
CAPECO MARITIME & 3 ORS v PEMILIK KAPAL "BLUEBELL SUSANNAH"
HIGH COURT, PULAU PINANG
ABDUL HAMID MOHAMED J
ADMIRALTI IN REM NO 27-1 OF 1995
14 MAY 1996
[1996] 1 LNS 273

Case(s) referred to:

1 The "Avro Venture" [1987] 1 MLJ 16 (High Court Singapore); [1988] 1 MLJ 147 (Court of Appeal Singapore)

2 Middle East Tankers and Freighters v. The Owner Of The Vessel And Other Interested Party In The Vessel of M.V. "IRA" Registered At Monrovia, Liberia [1996] 1 AMR 353 (High Court, Johor Bahru) [9]

3 E.G. Tan & Co. (Pte) (in liquidation) v. Tan Chong San [1993] 1 MLJ 256

4 Tengku Ali ibni Almarhum Sultan Ismail v. Kerajaan Negeri Trengganu Darul Iman [1994] 2 MLJ 83

5 Ponnusamy v. Nathu Ram [1959] 228

6 The "Evangelismas" [1858] XII MVO PC 352

7 The "Strathnaver" [1975] 12 MOO P.C. 378

8 Yamaha Hotel Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. [1953] 1 MLJ 213

Counsel:

Gerald Peter Samuel (Presgrave & Matthews) for the defendant.

Raj Sativale (Sativale & Associates) for the plaintiff.

ALASAN PENGHAKIMAN

(Lampiran 84)

This is an application by the Defendant to amend its statement of defence to include a counter-claim. Since it is not very lengthy, for easy reference I reproduce it here:

"COUNTERCLAIM

19. The Defendant repeats paragraphs 1 to 18 of the Statement of Defence.

20. The Defendant avers that the Plaintiffs have wrongfully arrested the vessel "Bluebell Susannah" particulars of which are as follows: -

Particulars

(a) Arresting the vessel "Bluebell Susannah" knowing that the Plaintiffs' purported claim was not within the Admiralty jurisdiction of the High Court as provided by the Courts of Judicature Act 1966 and the U.K. Supreme Court Act 1981. **[2]**

(b) Arresting the vessel "Bluebell Susannah" knowing that the Plaintiffs' purported claims were not within the class of claims which permitted arrest as provided by the Courts of Judicature Act 1966 and the U.K. Supreme Court 1981.

21. Further and in the alternative that the Plaintiffs' acts in arresting the vessel were malicious as the Plaintiffs knew they had no right to do so and proceeded to arrest the said vessel.

22. By reason of the matters aforesaid the Defendant has suffered loss and damage and prays:-

(a) damages for wrongful arrest'

(b) general damages;

(c) costs;

(d) such further and other relief as the Honourable Court seems fit."

The action was filed on 27th April 1995. It is an admiralty action in rem. The statement of claim was filed on 29th May 1995. It is a claim for money, damages, interest and costs. Appearance was filed on 19th July 1995. Even though many applications and orders have been made, the suit itself has not been set down for trial. This application by the Defendant to amend the statement of defence was filed on 4th January 1996. As I have said above, the purpose is to include a counter-claim.

The application was strenuously opposed by learned counsel for the Plaintiffs.

Challenge to Jurisdiction

First, it was argued that as the Defendant had entered **[3]** an unconditional appearance, the counter-claim could not be added because it was challenging the jurisdiction of the court. In other words, it was argued that the Defendant could only challenge the jurisdiction of the court if it had entered a conditional appearance. For that proposition, learned counsel for the

Plaintiff refered me to *The "Avro Venture"*[1] and *Middle East Tankers and Freighters v. The Owner Of The Vessel And Other Interested Party In The Vessel of M.V. "IRA" Registered At Monrovia, Liberia*[2] which I shall refer to as *Middle East Tankers*[2].

With respect, I do not think that those judgments are authorities for what they are said to be. *The "Avro Venture"* was an application by the defendants to strike out and/or dismiss the action on the ground that the admiralty jurisdiction of the Court could not be invoked against the defendants. The application was dismissed by the Deputy Registrar. On appeal to the Judge, it was again dismissed. From my reading of the judgment, what the learned Judge said was that if a defendant wanted to apply for the action to be struck out and/or dismissed summarily, the defendants should have filed a conditional appearance. But the learned Judge did not say that once having entered an unconditional appearance, the defendant could not challenge the Court's jurisdiction any more. In fact this **[4]** was what the learned Judge said, at page 17:

> "The case (referring to *The Bilbao* (1860) Lush, 149; 3 L.T. 338; 167 E.R. 72 - added), to my mind, reinforces that under the Rules of Court a defendant who objects to an irregularity in the writ of summons or the service of the writ or to jurisdiction must, if he wants to raise the ground, enter conditional appearance. In the present case, the defendants are, of course, at liberty to raise the issue of jurisdiction in limini. They may raise it as a defence to the action. And, they can have the issue determined first as a preliminary issue. But, as they had entered unconditional appearance, they may not raise it now at this stage of the proceedings."

I think that is very clear and I need say no more. *Middle East Tankers*[2]'s case was also decided on an application to strike out the plaintiff's action under Order 18 rule 19 of the Rules of the High Court 1980 (RHC 1980). The learned Judge in his judgment followed *The "Avro Venture"*[1], in my view correctly as the circumstances were similar.

Learned Counsel for the Plaintiff also referred to *E G Tan & Co. (Pte) (in liquidation) v. Tan Chong San*[3]. Actually in that case, the judgement was on an application for leave to withdraw an unconditional appearance and to file a conditional apperance. Leave was refused. Clearly the intention of the Defendant in that case was, if leave was granted, the Defendant would move to have the writ and the claim struck out summarily. It is therefore understandable that the learned judge refused leave. But **[5]** that does not mean that the Defendant could not raise it as a defence.

The other case referred to by learned counsel for the Plaintiff was *Tengku Ali ibni Almarhum Sultan Ismail v. Kerajaan Negeri Trengganu Darul Iman*[4]. Again that was an application to strike out the claim of the Plaintiff under Order 18 rule 19(1)(a) RHC 1980, and is not relevant.

In this case, the Defendant is applying for leave to amend its defence, so that the Defendant can raise it at the trial. I am of the view that the authorities referred to above do not say that the Defendant, having entered an unconditional appearance is disqualified from doing so.

However, learned Counsel for the Defendant put forward another argument. He argued that the Defendant was not challenging the jurisdiction of the court. Instead, the Defendant contends that Plaintiffs' claim does not fall within the ambit of section 20(2)(m) of the U.K.

Supreme Court Act 1981 which the Plaintiffs contend it does. Again, I must bear in mind that this is only an application to amend the defence. I should not decide that issue here. Let it be argued in full and decided at the trial.

Estoppel

Next, it was argued by learned counsel for the Plaintiffs that the Defendant had in fact raised similar issues in Enclosure 34 and 51 and was therefore estopped **[6]** from raising it again.

Enclosure 34 is the Defendants' application for leave to withdraw the Defendants' (unconditional) Memorandum of Appearance and to enter a conditional apperance. That application was dismissed by the SAR and there was no appeal against it.

Enclosure 51 is the Defendants' application for the issue whether the Plaintiff's claim falls within the ambit of the provisions of section 20(2)(m) U.K. Supreme Court Act 1981 should be tried first. This appplication was later withdrawn by the Defendant.

Having perused the file, I am of the view that the issue sought to be raised by the Defendant in this application had not been decided on and that the Defendant was not estopped from raising it by way of this proposed amendment.

Delay

I shall now touch on the question of delay. I do not think that it is necessary for me to refer to authorities on this point. Court may at any stage of the proceedings allow an amendment of pleading - Order 20 rule 5(1). In this case the application was made less than six months after the original defence was filed even before Summons for Directions was issued. Compared to many other cases I have come across I must say that there is no undue delay. **[7]** In any case, in the circumstances of this case, it is not a sufficient reason to dismiss this application.

Useless Amendment

It was also argued that the proposed amendment was a useless amendment and should not be allowed. The authority for this proposition is *Ponnusamy v. Nathu Ram*[5]. I agree that a useless amendment should not be allowed.

But the question is whether, at this stage, the court is in a position to certainly say that the amendment is useless. Learned counsel for the Plaintiff argued that one of the prayers sought by the Defendant in the proposed defence was damages; damages is not automatically given even if there is a wrongful arrest; Defendant must show that there was malice. He submitted that in England, award for damages for wrongful arrest was so rare that there was no reported cases since 1875. He referred me to two English cases *The "Evangelismas"*[6] and *The "Strathnaver"*[7].

That may be so. But malice is pleaded in the proposed counterclaim. Whether the Defendant can prove it is a matter for the trial. Similarly whether the Defendant will succeed or not in its counterclaim is a matter for trial.

It is worth reminding myself that this is an application to amend the defence. The principle is well stated in *Yamaha Hotel Co. Ltd. v. Yamaha Malaysia Sdn. **[8]** Bhd.*[8]. The Court would

allow an amendment if it causes no injustice to the other party. Whether there is injustice or not, the court will consider the application as bona fide, whether there is prejudict to the other side and whether proposed amendment results in changing the suit from one character into a suit with another and inconsistent character.

I am of the view that the proposed amendment is bona fide, it is not prejudicial to the Plaintiff and it does not change the character of the suit from one character into a suit of another inconsistent character.

For these reasons I allowed the application.