

Shipping & International Trade

Correcting the Course – Can a Ship Arrest be Maintained on Subsequently Amended Pleadings?

Introduction

If the premise upon which an arrest was obtained turns out to be factually unsustainable, can the arrest nonetheless be maintained on a different factual basis by amending the pleadings? That was the question in *The Jeil Crystal* [2021] SGHC 292 where the Singapore High Court sustained an arrest on the basis that the facts underpinning the amended pleadings fell within the admiralty jurisdiction of the Court and existed when the writ *in rem* was issued.

Material Facts

The claimant bank ("**Bank**") had provided trade financing to its customer ("**GP**") for the purchase of a cargo of oil which was shipped on the vessel *Jeil Crystal* (the "**Vessel**"). The Bank obtained possession of the full set of the original bills of lading made out to its order on 13 June 2020 as part of the documents submitted for payment under the letter of credit it had issued. The Bank informed GP of the presentation and, on or after 24 June 2020, on GP's request, duly endorsed the original bills and delivered them to GP to enable GP to deliver the cargo to its customer.

In the meantime, GP had requested the defendant shipowner to switch the bills of lading, which the shipowner agreed to. The original bills of lading were eventually surrendered to the shipowner on 29 June 2020 whereupon the shipowner cancelled them and issued a new set of bills (the "**Switch Bills**") where GP was reflected as shipper and another bank was reflected as the consignee.

In the meantime, GP furnished the shipowner a letter of indemnity on 27 June 2020 for the discharge of the cargo without production of the bills of lading and the cargo was discharged on 30 June 2020 against that indemnity. The switch bills were subsequently surrendered to the shipowner on 22 July 2020, following which both the original bills of lading and the Switch Bills were in the shipowner's custody and possession. Ordinarily, the delivery of the cargo, and the receipt of the original bills of lading and the Switch Bills, should have neatly closed the transaction evidenced by bills of lading. Not so for the shipowner in this case.

On 10 October 2020 the Bank issued an admiralty *in rem* writ against the *Vessel* based on the Bank being the lawful holder of the original bills of lading and the shipowner having delivered the cargo without

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their production (i.e. a classic misdelivery claim) and applied for a warrant of arrest on this basis. The affidavit leading the application for the arrest warrant stated that the Bank had custody and possession of the original bills of lading. The application for the warrant was granted on this basis and the Vessel was arrested the following day; she was eventually released from arrest after substitute security was furnished.

The Bank then filed its Statement of Claim wherein it reiterated that it was the holder of the original bills of lading and that the shipowner was liable for misdelivery of the cargo shipped thereunder. At this stage, the shipowner sought inspection of the original bills of lading which the Bank claimed to have custody and possession of but to no avail. Eventually the shipowner filed its Defence & Counterclaim stating the facts relating to the return of the original bills of lading and the issuance of the Switch Bills and counterclaimed for wrongful arrest.

After sighting the Defence & Counterclaim, and realizing that it did not have possession of the original bills, the Bank applied to amend its Statement of Claim from one of misdelivery to a claim for breach of contract and/or negligence on the basis that the shipowner had wrongfully switched the bills of lading without the Bank's knowledge and that it was wrongfully removed as a party to the contract of carriage which resulted in the Bank's interests in the cargo being adversely affected. The shipowner cross-applied to set aside the writ and warrant of arrest, or alternatively to strike out the action, based on material non-disclosure and that there was no valid cause of action when the writ and the arrest warrant were issued.

Decision of the Singapore High Court

Material non-disclosure

On material non-disclosure, the Court agreed that the Bank's failure to disclose that it had indorsed and delivered the bills to GP to facilitate delivery of the cargo was material. On the Bank's argument that it had innocently tripped-up on the status of the original bills, the Court emphasized that having made averments that it was the holder of the bills, it was incumbent on the Bank to ensure that this was true. The Court however declined to set-aside the arrest for material non-disclosure because it did not appear, at this stage, that the non-disclosure was calculated to mislead the Court and deferred the determination of this issue to the trial.

Upholding the arrest

As to whether the amendments to the Statement of Claim ought to be allowed to save the arrest, the Court allowed that application and declined to set aside the arrest, providing the following reasons:

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- (a) The original claim as set out in the writ and endorsement to the warrant of arrest, albeit premised on an erroneous factual basis, fell within High Court (Admiralty Jurisdiction) Act ("**HCAJA**") - specifically, section 3(1)(h) of the HCAJA, which covers "*any claim arising out of any agreement relating to the carriage of goods in a ship*". The amended claim, although framed in tort (whereas the original claim was centred in contract), also fell within section 3(1)(h) for it is well established that (i) the section is wide enough to encompass claims in tort and (ii) the 'agreement' referenced therein need not be between the claimant and the shipowner.
- (b) Under the "relation back" rule, the amended claim (if allowed, as it eventually was) takes effect from the date of the original document which it amends. As such, the amendment when allowed would be read as if it was pleaded from the beginning. Had the amended claim been pleaded and an application for a warrant of arrest made on this basis, all the requirements for the valid invocation of the Court's admiralty jurisdiction would have been satisfied and the Court would have allowed the warrant of arrest to be issued.
- (c) On the facts here, the switching of the original bills and the delivery of the cargo to third parties without the Bank's knowledge occurred before the writ was filed; in other words, the cause of action already existed at the time of the issuance of the writ. The amendments proposed by the Bank did not introduce a cause of action or facts that did not exist as at the date of the writ or the warrant of arrest.
- (d) The argument that the amendment only sought to amend the Statement of Claim and not the writ or the warrant of arrest was rejected. The amendment to the Statement of Claim also cures any defect in the writ and the warrant of arrest as of the date of the original filing of each of the documents because:
 - i. It is trite that any amendment to a Statement of Claim has the effect of curing any defect in the writ. Otherwise, the Court's order granting leave to amend the Statement of Claim would be rendered nugatory should the writ still be considered defective just because no leave was sought to amend the writ separately. This reasoning ought equally to apply to the warrant of arrest.
 - ii. The Court is also empowered under Order 2 Rule 1 of the Rules of Court to cure any irregularities in, and under Order 20 Rule 8 of the Rules of Court to amend, "any document". The Court would have allowed the defect in the writ and the warrant of arrest to be cured pursuant to these provisions here.
 - iii. The "relation back" rule (referenced above) would have supported sustaining the warrant of arrest on the amended basis.

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Finally, the Court also dealt with the argument that sustaining the arrest on the amended pleadings would set an unwelcome precedent and encourage imprudent and trivial applications for an arrest warrant. Whilst accepting that the Court must be vigilant against abuse of the arrest procedure in cases of material non-disclosure, the Court emphasized that it ultimately retains overriding discretion whether to set aside a warrant of arrest and in exercising this discretion, the Court often applies the principle of proportionality in assessing the sin of omission against the impact of the default. The Court was not, on the facts here, satisfied (at this stage) that there was an abuse of the arrest procedure.

As such, the Court allowed the application to amend the Statement of Claim and maintained the arrest based on the amended claim.

Appeal

The shipowner sought leave from the Appellate Division to appeal the High Court's decision refusing to set aside the warrant of arrest (but not the order granting leave to amend the Statement of Claim). The Appellate Division granted the shipowner leave to appeal on the following issue which it felt raised a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage:

"In an application to set aside a warrant of arrest of a ship, can the warrant of arrest be upheld on the basis of an amended claim and/or cause of action which was not originally pleaded by the arresting party at the time of the application for and the issue of the warrant of arrest?"

Conclusion

Ship arrest is a vital tool for claimants in maritime actions, allowing for a measure of security in what could be extremely time-sensitive proceedings. However, as demonstrated in this case, complications may arise when there are factual inaccuracies in the initial pleadings. Such errors may erode the very basis of the arrest.

The question considered by the Court is thus an important one with potentially far-reaching implications. Will the claimant be allowed to amend the pleadings so as to justify and maintain the arrest?

The position adopted by the Court in this decision appears to be practical and measured. It allows the amendment of pleadings and recognises the potentially disproportionate and unfair consequences of setting aside an arrest where a valid basis to arrest existed at the time of the writ and warrant of arrest. To balance this, it sets out certain safeguards, such as the amended claim falling within the admiralty jurisdiction of the Court and the factual basis of the arrest being in existence at the relevant time.

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In any event, the question appears to be headed to an appeal. We will keep you updated on any further developments in this area.

For further queries, please feel free to contact our team below.

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