RECENT DECISIONS OF THE FEDERAL COURT - IS THE COURT IN HARMONY WITH OTHER JURISDICTIONS?

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INTRODUCTION

This paper compares decisions in several areas of the Federal Court's maritime jurisdiction with developments and cases in other significant maritime jurisdictions. Because of the international nature of maritime law, it is appropriate that, where not otherwise affected by local Rules, decisions of the Federal Court should strive to attain international uniformity. As stated by Lord MacMillan in the context of the Hague Rules:[3]

> "As these Rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation."

Recognizing that the practices of maritime lawyers regularly cross international boundaries and that the commerce we represent is international, uniformity is a desirable goal.

VESSEL ARREST

The decision of the Federal Court of Appeal in *Armada Lines Limited v. Chaleur Fertilizers Limited*, [1995] 1 F.C. 3 was partially overturned by the Supreme Court of Canada in June of this year.[4]

The portion of the Court of Appeal decision that was reversed related to the awarding of damages by the Court of Appeal for wrongful arrest in the absence of a finding of malice or gross negligence. This decision of the Supreme Court of Canada brings Canadian law back in line with English cases which set out the circumstances in which damages for wrongful arrest can be awarded.[5]

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3 *Stage Line Limited v. Foscolo, Mango & Company Limited*, [1932] A.C. 328, at p. 350

4 [1997] S.C.J. No. 67

5 The *"Evangelismos"* (1858), 12 Moo. P.C. 352, 14 E.R. 945

The Supreme Court did not comment on certain other statements made by the Court of Appeal. In the decision of the Court of Appeal, the Court indicated that Rule 1003 establishes, "The onus is undoubtedly cast upon the plaintiff to show that the arrest requested is necessary for the protection of its rights." This argument seems to have survived the decision of the Supreme Court of Canada. In *Kiku Fisheries Limited v. Canadian North Pacific Ocean Corporation et al* [6] the foregoing comments of the Court of Appeal were submitted as part of an argument relating to the contents of an Affidavit to Lead Warrant. Prothonotary Hargrave commented (p. 16):

> "However, the comments of the Court of Appeal, or perhaps what were the views of the Court, are an interesting gloss on Rule 1003(2) dealing with the content of the Affidavit to Lead Warrant. The Court of Appeal recognized that the Rule sets out the criteria necessary in order to obtain an arrest warrant. The Court also considered the somewhat more onerous requirements for obtaining a Mareva injunction, including full and frank disclosure of all material matters within the plaintiff's knowledge and to providing full particulars of the claim, including fairly stating the points made against the plaintiff by the defendant. Now this is quite laudable, but it is not required on the plain wording of Rule 1003(2)..."

Indeed, there is nothing in the Rule which requires the party seeking an affidavit to demonstrate that the arrest "is necessary for the protection of its rights."

The English Rule (0.75, p. R5) is in most respects identical to Rule 1003(2). It has never been suggested that the English rule requires an applicant to establish the necessity of the arrest for the protection of its rights. As pointed out by Prothonotary Hargrave in the *Kiku* case, the extent of the obligation is to disclose material facts and to immediately correct misstatements of fact.

These comments of the Court of Appeal in *Armada* have also recently surfaced in *Amincan Navigation Inc. v. Densan Shipping Company Inc. and the Owners and all Others Interested in the Vessel "NECAT A".*[7] In that decision, Lutfy, J. was sitting on Appeal from a decision of the

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6 Decision of Prothonotary Hargrave, September 15, 1997

7 Decision of Lutfy, J. October 21, 1997

prothonotary who had reduced bail. The Judge seems to accept the correctness of the comments of the Court of Appeal in *Armada*. He says:

> "The plaintiff must show that '... the arrest requested is necessary for the protection of its rights' and '... that the arrest was lawfully carried out.'"

If the Federal Court embraces the comments of the Court of Appeal requiring that the plaintiff must show that the arrest is necessary for the protection of its rights, it will be out of step with jurisprudence in other jurisdictions.

SISTERSHIP ARREST

The right to arrest "sisterships" is conferred by s. 43(8) of the *Federal Court Act*:

> The jurisdiction conferred on the Court by Section 22 may be exercised *in rem* against any ship that, at the time the action is brought, is beneficially owned by the person who is the owner of the ship that is the subject of the action."

In *Hollandsche Aannaming Maatschappij v. The Owners and all Others Interested in the Ship "RYAN LEET" and Secunda Marine Services Ltd.*[8], Rothstein, J. was asked to interpret the meaning of the phrase "owner of the ship that is the subject of the action." Rothstein, J. decided that the phrase "owner of the ship" must mean the registered owner. Rothstein, J. also commented on the intent of s. 43(8) at p. 6 of the decision:

> "Section 43(8) was enacted to enable plaintiffs to have sisterships arrested as security for a claim. This is indeed an extraordinary remedy. However the basis of the extended remedy is potential liability by the registered owner of the ship which is the subject of the action. To interpret the term 'owner' more broadly would be to impute to parliament an intent to 'pierce the corporate veil' in respect of the ownership of

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8 Decision of Rothstein, J. August 19, 1997

> vessels incurring potential liability. I would think that if such a radical departure from ordinary principles of corporate law were intended by parliament with respect to an already extraordinary remedy provided in subsection 43(8), the intention would have been explicitly stated."

The only exception contemplated by Rothstein, J. would be if the separate corporate ownership was seen to be "a fraud or a sham."

This approach to the scope of the sistership provisions is consistent with English authority, most notably the *"EVPO AGNIC"*.[9]

Much of the English jurisprudence was reviewed by Prothonotary Hargrave in *Ssanjyong Australia Pty. Limited et al v. The Ship "LOOIERSGARCHT"*.[10] Having considered this jurisprudence, Prothonotary Hargrave commented (at p. 270):

> "To come within the Canadian sistership provisions there must be common complete ownership of both vessels by the same owner or owners, for that is the plain and ordinary meaning of our legislation."

Both the *Ssanjyong* and *Secunda* decisions are consistent with the approach adopted in England recognizing that the wording of the sistership sections differs somewhat between Canada and England.

EXTENSION OF SUIT TIME AND CHOICE OF FORUM CLAUSE

In *Sydmar M.V. v. Fednav International Limited* [11], the Federal Court of Appeal decided that a time extension granted in a case governed by the Hague-Visby Rules was valid but that a

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9 [1988] Lloyds 411

10 (1995) 85 F.T.R. 265

11 Federal Court of Appeal February 25, 1997

choice of forum clause included as part of the time extension was invalid. Leave to appeal to the Supreme Court of Canada was dismissed.

The case arose in circumstances where shippers, having shipped goods to the United States, sought extensions of suit time which included a provision that any actions were to be filed in Detroit. Bills of lading required litigation in Canada.

It was agreed that the Hague-Visby Rules governed the carriage. Article III Rules 6 and 8 were relevant. The one-year limitation on suit time contained in Rule 6 provides that, "This period may, however, be extended if the parties so agree after the cause of action has arisen." Rule 8 provides:

> "Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article are less than such liability otherwise and as provided in these Rules, shall be null and void and of no effect." (emphasis added)

It was agreed that if the claims were to proceed in the United States the liability of the carrier would be less than if the actions were maintained in Canada.

Marceau, J. for the Court of Appeal found that the requirement to sue in Detroit was void as violating Rule 8. The time extension itself was saved by the provision in Rule 6 that the time for suit may be extended.

In order to properly appreciate the rationale for Rule 8 in particular, one must appreciate the history of the Hague Rules, of which the Hague-Visby Rules are the successor. As

noted in Scrutton on Charterparties[12] the common law had permitted shipowners to modify their *prima facie* liabilities as much as they desired. While this was not particularly troublesome with respect to charterparties, it had more serious repercussions with bills of lading. Scrutton comments:

> "Not only were they (bills of lading) contracts of carriage but they were also documents of title, which by virtue of mercantile custom and the *Bills of Lading Act 1855*, passed freely from hand to hand as part of the currency of trade conferring on their holder both rights and liabilities. Thus consignees, bankers and others who had not been parties to the original contract and had no effective control over its terms, became interested in the bill of lading without having had any real opportunity of examining its terms or assessing the value of the security it afforded."

Thus the provision in Rule 8 which renders void any agreement between a shipper and a carrier to lessen liability in a contract of carriage served to benefit potential consignees or others who may become entitled to sue as title holder but who would have had no input into the original contract of carriage.

The rationale for Rule 8 simply does not exist once the carriage is complete and the persons entitled to sue on the bill of lading are established. At that point, variations which they may wish to make by agreement with the carrier cannot have any impact on the contract of carriage which has already been completed.

It is clear from the decision of the Court of Appeal that the Court considers the time extension and forum clause to be part of the contract of carriage:

> "In my view, the right of action for damage to its goods that a shipper may have against a carrier is embodied into the contract of carriage itself and its eventual exercise remains a direct effect of the contract - its object being enforcement through the shippers' equivalent indemnity in damages of the contractual obligations assumed by the carrier. It is, in a sense, a continuation of the contract. On the other hand, the suit time limitation of one year is imposed by the Rules (Article III, Rule 6). It is binding on the parties and, if it can be circumvented, it is only because the same provision that fixes

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12 20th edition, 1996 at p. 404

> the term authorizes the parties to extend it. It seems to me that the very extension of time is thereby made part of the Rules applicable to the contract as an amendment to it and, therefore, becoming retroactively part of the contract itself."

It has been accepted for many years in most Maritime jurisdictions that the one year time for suit provision of the Hague Rules could be extended by agreement between the parties. The Hague Rules suit time clause did not contain the proviso for an extension found in the Hague-Visby Rules. Nevertheless, it was commonly accepted that extensions were valid in *United Fruit Company v. J. A. Folger & Company*[13]. Wisdom, J. stated matter of factly (at p. 2226):

> "We do not question the principle that the statutory period for bringing suit may be waived."

To similar effect is the decision of the United States District Court for the Eastern District of Louisiana in *Bunge Edible Oil Corporation v. M/V TORM RASK*[14].

In Scrutton, the author's comment on the effect of the clause in Article III, Rule 6 of the Hague-Visby Rules permitting extension ("this period may, however, be extended if the parties so agree after the cause of action has arisen"). The author's comment (at p. 441):

> "The last sentence of the third paragraph does not affect the position under English law. It cannot in our view be said to qualify the parties' right to extend the time limit by agreement **before** the cause of action has arisen."

It is not uncommon for suit extension agreements to include forum clauses and/or agreements that the amount of the claim as eventually presented will not exceed certain amounts. The decision of the Federal Court of Appeal has rendered such agreements suspect. This will have an unsettling effect on the practices of insurers who regularly issue extensions.

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13 [1959] A.M.C. 2224 (Fifth Circuit)

14 [1991] A.M.C. 1102