

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 96/ 2008

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
 THE HON. MR. JUSTICE COOKE, J.A.
 THE HON. MR. JUSTICE HARRISON, J.A.**

**BETWEEN: HARPA SHIPPING & CHARTERING APPELLANT/
 GMBH & CO. KG CLAIMANT**

**AND EUROPE WEST-INDIE 1ST RESPONDENT/
 LIJNEN B.V. DEFENDANT**

**AND FORBES MANUFACTURING AND 2ND RESPONDENT/
 MARKETING LIMITED DEFENDANT**

**Emile Leiba and Ms Lisa Russell instructed by Myers, Fletcher & Gordon
for the Appellant**

**Jerome Spencer instructed by Patterson Mair Hamilton for the 2nd
Respondent**

2nd, 3rd February and 27th March, 2009.

PANTON, P.

I agree with the reasoning of my learned brother, Cooke, J.A., and the order proposed by him. I am of the view that the appeal is also defeated by:

- (a) the absence of a contractual arrangement between the appellant and the second respondent; and
- (b) the discharge of the goods prior to the making of the order by Campbell, J.

COOKE, J.A.

1. The appellant is a Chartering Company with registered offices in Germany. It owned two vessels – MV Panabo and CFS Paradero. The 1st respondent (which has so far not participated in the proceedings) was a slot charterer on the aforementioned vessels. The 2nd respondent was the consignee of a 40 foot container CARU9690651, which was onboard CFS Paradero. This container had been shipped to the 2nd respondent by Recochem Inc., a Canadian company. The container contained various household and chemical products.
2. On the 30th June 2008, the appellant obtained an order for the arrest of cargo contained in containers on the MV Panabo and CFS Paradero. This successful application was grounded on an Admiralty Claim in rem, the thrust of which was that the 1st respondent had failed to settle invoices for services provided and was thereby in breach of clause 12.2 of the Slot Charter Agreement between the appellant and itself. Clause 12.2 required the 1st respondent to pay the amount due for freight within fifteen (15) business days “upon the receipt of the correct invoice by the charterer”. The amount claimed was US\$193,470.50. Included in the cargo to be arrested was container CARU9690651.
3. On the 30th July 2008, the 2nd respondent filed a “Notice of Application to Release Cargo” consigned to it.

This application sought the following orders: -

- “1. That Forbes Manufacturing Limited be made a party to this claim
2. The Order made on June 30, 2008 be set aside
3. The cargo in container #CARU9690651 which is now under arrest pursuant to a Warrant of Arrest issued by this Honourable Court on June 30, 2008 be released from the said warrant.
4. The costs of and/or consequent upon this Application, as well as all the attendant costs of the arrest and storage of the said cargo, be paid by the Claimant.
5. Such further and other relief as may be just.”

Anderson J. heard this application and gave judgment on the 20th August 2008.

In the concluding paragraph of his judgment he said: -

“I hold that the applicant (2nd respondent) must succeed. I accordingly make the order in respect of the Applicant’s application.”

The appellant now challenges the correctness of the ruling of the court below.

4. The Admiralty Jurisdiction (Jamaica) Order in Council 1962, which came into operation on the 29th March 1962 provided in section 2 that the Supreme Court of Jamaica should exercise (with certain modifications) the Admiralty Jurisdiction of the High Court of England as defined by section 1 of the Administration of Justice Act 1956 (The Act).

5. It is agreed by the contending parties that the resolution of this appeal lies in the determination as to whether or not a claim for unpaid freight gives rise

to an action in rem or is such claim to be invoked by an action in personam. Section 1(1) (a) – (s) of the Act sets out the “questions or claims”, concerning which the Court would have jurisdiction.

Section 1(1) (h) stipulates that one such claim is:

“(h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.”

6. Section 3 of the Act is concerned with the mode of exercise of Admiralty Jurisdiction. Section 3 (1) provides that all the questions or claims set out in Section 1 (1) (a) – (s) may be invoked by an action in personam. Section 3 (2) and (3) pertain to circumstances in which an action in rem may be invoked in respect of “questions or claims” enumerated in Section 1 (1) (a) – (s). Paragraphs specified (a) – (c) and (s). Paragraph (h) (supra) was specifically excluded. It is my view, that this exclusion is of telling effect. I cannot perceive how the appellant’s claim for unpaid freight within the Slot Charter Agreement can be other than:-

“(h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship”.

As already said, any claim falling within the parameter of Section 1 (1) (h) is not subject to an action in rem.

7. Section 3 (3) of the Act provides that an action in rem may also be invoked:

"3.(3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, the Admiralty jurisdiction ... may be invoked by an action in rem against that ship, aircraft or property."

The appellant sought to rely on clause 1.0 of the Bill of Lading which states:-

"The Carrier shall have a lien on the Goods for all freight, deadfreight, demurrage, detention and all other costs and charges resulting from the Carriage, hire, detention, demurrage for Containers and stripping and storage costs, as well as for all other monies which are or become due to the Carrier by the Merchant in respect of previous Carriages for account of the Merchant. The Carrier shall be entitled to sell the Goods privately or by auction to cover any such claims."

The submission was to the effect that this lien fell within the ambit of "other charge" in section 3(3) of the Act. Clearly, the lien in Clause 1.0 is not a Maritime Lien which is the only category of lien which section 3 (3) of the Act recognizes. Accordingly, any other type of lien, however described is outside the confines of section 3 (3). It follows therefore that any discussion of liens other than those properly regarded as maritime are not helpful. Accordingly, I do not find it necessary to advert to those cases which speak to the legal effect of non-maritime liens.

8. The only case cited to this court in which there has been attention to the words 'or other charge' in section 3 (3) of the Act is **The St. Merriel** [1963] 1 All ER 537. At p 542 letter b, Hewson J. opined as follows:

"It will be seen, therefore, that, although 'charge' is not defined in the Administration of Justice Act, 1956, there exist in shipping statutes the very words 'a charge upon the ship'. In the absence of any direct words by the legislature which enlarge the meaning of 'other charge', I am not disposed to extend its meaning beyond the words which I find in the Merchant Shipping Acts to which I have been referred. Though I have much sympathy with the argument put forward so powerfully by counsel for the plaintiffs, I am not satisfied that the holder of a possessory lien has been put by this statute into such a position that his rights and his remedies amount to a charge on the ship for the amount claimed. They certainly amount to an inconvenience, but, as I say, in the absence of express words such as 'other charge or right to possess by the holder of a possessory lien', or some such words, I am not disposed to extend the meaning further than I have indicated. 'Other charge' seems to me to have some meaning based on statutes dealing with merchant shipping."

This judgment indicates that the construction of the words "other charge" must be sought within the context of the shipping environment.

9. I would dismiss the appeal. The 2nd respondent should have its costs of the appeal. Further, I would award to the 2nd respondent the costs of the arrest and storage of the cargo contained in container CARU9690651.

HARRISON, J.A.

I agree.

PANTON, P.

ORDER

1. The appeal is dismissed. The order of Anderson, J, making the second respondent a party to the claim, and releasing the cargo in container #CARU9690651 is affirmed.
2. Costs of the arrest and storage of the cargo in container # CARU9690651 to the second respondent.
3. Costs of the appeal to the second respondent to be agreed or taxed.