

**MED COAST SHIPPING LTD., PECOS NAVIGATION CO., LTD. AND
GEC ALSTHOM ENERGIE INC., Plaintiffs**

THE GOVERNMENT OF THE REPUBLIC OF CUBA, Defendants

Canada, Province of Quebec, District of Montreal, Superior Court,

April 6, 1993

Nos. 500-05-002389-938, 500-05-002390-936 and 500-05-002929-931

CHARTER—141. Demise, Scope and Intent, Conditional Sale—**PRACTICE**—1934. Attachment and Garnishment—**TITLE**—11. Registry—14. Conditional Sale. Seizure of a vessel before judgment was warranted in an action by creditors against the Republic of Cuba and the bareboat charterer of the vessel, which was registered in Cuba to a Spanish corporation as owner, where it appeared that the charterer was a corporation owned and controlled by Cuba as an agent to operate vessels, whose property was the property of Cuba and its debts the debts of Cuba; that the charter, of which 7 years had run, was for 12 years, after which all title would vest in the charterer; that Lloyd's Register had formerly shown Cuba, and latterly the charterer, as owner, and the charterer thus had such an equitable interest as to be a beneficial owner; and the evidence showed that defendants were unlikely to pay their debts absent security.

EVIDENCE—141. Classification Societies—**TITLE**—11. Registry.

Lloyd's Register is said to rely on its own research as to information published (a description is given of its nature and practices), and its designation of a vessel owner is given evidentiary weight.

Marc de Man (Gottlieb Pearson) for Plaintiffs Med Coast Shipping Ltd. and Pecos Navigation Co. Ltd.

Louis Linteau (Legault, Longtin & Assocs.) for Plaintiff Gec Alsthom Energie Inc.

Trevor Bishop (Brisset Bishop) for Defendant Empresa de Navegacion Mambisa

DANIEL H. TINGLEY, J.S.C.

Empresa de Navegacion Mambisa (Mambisa), a state corporation of the Government of the Republic of Cuba (Cuba), seeks to quash three seizures before judgment of the motor vessel *Bahia de la Habana* practised at Port Cartier, Québec in late February and early March, 1993 by three creditors of both Cuba and Mambisa, amongst others. These proceedings, brought pursuant to Article 738 of the Code of Civil Procedure, have been joined for hearing.

Mambisa claims that it is not the owner of the *Bahia de la Habana* and that it is not indebted to any of the seizing creditors. It adds that in any event these creditors have no reason to fear that the recovery

of their claims will be placed in jeopardy by the mere fact the *Bahia de la Habana* leaves Canadian waters.

The Parties and Their Claims

The seizures before judgment arise from three actions brought against Cuba and Mambisa, amongst others. The Plaintiffs and seizing creditors in these actions are Pecos Navigation Co. Ltd. (Pecos), a corporation having its head office in the city of Valetta, Malta, Med Coast Shipping Ltd. (Med Coast), a corporation having its registered office in the city of Monrovia, Liberia and Gec Alsthom Energie Inc. (Gec), a corporation having its head office at Laprairie, Québec.

Pecos claims 2,194,024\$ from Cuba, Mambisa and Empresa Cubana de Fletes (Empresa), another state corporation of Cuba, representing charter hire unpaid since July, 1992. Med Coast's action also claims unpaid charter hire from these same Defendants aggregating \$294,952.

Gec claims 395,958\$ from Cuba and Energoimport, yet another state corporation of Cuba, representing the unpaid balance due and interest on the purchase price of electrical parts and equipment sold and delivered to Energoimport during 1986 under various purchase contracts. These contracts were combined in a consolidation agreement between Gec and Energoimport made in late October, 1989 following a seizure before judgment of another alleged Cuban vessel in Canadian waters.

Issues

All three seizures have been taken pursuant to the provisions of Article 733 of the Code of Civil Procedure and the authorization of a judge of this Court. This article states:-

The plaintiff may, with the authorization of a judge, seize before judgment the property of the defendant, when there is reason to fear that without this remedy the recovery of his debt may be put in jeopardy.

Three issues or questions are raised by Mambisa's motions to quash the seizure before judgment. They are: (1) Have Plaintiffs seized property of Defendants, or any of them; (2) Are such Defendants liable for the debts claimed; and (3) Have Plaintiffs reason to fear that without these seizures the recovery of their claims may be put in jeopardy.

1. *Who Owns the Bahia de la Habana?*

Mambisa asserts that the registered owner of the *Bahia de la Habana* is Naviera Castellana S.A., a body politic incorporated under the laws of Spain and that it merely operates and manages the vessel. Plaintiffs all say that the vessel is owned by Cuba and that Mambisa is nothing more than a department or ministry or agent of Cuba established by the latter in 1961 to operate as a shipping company.

The *Bahia de la Habana* was constructed at Sestea, Bilbao, Spain by Astilleros Espanoles S.A. in 1985 and 1986 for Servicios Comerciales do Informatica y Maritimos S.A. (Sercom). A bareboat charter contract in respect of the vessel was entered into between Sercom, as shipowner, and Mambisa, as charterer on April 14, 1983. The period of the charter is twelve years which commenced on the date of delivery of the vessel to the charterer at shipbuilder's jetty in 1986 and ends in 1998. In 1984, Sercom assigned all its rights and obligations in respect of the *Bahia de la Habana* under the construction and charter contracts to Naviera Castellana.

The bareboat charter contract provides specifically in Part II that:-

MAINTENANCE AND OPERATION

- a) During the period of the Charter, the vessel shall be fully in the possession of, and at the disposal of the Charterers, and shall be totally under their control in all senses ...

and goes on to impose upon Mambisa a litany of obligations usually associated with an owner that one frequently sees imposed upon a lessee in Canadian finance or capital leases.

Mambisa is also a signatory to the mortgage contract under which the vessel is financed and it is obliged to comply "with all the mortgage contract's instructions or directives...".

Part III of the Charter contract, entitled "Hire/Purchase Contract" applies. It provides that:-

26. On completion of this Charter and provided that Charterers have complied with their obligations under §I and II, it is agreed that at the time of payment of the last month's hire, in accordance with Clause 10, the Charterers shall have acquired the Vessel and everything belonging to it, and that the vessel shall have been totally paid for. (See Clause "I").

Moreover, Mambisa has the right during the period of the charter to exercise a purchase option at a prescribed or predetermined formula price. In sum, Mambisa has, if not all then virtually all, of the obligations of an owner of a ship. It has possession and use of the ship, an eventual right to dispose of it and it has assumed all of the risks generally associated with an owner under the bareboat charter contract (*jus utendi, fruendi et abutendi*)¹.

According to the Ministry of the Interior of the Republic of Cuba, the *Bahia de la Habana* is registered as being under the Cuban flag, owned by Naviera Castellana and operated by Mambisa. This registration was first made on July 14, 1986 and remains unchanged, at least as at March 3, 1993.

Despite this registration, Lloyd's Register of Ships and List of Ship-owners from 1986/87 to 1987/88 shows the Government of the Republic of Cuba as the owner of the vessel. In 1988 a correction or amendment was made to show Mambisa as the owner. From 1988/89 to 1992/93, Mambisa is listed as the owner of the vessel.

Lloyd's Register is essentially a classification society. Its primary activity is the classification of ships worldwide. It sets standards of quality, safety and reliability for ships of all kinds and performs annual surveys (inspections) of all the ships it classifies. As a consequence of these activities, Lloyd's Register regularly publishes information worldwide concerning the ships it classifies and inspects.

Lloyd's Register was hired to classify the *Bahia de la Habana* and as well acts for the Republic of Cuba and Mambisa, at least for the carrying out of inspection services. For example, a request for inspection services was made to Lloyd's Register by the Captain of the *Bahia de la Habana* on February 24, 1993, while the vessel was at Port Cartier.

In a foreword to Lloyd's quarterly publication "World Shipowning Groups", it is said:-

Shipping is also the international industry par excellence. Though the subject of increasing regulation at operational levels, shipping still enjoys considerable freedom of movement. Ships change flags, shipowners move their operating base, subsidiaries are established, vessels change hands, restructurings are announced, there are bankruptcies and takeovers, buy-outs and sell-offs—and all on an increasingly international scale. Liberia may have the world's largest

1. Article 406 C.C.L.C.; *R.C. Compagnie Immobilière BCN Limite* (Supreme Court of Canada) (1979) D.T.C., 5068 at pages 5072 to 5074 inclusive.

fleet, but who owns these ships and where are they based? A ship may fly the Cyprus flag but be owned by Russians. A German owner may operate out of Monte Carlo, register his ship in Panama, bareboat it out to the Philippines, and delegate the operation to managers in Hong Kong. The variety is kaleidoscopic. It is also baffling, even to those within the industry.

As the charterer of the vessel under a bareboat charter party contract, which includes a hire/purchase clause, Mambisa enjoys all the incidents of ownership (possession, use and risk) and has all the obligations of an owner. Lloyd's Register listing is consistent with this finding. Lloyd's Register does not appear to be too concerned about what the registers of a country might have to say regarding "registered" ownership. It relies on its own research for the information it publishes.

Like Lloyd's Register and consistent with Article 2391 of our Civil Code and the criteria the Courts have used to determine ownership of a ship, whether under our civil law² or maritime law³, this Court concludes that the *Bahia de la Habana* is the property of the Defendant, Mambisa.

The following remarks of Mr. Justice Marceau of the Federal Court of Appeal in the case of *Mount Royal/Walsh Inc. v. The Ship Jensen Star et al.*⁴ have special application to this case, where the bareboat charter contract contains a hire/purchase clause:-

2. *Legoux et Frères Inc. v. MNR*, 1974, D.T.C., 6569; *Thibault v. Anger*, (1950), S.C., 343; *Chibougamou Lumber Ltee v. MNR*, (1973), D.T.C. 134; *Robert Bédard Auto Ltee v. MNR* (1985) D.T.C. 643; *R. v. Compagnie Immobilière BCN Ltee* (1979) D.T.C. 5068; *Olympia & York Developments Ltd. v. R.* (1980) D.T.C. 6184; *Victory Hotels v. MNR* (1962) D.T.C. 1378; *MNR v. Wardean Drilling Ltd.* (1969) D.T.C. 5194.

3. *The Canada Shipping Act*, R.S.C., C.S-9, section 2 "owner"; R. Collinvaux, *Carver's Carriage by Sea*, vol. 1, 13th ed., London, at pages 410 to 414; Sir Alan Abraham Mocatta *et al.*, *Scrutton on Charterparties and Bills of Lading*, 1984, 19th ed., London, at pages 45 to 51; Grant Gilmore *et al.*, *The Law of Admiralty*, 1975, 2nd ed., New York, especially at pages 239, 240 and 242 where the authors say: "The demise charter is thus not a documentary device for the conduct of the business of shipping; it is rather an instrument for vesting in one person most of the incidents of ownership in a capital asset of that business — the ship — while another retains the general ownership and the rights of reversion" and, quoting the Supreme Court of the United States in *Guzman v. Pickirilo*, 369 U.S. 698, 699, 1962 AMC 1142, 1143, "To create a demise the owner of the vessel must completely and exclusively relinquish 'possession, command, and navigation' thereof to the demisee" and "the most important consequences of the distinction between the demise and the other forms of charters flow from the fact that the demise charterer is looked on as the owner of the vessel *pro hac vice*".

4. (1990) 1993 AMC —, 1 F.C. 199 at pages 209 and 210.

The problem, however, is that I simply do not see how a court could suppose that Parliament may have meant to include a demise charterer in the expression "beneficial owner" as it appears in subsection 43(3) (of the Federal Court Act). Whatever be the meaning of the qualifying term "beneficial", the word owner can only normally be used in reference to title in the *res* itself, a title characterized essentially by the right to dispose of the *res*. The French corresponding word "*propriétaire*" is equally clear in that regard. These words are clearly inapt to describe the possession of a demise charterer. In my view, the expression "beneficial owner" was chosen to serve as an instruction, in a system of registration of ownership rights, to look beyond the register in searching for the relevant person. *But such search cannot go so far as to encompass a demise charterer who has no equitable or proprietary interest which could burden the title of the registered owner.* As I see it, the expression "beneficial owner" serves to include someone who stands behind the registered owner in situations where the latter functions merely as an intermediary, like a trustee, a legal representative or an agent. The French corresponding expression "*véritable propriétaire*" (as found in the 1985 revision, R.S.C., 1985, c. F-7) leaves no doubt to that effect.

In the cases before this Court, Mambisa has, by virtue of the hire/purchase clause, that "equitable or proprietary interest which could burden the title of the registered owner".

What then is the relationship between Mambisa and Cuba? The former was created as a consolidated state company by the latter in 1961 to take certain shipping assets seized from private corporations and banks following the Revolution in 1959 and, with these assets, to operate a shipping business for Cuba. By its charter, it has one director who is responsible for the "government and control" of the company. That person is appointed by Cuba and may be removed by it. Cuba may also remove the company's management. The company was created for an unspecified period but may be dissolved at any time by decree.

In substance, Mambisa is a creature of Cuba and subject to its complete control and governance. It is a state controlled agency, an arm of Cuba. From the evidence so far adduced in these cases, the Court concludes that the property of Mambisa is in reality the property of Cuba. Mambisa's mandate is to operate and administer the property

given or assigned to it by Cuba for the benefit of Cuba.⁵ Mambisa is an agent of Cuba for the purpose of carrying on a shipping business worldwide.⁶ Mambisa's debts and obligations are Cuba's debts and obligations. There is nothing in Mambisa's charter to prevent a creditor from reaching the true owner of Mambisa's property and undertaking.

Nor is there anything in Mambisa's charter (Decree no AEE-85) conferring upon it any limited liability. Possibly as an afterthought, the issue of limited liability of Mambisa was at least partially addressed in a resolution (no AEE-149) passed by Cuba on August 1, 1961 which provides, in part:-

FIRSTLY: The State Corporation known as Empresa Consolidada de Navegacion Mambisa created following Resolution No. AEE-85 passed by the undersigned on June 27, 1961, by virtue of its distinct legal entity, shall be solely accountable as regards its assets for any corporate obligations contracted here or abroad, and shall not be held liable for any obligations contracted by the Cuban State.

While this self-serving clause may provide Mambisa with immunity before a Cuban Court for "obligations contracted by the Cuban State", this Court believes it cannot be made to apply beyond the jurisdiction of the Cuban government. Nor can it be made to apply to prevent the execution upon Cuban property, held by Mambisa for Cuba, of any judgment of a Canadian Court ordering Cuba to pay a debt it owes.

2. Is Cuba Liable for the Debts Claimed?

Cuba is a named Defendant in all three cases. Medcoast, Pecos and Gec all seek condemnations against Cuba, amongst other Defendants. The debts that are claimed all arise from contractual obligations to pay assumed by State Corporations of Cuba, namely, Mambisa, Energoimport and Empresa. All three State Corporations are alleged to have breached payment obligations and to be agents or departments of Cuba.

5. *Op. cit.*, note 4 and the last sentence of the passage quoted.

6. *The "I Congreso del Partido"*, (H.L.), (1981) 2 Lloyd's Rep., Pt. 4, 367 at pages 379, 380 and 383 where it was held that "...the relationship between the Republic (of Cuba) and its creature Mambisa, in respect of all state-owned ships, was such that the Republic took legal possession of (one of such ships) through Mambisa as its agent". (per Lord Bridge of Harwick); *Charwell Shipping Limited v. Q.N.S. Paper Company Limited* (1989), 1989 AMC 2798, 2 S.C.R. 683, at pages 712 to 730 inclusive; Articles 1701 *et seq.* C.C.L.C.

Thus, at this stage of the proceedings, the Court concludes from the pleadings that Cuba is liable for the debts claimed.

3. Have Plaintiffs Reason to Fear That Without the Seizures Recovery of Their Claims May Be Put in Jeopardy?

Mambisa argues that no fraud has been alleged in support of any of the seizures and that without fraud there cannot be a seizure before judgment. But the failure to pay a debt when due may, in itself, constitute a fraud. In the absence of mitigating factors—and there appear to be none—a breach of a payment obligation is an act of insolvency or bankruptcy. The fraud lies in the failure or refusal to pay when due an acknowledged debt. Used in this sense, the term "fraud" may be defined as an:-

Act accomplished with the intention ... to avoid the application of a juridical rule or

Means used by one person to deceive another so as to incite the latter to enter into a juridical act or

Act of a debtor who, in bad faith and with deliberate intent, refuses to perform a contractual obligation⁷.

The allegations contained in Plaintiffs' declarations and in the affidavits supporting the seizures before judgment all allege a refusal by the contracting Defendants to pay acknowledged debts, whether in a consolidation agreement, irrevocable letter of credit or time charters. In the case of Energoimport, in particular, the refusal to pay an acknowledged debt may fairly be described as persistent and deliberate⁸. A partial payment of the debts due by Energoimport was only made after a similar type of seizure was practised on another Cuban vessel found in Canadian waters in 1989. The promises to pay made in the consolidation agreement have themselves all been breached.

The contracting Defendants in these proceedings have acknowledged that they are unable at this time to pay the claims of Plaintiffs. They are unable or unwilling to pay their debts generally as they come due. This, coupled with the persistent refusal by Energoimport to pay for equipment it acquired for Cuba in 1986 is sufficient, in the opinion of

7. *Private Law Dictionary and Bilingual Lexicons*, 1991, 2nd ed., Cowansville, at pages 170 and 171, "Fraud".

8. *Toledo Engine Rebuilders Inc. v. Lefort et al.* (1977) C.A. 558 at p. 559 (Mr. Justice Kaufman).

this Court, to permit the conclusion that Plaintiffs are fully justified in their fears that without the seizures, their claims will not be paid⁹.

Conclusions

In sum, Cuba is the real owner of the *Bahia de la Habana*, it is liable on the face of the proceedings for the debts claimed and Plaintiffs probably won't be paid their claims without the exercise of an extraordinary remedy such as a seizure before judgment.

For these reasons, the court dismisses the Motions to Quash of Defendant, Mambisa, in these three cases, with costs.

9. *Lanificio Blam c. Paris Sportswear Limited et al.* (1987) R.D.J. 156 at pages 164, 165 and 166; *Toledo Engine Rebuilders Inc. c. Lefort et al.*, *op. cit.*, note 8; *Comco Roots Compressor Canada Inc. c. Aerzener Maschinenfabrik GmbH et al.* (1989) R.D.J. 106; *N.E.C. Canada Inc. c. François Gagnon Musiqua Inc.* (1989) R.J.Q. 61; *Ellin c. Hellier et al.* (1991) R.D.J. 49 at p. 51; *Canadian Javelin Limited c. Atlas Steel Corporation et al.* (1973) C.S. 779 at pages 782 and 783.

ST. PAUL INSURANCE COMPANY OF ILLINOIS, *Plaintiff, Counter-Defendant*

v.

GREAT LAKES TURNINGS, LTD., NATIONAL MATERIAL TRADING, NATIONAL PINKERT STEEL, A DIVISION OF NATIONAL MATERIALS, LTD., AND TANK INDUSTRIES, INC., *Defendants, Counter-Plaintiffs*

GREAT LAKES TURNINGS, LTD., *Third-Party Plaintiff*

v.

ALEXANDER & ALEXANDER, INC., *Third-Party Defendant*

United States District Court, Northern District of Illinois, August 5, 1993
No. 91 C 2019

MARINE INSURANCE—113. *Good Faith*—1132. *Disclosures and Representations*. The doctrine of utmost good faith is established federal law, applicable to disclosures and representations in relation to a charterer's liability policy in transoceanic commerce. To decide otherwise "would require this court to ignore four hundred years of judicial decisions, the entire history of insurance, and the need for uniformity and coherence of a vital international industry." The interests of Ill. are minimal and would not support the application of its law under *Wilburn Boat*.

Joel S. Feldman (Sachoff & Weaver) for *Great Lakes Turnings, Ltd.*
Richard E. Repetto (Donovan, Parry, Walsh & Repetto) and Warren Marwedel (Keck, Mahin & Cate) for *St. Paul Ins. Co. of Ill.*

BRIAN BARNET DUFF, D.J.

This is a marine insurance case. Counts II and III of the Second Amended Complaint ask for rescission of an insurance policy under the doctrine of *uberrimae fidei* (utmost good faith and honesty) based on misrepresentations and nondisclosures which the Defendant assureds allegedly made to the Plaintiff insurer. The Defendants have filed a motion to dismiss Counts II and III of the Second Amended Complaint. They assert that *uberrimae fidei* is not applicable and that, accordingly, the Illinois doctrine of ordinary good faith in insurance contracts governs this dispute. Under this doctrine, the Defendants assert that the Plaintiff has not stated a claim for relief.¹ For the following reasons, the motion to dismiss is denied.

1. For the purposes of this opinion, all allegations and all reasonable inferences drawn therefrom are deemed true. See, generally, Charles Wright & Arthur Miller, 5A *Federal Practice and Procedure*: Civil 2d §1357 (2d ed. 1990).