

## Litigation - Cyprus

### Ship arrest and security for release: court decision offers valuable insight

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March 05 2013

#### Facts

#### Decision

#### Comment

A recent decision<sup>(1)</sup> of the Supreme Court in its first instance admiralty jurisdiction gives valuable insight into the court's approach to applications for the arrest of vessels and for security to be lodged with the court for the release of the vessel.

#### Facts

The plaintiff, a fish-farming business, was the owner of a number of fish cages that were damaged and destroyed by the ship *Friendship* as it approached the port of Vasiliko, leading to the loss of the fish that had been kept in the cages. The incident took place in the early hours of Saturday morning, December 1 2012. On the following Monday (December 3 2012) - the date on which the vessel was scheduled to depart - the plaintiff filed an action (26/2012) claiming damages of €7.5 million, together with an application for arrest of the vessel.

The court issued an order for the arrest of the vessel, setting the lodging of security of €5 million as a condition for the vessel's release.

The owners of the vessel objected to the plaintiff's application for the arrest and security, based on the established principle that no order for security may be issued for the release of a vessel where the amount ordered as security exceeds the value of the vessel. In support of its objection, the owner submitted a valuation report valuing the vessel at a little over €2 million. With the leave of the court, the plaintiff filed a supplementary affidavit exhibiting a valuation report that estimated the current value of the vessel at €4 million.

The court was required to decide on:

- notices of opposition and Rule 60 of the Admiralty Jurisdiction Order 1893;
- the applicant's obligations when making an *ex parte* application for the arrest of a vessel and security for release; and
- calculation of the security for release and the defendant vessel's burden of proof to rebut the plaintiff's evidence as regards the value of the vessel.

#### Decision

##### Notice of opposition

Rule 60 of the order provides that:

*"Any party may apply to the Court for the release of any property arrested and the Court or Judge may, by order, direct the release of such property upon such terms as to the security or as to payment of any costs of appraisal or removal or inspection or otherwise as to the Court or Judge shall seem fit."*

Therefore, any request for the release of a vessel must be made with a filing of an independent motion for such release. The court considered this matter in brief and ruled that such non-compliance did not constitute a fundamental defect that nullified the whole proceedings.

The parties acknowledged the above principle on the basis of *The Ship 'Gloriana' v Eddy Breidi*,<sup>(2)</sup> in which the court considered the same matter and allowed the case to proceed, finding the notice of opposition to be a motion under Rule 60 of the order.

##### Obligations under *ex parte* application

It is a well-established principle that an applicant in an *ex parte* application for the arrest of a ship is obliged to assist the court in reaching an informed and correct decision, particularly as the other party is not represented. The applicant must not only satisfy the court that the conditions set out in the rules have been satisfied, but also provide all details and material facts of the case that the court requires in order for it to reach an informed and just decision.

An affidavit in support of the application for an arrest order must at least provide the minimum background with regard to the existence of a matter to be tried; this usually means that it must include all of the information required to satisfy the necessary pre-conditions for invoking the *in rem* jurisdiction of the court.

In *Caspi Shipping Ltd v the Ship 'Sapphire Seas' (2)*,<sup>(3)</sup> the court rejected the application because the applicant had failed to inform the court of an arbitration clause that was contained in the charterparty under consideration.

In *Demetris Panagiotou (Tzimmis) v the Ship 'Tamara I'*,<sup>(4)</sup> although the applicant failed to satisfy in full the provisions of Rules 51 and 52(b), the court exercised its discretion under Rule 54 and allowed the application, having been satisfied that the omission had no material effect on the subject matter of the application.

In *El Fath Co for International Trade SAE v ADT Shipping*,<sup>(5)</sup> the application for arrest was rejected due to the fact that the affidavit in support of the application had failed to address properly how the preconditions for granting such an order were met.

In the present case the court was satisfied that (given the limited time available) the plaintiff had provided the court with the requisite information that was in its possession at the time it filed the application, and that the preconditions for granting an arrest warrant were satisfied.

##### Calculation of security for release

One of the factors that the court will take into account when assessing the amount of security to be lodged in order to secure the release of the defendant vessel is the value of the claim. In *AK International UK Limited v The Ship 'Naima S' under the flag of the Comoros Islands (2)*,<sup>(6)</sup> the court stated that "with respect to the security for the release of the Vessel, this is again decided upon taking into consideration the plaintiffs' claim and the satisfaction of a judgment that may be delivered" (at 1475-1476).

As this case indicates, the court will take into consideration both the extent of the damage sustained and the time available for the plaintiff to make an estimate. Where time is limited and there is a risk that the vessel will move outside the jurisdiction, the court may grant an order if it is satisfied that the applicant has provided at least a basic assessment of the damage and the amount claimed.

The court addressed the matter of security in *The Ship M/V 'Bay Star' v Mario Cirino Pomicino SPA*,<sup>(7)</sup> referring to the case of *Singh v F/B 'Alisur Blanco'*.<sup>(8)</sup> Judge Pikis (as he then was) stated that:

*"The discretion of the court under r. 60 must, no doubt, be exercised judicially by reference to the principle of law underlying the power to direct arrest, on the one hand, and the realities of the case, on the other. The power to arrest a ship and, generally, order security for the claim of the*

plaintiff, is an especially necessary remedy for the effective exercise of the admiralty jurisdiction in rem, considering that the presence of the defendant in the jurisdiction is normally temporary. However, the terms for the release of a boat must not be oppressive and the amount fixed must be directly referable to the amount likely to be recovered in the event of success."

In assessing the amount of security, the court based its ruling on the principle that the claim cannot exceed the value of the vessel. As such, a claimant is entitled to security that is sufficient to cover the amount of its best arguable case, together with costs and interest, but the amount cannot be more than the value of the vessel.

Ideally, the amount of security or the value of the vessel would be agreed between the parties; where the parties cannot agree on the value of the vessel, the owner of the vessel may file an affidavit in this respect. The applicant may file its affidavit as to the actual value in response and allow the court to decide.

Neither party disputed the basic principles as to the maximum security that the court may grant. However, there was no agreement on the value of the vessel: the owner produced a report estimating its value at a little over €2 million, while the report put forward by the plaintiff valued it at €4 million.

The court considered both of these reports and concluded that that the owner had presented no solid reasons to dispute the valuation put forward in the plaintiff's report. Since the burden of proof was on the defendant vessel to rebut the applicant's valuation, the court accepted the plaintiff's valuation and set the security at €4 million.

### Comment

Examples of nullity would include proceedings which:

- ought to have been served, but have never come to the notice of the defendant;
- have never started owing to some fundamental defect in issuing the proceedings; or
- appear to be duly issued, but fail to comply with an essential statutory requirement.

A distinction must be made between these on the one hand, and minor irregularities and procedural defects on the other. This does not relieve the parties of their obligation to abide by the court's rules and practices, but in appropriate circumstances the court will exercise its discretion and allow the case to be heard despite minor irregularities.

Rule 237 of the order allows the Supreme Court in its admiralty jurisdiction to follow Order 70 of the former English Rules, permitting the court to exercise such discretion where such non-compliance "shall not render any proceedings void". As was decided in *Gloriana*, "no application to set aside any proceedings is allowed unless made within reasonable time, nor if the party applying has taken fresh steps after knowledge of the irregularity".

As noted above, an applicant in an *ex parte* application must satisfy the court that:

- the application complies with the provisions and requirements of the rules; and
- the pre-conditions for the issuance of an arrest order have been fulfilled.

This distinction is an important one. Failure to meet all of the procedural requirements of the rules will not automatically result in the application being rejected. The court may exercise its discretion and, where any omissions do not render the exercise of its powers impossible, allow the application to proceed (as in *Tamara I*). However, if the applicant fails to apprise the court of all facts that it needs in order to exercise its discretion correctly and justly, the application will fail (as in *El Fath Co*).

The amount fixed as security for the release of a vessel must not be unreasonable and must be justified accordingly. The nature of the claim and the amount likely to be recovered in the event of success are among the factors that the court will take into consideration. The burden of proof of the actual value of the vessel lies with the defendant. If it fails to rebut a claimant's evidence with respect to the actual value of the vessel, it cannot succeed in reducing the security that must be filed for such vessel's release. It is insufficient that a mere opposition or denial of the claimant's allegations be made. As in *Gloriana*, the defendant must prove that the claimant's evidence does not correspond to the facts.

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### Endnotes

(1) *Telia Vasiliko Limited v The Ship 'FRIENDSHIP' under Malta flag now lying at the Port of Vasiliko*, Action No 26/2012; decision dated January 18 2013, application for ship arrest dated December 3 2012.

(2) (1982) 1 CLR 409.

(3) (1997) 1B CLR 833.

(4) (1992) 1A CLR 21.

(5) (1992) 1B CLR 1255.

(6) (2004) 1Γ AΔ 1456.

(7) (1998) 1A CLR 471.

(8) (1984) 1 CLR 532.

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