granted.

Cases referred to:

St. Elefterio Schwarz & Co. (Grain), Ltd. v. St. Elefterio ex Arion (Owners), [1957] 2 All E.R. 374.

Application. 10

Application by defendants for an order of the Court discharging the warrant for the arrest of M/V "Cometa-23".

K. Chrysostomides, for the applicants.

L. Papaphilippou, for the respondent.

Cur. adv. vult. 15

A. LOIZOS J. read the following judgment. The plaintiff filed this mixed action in rem and in personam on the 21st August 1982, whereby he claims

- "(a) An order of the Honourable Court ordering the specific performance by the defendants of the charterparty dated the 5.5.1982 entered into between the plaintiff and defendants 2 by which defendants vessel was chartered/hired to the plaintiff. 20
- (b) 1,000,000 U.S.D. damages for breach of charterparty and/or otherwise. 25
- (c) Further or other relief as the Court may deem just in the premises.
- (d) The costs and expenses of this action".

He also applied for the issue of a warrant for the arrest of the defendant ship lying at the port of Larnaca "pending the hearing and final determination of the present action and/or until further order of this Court". In support of that application he filed an affidavit in which it is deposed that by a written agreement dated the 5th May 1982, he agreed with defendants 2, to charter the defendant ship belonging to them for the period of the 1st June 1982 to the 30th November 1982 for sailing 35

inter alia to Latakia, Beirut and Jounieh, with an option to extend the said charter until the 31st May 1983. According to paragraph 4 thereof on the 15th June 1982, he agreed with defendants 2 that the said charter be amended by the exclusion
5 of the routes to Beirut, Jounieh, from the said agreement for a period of sixty days on account of the abnormal situation in Lebanon. The said amendment appears in telexes which were attached thereto as -exhibits 1, 2 and 3 and they read as follows:

10 "DEAR SIRS,

TAKING INTO ACCOUNT THE SITUATION IN LABEEE IN LEBANON AND SYRIA WE PROPOSE THE FOLLOWING:

15 DURING THE 60 FIRST DAYS OF OPERATION KOMETA SHE WILL DO THE FOLLOWING LINES

LARNACA-SYRIA PORTS.

LARNACA-TURKEY.

RAOUND CYPRUS.

20 THE RENT FOR THIS PERIOD WILL BE 450RB./DAY AT THE EXPIRATION OF THE 60 DAYS PERIOD OF OPERATION BOTH SIDES WILL CONSIDER FUTURE CO-OPERATION AND WORK OF THE SHIP. IF AT THE EXPIRATION OF THE 60 DAYS PERIOD THE OPERATION DOES NOT SHOW
25 PROFITS DELIVERY AND REDELIVERY EXPENSES OF THE SHIP WILL BE BORNED BY MORPASFLOT. IF AT THE EXPIRATION OF THE 60 DAYS PERIOD SHOWS PROFITS THAT COVERS THE EXPENSES OF DELIVERY AND REDELIVERY SP EEE
30 REDELIVERY SO THEY WILL BE PAID BY ME. CONCERNING LIBANON THIS QUESTION WILL BE DISCUSSED WHEN IS PERMITTED BY THE SITUATION.

35 IF THE OPERATION SHOWS PROFITS WHICH ALLOW TO COVER A RENT OF 600RB. IT WILL BE TAKING IN CONSIDERATION.

ALL OTHER PROVISIONS OF THE CONTRACT REMAIN IN FORCE. KOMETA MUST BE IN

CYPRUS NOT LATE THAN THE 17 JUNE 1982
BECAUSE THE FIRST TRIP TO CATTAGUIA WILL
BE ON THE 19 JUNE 1982

PLEASE CONFIRM BY RETURN.

REGARDS

5

ECONOMIDES."

Exhibit 2 reads:

"WE CONFIRM YOUR CONDITIONS AS PER TLX
622 OF 15.6.1982 COMMENCING OF 60 DAY
CHARTER PERIOD IS TO BE FROM THE DAY
FOLLOWING HYDROFOIL'S ARRIVAL TO
LARNACA. WE BELIEVE HYDROFOIL TO BE AT
LARNACA JUNE 17.

10

1982 LATE AFTERNOON. PLS CONSIDER THIS
EXCHANGE OF TLXS AS ADDENDUM TO THE
CONTRACT SIGNED BY BOTH PARTIES 5.5.1982
REGARDS

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TMPF-851 MORPASFLOT"

Exhibit 3 reads:

"RE: CHARTER COMETA-23

20

FURTHER TO OUR TLX OF TODAY TMPF-1297
TO AVOID MISUNDERSTANDINGS WE INFORM
THAT WITHIN PERIOD OF CHARTER CALLS
AT LEBANESE PORTS TO BE EXCLUDED

REGARDS

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TMPF-1305 MORPASFLOT"

It is significant that in telex, exhibit 2 and plaintiff is asked
to consider "this exchange of telexes as addendum to the contract
signed by both parties on the 5th May 1982".

It was further contended in paragraph 4 that by telexes dated
20th August 1982, exhibit 3, the defendants informed him that
during the remaining period of the charter the said ship would
not be entitled to visit Lebanese ports. He asserted that as
it is known Lebanon was "now a free zone and a visit of the
said ship to the Lebanese ports is safe".

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On the same day he visited with the Master of the said ship the Marina of Larnaca, who informed him that he had instructions to get ready and sail for Yalta and so not to carry out the voyage of the 21st August 1982 for Latakia. He further referred to the preparations made by the ship for its departure, the damage which will be suffered by the alleged breach of the said contract amounting to U.S. \$25,000.— per day and sought the issue of the warrant of arrest. On this material I issued the warrant and at the request of counsel for the plaintiff I fixed it for the 23rd August 1982 at 9:30 a.m.—(that is within a shorter period than would normally a warrant of arrest is fixed as that might expedite a solution of the matter)—for anyone to move the Court against the continuance in force of the order of arrest made ex parte. On the 23rd of August, being a Monday, no one appeared on behalf of the defendants, though the writ and warrant were duly served, but on the 26th August, 1982, counsel for the applicants made a conditional appearance and only for the purpose of taking steps in relation to the warrant of arrest and/or the variation and/or cancellation of certain conditions provided therein and not with regard to the action itself, which is fixed for appearance on the 18th September 1982. He further applied under rule 203 of the Cyprus Admiralty Jurisdiction Order 1893 for extension of the time fixed by the Court in paragraph 6 of the warrant of arrest and/or for leave to apply out of time for the discharge of the said warrant inasmuch as with the intervention of the Sunday and as the defendant ship is managed from Yalta, U.S.S.R., there was no time for the master to communicate with his superiors and instruct advocate to appear on his behalf. I granted the order for the reasons appearing therein which I need not repeat here as there is no issue arising on these matters.

In pursuance thereof the defendants filed this application on the 22nd August 1982 seeking the following remedies:

- 35 "1. An order of the Court ordering that the warrant of arrest issued on the 21st August, 1982 for the arrest of M/V 'COMETA—23' is discharged and that the said vessel be forthwith released from arrest.
- 40 2. (a) In the alternative and without prejudice to the above an order of the Court varying the terms and conditions and/or cancellation of such conditions

in particular the amount of the security bond to be filed by defendants-applicants for the release of the said vessel as the amount for such security bond is exorbitant and out of all proportions.

- (b) An order ordering the plaintiffs to increase the amount of their security bond to an appropriate and proportionate amount and in a form which would better secure the interests of the defendants-applicants namely in the form of a bank guarantee. 5
3. Any other order which the Honourable Court may deem necessary or expedient to issue. 10
4. Costs".

In support of the said application an affidavit was filed in which it is deposed inter alia the following:

- "5. The said ship belongs to a State Company, defendant No. 2, which is the property of the Sovereign State of the USSR and therefore the said ship is state property. 15
6. The dispute arose out of a charterparty dated 15th May, 1982 signed for and on behalf of the plaintiff and defendants No. 2, which among other things stipulates in clause 21 that all disputes arising under and in connection with this contract shall be submitted to the arbitration commission in Stockholm, Sweden. Such contract is attached hereto marked EKCI. 20
7. As admitted by the plaintiff the said charterparty was amended by a series of telexes exchanged between the parties to the effect that for the first 60 days from delivery of the vessel to plaintiff no calls at Lebanese Ports should be made because of the prevailing situation there and that the trips which were to be made by the said vessel would be Larnaca—Syrian Ports, Larnaca—Turkey and around Cyprus. The rent for this period would be instead of the original 600.— Roubles per day 450.— Roubles per day and that at the expiration of the 60 day period both sides would reconsider the terms of their charterparty. Various other amendments were made considering delivery and redelivery and terms of payment by the plaintiff to the defendants. Telexes 25 30 35

- 5 attached hereto Nos. 1 to 26 are self explanatory in particular telexes Nos. 9, 11, 14, 15 and 16 which show, and are admitted by the plaintiff, what amendments were made to the original charterparty and that after the expiration of the 60 days it was agreed that the whole charterparty should be rediscussed. (Telexes attached marked EKC 2/ 1-26).
8. The plaintiff did fail to meet his financial obligations at various stages and was warned by the defendants representative to comply with such obligations on various occasions.
9. Through further exchange of telexes a further extension of the charterparty was agreed for a month starting on August 19th, 1982 under terms appearing in telexes Nos. 19 to 25. Under the terms of such agreed extension it was repeated that during such period of one month the vessel should again not call at Lebanese Ports.
10. In breach of the said agreed amendments the plaintiff filed in my belief frivolously and vexatiously, the writ of summons, and the application ex-parte for the arrest of the vessel without any warning and immediately after the 19th August, 1982, that is 20th August, 1982 the date on which the defendants believed that final agreement had been reached for the extension of charterparty under the agreed amendment for the further period of one month. On the morning of 21st August, 1982 Mr. Economides personally was informed by the Trade Representation of the USSR Embassy in Cyprus acting on instructions of the owners that the vessel was awaiting for his instructions to sail to Latakia as scheduled.
11. Even after the expiration of the 60 days, as above explained, the vessel on the 19th August, 1982 made another trip to Latakia in pursuance of the belief of the defendants that agreement had been reached for the extension of the charterparty for a further period of 30 days. At that time the plaintiff had not paid the preagreed charter price nor the delivery and redelivery dues as agreed. Plaintiffs now apply for leave to lodge such payment into court which makes it obvious that

they were not at the time in a position to do it pursuant to the agreement, which, if they had done it would have secured further continuation of the charterparty under the agreed new terms for a further period of 30 days. Doubts are, therefore, cast on the financial solvency of the plaintiff". 5

Applicants attached to the said affidavit a photocopy of the charterparty of the 5th May, 1982, and a bundle of telexes which, together with the three telexes already mentioned, complete the factual background of the case. The charterparty in question was amended by agreement of the parties. Telex No. 14 of the 12th July, 1982, reads as follows:- 10

"TAKING INTO ACCOUNT SERIOUS MISUNDERSTANDING AND TO CLARIFY SITUATION WE WOULD LIKE TO EXPRESS OUR UNDERSTANDING OF THE AGREED TERMS STP NEW ARRANGEMENT AS PER OUR TLX EXCHANGE OF 15.6.1982 STIPULATES NOTHING BUT: 15

1. SPECIFYING BEGINNING OF CHARTER PERIOD
2. SPECIFYING ITENERARY 20
3. NEW CHARTER RATE
4. THE RIGHT OF THE PARTIES, TO RECONSIDER CHARTER RATE AND DELIVERY/REDELIVERY VOYAGES UPON EXPIRATION OF 6Φ DASEE DAYS CHARTER PERIOD STP SHOULD THE PARTIES FAIL TO COME TO AN AGREEMENT THEY RESERVE RIGHT TO CANCEL THE CONTRACT STP 25

ALL THE REST CONDITIONS INCLUDING TERMS OF PAYMENT REMAINED UNCHANGED I.E. ON JULY 1 YOU ARE TO PAY FOR WHOLE AUGUST ON AUGUST 1—FOR WHOLE SEPTEMBER ETC STP IF UPON EXPIRATION OF 6Φ DAY CHARTER PERIOD / WHICH IS ON AUGUST 18 / PARTIES AGREE TO RESUME INITIAL CHARTER RATE THEN CHARTERERS WILL HAVE TO PAY THE DIFFERENCE IN CHARTER RATE FOR PERIOD FROM AUGUST 19 TO SEPTEMBER 3Φ STP SHOULD THE PARTIES FAIL TO REACH AN AGREEMENT 35

UPON EXPIRATION OF 6Φ DAY CHARTER SHIP-
OWNERS SHALL REIMBURSE CHARTERERS FOR
FULL UNUSED DAYS OF CHARTER STP

5 PLS CLARIFY YOUR POSITION AND ADVISE WHEN
YOU ARE GOING TO MAKE YOUR SUBSEQUENT
PAYMENTS

REGARDS MORPASFLOT".

10 On the 22nd July, 1982, the applicants sent Telex No. 15
to which the respondent replied by Telex No. 16. They read
as follows:-

Telex 15:

15 "RE CHARTER KOMETA 23 OUR TLX 1ΦΦ9 OF
JULY 12 1982 SO FAR WE HAVE NOT RECEIVED
YOUR ANSWER TO OUR ABOVE TLX STP WE
SHALL CONSIDER YOUR NON-PAYMENT OF THE
CHARTER AS PER TERMS STIPULATED IN OUR
CONTRACT PARA 5 POINT B AS CANCELLATION
20 BY YOU ABOVE CONTRACT OF MAY 5 1982 AND
WE RESERVE THE RIGHT TO WITHDRAW COMETA
ANY MOMENT STP

AE AWAITING YOUR COMMENTS BY RETURN
REGARDS MORPASFLOT".

Telex 16:

"ATTN: MORPASFLOT

25 1) CONCERNING YR TLX 1ΦΦ9. WHEN WE
RCVD IT WE SENT IT TO THE TRADE DEPT AT
YR EMBASSY HERE WHO HV DISCUSSED IT WITH
U AND ALSO SAID THEY WOULD DISCUSS THE
MATTER WITH MOSCOW. THE TRADE DEPT
30 SAID THE MATTER HAS BEEN DISCUSSED
AND THEY CANNOT UNDERSTAND WHY U HV
SENT THIS TLX.

35 2) THIS MORNING THE TRADE DEPT HV SAID
WE MUST MAKE THE PAYMENT OF THE
BALANCE OF 4ΦΦΦ ROUBLES WHICH WE WILL
DO TODAY.

3) THE WHOLE MATTER OF CHARTER WILL BE

DISCUSSED AT THE END OF THE CHARTER PERIOD AGREED, I.E. IN 2 MONTHS.

4) WE WILL NOT ACCEPT ANY MORE THREATS CONCERNING THE AFFAIRS OF THE KOMETA.

5) U KNOW VERY WELL THAT WE HV ASKED TO PURCHASE A SECOND-HAND KOMETA AND A NEW ONE. WE HV GIVEN U A TIME LIMIT TO CONCLUDE THE DEAL AND STILL U THREATEN US CONCERNING THIS MATTER. THIS DOES NOT SIGNIFY A GOOD BUSINESS RELATIONSHIP, AND U KNOW THAT TO DATE WE ARE STILL LOSING MONEY AND ARE STILL TRYING TO PROMOTE THE KOMETA.

6) PLS IN THE FUTURE BEFORE SENDING A TLX TO US, ADVISE FIRST MR. GRIGORIAN OF THE TRADE DEPT HERE.

7) A COPY OF THIS TLX IS BEING SENT TO MR. GRIGORIAN.

RGDS,

ECONOMIDES.

PLEASE PASS ON THIS TLX TO MR. GRIGORIAN, TRADE DEPT. THANKS.

3Φ9Φ VNTORG CY

3272 ECOGROUP CY".

Telexes 19, 20, and 21 read as follows:

Telex 19:

"RE: CHARTER COMETA-23

YOUR REMITTANCE OF EEEE OF RBL\$ 4.000/ RECEIVED 3.8.92 ONLY/COVERS CHARTER PERIOD UP TO AUGUST 18, 1982 INCLUDED. WE CONSIDER IT IS HIGH TIME TO SPECIFY FURTHER OPERATION OF COMETA-23 PARTICULARLY TAKING INTO CONSIDERATION YOUR REFUSAL TO MAKE ADVANCE PAYMENTS.

AUGUST 19, 1982 THE TERMS OF CONTRACT OF

MAY 5, 1982 ARE TO BE RESUMED, WE ESPECIALLY POINT OUT FOLLOWING POINTS:

1. NET CHARTER PRICE—RBL\$ 600 PER DAY,
- 5 2. IN ADDITION TO THE COST OF HIRE CHARTERERS SHALL PAY THE SUM OF RBL\$. 10.000 FOR DELIVERY/REDELIVERY VOYAGES:
- 10 3. PAYMENT OF HIRE IS TO BE MADE IN THE FOLLOWING PERIODS, FOR PERIOD FROM AUGUST 19—10 SEPTEMBER 30—NOT LATER THAN AUGUST 18, 1982, FOR OCTOBER—NOT LATER THAN SEPTEMBER 1, 1982 ETC.

AWAITING YOUR URGENT COMMENTS ON EACH POINT REGARDS TMPF-1209 MORPASFLO”.

15 Telex 20:

“REGRET BUT YOUR SUGGESTION IS UNACCEPTABLE TO US. WE INSIST ON ORIGINAL TERMS OF CONTRACT OTHERWISE WE WILL HAVE TO GIVE INSTRUCTIONS TO MASTER OF COMETA TO PROCEED TO HOME PORT AFTER END OF AGREED CHARTER PERIOD AUGUST 18, 24-00 REGARDS
20
TMPF-1235 MORPASFLOT”

Telex 21:

25 “RE: CHARTER COMETA—23
DUE TO FACT THAT WE FAILED TO REACH AGREEMENT WE INFORM THAT WE HAVE TO WITHDRAW COMETA-23 UPON EXPIRATION OF AGREED CHARTER PERIOD, I.E. FROM AUGUST
30 18, 1982.
AT 24-00 HRS.
MASTER HAS BEEN INFORMED ACCORDINGLY REGARDS
TMPF-1260 MORPASFLOT”

35 Then there followed telex 22 which reads:

“1) WE ACCEPT YR TLX 1209, AND WE WILL

CONTINUE OUR CONTRACT OF 5.5.1982. PLS GIVE ALL NECESSARY INSTRUCTIONS TO KOMETA 23 TO FULFIL HIS OBLIGATIONS AS PER CONTRACT OF 5.5.1982.

2) CONCERNING YR TLX 1260 WE WOULD POINT OUT THAT WE HAVE NOT FAILED TO REACH AN AGREEMENT. AS YOU KNOW, WE HAVE BEEN IN NEGOTIATIONS WITH SUDOIMPORT CONCERNING THE PURCHASE OF A SECOND HAND AND NEW KOMETA AND THE REPRESENTATIVE HAD GIVEN US INSTRUCTIONS TO AWAIT THE ANSWER OF SUDOIMPORT".

Telex 1209 to which reference is made in it is Telex No. 19 already set out.

Then there followed Telexes 23 and 24 which read as follows:

Telex 23:

"FURTHER TO MY TELEX NO. 355 OF TODAY'S DATE, I SHOULD LIKE TO HAVE YOUR AGREEMENT BY TELEX NOW IN ORDER TO Telerimit 18,000 ROUBLES ADVANCE HIRE FOR 30 DAYS AS PER OUR CONTRACT. BANKS CLOSE WITHIN TWO HOURS. PLEASE EXPEDITE REPLY. I AM WAITING WITH THE LINE OPEN. COPY TO MR. GRIGORIAN".

Telex 24:

"RE: CHARTER COMETA—23 YOUR TLX 355 OF TODAY WE CONFIRM OPERATION OF COMETA, W EEEE COMETA—23 THIRTY DAYS MORE COMMENCING AUGUST 19, 1983 00-00 HRS. PROVIDED YOU REMIT NOT LATER THAN 23.8.1982 SUM OF RBLS 28.000 I.E. 18.000 RBLS.

FOR 30 DAYS OF CHARTER PLUS 10.000 RBLS FOR DELIVERY/REDELIVERY VOYAGES. PLS CONFIRM BY RETURN REGARDS TMPF-1297 MORPASFLOT".

Finally on the same day the applicants sent Telex 25 which has already been set out as exhibit 3.

It has been argued on behalf of the applicants that the agreement concluded between the parties excluded a call at the ports of Lebanon, as the original agreement had been modified by telexes exchanged between the parties and which formed part
5 of the original agreement. That being so there was no cause of action as a result of which the warrant of arrest could be issued. Alternatively it was suggested that the parties were not ad idem and therefore there was no valid contract or the contract between the parties could be voided on that ground.

10 Having gone through the telexes exchanged between the parties, I have come to the conclusion that the new agreement concluded between the parties refer to the agreement of the 5th May with its amendments regarding the ports of calls, which existed on the 20th of August and which excluded the Lebanese
15 ports because of the prevailing situation there. That being so, there is no cause of action disclosed on the material before me now that the totality of it has been adduced and as there was no cause of action the warrant of arrest issued cannot be sustained and is hereby discharged.

20 The case of *St. Elefterio Schwarz & Co., (Grain), Ltd., v. St. Elefterio ex Arion (Owners)*, [1957] 2 All E.R. 374 relied upon by counsel for the respondents is distinguishable, as that was a case where the plaintiffs were entitled to bring it and to have it
25 tried and whether or not their claim turned out to be a good one they were entitled to assert that claim by proceeding in rem, whereas in the instant case there does not exist a contract between the parties which calls for a determination once in the present case there does not exist a contract valid for trips to
30 Lebanese ports in which case there would have been a triable issue as to its breach.

Having come to this conclusion I need not examine the further arguments advanced on behalf of the applicant, nor do I have to interpret Article 40 of the Consular Convention 1978 between
the Government of the Republic of Cyprus and the Government
35 of the Union of the Soviet Socialist Republics (Ratification) Law 1978, Law No. 49 of 1978, which provides that whenever the Courts or other competent authorities and the receiving State intend to take compulsory measures or to carry out any official investigation on a ship of the sending State, they must inform

about it the Consular officer. Such notification must be made in time so that the Consular officer will be able to attend. If the Consular officer did not attend the competent authorities of the receiving State should, on his application, furnish him with full information of what has happened.

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For all the above reasons the warrant of arrest is discharged with costs.

Warrant of arrest discharged.