

1980 February 21

[A. Loizou, J.]

PAOLO BONNICI AND CO. AND ANOTHER,
Plaintiffs,
v.
THE SHIP "KYARDLA",
Defendants.

(Admiralty Action No. 35/80).

5 *State immunity—Foreign sovereign state—Immunity from suit—Principles applicable—Admiralty—Action in rem—Ship owned by Shipping Company in U.S.S.R.—Undertaking to carry cargo from Denmark to Malta pursuant to a charter-party—Action in rem against ship by cargo owners in respect of damage to and/or short delivery of cargo—Transaction a commercial one and not a governmental one—No sovereign immunity can be claimed.*

10 *Admiralty—Jurisdiction—Action in rem against state-owned ordinary trading ship—And application for warrant of arrest of ship—Claim in respect of which arrest is sought having no substantial connection with territorial jurisdiction of the Court—Whether Court can assert jurisdiction.*

Admiralty—Action in rem—Arrest of ship—Claim for damages to and/or short delivery of cargo.

15 The plaintiffs having filed an action in rem against the defendant ship for the damage to and/or short delivery of goods during their carriage from Denmark to Malta, pursuant to a charter party relating to the said ship made between plaintiffs 1 and the Estonian Shipping Company of Tallin U.S.S.R., as owners of
20 the said vessel, have, further, applied for the issue of a warrant of arrest of the said ship.

25 The defendant ship was the one in connection with which the claim arose and it was contended by the plaintiffs that the above action could be brought against her under section 3(4)* of the Administration of Justice Act, 1956.

* Quoted at p. 152 *post*.

As from what appeared on the face of the proceedings and taking judicial notice of ownership in general within the state structure of the U.S.S.R. there might arise a question of state immunity, the Court invited Counsel to address it on this issue with particular regard to such immunity in respect of ships and at that trading ships. 5

Held, (1) (*on the question of state immunity*) that when the complaint against a vessel owned or controlled by a government or used by it or by third parties, arises from a commercial transaction and not a governmental act, no sovereign immunity can be successfully claimed in the case where an action in rem is brought against such a vessel; that in this case the transaction complained of appears to be one of a commercial and not governmental nature, in addition to the fact that the defendant ship is registered in the name of what appears to be an ordinary shipping company; and that, therefore, on the facts as at present before this Court, no question of state immunity arises. 10 15

(2) (*On the question whether the Court should assume jurisdiction in an action in rem against a state-owned ordinary trading ship where the claim, in respect of which the arrest is sought, has no substantial connection with the territorial jurisdiction of this Court*) that jurisdiction asserted by means of an arrest of a ship is not an exorbitant jurisdiction; that by allowing his ships to trade a foreign sovereign must be taken to have exposed his ships to the possibility of arrest; and that, accordingly, this Court can assert jurisdiction. 20 25

(3) (*On the merits of the application*) that on the material before this Court a warrant of arrest of the defendant ship "KYARDLA", now anchored at the Limassol port, should be issued and an order is made accordingly (*vide pp. 156-157 post*). 30

Application granted.

Cases referred to:

- Parlement Belge* [1927] L.R. 497;
The Porto Alexandre [1918-19] All E.R. (Rep.) 615;
The Philippine Admiral [1976] 1 All E.R. 78; 35
The Trendtex Trading Corporation Ltd., v. Central Bank of Nigeria [1977] 1 All E.R. 881;
I Congreso del Partido [1978] 1 All E.R. 1169;
Smith v. Leech Brain & Co. Ltd. [1961] 3 All E.R. 1159 at p. 40
 1162.

Application.

Application for the issue of a warrant of arrest of the defendant ship in an admiralty action for damages for breach of contract and/or breach of duty and/or negligence of the defendants, their servants or agents in respect of damage done to goods during the voyage and short delivery of goods.

E. Montanios with D. HadjiHambis, for the applicants-plaintiffs.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. The applicants/plaintiffs having filed this action in rem in the admiralty jurisdiction of this Court have applied for the issue of a warrant of arrest of the defendant ship.

"The claim of the applicants/plaintiffs against her is as follows:

The first plaintiffs as owners of goods and/or as holders and/or indorsees of the bill of lading of goods and the second plaintiffs as assignees of, and/or as entitled by subrogation to, all the rights and remedies of the owners of the goods shipped on board the Defendant vessel for carriage from NAKSKOV, Denmark to Malta claim against the Defendant ship:

(1) Damages for breach of contract and/or breach of duty and/or negligence of the Defendants their servants or agents in respect of damage done to the goods during the voyage and short delivery of the goods.

(2) Costs."

The facts relied upon appear in the affidavits filed in support of this application and I shall only refer to them briefly.

It is the case for the applicants/plaintiffs that pursuant to a charterparty relating to the defendant ship, dated the 24th February, 1978, and made between applicants/plaintiffs 1, and the Estonian Shipping Company of Tallin U.S.S.R., as owners of the said vessel, her master received at Nakskov, Denmark, goods for carriage to Malta and signed and issued bills of lading subject to the charterparty. When the goods were unloaded at their destination, it was found that there was wetting and loss

of contents of the bags and that 63 bags were short-delivered. The damage alleged to have been suffered thereby is stated to be C£14,236.—which is the equivalent in Cyprus money of the amount claimed in Maltese pounds by the plaintiffs.

It is further contended that the defendant ship is the ship against which the action is brought and is the one in connection with which the claim arose. The person who would be liable on the claim in an action in personam is the Estonian Shipping Company of Tallin U.S.S.R., who were, when the cause of action arose, the owners of the defendant ship and that now that this action is brought the defendant ship is beneficially owned as respects all the shares therein by them. In support of these assertions photocopy of the relevant page from the Lloyds Register on Ships for 1979–1980 has been produced, which contains an entry to that effect and that Tallin is the port of registration and its flag that of U.S.S.R.

On these alleged facts this action could be brought by plaintiffs under section 3(4) of the Administration of Justice Act, 1956, which so far as material reads as follows:—

“In the case of any ... claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of the action arose, the owner or charterer of, or in possession or in control of, the ship, the Admiralty jurisdiction of the High Court ... may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against—(a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or (b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid”.

As from what appeared on the face of the proceedings and taking judicial notice of the nature of ownership in general within the state structure of the U.S.S.R., there might arise a question of state immunity, I invited counsel to address me on this issue with particular regard to such immunity in respect of ships and at that trading ships. In that respect I was referred to a number of English cases, namely, the *Parlement Belge* [1927] L.R. 497; *The Porto Alexandre* [1918–19] All E.R. (Rep.) 615; the *Philippine Admiral* [1976] 1 All E.R. p. 78; the *Trendtex*

Trading Corporation Ltd. v. Central Bank of Nigeria [1977] 1 All E.R. 881; and to the latest one that of *I Congreso del Partido* [1978] 1 All E.R. 1169. I find, if I may say with respect very elaborate and apt the summing up of the legal position in England which is made by R. Goff, J., at pp. 1184–1185 in the *I Congreso del Partido* (*supra*) which reads as follows:—

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“The decision of the Court of Appeal in *The Porto Alexandre* has been subjected to a growing body of criticism; and this has culminated in the advice delivered by the Judicial Committee of the Privy Council in *The Philippine Admiral*. In that case the Judicial Committee, accepting the analysis of *The Parlement Belge* made by MacKenna J. in *Swiss Israel Trade Bank v. Government of Salta*, concluded that *The Parlement Belge* decided only (a) that a foreign sovereign cannot be sued in personam and (b) that an action in rem cannot be brought against his ship if that ship is being used substantially for public purposes. On this analysis, the Court of Appeal were not bound by *The Parlement Belge* to reach the conclusion which they reached in *The Porto Alexandre*. Furthermore the Judicial Committee decided that they would not follow the decision in *The Porto Alexandre*; in doing so, they emphasized that ‘the trend of opinion in the world outside the Commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transactions’.

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In the argument on the resumed hearing, the question canvassed before me was whether, after *The Philippine Admiral*, I was bound to follow *The Porto Alexandre*. However these proceedings have been fated to be overtaken, between argument and judgment, by decisions of the appellate courts; and after completion of the argument on the resumed hearing, the Court of Appeal gave judgment in *Trendtex Trading Corp'n Ltd. v. Central Bank of Nigeria*. The case was concerned with a claim under a letter of credit issued by the defendant bank. The bank claimed sovereign immunity, but their claim was rejected by the Court of Appeal. One of the two *rationes decidendi* of that case is that international law forms part of English law, by virtue of the doctrine of incorporation, that doctrine being preferred to the doctrine of transformation. Under the doctrine of

incorporation, 'the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament': per Lord Denning MR. Applying the doctrine of incorporation, both Lord Denning MR and Shaw LJ rejected the absolute doctrine of sovereign immunity and gave effect to the restricted doctrine, although the case involved an action in personam. I am bound by this decision; and I must in the present case likewise give effect to the rules of international law, irrespective of any previous English decision to the contrary. *The Philippine Admiral* provides me with the clearest guidance that, in an action in rem against an ordinary trading ship, the rules of international law require me to give effect to the restricted doctrine of sovereign immunity. I must therefore give effect to that doctrine in the present case, disregarding the decision of the Court of Appeal in *The Porto Alexandre*.

I should add that, before the decision in *Trendtex Trading Corpn Ltd. v. Central Bank of Nigeria* had been reported, I had already concluded that I was not bound to follow *The Porto Alexandre* and should not do so. I need not now set out my reasons in any detail".

In *The Philippine Admiral (supra)* on appeal from the judgment of the Full Court of the Supreme Court of Hong Kong it was held by the Privy Council that a foreign government was not entitled to claim sovereign immunity in cases where an action in rem was brought against a vessel owned by that government, if the vessel was being used either by the government itself or by a third party for trading purposes and not for the public service. In considering whether the ship was at the relevant time a mere trading vessel regard was to be had to the ship's past history which followed that the ship had always operated as an ordinary merchant ship.

I respectfully agree with the aforesaid approach on this aspect of state immunity. The development of the law along these lines has been both desirable and in many respects inevitable in view of the extent to which state owned or state controlled ships are engaged in purely trading activities and which naturally from time to time give rise to monetary claims against them. We, in Cyprus, have always looked to English case-law for guidance

in view of the origin of our legal system, the great similarities or even identity of most statutory provisions and the fact that the common law of England and the doctrines of equity are made part of the law of this country under section 29(1)(c) of the Courts of Justice Law, 1960 (Law No. 14/60) in all cases where no other provision to the contrary has been made by any law or the Constitution. More so, as in the exercise of the admiralty jurisdiction of this Court the law to be applied is under section 29(2)(a) of the aforesaid law, the law applied by the High Court of Justice in England in the exercise of its admiralty jurisdiction on the day preceding Independence Day. There is also an additional reason. As we are, generally speaking, a common law country, it is important that the development of the common law should be homogeneous in such countries. As stated by Lord Parker, C.J., in *Smith v. Leech Brain & Co. Ltd.* [1961] 3 All E.R., 1159, at p. 1162:

"It would be lamentable if a Court sitting here had to say that, while the common law in the Commonwealth and Scotland has been developed in a particular way, yet we in this country, and sitting in these Courts, are going to proceed in a different way".

No doubt when the complaint against a vessel owned or controlled by a government or used by it or by third parties, arises from a commercial transaction and not a governmental act, no sovereign immunity can be successfully claimed in the case where an action in rem is brought against such a vessel. The doctrine of sovereign immunity to such ordinary trading transactions cannot be held to be applicable.

In the present case the transaction complained of appears to be one of a commercial and not governmental nature, in addition to the fact that the defendant ship is registered in the name of what appears to be an ordinary shipping company. On the facts, therefore, as at present before me, I find that no question of state immunity arises.

I further considered whether this Court should assume jurisdiction by an action in rem against a state owned ordinary trading ship where a claim, in respect of which an arrest is sought, has no substantial connection with the territorial jurisdiction of this Court, as in the present case where the claim arises

from the damage to and or short delivery of goods carried from a Danish port to Malta on a contract having no connection with Cyprus. As pointed out in the *I Congreso del Partido* case (*supra*) pp. 1197-1198, jurisdiction asserted by means of an arrest of a ship is not an exorbitant jurisdiction. By allowing his ships to trade a foreign sovereign must be taken to have exposed his ships to the possibility of arrest. 5

I felt that in view of the great importance of the issues raised by this application I should have dealt at some length with them and give these more extensive reasons for my decision. 10

For all the above reasons I have come to the conclusion that on the material before me a warrant of arrest of the defendant ship "KYARDLA", now anchored at the Limassol port, should be issued and I make an order as follows:-

1. Let a warrant issued for the arrest of the ship "KYARDLA" now anchored at the Port of Limassol. 15
2. Notice of such arrest shall be served on the said ship.
3. The Marshal shall release the ship upon directions of the Registrar of this Court on the filing of a security bond by or on behalf of the ship in the sum of C£14,500.— (fourteen thousand five hundred Cyprus pounds) for the satisfaction of any order or judgment for the payment of money made against the ship or her owners in this action. 20
4. The applicants-plaintiffs shall comply with the following requirements: 25
 - (a) Lodge in Court the sum of C£200.—deposit for any expenses which may be incurred by the Marshal in connection with the custody of the ship while under arrest, subject to this sum being increased later on. 30
 - (b) To lodge in Court any further amount that the Registrar of this Court will ask the plaintiffs to do with regard to the expenses of the arrest and failing to comply within three days from such demand, the order of arrest to be discharged. 35
 - (c) File a security bond in the sum of C£3,000.—to be answerable in damages to the defendant ship and her

owners against whom the present order is made. This to be replaced by a Bank Guarantee and/or deposit of money in Court in the amount of C£15,000.—within 48 hours from now (the time being 11 a.m.). Failing to do so, this warrant of arrest will be automatically discharged.

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5. The Marshal is required to report to this Court by the latest at 9.00 a.m. on the 23rd February, 1980, with regard to the arrest of the ship and probable costs to be incurred in connection with such arrest.

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6. This case is fixed for the 23rd February, 1980, at 9.00 a.m. in case it is decided to move* the Court against the continuance in force of the order of arrest made to-day *ex parte*.

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7. Question of costs reserved.

Order accordingly.

* The Court was not moved on behalf of the defendant ship against the continuance in force of the order of arrest and the ship was bailed out by furnishing the proper guarantee.