

IS COUNTER SECURITY A REQUIREMENT UNDER ENGLISH LAW?

THE “ALKYON”

[2018] EWCA Civ 2760

Brian Taylor
Legal Director Gateley Plc

At rest in Falmouth



Stallion Eight Shipping Co. S.A

v

Natwest Markets Plc

(formerly known as the Royal Bank of Scotland)

**“NO REQUIREMENT FOR A CROSS UNDERTAKING IN DAMAGES WHEN
ARRESTING A SHIP”**

THE “ALKYON”

FACTS

- RBS LENT \$15,700,000 - 30 January 2015
- SECURED OVER THE VESSEL
- EVENT OF DEFAULT
- 22 MARCH 2018 – BANK VALUED VESSEL AT \$15,250.00
- 112% - VTL
- DEMAND – ADDITIONAL SECURITY OF \$1,750,000
- OWNER DISPUTES VALUATION
- 25 APRIL – BANK’S NOTIFICATION OF DEFAULT
- 15 JUNE – NOTICE OF ACCELERATION
- 21 JUNE – NOTIFIED OWNERS
- 26 JUNE - ARRESTED VESSEL AT NEWCASTLE

THE DISPUTE

- OWNERS DENY \$13,496,922.33 OWING; BECAUSE
- NO EVENT OF DEFAULT; BECAUSE
- BANK'S VALUATION MATERIALLY "OFF MARKET"
- BANK DID NOT EXERCISE POWERS IN GOOD FAITH
- OWNERS POTENTIAL CATASTROPHIC LOSSES
- LOST HIRE OF \$11,350 PER DAY
- NO P&I CLUB LETTER FOR DISPUTE UNDER LOAN AGREEMENT

JURISDICTION

- SENIOR COUNTS ACT 1981 s20
- CIVIL PROCEDURE RULES PART 61

THE OWNERS APPLICATION

- CPR 61.8(4)(B) – REQUEST BY OWNER TO RELEASE VESSEL:
- UNLESS THE BANK PROVIDES A CROSS UNDERTAKING IN DAMAGES FOR LOSSES ARISING
- SIMILAR TO THAT ROUTINELY PROVIDED IN FREEZING INJUNCTION
- LOSSES OF \$3500 - \$4000 PER DAY

MR JUSTICE TEARE

- PROCEDURAL COMPLIANCE WITH CPR GIVES RISE TO RIGHT OR ARREST

NO DISCRETION

NO CROSS UNDERTAKING

THE “*EVANGELISMOS*” 1858

- AN ARRESTING PARTY WILL BE LIABLE FOR LOSS OR DAMAGE CAUSED BY WRONGFUL ARREST ONLY IF HE
 - ACTED IN BAD FAITH (“MALA FIDES”); OR
 - GROSS NEGLIGENCE IMPLYING MALICE (“CRASSA NEGLIGENTIA”)
- IF THESE ELEMENTS NOT PRESENT AND NO CLAIM - OWNER HAS NO REMEDY “THE KOMMUNAR (NO. 3)
- CROSS UNDERTAKING SOUGHT HERE WAS INTENDED TO APPLY IF BANK DID NOT SUCCEED.
- NO NEED TO SATISFY “KOMMUNAR” TEST

RELEASE

- POWER TO RELEASE IS DISCRETIONARY
- DISCRETION EXERCISED USUALLY IF A SECOND ARREST AMOUNTS TO ABUSE OF PROCESS.
- COURT MUST EXERCISE DISCRETION IN A PRINCIPLED MANNER
- NO AUTHORITY FOR PROVIDING SECURITY
- TO ORDER RELEASE IN ABSENCE OR AN UNDERTAKING WOULD “CUT ACROSS AND NEGATE” THE CLEAR AND WELL ESTABLISHED PRINCIPLE THAT A CLAIMANT MAY OBTAIN A WARRANT WITHOUT A CROSS UNDERTAKING.
- THIS WOULD AMOUNT TO A SUBSTANTIAL CHANGE.

RELEASE

- IT RAN COUNTER TO PRINCIPLE THAT A CLAIMANT CAN ARREST AS A RIGHT
- INCONSISTENT WITH COURT'S LONG STANDING PRACTICE
- CONTRARY TO ESTABLISHED LEGAL AUTHORITY
- THIS WOULD BE MORE THAN A "TWEAK" TO COURT PRACTICE

COURT OF APPEAL

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SIR TERENCE ETHELTON
LORD JUSTICE GROSS
LORD JUSTICE FLAUX

- DID TEARE J ERR IN HIS DISCRETION UNDER CPR 61.8(4)(b) BY REFUSING TO ORDER RELEASE OF THE VESSEL FROM ARREST UNLESS THE BANK PROVIDED A CROSS UNDERTAKING IN DAMAGES
- AKIN TO THAT PROVIDED IN APPLICATIONS FOR FREEZING INJUNCTIONS

ISSUES

- CAN ARREST AS A RIGHT – NO JUDICIAL DISCRETION
- COURT REVIEWED ACADEMIC AUTHORITY
- CAN BE HARSH ON OWNER
- WELL DEBATED IN LEGAL JOURNALS
- CMI, SINGAPORE AUTHORITY, AUSTRALIAN CANADIAN
- NO UNIFIED APPROACH EVEN IN COMMONWEALTH COUNTRIES
- “EVANGELISIMOS” TEST COULD NOT BE RELIED ON, ON ITS ORIGINAL RATIONALE – I.E ARREST IS NO LONGER NECESSARY TO ESTABLISHED JURISDICTION IN AN ACTION IN REM.

HELD

AGREED “EVANGELISMOS” TEST RATIONALE COULD NOT BE RELIED ON;

BUT THERE ARE FORMIDABLE CONSIDERATIONS TO SUPPORT THE STATUS QUO.

- THE RIGHT IS A UNIQUE FEATURE OF AN ACTION IN REM – CAUTION SHOULD BE EXERCISED BEFORE HINDERING THIS
- IF COURT WERE TO ORDER A CROSS UNDERTAKING HERE – SUCH A REQUIREMENT COULD BECOME ROUTINE – DETER PARTIES
- ARREST OR THREAT OF ARREST IS AN EFFECTIVE WAY OF OBTAINING SECURITY
- FEW ARRESTS ARE ACTUALLY NECESSARY
- UNLIKE A FREEZING INJUNCTION, AN ARREST IS SPECIFIC TO THE SHIP

HELD

- JUDGES OF “GREAT AUTHORITY” HAD NOT BEEN PERSUADED THAT FREEZING INJUNCTIONS AND SHIP ARRESTS ARE ANALOGOUS.
- WHILST IT IS NO LONGER REQUIRED TO START A CLAIM IN REM THE POSITION ON COUNTER SECURITY AND WRONGFUL ARREST HAS REMAINED CONSTANT SINCE 1883
- NO SIGNIFICANT PRESSURE FROM MARITIME INDUSTRY TO CHANGE THE LAW. NO INTERNATIONAL CONSENSUS. UK HAS NOT ADOPTED 1999 ARREST CONVENTION.
- COMMERCIAL AGREEMENTS ARE IN PLACE WITHOUT DISCONTENT, TO DEAL WITH ARRESTS

CONCLUSION

- COURT OF APPEAL ROBUSTLY ENDORSED TEARE J'S APPROACH.

EXCEPT

- IT DISAGREED THAT PARLIAMENT OR THE COURT RULES COMMITTEES WERE THE APPROPRIATE BODIES TO MAKE THIS CHANGE

WHY IS THIS A LIVE ISSUE?

JUDGMENT PARAGRAPH 95

“..... WE ONLY PART COMPANY FROM TEARE J INsofar AS HE CONSIDERED THAT THE INTERVENTION OF PARLIAMENT OR THE RULES COMMITTEE WAS REQUIRED TO ALTER THE PRESENT POSITION”

“.....INSTEAD IN THE PRESENT CONTEXT, PARTICULARLY BECAUSE IT CONCERNS THE DISCRETIONARY POWER OF THE COURT TO ORDER THE RELEASE OF A VESSEL FROM ARREST, WE ARE RESPECTFULLY MUCH ATTRACTED TO THE APPROACH ADOPTED BY THE SINGAPORE COURT OF APPEAL IN *THE “VASILY GOLOVNIN”*

“...AS ENVISAGED BY THAT APPROACH, IT IS OPEN TO THE COURT ITSELF TO RECONSIDER THE POSITION, BUT IT SHOULD ONLY DO SO IF PROPERLY INFORMED AS TO THE VIEWS OF THE MARITIME COMMUNITY, INCLUDING THE PRACTICAL RAMIFICATIONS OF ANY PROPOSED CHANGES AND THE PREFERRED ROUTE TO BE ADOPTED IF ANY SUCH CHANGES AND DECIDED UPON”

WHY IS THIS A LIVE ISSUE?

“..... IN SHORT, THE COURT WOULD WISH AND NEED TO HAVE A CLEAR UNDERSTANDING OF THE INDUSTRY IMPLICATIONS OF ANY PROPOSED CHANGE BEFORE ACCEDING TO IT. IT IS NECESSARY TO BE PRESCRIPTIVE AS TO HOW THE VIEWS OF THE MARITIME COMMUNITY SHOULD BE OBTAINED (WHETHER BY WAY OF CONSULTATION OR OTHERWISE) OR WHETHER A CONSENSUS WOULD NEED TO BE APPARENT – BUT, PLAINLY A CASE FOR CHANGE WOULD BE MUCH STRENGTHENED IF IT COULD RELY ON SIGNIFICANT SUPPORT FROM THE MARITIME COMMUNITY, EXTENDING MUCH WIDER THAN THE VIEWS OF (EVEN EMINENT) LEGAL COMMENTATORS.”

ARGUMENT FOR CHANGE

- NO DISCRETION. IT IS A RIGHT THE “VARNA” 1993.
- IT IS AN ADMINISTRATIVE PROCESS - IF IT COMPLIES WITH CPR 61 PD 5.2 ARREST WARRANT IS ISSUED
- NO NOTICE REQUIREMENTS.
- NO NEED TO SHOW A GOOD ARGUABLE CASE
- NO FULL AND FRANK DISCLOSURE
- NO NEED TO SHOW RISK OF DISSIPATION
- NO CROSS UNDERTAKING OR CROSS SECURITY
- NO ENTITLEMENT TO RELEASE IF CROSS UNDERTAKING NOT PROVIDED
- NO LIABILITY FOR WRONGFUL ARREST ABSENT “BAD FAITH” OR “CRASSA NEGLIGENTIA”

AGAINST

- MAINTAINS THE STATUS QUO
- IN REM ACTION UNIQUE – SHOULD NOT BE RESTRICTED
- ROUTINE CROSS UNDERTAKINGS - ADVERSE EFFECT
- TRADITION / JURISPRUDENCE
- NOT THE SAME AS A FREEZING INJUNCTION. IT DOES NOT FREEZE AN OWNERS BUSINESS.
- NO COMPARISON
- NO LONGER A REQUIREMENT TO ESTABLISH JURISDICTION. BUT NO SUCH RECONSIDERATION HAS TAKEN PLACE

AGAINST

- NO CONSENSUS FOR CHANGE
- THERE ARE ADEQUATE ARRANGEMENTS IN PLACE

CONCLUSION

- THE ISSUE IS OPEN FOR DEBATE
- INPUT FROM PRACTITIONERS
- NO APPETITIE IN THIS CASE

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of following bulkcarrier circulate for your information this
Admiralty Court Sale by Tender**



"ALKYON" IMO nr 9655224

Abt 36,056 dwt on 10.3m draft. Built 02/2015 Jinling Shipyard - Nanjing JS, China
Class Lloyds Register. Abt 180m LOA, 30m beam. 5ho/5ha Abt 45,654cbm bale. Cranes 4x31t
Wartsila 5RT-flex50D 8,633 BHP

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The vessel is lying near Falmouth, UK, and is to be sold by sealed tender, as is where is at the time of sale, on the Admiralty Marshal's Conditions of Sale.

Offers may be submitted in sealed envelopes marked 'ALKYON' or by email, and should be received by the exclusive brokers, CW Kellock & Co Ltd (address below), latest by 1200 hours midday on

Tuesday 18th June 2019

For permission to inspect and Conditions of Sale buyers should apply to:-

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