

1989 February 4

(PAPADOPOULOS, J)

COLI MARITIME AGENCIES COMPANY LIMITED,

Plaintiffs,

v.

THE SHIP «EL SEXTO» NOW LYING AT THE PORT OF LIMASSOL,

Defendants.

(Admiralty Action No. 211/84).

Admiralty — Jurisdiction of the Supreme Court — It is that exercised by the Admiralty Division of the High Court of England on the day preceding Independence Day — The Courts of Justice Law, 1960 (Law 14/60), section 19(a) — The Law applicable is that which was applicable in England by the said Division on the said day (section 29(2))(a) of Law 14/60) — Therefore, the English Administration of Justice Act, 1956 is applicable in Cyprus — Claim by agent in respect of disbursements made on account of a ship (section (1)(p) of the said Act) — It is within the Admiralty Jurisdiction — But such jurisdiction is, in virtue of section 3, if the action is in rem, conditional upon proof of ownership of the ship — Burden of proving ownership rests on the plaintiffs. 5 10

Contract — Entire contract — What is an entire or indivisible contract — A passage from Halsbury's Laws of England, 3rd Edition, Vol. 8, p. 166, para. 184 cited with approval. 15

Agency — Shipping agency agreement, whereby the plaintiffs agreed to act as agents of the ship and supply her with materials — In the circumstances it must be classified as a divisible contract — Therefore, the agents could demand payment for materials supplied, notwithstanding that their obligations under the contract had not been completed. 20

Admiralty — Arrest of ship — Whether defendant entitled to damages for the detention, if the action fails or the order is discharged — In the absence of mala fides or gross negligence on the part of the plaintiff, no question of damages arises. 25

Admiralty — Arrest of ship — Damages for the detention — Assessment of (assuming that they are payable) — Duty of defendant to mitigate

his damage — Ship could have been released, if the defendant had put a security of £2,000 — Therefore, damages cannot exceed £2,000.

5 The principles expounded by the Court in assuming jurisdiction to deal with the plaintiffs' claim for disbursements incurred by them as agents of the ship, in giving judgment for the plaintiffs, notwithstanding that the action was brought at a time, when they were still the agents of the ship and had not performed in full their own obligation under the contract, and in dismissing: 10 the counterclaim for damages arising from the alleged wrongful detention of the ship, appear sufficiently in the hereinabove headnote.

15 *Judgment for the plaintiffs as per claim. Counterclaim dismissed. Costs against the defendants.*

Cases referred to:

- Kolokoudias and Others v. Vamavidou and Others* (1988) 1 C.L.R. 566;
- CY.T.A. v. The Ship Maria* (1983) 1 C.L.R. 825;
- 20 *Walter Turnbull and Others v. The owners of the Ship «STRATHNAVER», her cargo and freight* [1875] 1 App. Cas 58;
- The Evangelismos*, Swa. 378;
- The Peri*, 32 L.J. Adm. 46;
- The Keroula*, 11 P.D. 92;
- 25 *The Walter D. Wallet* [1893] P. 202;
- Poulson v. Village Belle*, 12 Times Law Reports, 630;
- Staikouras v. The Ship CHARALAMBOS* (Adm. Action 16/69, unreported);
- 30 *The owners of the Ship ZEUS v. The Cargo laden on the Ship ZEUS and Others* (1970) 1 C.L.R. 294;
- Anastassiou v. The Ship MAHEE* (1982) 1 C.L.R. 343.

Admiralty action.

Admiralty action for C£1,513.81 for various disbursements the applicants incurred as agents of the owners of the defendant ship.

St. McBride, for the plaintiffs.

M. Montanios, for the defendants.

Cur. adv. vult.

PAPADOPOULOS J. read the following judgment. This is an action by the plaintiffs against the defendant ship claiming the sum of CY£1,513.81 with interest, as well as the cost of the arrest and Marshal's expenses in maintaining the defendant ship in arrest and costs of the action.

It is the allegation of the plaintiffs that before the arrival of the defendant ship in Cyprus they were appointed as owners' agents, of the defendants, and in that capacity they incurred various disbursements and spent money at the request of the defendant ship. It is also the allegation of the plaintiffs that shortly before the arrival of the ship in Cyprus, they asked for the remittance of certain sums of money to cover anticipated expenses and disbursements which would be required during the stay of the ship in Cyprus, but no moneys were remitted. It is further their allegation that before the departure of the ship they pressed for the remittance of moneys but without avail. As a result of the non payment and the imminent departure of the ship from Cyprus, the plaintiffs filed an application for the arrest of the ship to secure their due. This application was filed on the 9th of June, 1984 and an order for her arrest was given by the Court on that same day.

The defendants dispute the claim of the plaintiffs mainly on two grounds: First, that the Court has no jurisdiction to hear this case and second, that the amounts due to the plaintiffs by the defendants were not due when the ship was arrested. It is the allegation of the defendants that the arrest of the ship on the 9th June, 1984 was unlawful and as a result of this unlawful arrest they suffered damage. The loss and damage by the defendants is, according to their allegation, due to loss of use and revenue and/or income at the rate of \$5,000 a day for 18 days, during which time the ship in question was unlawfully detained. By their counterclaim they claim the sum of \$90,000 for this loss.

As it has been decided in the case of *Ioannis Constantinides Kolokoudias & Others v. Thoulla Varnavidou & Others*, (1988) 1 C.L.R. 566 the Court before examining the merits of the case must first decide the question of jurisdiction. The Supreme Court of

Cyprus has exclusive original jurisdiction as a Court of Admiralty vested with and exercising the same powers and jurisdictions as those vested in/or exercised by the High Court of Justice in England in its Admiralty jurisdiction on the day immediately preceding the Independence Day, 16.8.1960, by virtue of the provisions of section 19(a) of the Courts of Justice Law 1960 (14/60) and the Administration of Justice (Miscellaneous Provisions) Law 1964 (33/64). Section 29(2)(a) of 14/60 refers to the Law to be applied by such Court and reads:

«It shall be the Law which was applied by the High Court of Justice in England in the exercise of its Admiralty Jurisdiction on the day preceding Independence Day as may be modified by any Law of the Republic».

The relevant English Act is the Administration of Justice Act 1956. According to section 1 of this Act, the High Court has jurisdiction to hear and determine any of the following questions or claims:

«(a)

(m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;

(p) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;»

One can easily conclude that at first glance the High Court has jurisdiction on admiralty cases if the claims fall within the provisions of (a) to (s) of section 1(1) of the Administration of Justice Act, 1956. However, section 3 of the same Law imposes certain limitations to the jurisdiction. Section 3 reads as follows:

«3. *Mode of exercise of Admiralty jurisdiction.*

(1) Subject to the provisions of the next following section, the Admiralty jurisdiction of the High Court, the Liverpool Court of Passage ... may in all cases be invoked by an action in personam.

(2) The Admiralty jurisdiction of the High Court may in the cases mentioned in paragraphs (a) to (c) and (s) of subsection (1) of section one of this Act be invoked by an action in rem against the ship or property in question.

(3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property of the amount

claimed, the Admiralty jurisdiction of the High Court, the Liverpool Court of Passage ... may be invoked by an action in rem against that ship, aircraft or property.

(4) In the case of any such claim as is mentioned in paragraphs (d) to (r) of subsection (1) of section one of this Act, being a 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 action arose, the owner or charterer of, on in possession or in control of, the ship, the Admiralty jurisdiction of the High Court and (where there is such jurisdiction) the Admiralty jurisdiction of the Liverpool Court of Passage 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».

It is evident that the Admiralty jurisdiction of the High Court is, in the cases mentioned in paragraphs (a) to (c) and (s) of subsection (1) of section one of this Act, automatic. Also automatic is in the cases where there is a maritime lien on the ship. But, in all other cases, which are provided in subsections (1)(1)(d) to (r) of the Act, are conditional upon proof of the ownership of the ship.

Before proceeding to examine if section 3(4) applies, that is, regarding the ownership of the ship, I propose to examine first if any of the provisions of section (1)(1)(a) to (s) apply. In particular, I will examine first the provision of (1)(1)(m) and (1)(1)(p) which appear at first glance to apply.

I have quoted the provisions of section (1)(1)(p) above, which reads:

«(p) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;»

I have examined the submissions of both counsel on the matter. I have no difficulty in deciding that section (1)(1)(p) applies in the present case. It is clear that the claim is in respect of disbursements made on account of a ship by the plaintiffs who were the authorised agents.

I would now proceed to examine if the provision of (1)(1)(m) also applies, that is, if this is a claim for goods and materials supplied to the ship in her operation or maintenance. It is not very clear from the evidence what exactly was supplied to the ship at the date prior to her arrest, or if any materials at all were supplied. One might suppose that only services were supplied to the ship, such as laundry services. On the disbursements account, exhibit 1, which was produced to the defendants on the 16th June, 1984, one can read that water was supplied to the ship. Mrs. Katsantoni, who is the owner of the company and the Manager, in her evidence before the Court stated that the water was supplied on the 7th of the month (7.6.84). We know that the ship was arrested on the 9th. Mrs. Katsantoni said in her evidence that the bill for the water was paid to the water suppliers on the 11th of June. In other words, the amount for the supply of water, which is something that can be classified as «material for the operation of the ship», was not known to the plaintiffs before the 11th June, 84. It follows that this amount could not be demanded for payment before the 11th June, 1984 and, consequently, one cannot say that this amount was due at the time of the filing of this action. The situation cannot be any more clarified by the affidavit of Eliana Constantinidou made, sworn and signed on the 9th June, 84. I speak, of course, of the affidavit in support of the ex parte application for the arrest of the ship. This affidavit is general. It does not specify either the amounts then due, for what purpose these amounts were spent and when. In conclusion, I am not satisfied that the provision of section (1)(1)(m) applies in the case under consideration.

I would not go any further to examine any other issues, such as what is necessary and what is not necessary for the operation and maintenance of the ship. Nor shall I try to define or limit what can be classified as «for the maintenance and operation of the ship» as a prerequisite provided by section (1)(1)(m) of the Act.

Having been satisfied that section (1)(1)(p) is applicable in the present case, I shall now proceed to consider if the provisions of section 3, paragraph (4) are satisfied, that is, the ownership of the ship.

A very important point raised by Mr. Montanios in the present case is that of ownership. According to the above section the ownership of the ship has to be established before the Admiralty

jurisdiction of the High Court is invoked for an action in rem against the ship. The leading Cyprus case on the matter is that of *C.Y.T.A. v. The Ship Maria* (1983) 1 C.L.R. 825. In that case it was clarified that,

«... that once the question of ownership of the ship was in issue the burden was upon the plaintiffs to prove that at the time of the institution of the action the ship was beneficially owned as respects all shares therein ...» 5

In the present case, not only the ownership of the ship was not in dispute at any stage, but there is also affirmative statement to the effect that the ownership is admitted by the persons appointing the plaintiffs as the agents of the ship. (See exhibit PL2) 10

In the light of the above findings I am satisfied that the Supreme Court of Cyprus has jurisdiction and has had jurisdiction to hear this action. 15

I shall now deal with the claim. The plaintiffs called one witness, Mrs. Despina Katsantoni, who is the owner of the company and the Manager. She described the way she supplied various items to the ship and how she asked for moneys which were not forthcoming and when the ship was about to sail after the completion of the discharge of the cargo, she applied to the Court for a warrant of arrest, which was eventually issued. It is her allegation that the expenses incurred for the defendant ship amounted to £1,513.81. She asked for the money from the Master and from the owners, but no one paid her. The amount is still due. As a result of the non payment and the delaying tactics of the defendants, she had to give up the agency of the ship on the 14th of June. 20 25

The disbursements account, exhibit 1, was prepared and placed before the defendants on the 16th of June, 1984. I must say that the disbursements account of the plaintiffs has not been seriously challenged by the defendants in the sense that the amounts stated in the disbursements account did not seem to the defendants to be unreasonable or unjustified. The only submission or exaggeration on the account was directed to the fees of the plaintiffs but no alternative suggestion was made nor did any evidence appear to contradict or suggest that the amount was exorbitant. I do not think 30 35

I should say more about the proof of the claim of the plaintiffs other than I am fully satisfied that the amount claimed has been proved.

5 I shall now proceed to examine if the plaintiffs are entitled to this amount, in view of the second basic objection of the defendants, namely, that the agency agreement was an indivisible contract and the plaintiffs could not claim under it any part payment before its conclusion. The defendants submitted that the plaintiffs are not
10 entitled because they had not completed their part of the obligation which was an entire obligation and not a divisible one, and when the plaintiffs filed their action, only part of the contract had been concluded. Secondly, according to the allegations of the defendants, the action was premature and it follows that when
15 they filed the application for the arrest of the ship on the 9th of June, 84, they had no such right. It is the allegation of the defendants that no one can claim under an entire contract before it is completed.

Mr. McBride for the other side, submitted that this is not an entire contract, it is a divisible contract and the plaintiffs were
20 entitled to claim any amount, something which in fact they did, from the defendants and only when they saw that the defendants were not ready and prepared to pay them they had to file this action to secure their due.

In Halsbury's Laws of England 3rd edition, Volume 8, p. 166,
25 paragraph 284, it is stated:

«284. Entire and divisible contracts. There is a distinction to be drawn between contracts which are divisible and those which are indivisible, and the distinction is of particular importance in regard to questions of illegality and questions of
30 payment. Contracts are indivisible where the consideration is one and entire, or where it is stated or can be gathered by necessary inference that no consideration is to pass from one party till the whole of the obligations of the other party have been completed; but where no such intention can be
35 gathered, and the contract resolves itself into a number of considerations for a number of acts, as in the case of periodical payments for a number of services which do not form one complete whole, the contract is divisible.

In an indivisible or entire contract the right to payment does

not arise until the contract has been completely performed; but if there has been substantial performance a claim will be allowed subject to any counterclaim or set-off for omissions or defects in execution.

If a contract is divisible, for example where a seller of goods agrees to deliver by instalments, the right to payment arises as each part of the contract is performed and where there has been partial performance a proportionate payment may be recovered.

A claim can also be made where it can be inferred from the circumstances that there is a fresh agreement between the parties that payment shall be made for work already done or goods already supplied under the original contracts, as for example where a buyer of goods accepts less than the stipulated quantity».

The contract under consideration is a shipping agency agreement whereby the plaintiffs agreed to be the agents of the ship and supply her with various items and materials.

I have no doubt that this is a contract where the intention of the parties is not expressed whether it is an entire contract or a divisible contract. But I feel sure that it resolves itself into a number of considerations for a number of acts for periodical payments for a number of services which do not form one complete contract. I am inclined to classify it as a divisible contract. In fact, one might expect that for each one and complete act that the agents did for the benefit of the plaintiffs, they would be entitled to immediate payment if demanded and such separate acts would form other contracts. In fact, such periodical payments have been demanded, contrary to what Mr. Montanios tried to submit in cross-examination. These demands are exhibited in a number of documents, which are before the Court. (See telexes, exhibit D6 and exhibit D7).

One other factor which I have to consider is the suggestion by Mr. Montanios that the plaintiffs would collect money from a third person and so the obligation of the defendants towards the plaintiffs would be discharged. I cannot accept this suggestion. The debt between the plaintiffs and the defendants was between these two parties only and no agreement, whatever, has been made with a third person for the reimbursement of any debt by the one to the other. I would think that the direction to the plaintiffs to

collect demurrages due to a third party for a debt by the defendants to the plaintiffs, was only a mode of delaying tactics in payment, but which, in any event, have never been agreed between the plaintiffs and the defendants.

5 In the light of my above findings, I am of the opinion that the plaintiffs are entitled to their claim.

I shall now proceed to examine the counterclaim. It has been established for over hundred years that there can be no claim for damages for detention of a ship under warrant of arrest. (See
10 *Walter Turnbull and Others v. The owners of the ship «STRATHNAVER», her Cargo and Freight* [1875] 1 App. Cas. 58).

This legal proposition has been stressed over and over again in a number of cases. (See *The Strathnaver* [1875] 1 App. Cas. 58 (where in an action in rem the plaintiff fails to establish his case, the
15 Court will not ordinarily order him to pay damages for the arrest of the ship proceeded against, but in case the arrest is an act of mala fides, or an act of such gross negligence as to lead the Court to imply malice, the Court will award damages to the defendant). See also *The Evangelismos*, Swa. 378; *The Peri*, 32 L.J. Adm. 46; *The
20 Keroula*, 11 P.D. 92; *The Walter D. Wallet*, [1893] P. 202; *Poulson v. Village Belle*, 12 Times Law Reports 630).

In examining the question of mala fides a little further, one can say that the Judge giving the order for the arrest is not obliged to do so. His power is discretionary under Order 50 of the Cyprus
25 Admiralty Jurisdiction Order, 1893. This was said in the case of *Staikouras v. The Ship 'CHARALAMBOS'*, Admiralty Action No. 16/69, unreported but cited by Triantafyllides ex President of this Court in the case of *The Owners of The Ship 'ZEUS' v. The Cargo laden on the Ship 'ZEUS' and Others* (1970) 1 C.L.R. p. 294,
30 where Josephides, J. said that «the power of ordering the arrest of the ship is discretionary». See, also, the case *Anastassiou v. The Ship 'MAHEE'*, (1982) 1 C.L.R. p. 343. So, the Judge who is ordering the arrest of the ship will have to rely squarely on the contents of the affidavit in support of such application, which is made usually
35 «ex parte». If the Judge in examining the affidavit in support is satisfied, then he will give the order for the arrest. But if the Judge makes a mistake, for instance, as the application of the Law, and in a given case the Judge considers that the claim of the plaintiff-

applicant falls within the provisions of the Administration of Justice Act 1956, section (1)(1)(m) and he grants the order for the arrest, whilst he has, under the Law, no jurisdiction to do so, in such a case, of course, there is no mala fides on behalf of the plaintiff. The only case where the plaintiffs will act in bad faith is when they include in their affidavit in support of the application for the arrest, matters which are untrue and are intended to mislead and deceive the Judge before whom such application appears. It is definitely not the case before me.

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In the present case it is, in my opinion, impossible to find signs of fraud or gross negligence on the part of the plaintiffs in arresting the ship, nor can one find mala fides or such gross negligence as to lead the Court to imply malice. This is a simple case where agents had a claim against a ship, they demanded payment, repeatedly, the ship was due to leave and the only way that seemed at the time to the plaintiffs open to enable them to collect their due, was with the assistance of the Court by arresting the ship. There might be other ways but certainly, in my opinion, the plaintiffs did not act in a way that would entitle the defendants to claim damages for wrongful arrest. If I am wrong in my judgment as to whether the defendants are entitled to claim damages by way of counterclaim, I shall proceed to examine the proposition on the assumption that they are entitled to damages and make an effort to assess them.

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There was an order for the arrest of the ship. The defendants came before the Court, through their advocates, on the 13th of June, 1984, on the 18th of June and on the 21st of June and the maximum amount that the defendants had to secure by way of a guarantee, so that the ship could be at liberty to sail, was £2,000. Yet, the defendants, although appeared in Court and were well aware of the fact that in the beginning the security sum was only £1,500, which was later increased to £2,000, they failed to make any arrangements to provide a guarantee or a security to that amount, so that the ship would sail.

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It is an established principle of Law on damages that the plaintiff has a duty to mitigate his losses. We have seen no signs whatsoever, of any attempt to this direction by the defendants. The suggestion by Mr. Montanios that the plaintiffs did not apply for the release of the ship, cannot be sustained as section 60 of the Cyprus Admiralty Jurisdiction Order, 1983 states clearly that any party may apply for the release and the only condition for the

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release of the ship by Stylianides, J., when giving the order, was that «the ship would be released on filing of a security bond by or on behalf of the ship in the sum of CY£1,500. (See Order of the 9th June, 1984, paragraph 3).

- 5 It follows that even if the arrest of the ship was in bad faith or gross negligence amounting to malice, I wonder how the plaintiffs could recover anything over the amount of £2,000 plus perhaps consequential interest and other charges for that amount.

- 10 Finally in my judgment, I find that the defendants are not entitled to any amount for their counterclaim.

In the result, I give judgment for the plaintiffs as per claim. Counterclaim dismissed.

Costs of claim and counterclaim against the defendants.

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*Judgment as per claim.
Counterclaim dismissed.
Costs against defendants.*