[2000] SGHC 275

Case Number : Adm in Rem 774/1998

Decision Date : 14 December 2000

Tribunal/Court : High Court

Coram : G P Selvam J

Counsel Name(s) : Vivian Ang and Mark Ortega (Allen & Gledhill) for the defendants (Respondents in NM 251/99); Khoo Kah Ho and Lim Tanguy Yuteck (Fabian & Khoo) for the second interveners; Leong Kah Wah (Joseph Tan Jude Benny) for creditor who had obtained a stop order in Adm in Rem 774/98

Parties : Plaintiff — Defendant — Third Party

JUDGMENT: Grounds of Decision The claim 1. The "KAY" was arrested in this action by her crew on 18 November 1998. It was sold for $1,620,000 including bunkers on board. After payment of the Sheriff's expenses, crew's wages and the claims by the shipyard there remained to the account of the action about $570,000. Two parties are scrambling for it. 2. By Notice of Motion No 250 of 1999 a Liberian Corporation have asked for the funds in Court to be paid out to them. By name it is Falkland Investments Ltd ("Falkland"). A Russian corporation Vladivostock Base of Trawling and Refrigeratory Fleet ("VBTRF") by its liquidator opposes the application. 3. Falkland asserts the claim for the funds on the premises that it was the owner of the "KAY" at the time of the arrest and sale. The determination of the issues depends on whether the premises put forward by Falkland are true or false. So I shall at once state the premises relied on by Falkland. The premises 4. Falkland's basic premises is that the former owner of the "KAY", that is VBTRF, by an agreement dated 16 January 1998 transferred the vessel to Falkland as datio in solutum. The Latin phrase means "An accord and satisfaction under the civil law, wherein the consideration is in property and not in money". The document states "indemnity" as the equivalent of datio in solutum. The vessel was then known as "VLADIMIR CHIVILIKHIN" and belonged to the Port of Vladivostock. 5. Following the transfer, says Falkland, the vessel was on 1 July 1998 registered provisionally at the Port of Belize in the state of Belize. It is in Central America. It was formerly known as British Honduras. The provisional registration certificate was issued on 1 July 1998. 6. The transfer document refers to Falkland as "Creditor" and VBTRF as the "Debtor". The recitals in the transfer document read as follows : "(1) The debtor and the Creditor on 2 June 1997 concluded a Loan Agreement (the "Loan Agreement") under which the Debtor received a loan in the amount of USD7,000,000 (seven million) and was to repay same to the Creditor within 11 July 1997 in accordance with the terms of the Loan Agreement. (2) The debtor and the Creditor on 2 June 1997 concluded a mortgage agreement in respect of MV "VLADIMIR CHIVILIKHIN" and which is registered in the State Register of Ships in the Fishing Sea Port of Vladivostock No 43 on 3 June 1997 ("the Mortgage Agreement"). (3) The debtor has defaulted in the due performance of his obligations under the Loan Agreement, has acknowledged his debt in full and undertakes in all respects to procure the repayment of the moneys to the Creditor due under the Loan Agreement but is unable to make any repayments." 7. The operative parts of the document which effected the transfer of title read as follows : "1.1 In consideration of the matters set out in this Agreement the Debtor undertakes in lieu of the partial performance of its obligations under the Loan Agreement and the performance of its obligations under the Mortgage Agreement to transfer to the Creditor the vessel "VLADIMIR CHIVILIKHIN" ("the Vessel") and the Creditor undertakes to accept the said Vessel as an indemnity (datio in solutum) in accordance with the present Agreement. 1.2 The Vessel "VLADIMIR CHIVILIKHIN" is registered in the State Register of Ships in the Fishing Sea Port of Vladivostock 19 July 1990 under No 6. The vessel is sailing under the Russian Flag, has a call signal UHGP. 1.3 It has been mutually agreed between the Parties that the transfer of the Vessel and the rights of ownership therein to the Creditor shall extinguish the Debtor's obligation under the Loan Agreement only in the amount of US$3,500,000 (three million, five hundred thousand) and provided always that the transfer of the Vessel is completed and shall extinguish the Debtor's obligations under the Mortgage Agreement. Save as aforesaid the Debtor's obligations under the Loan Agreement and all other associated security documents shall remain in full force and effect. 2. Transfer of the vessel and Documents. 2.1 The vessel shall be transferred in its entirety, including any of its part and appurtenance such as her engines, equipment, life boats, spare parts and materials, bunkers and other consumable as well as non-consumable supplies whether on board the vessel or ashore and whether available at the time of the conclusion of the present Agreement or acquired thereafter. 2.2 Upon signing this Agreement all rights of ownership (title) in the vessel are immediately transferred by

the Debtor to the Creditor and the Debtor will transfer to the Creditor all the documents relating to the vessel and any additional documents confirming the transfer of the right of ownership (title) therein which the Creditor may require. 2.3 The Debtor hereby transfers the vessel and all rights of ownership therein to the Creditor and undertakes to assist the Creditor in complying with all legal formalities which may be required. 2.4 The Debtor shall transfer to the Creditor all the documents relating to the Vessel by no later than close of business in London on 28 February 1998 as well as any additional documents confirming the right of ownership (other than this Agreement) which may be required by the Creditor. 2.5 The transfer of the vessel shall take effect when this Agreement is signed by the parties and shall be deemed finally accomplished and the obligations of the Debtor under the Loan Agreement in the respective part and under the Mortgage Agreement shall be extinguished, but only to the extent provided by this Agreement." 8. The transfer document provided that it "shall be governed by and construed in accordance with English Law". 9. There was an earlier attempt to transfer the "VLADIMIR CHIVILIKHIN" also by way of datio in solutum by a by a transfer agreement dated 9 September 1997. It was not consummated because VBTRF's inability. Hence the second transfer agreement. Both transfer agreements were signed for VBTRF by Nikolay Nikitenko. The Mortgage 10. There was incontrovertible evidence that the "VLADIMIR CHIVILIKHIN" was mortgaged by VBTRF in favour of Falkland. The mortgage was duly entered in the ship register on 3 June 1997. It was part of a fleet mortgage of seven vessels. The aggregate amount in respect of all the seven mortgages was USD12m. The amount of USD7,000,000 was transferred on behalf of Falkland by Clydesdale Bank plc (UK) through National Australia Bank Limited. It was transferred to VBTRF's bank, Darylbank, Vladivostock. The value date was 5 June 1997. The arrest in China 11. Falkland caused the "VLADIMIR CHIVILIKHIN" to be arrested at the Port of Dalian, China on 30 January 1998. The vessel remained under arrest in China till 1 July 1998. On that day at the request of Falkland the vessel was released from arrest. It was on 1 July 1998 that provisional registration of the vessel was effected at the Port of Belize. Falkland no longer maintain the arrest since it became the registered owner on 1 July 1998. Its new name was "KAY". The "KAY" comes to Singapore 12. Falkland engaged crew for the"KAY" who began their service on 1 September 1998. From Dailan the "KAY" sailed into Singapore under the ownership of Falkland. At Singapore, the vessel was placed in the hands of Singapore Technologies Marine Ltd ("ST Marine") for repairs. The vessel was brought to Singapore by Lithuanian crew. Claims against Falkland 13. (i) At Singapore the "KAY" was arrested by its master and crew in this action. The master filed an affidavit positively asserting that (i) they were engaged by Falkland Investments Ltd, (ii) Falkland was the owner of the "KAY" and (iii) the vessel was registered at the Port of Belize. (ii) Falkland made a substantial payment to ST Marine but not all. ST Marine instituted in rem proceedings against the "KAY" in Admiralty in Rem No 855 of 1998. Again ST Marine positively asserted that it contracted with Falkland and filed an affidavit exhibiting invoices addressed to Falkland. Eventually ST Marine obtained judgment and $553,731.86 was paid out to it. (iii) Bankassure Insurance Services Ltd and Aon Group Ltd commenced a personam action against Falkland to recover premiums payable to them in respect of crew liability and port risk insurance. They obtained default judgment in Suit No 609 of 1999 against Falkland on 25 May 1999 for USD133,726.04 plus interest and costs. In respect of the "KAY" there were 23 debit notes covering the period beginning 23 January 1998 and ending 4 December 1998. All debit notes named Falkland as the insured party. Admissions by VBTRF 14. In Korea, Falkland caused the arrest of two vessels in the ownership of VBTRF. This was on 24 March 1998, that is before the "KAY" was provisionally registered at the Port of Belize. In July and August 1998 they were sold by the Korean Court for an aggregate amount of USD6.7m. Falkland causes three other vessels belonging to VBTRF to be arrested in Korea. According to Falkland two of these three vessels broke arrest and sailed off. Those on board no doubt would have reported to VBTRF about the other VBTRF vessels in Korea. VBTRF disputes that the vessels broke arrest but does not deny that the vessels were in the Korean port and departed from them. Admiralty arrests are unknown in Russia. The third vessel was sold by the Court for USD300,000. It is Falkland's case that moneys claimed in Korea were in respect of a different loan transaction. It was over and above the USD7m in respect of which the "KAY" and another vessel the "VIRGO I" were transferred to Falkland datio in solutum. It was in partial satisfaction of the US$7m loan that the "KAY" ex "VLADIMIR CHIVILIKHIN" was transferred to it – that is US$3,500,000. 15. Now comes the nub of the matter. VBTRF filed documents in Korean Court proceedings made the following admissionary and assertions : (i) Falkland Investments Ltd loaned VBTRF USD7,000,000 ON 2 June 1997 and USD8,977,601.08 ON 14 July 1997. (ii) On January 6, 1998 VBTRF and Falkland signed a settlement agreement for repayment of the above credit and debt (namely the USD7m). The content of the settlement was that VBTRF assigned the rights and ownership of vessels owned by VBTRF, the "KAPITAN VOLOSHIN" (the "VIRGO I") and "VLADIMIR CHIVILIKHIN" (the "KAY") and as the vessels were valued at USD3,500,000 each, the above debt of

USD7,000,000 was completely repaid. In accordance with the above settlement agreement, VBTRF assigned the rights and ownership of the above vessels to Falkland, the above debts was totally repaid. (iii) Additionally, in accordance with the performance of the above settlement agreement VBTRF's mortgage has already been cancelled in Russia. 16. VBTRF is now in liquidation and there are proceedings in Russia. There too there is a ruling affirming that "VLADIMIR CHIVILIKHIN" (renamed "KAY") and "KAPITAN VOLOSHIN" (renamed "VIRGO I") were transferred to Falkland in satisfaction the debt of USD7,000,000 due from VBTRF to Falkland. Thus the transfer agreement is recognized. 17. The above is an extraction of the essential elements Falkland relied on to make out the premises on which it founded its case. It omits considerable peripheral matters. What I have stated is the sort of evidence one wants to see before giving summary judgment under O 14 of the Rules of the Court. There are all inconvertible facts which appear in black and white. Discussion 18. When logic and the law of contract and evidence are applied to the matter I have outlined it leads to the inescapable conclusion that Falkland was the registered owner of the "KAY" from 1 July 1998. The vessel was not taken away from VBTRF by any foul or fraudulent means. It was done with full knowledge of VBTRF. When Falkland took steps to place the vessel in the Belize register the French Classification Society, Bureau Veritas notified VBTRF of the change of class and registry. The Classification Society notified VBTRF on 10 September 1998 that "taking into account content of the Transfer Agreement dated 16 January 1998 and having now received copy of the International Merchant Marine Registry of Belize 'INMARBE" Patent of Navigation, copy enclosed we cannot anymore delay Classification After Construction Surveys". The vessel in question was the "VLADIMIR CHIVILIKHIN". VBTRF therefore was fully aware of it reclassification and registration at Belize. Nothing was said to anyone that there was something foul. The classification society went ahead and reclassified the vessel. Belize gave it provision registration – provisional because VBTRF failed to secure a deletion certificate at the Russian Registry. This was in breach of the transfer document. Clearly VBTRF was taking advantage of its own wrong. I repeat that the mortgage on the vessel according to VBTRF was deleted at the Russian Register. 19. VBTRF stood by while the whole world, including Russia, acted on the transfer document and subsequent registration in Belize. 20. Several debts were incurred by Falkland in respect of which admiralty actions were filed in Singapore. VBTRF never batted an eyelid against the other claimants who contracted with Falkland. It was only when Falkland applied to enter appearance and to apply for the balance of the proceeds of the sale that it came on the scene and made vociferous objections. There was much rhetoric on behalf of VBTRF accompanied by voluminous documents. There was nothing in them to answer the solid and substantial documentary evidence placed before this Court by Falkland. 21. What emanated from the VBTRF camp was confusion, contradiction, confabulation (both conscious and unconscious and obfuscation). It was a feeble attempt to wrest the facts to suit their claim. There was in fact a veiled concession that they had no hard evidence to produce. They said that there was some important evidence in London. They had been saying that for some time but never came up with anything. In view of the glaring admissions VBTRF had made and the long elapse of time since the transfer document I was not convinced that they could produce anything relevant and credible. 22. The high water mark of VBTRF's case was that one Oleg Nikitenko was the principal shareholder of Falkland. His father Nikolay Nikitenko was the President of VBTRF, and it was the father who signed the transfer document. It was further said that on 16 January 1996 Nikolay Nikitenko could not have signed the transfer and therefore it was a forgery. Finally, it was said, the witness to his signature had no authority. So it was void. I was not persuaded. If it was all right for VBTRF to take a loan from the son's company and for the father to sign the loan agreement it must be all right for him to sign the settlement and transfer document since he was the President of VBTRF. A witness need not be an employee of the organization on behalf of which the document is executed. The more important point to note is the admission, reliance and reaffirmation of VBTRF on the transfer agreement. 23. The crucial point is whether VBTRF received the money. Admittedly it did. There are several obvious and conspicuous admissions to that effect in incontrovertible documents. There was a document evidencing the transfer of US$7m to VBTRF. It was said that Falkland was a nett debtor to VBTRF. The Singapore Court, however, is not concerned with the global picture. The concern of the Singapore Court in this action is the "KAY". So this Court has no jurisdiction, when disposing of an admiralty case to bring into this case by a side-wind a myriad of hypothetical matters unrelated to what is at hand. In good measure, I must record here Falkland has said to this Court that when the balance of the proceeds is received by it, due credit will be given for it in other proceedings between it and VBTRF. 24. The true aim of VBTRF's intervention was to ask this Court to set aside this transfer agreement. To achieve that end VBTRF must show that it repaid the loan. Did VBTRF repay? All the evidence pointed to the fact of datio in solutum and not payment by money. Time and again VBTRF asserted and reaffirmed the transfer document and repayment by datio in solutum. It must not resile from it. Accordingly there is not even

an iota of evidence to set aside the transfer agreement. 25. Counsel for Falkland put it poignantly that since the loan and mortgage are not disputed Fakland must be entitled to payment of the balance of the proceeds in that right. But VBTRF has admitted, first in writing that on the basis of the transfer datio in solutum dated 16 January 1997 and that the mortgage registrations at the Russian registry of ship was cancelled on that basis. Secondly, VBTRF never took any steps to prevent the registration of the vessel at the Port of Belize. Thirdly, VBTRF did nothing while the vessel was under arrest in China. Fourthly, VBTRF did nothing in Singapore while actions were being filed and judgments being entered; for that matter VBTRF did not object to the money being paid out to the crew and ST Marine. Fifthly, VBTRF has not brought any action against Falkland for stealthily taking the ship away from VBTRF. Sixthly, VBTRF has not produced a shade of direct evidence to establish repayment of the loan of USD7m other than by datio in solutum. Having slumbered all this time how can it now come and deny, after all those events, that Falkland is the owner of the "KAY". All that VBTRF has done is to obfuscate and confuse the real issue by bringing in irrelevant and inadmissible materials such as the additional loans which are the subject matter of legal proceedings elsewhere. I agree. The result 26. That compels me to conclude at once with moral certainty that Falkland established its entitlement to the balance of the proceeds of the sale of the "KAY". G P Selvam Judge

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