

No Foundation For Arrest: High Court On Admiralty Jurisdiction And Wrongful Vessel Arrest

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The decision of the High Court in *Desert Oasis Petrochemical Trading LLC v The Owners and/or the Demised Charterers of the Ship or Vessel Alpine Mathilde from the Port of Hong Kong* [2024] 8 MLJ 903 (Desert Oasis) is a timely reminder that the arrest of a vessel is not a remedy to be invoked lightly. An arrest must be supported by a proper underlying cause of action and jurisdictional foundation.

Although Desert Oasis predates the establishment of Malaysia's International Commercial and Admiralty Division (ICAD), the decision illustrates the type of complex, cross-border admiralty dispute that now falls within the remit of the specialised division at the Kuala Lumpur High Court.

Brief Facts

The Defendant, Heroic Serena Inc, was the registered owner of the vessel M/T ALPINE MATHILDE. The vessel was carrying a cargo of naphtha which had originally been sold by Unicious Energy Pte Ltd (Unicious) to Idemitsu International (Asia) Pte Ltd for carriage from Singapore to Japan. The Voyage Charter Party contained sanctions clauses entitling the innocent party to terminate if the other party became subject to sanctions.

On 9.2.2023, approximately six hours after the vessel departed Singapore, Unicious was designated by the United States Office of Foreign Assets Control (OFAC) on its Specially Designated Nationals and Blocked Persons List. As a result, the cargo became blocked property.

As the Defendant was a “US Person”, it was prohibited from having unauthorised dealings with Unicious or its property. The Defendant subsequently rejected Unicious’ demand for delivery and terminated the Voyage Charter Party.

On 6.4.2023, Unicious purportedly entered into an unsigned sales contract with the Plaintiff, Desert Oasis Petrochemical Trading LLC, under which the Plaintiff was not required to pay for the cargo until after delivery. However, the Plaintiff only first asserted its entitlement to the cargo on 10.5.2023.

The Plaintiff subsequently demanded delivery of the cargo. When the Defendant refused, the Plaintiff commenced admiralty arrest proceedings before the High Court of South Africa in Durban on 4.7.2023 and obtained an arrest order against an associated vessel, M/T ALPINE MYSTERY. The order was set aside on 7.7.2023. Notwithstanding that outcome, on 31.7.2023, the Plaintiff commenced an action in rem in Malaysia on substantially the same underlying facts and arrested the Alpine Mathilde at the Port of Tanjung Pelepas, Johor.

The Defendant thereafter applied to set aside the writ in rem and warrant of arrest and sought damages for wrongful arrest. It contended that the purported sales contract was a sham and that the Plaintiff had neither suffered any loss nor established an underlying claim capable of supporting the exercise of the Court’s admiralty jurisdiction.

The High Court’s Decision

No Valid Underlying Claim

The High Court found that the purported sales contract was a sham entered into as an attempt to circumvent the US sanctions imposed on Unicious. The contract displayed a number of suspicious and unconventional features whereby:

- (a) it was unsigned;
- (b) the Plaintiff was not required to make any payment until after receipt of the cargo;
- (c) Unicious purportedly transferred title without receiving any payment; and
- (d) the contract made no reference to the sanctions affecting the cargo, nor did it require Unicious to hand over duly endorsed bills of lading to enable the Plaintiff to take delivery.

The High Court concluded that the arrangement was a pretext for Unicious to recover the cargo, or its value, by using the Plaintiff as a proxy, and that the Plaintiff was conspiring with Unicious to perpetrate a deception on the Court. Applying the principle of *ex turpi causa non oritur actio*, the court held that the Plaintiff had failed to establish that it was the lawful owner of, entitled to possession of, or otherwise had a legal or equitable interest in the cargo.

The court further agreed with the Durban High Court that the Plaintiff had suffered no loss under the purported sales contract. Under the terms of the purported sales contract, the Plaintiff was only required to pay Unicious after delivery of the cargo. Accordingly, if the cargo was never delivered, no payment obligation arose and there was no basis upon which the Plaintiff could claim loss or seek security against the Defendant.

Admiralty Jurisdiction Was Not Established

The court then considered whether the Plaintiff had satisfied the jurisdictional requirements for proceeding in rem and arresting the vessel. Referring to the Singapore Court of Appeal's decision in *The 'Bunga Melati 5'* [2012] SGCA 46, the Court noted that an arresting party must, among others, identify the person who would be liable on the claim in an action in personam.

Here, the Plaintiff had failed to establish any claim in personam against the Defendant. Without title, an immediate right to possession or any other legitimate basis to demand delivery of the cargo, its claim in conversion was unsustainable. The Defendant was therefore not the "relevant person" who would be liable on the Plaintiff's claim in personam for the purposes of section 21 of the UK Senior Courts Act 1981. The Court consequently set aside the writ in rem and warrant of arrest.

Wrongful Arrest

Importantly, the setting aside of the arrest did not, by itself, entitle the Defendant to damages. The court reiterated that damages for wrongful arrest require *mala fides* or *crassa negligentia*, namely an arrest brought with so little colour or foundation that malice or gross negligence may be inferred.

On the facts, however, the court found that this threshold had been crossed. The purported sales contract was entered into after the parties were already aware that Unicious was sanctioned and that the cargo was blocked property. Further, the Plaintiff had previously pursued substantially the same claim before the Durban High Court and was already on notice of the deficiencies in its case. Nevertheless, it proceeded with the Malaysian arrest.

The court also took into account the Plaintiff's conduct after the arrest. Despite the Defendant offering alternative security through an international surety, the Plaintiff rejected the offer, delayed in providing information on the amount of security required and made an excessive demand for quantum security, thereby prolonging the vessel's detention for nearly two months.

The court concluded that this was not simply a case of "so little foundation", but one with "no foundation" at all. It was held that the Plaintiff had acted with *mala fides* and/or gross negligence in obtaining and continuing the arrest, and accordingly ordered the Plaintiff to pay damages for the wrongful arrest and wrongful continuation of arrest, to be assessed, together with costs.

Commentary

Desert Oasis demonstrates that vessel arrest is not merely a procedural means of obtaining security. The substantive claim and jurisdictional basis for invoking the remedy must first exist.

First, an arresting party must establish the underlying rights upon which its in rem claim depends. In Desert Oasis, the Plaintiff's case rested on its asserted ownership and right to possession of the cargo. Once the sales contract was found to be a sham and the Plaintiff was unable to establish title, possession or any loss arising from non-delivery, the foundation for its claim against the vessel owner fell away.

Second, the setting aside of an arrest does not, without more, render the arrest wrongful. Damages require the higher threshold of *mala fides* or *crassa negligentia*. What took Desert Oasis beyond a mere jurisdictional failure was the Plaintiff's knowledge of the weaknesses in its case, particularly in light of the earlier proceedings before the Durban High Court, coupled with its decision nevertheless to pursue substantially the same arrest in Malaysia. The case therefore illustrates the importance of what the arresting party knew, or ought to have known, at the time of the arrest was sought.

Third, the arresting party's conduct after arrest may also have consequences. The Court took into account the Plaintiff's rejection of alternative security and its conduct in prolonging the detention of the vessel. An arresting party should therefore continue to assess whether the continued detention of a vessel remains justified where reasonable alternative security has been offered.

Overall, Desert Oasis highlights the significant commercial consequences that may follow from the arrest of a vessel. Parties contemplating an arrest should carefully assess the substantive basis of their claim, the requirements for invoking admiralty jurisdiction in rem and the information already available to them before proceeding. Where an arrest is pursued despite the absence of a proper foundation, the consequences may extend beyond the release of the vessel to liability in damages for wrongful arrest.

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