WISDOM

TSUI & CO Solicitors

Shipping

Stellar Ocean Transport LLC v. The Owners And/Or Demise Charterers of The Ship or Vessel "Ruby Star" HCAJ 126/2012, judgment on 24 January 2014

The Plaintiff was the ship manager pursuant to a ship management agreement with the Defendant demise charterer of the ship. The Plaintiff used the receipts in respect of the vessel to pay off the hire due from the Defendant to the shipowner under the charterparty and left the balance to meet all operational expenses and management fees. No offset of any claims for operational expenses, whether *in rem* or *in personam*, nor appropriation of receipts to any particular item of operating expenses was made by the Plaintiff.

The Plaintiff commenced proceedings against the Defendant for the sums due under the ship management agreement and served a writ of the ship. The Defendant did not file an acknowledgement of service but it admitted the claim. Although the Plaintiff had no claims against the shipowner, the shipowner filed an acknowledgment of service and the Plaintiff served a notice of discontinuance of action against the shipowner.

The Plaintiff applied for judgment in default of acknowledgement of service against the Defendant and the shipowner applied for an Order to set aside the Writ and a declaration that the court has no jurisdiction *in rem* over the ship.

The basis of the shipowner's argument was that while some items of the Plaintiff's claim fell within the admiralty jurisdiction of the Court, the Plaintiff's claim was for the balance of a mercantile account which did not. Since the Plaintiff demanded payment of operating costs comprising of crew salary, bunker, insurance, etc., the Plaintiff had made an appropriation generally to the running account between the Plaintiff and the Defendant. Therefore the Plaintiff's claim fell outside the Court's admiralty jurisdiction.

Held

Ng J held that if the underlying nature of a claim falls within one of the recognized maritime claims under section 12A(2) of the High Court Ordinance, the mere fact that the claim happens also to be the remaining balance of a general account between a plaintiff and a defendant makes no difference to the *in rem* nature of the claim. Since some items of outgoings claimed by the Plaintiff, e.g. provision of crew services, were within the *in rem* jurisdiction of the court, the bulk of the Plaintiff's claim was within the Court's in rem jurisdiction and sufficient to give the Court admiralty jurisdiction.

Regarding the Plaintiff's right to appropriate, Ng J held that the Plaintiff was entitled to exercise its right of appropriation up to the last moment, which was exercised when it served its Further and Better Particulars of the Statement of Claim.

With respect to the Plaintiff's application for default judgment, Ng J held that the *in rem* action is only machinery for enforcing the claim *in personam*. Since the Plaintiff's claim in personam is against the Defendant, it should be the Defendant's default in filing the acknowledgement of service which counts. Where a plaintiff sues multiple defendants, each defendant must acknowledge service of the writ and state its intention to contest the proceedings, failing which it will suffer the consequences of being liable to a default judgment.

The Plaintiff's notice of discontinuance did not change the shipowner's status as a defendant in the *in rem* action. The filing of acknowledgement of service of the writ *in rem* by the shipowner constituted a submission to the admiralty jurisdiction of the admiralty court. In an application for default judgment, the court has to be satisfied that the plaintiff's claim is well founded and a party should be allowed to demonstrate to the court that the claim or part of it is not well founded.

Since the shipowner proposed to demonstrate to the Court that the Plaintiff's claim was not well founded, Ng J held that the shipowner should be allowed to do so and it was only fair that the shipowner should be given an opportunity to defend the claim on the merits and pur forward defences which the Defendant could put up. The Plaintiff's application for default judgment was adjourned for substantive argument.

Comments

As demonstrated by this case, whether a plaintiff's claim falls within the court's admiralty jurisdiction depends on the underlying nature of the claim. A plaintiff's claim in respect of the balance of an account, which comprises of *in rem* and *in personam* items, does not necessarily imply that the claim falls outside the court's admiralty jurisdiction.

Commercially, if a ship manager indiscriminately apply the fund to sums that are subject to the admiralty jurisdiction first, then the ship manager may only take out actions *in personam* against the demise charterer or shipowner for the balance.

With respect to the application of default judgment, the plaintiff has to show that its claim is well founded so that the Court will allow the application. The shipowner should be given an opportunity to defend the claim on merits and put forward defences, if any, which defendant could but has chosen not to set up.

Personal Injury

Lo Wai Shing (Plaintiff) v Lik Sang Engineering Co Ltd (Defendant), HCPI15/2012, judgment on 5 November 2013

The business of the Defendant included the transportation of construction materials. The Plaintiff was employed as a manual labourer.

On the date of the accident, the Defendant was engaged to deliver some 40-feet long steel rods on flatbed trucks to a warehouse. The Plaintiff's job was to climb onto the back of the lorry, and working with another man, secure bundles of steel rods to a crane so that they could be lifted off the lorry. The steel rods were placed such that they ran the length of the lorry. One end of the rods rested on the top of the driver's cab. In the middle of the flat bed portion of the lorry was a sturdy metal frame which held the rods off the floor of the lorry so that the rods could slope down from the driver's cab to the very rear of the lorry without sagging in the middle. There were two potential hazards during unloading. Firstly, at the time of loading, large wooden wedges were hammered between bundles of steel rods to keep them apart. These wedges often worked themselves loose when the lorry travelled from one place to another and during the unloading process, falling to the floor of the lorry. Workman may then trip over the wedges. Further, the rods could swing and turn when they were lifted by crane.

During the course of employment, the Plaintiff received instructions from the Defendant's site foreman: the flatbed of the lorry was at all times to be kept clear of wedges; the wedges were to be picked up and put to one side, or thrown off the lorry onto the ground. Further, workmen were to alight from the lorry and move a safe distance away when the rods were being lifted.

On the date of the accident, the Plaintiff slipped on a wedge on the flatbed of the lorry, thus falling off the lorry onto rocky ground. His left kidney was badly injured and had to be surgically removed. The Plaintiff sued the Defendant in negligence.

<u>Held</u>

DHCJ Hartmann found for the Plaintiff on liability. The system to ensure safety was inadequate. The safety instructions given by the Defendant with respect to the risk of wooden wedges was at best vague. No storage space was provided on the lorry in which the wedges could be kept. It would have been easy enough to set out in clear, chronological terms, how the wedges were to be dealt with. It seemed to be the choice of the individual worker whether to move them to one side or to throw them off the lorry, in both cases there were risks of someone tripping over.

Further, there was only limited and irregular supervision to ensure compliance with the safety instructions. There was no specified supervisory programme and the foreman only visited the unloading area for limited period of time. Applying *Wilson v Tyneside Window Cleaning Company* [1958] 2 QB 110, the Defendant had a personal and non-delegable duty to take reasonable care of the Plaintiff's safety even though the Defendant did not have management of the warehouse. It would have been an easy enough matter for an employee of the defendant to ensure that the unloading only took place when a space in the designated unloading area became vacant; otherwise, the Plaintiff would not have fallen onto rocky ground.

However, the Plaintiff was contributorily negligent to the extent of 25% for disobeying safety instructions. Instead of alighting the lorry safely by taking one of the ladders at the rear of the flatbed, the Plaintiff chose to make his way forward along the flatbed and skirted along the edge of the bundle of steel rods and stepped over the metal frame.

Comments

The present is a personal injuries claim arising out of a relatively simple and straightforward industrial accident. It illustrates the need for employers to issue clear and workable safety instructions and have an adequate system of supervision to ensure compliance. That an accident occurs at a place outside his management is not necessarily a defence to a claim in negligence**.**

WISDOM OF THE ISSUE

You are never too old to set another goal or to dream a new dream.

~C. S. Lewis

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