

C OWNERS OF THE SHIP OR VESSEL “MY FERRY 2” v OWNERS
AND/OR DEMISE CHARTERERS OF THE SHIP OR VESSEL “KKD000132-T” &
ANOR

CaseAnalysis
| [2020] MLJU 298

C Owners of The Ship Or Vessel “My Ferry 2” v Owners and/Or Demise
Charterers of The Ship Or Vessel “KKD000132-T” & Anor [2020] MLJU 298

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

KHADIJAH IDRIS J

ADMIRALTY IN REM NO WA-27NCC-52-12/2018

31 January 2020

*Clive Navin Selvapandian (Christopher Lee & Ong) for the plaintiff.
Arifah Mohd Khairudin (LY Leong & Partners) for the defendant.*

Khadijah Idris J:

GROUNDS OF JUDGMENT

(enclosure 24)

Introduction

[1] This is an admiralty action in rem filed by the plaintiffs, Owners Of The Ship Or Vessel “My Ferry 2” (Official No. 334178) (“Plaintiffs”) against the first defendant, Owners And / Or Demise Charterers Of The Ship Or Vessel “KKD000132-T” (Official No. KKD000132-T) (“1st Defendant”) and the second defendant, Owners And / Or Demise Charterers Of The Barge Or Vessel “Wantas 17” (Official No. 333457) (“2nd Defendant”).

[2] The Plaintiffs’ claim is founded on a maritime lien pursuant to section 21 (3) of the Supreme Court Act 1981 (United Kingdom) which is applicable in Malaysia pursuant to section 24 (b) of the Courts of Judicature Act 1964.

[3] The Plaintiff alleged the 1st Defendant tug “KKD000132-T” towing the 2nd Defendant’s dumb barge “Wantas 17” at about 4.00 am on 30 December 2016 collided with the Plaintiff’s vessel “My Ferry 2” berthed t Kuala Kedah Cargo Jetty.

[4] The Plaintiffs' claim as endorsed in their Endorsement of Claim to the Writ In Action In Rem is, inter alia, as follows –

- a) *Damages and/or losses and/or expenses suffered or sustained (and/or to be suffered or sustained) by the Plaintiffs arising out of contact damage and/or an allision and/or a collision between their ship or vessel "MY FERRY 2" with the ship or vessel "KKD000132-T" and/or the barge or vessel "WANTAS 17" which occurred at the Kuala Kedah Cargo Jetty on or about 30 December 2016, and which was caused by the negligence and/or fault and/or breach of duty of the Defendants and/or their servants and/or agents in and about the navigation and/or management and/or equipping and/or control of the Defendants' ships or vessels "KKD000132-T" and/or the barge or vessel "WANTAS 17";*
- b) *A declaration that the Plaintiffs are entitled to be fully indemnified by the Defendants and/or to be kept indemnified by the Defendants from and against all liability and/or damage and/or loss and/or expense suffered or sustained, or to be suffered and sustained, arising out of or in connection with the aforesaid contact damage and/or an allision and/or collision and/or in consequence of claims made or to be made against the Plaintiffs arising out of or in connection with the aforesaid contact damage and/or an allision and/or collision;*
- c) *Further and/or in the alternative, a declaration that the Plaintiffs are entitled to contribution from the Defendants in respect of any and all such liabilities (present or contingent), consequences, claims, demands, losses, expenses, damages or sums as referred to in (a) and (b) above;*

[5] On 26 June 2019, the Plaintiffs arrested the 2nd Defendant's barge "Wantas 17". The said barge was subsequently released on 24 October 2019.

[6] The 2nd Defendant filed an application (enclosure 24) under Order 18 rule 19 (1) (a), (b) and / or (d) Rules of Court 2012 ("RoC 2012") and / or Order 92 rule 4 of the same for, inter alia, the following orders –

1. *The Writ in Rem No. WA-27NCC-52-12/2018 dated 28 December 2019 and all subsequent pleadings herein against the owners of barge "WANTAS 17", the second Defendant be struck out pursuant to Order 18, Rule 19 (1) (a), (b) and / or (d) of the Rules of Court 2012;*
2. *The Warrant of Arrest dated 25 June 2019 be set aside against the Second Defendant, the owners of the barge "WANTAS 17";*
3. *The Plaintiff forthwith return to the Second Defendant, the Letter of Undertaking issued by the Second Defendant's insurer, MSIG Insurance (Malaysia) Bhd dated 28 June 2019;*
4. *The Plaintiff do pay damages to be assessed and costs to be taxed for the wrongful arrest of the Second Defendant's barge "WANTAS 17";*
5. *The costs of and incidental to this action and this application herein be taxed and paid by the Plaintiff to the Second Defendant;*

[7] Enclosure 24 was dismissed and the 2nd Defendant appealed.

2nd Defendant's contentions

[8] The 2nd Defendant's grounds for striking out the Plaintiffs' writ in rem action may be summarised as follows –

- (a) at the time of collision on 30 December 2016 the 2nd Defendant's barge "Wantas 17" was towed by the tug "KKD00059-T" which was involved in the collision with the Plaintiff's tug "My Ferry". The 2nd Defendant relies on the Marine Department Report of a Shipping Casualty dated 30

December 2016 at Exhibit "KAR-1". The report was amended on 10 January 2017 where the barge "KKD000132-T" was amended to "KKD00059-T";

- (b) the 2nd Defendant's barge "Wantas 17" was a dumb barge with no self-propelling abilities and is incapable of manoeuvring on her own. The said barge can only manoeuvre by being towed by a tug which is the controlling mind to the navigation of the same. Thus it would be unjust and unreasonable to impose any liability on "Wantas 17" as she has no control and management of the tug "KKD00059-T";
- (c) the 2nd Defendant owe no duty of care to the Plaintiffs. The damage, if any, caused to the Plaintiffs' "My Ferry 2" cannot be reasonably foreseeable by the 2nd Defendant; and
- (d) any wrongdoing is only attributable to the tug towing 2nd Defendant's "Wantas 17" which is tug "KKD00059-T" and not the 1st Defendant's tug "KKD000132-T" which was not involved in the collision.

The Plaintiffs' contentions

[9] It is argued by the Plaintiffs that –

- (a) the barge "Wantas 17" caused damage to the Plaintiffs' vessel "My Ferry 2" on 30 December 2016 at the Kuala Kedah Cargo Jetty whilst being towed by the tug 'KKD000132-The';
- (b) the Plaintiffs arrested the barge "Wantas 17" based on a claim for a maritime lien. Specifically, the arrest was brought pursuant to a damage maritime lien;
- (c) for the Plaintiffs to maintain a claim pursuant to a damage maritime lien, the Plaintiff's claim must meet two requirements:
 - (i) the damage must be the result of a wrongful or negligent act or manoeuvre by persons engaged in the navigation or management of the ship; and
 - (ii) the ship must be the actual instrument by which damage is done.
- (d) based on the Marine Department Reports at Exhibits 'KAR-4' and 'KAR-9' - both these requirements are fulfilled and therefore the Plaintiff is entitled to bring its claim against "Wantas 17".

The law

[10] The Defendants' Striking Out Application is premised on Order 18 rule 19 of the Rules of Court 2012. As regards to the legal principles in respect of striking out application, the Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 held that the summary procedure under Order 18 rule 19 of the RoC 2012 can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'. In *Aras Jalinan Sdn Bhd v Tipco Asphalt Public Co Ltd & Ors* [2012] 1 MLJ 510 the Court of Appeal referred to the principles laid in the case of *Bandar Builder Sdn Bhd* (supra) and held that a striking out application is not a trial on affidavits and the court should not conduct a minute examination of the documents and the facts of the case. It is further held that as long as the claim discloses some cause of action or raises some question fit to be tried it should not be struck out. The mere fact the case is weak and not likely to succeed is no ground for the pleadings to be struck out.

Findings of the court

[11] The Plaintiffs named the Owners And / Or Demise Charterers Of The Ship Or Vessel "KKD000132-T" as the 1st Defendant. As stated above, the Plaintiffs' claim against the 1st Defendant (and also 2nd Defendant) is, inter alia, for damages for the losses suffered or sustained by the Plaintiffs arising out of the collision between their vessel "My Ferry 2" with the vessel "KKD000132-T".

[12] However it is the 2nd Defendant's contentions that the 1st Defendant's vessel "KKD000132-T" was never involved in the collision and it was the vessel "KKD00059-T" that towed the 2nd Defendant's vessel "Wantas 17" when it collided with "My Ferry 2". The 2nd Defendant pointed out that even the Plaintiffs in their affidavit enclosure 15 at paragraph 5 averred that the 2nd Defendant's vessel "Wantas 17" was under tow by the vessel "KKD00059-T" when the collision happened.

[13] In the affidavit in support of their application for warrant of arrest against "Wantas 17" (enclosure 15), the Plaintiffs explained at paragraph 11 of enclosure 15 (Plaintiffs gave notice vide enclosure 31 to use enclosure 15 to oppose enclosure 24) that the claim made against the 2nd Defendant's vessel "Wantas 17" is premised on the *Borang Aduan Pelanggan* and the police report dated 30 December 2016 (see Exhibit KAR-2 of enclosure 15).

[14] Having perused the Jabatan Laut Wilayah Utara *Borang Aduan Pelanggan* and the Police Report, the facts that may be discerned from the same is as follows –

- (a) a complaint was made on 30 December 2016 by one Mat Saad bin Ya, whose occupation is stated as Captain Ferry;
- (b) "My Ferry 2" reached Langkawi on 29 December 2016 at 8.50pm for disembarkation of passengers at Jetty No. 3 at Kuala Kedah Cargo Jetty. "My Ferry 2" then berthed at the said Jetty;
- (c) on 30 December 2016 at about 4.00am, "Wantas 17" collided into "My Ferry 2";
- (d) due to the impact of the said collision, "My Ferry 2" suffered damage on the port side and starboard side; and
- (e) crew members whose sleeping berth were located at the damaged parts of "My Ferry 2" suffered trauma.

[15] With regards to its claim against the 1st Defendant's vessel "KKD00132-T", the Plaintiffs relies on a Marine Department Report of a Shipping Casualty dated 30 December 2016 exhibited as Exhibit KAR-4 of enclosure 15. Having perused the said report, the facts that may be discerned from the same is as follows –

- (a) the vessels that were referred to in the report are –
 - (i) "KKD00132-T" (Official No. KKD000132-T);
 - (ii) "WANTAS 17" (Official No. 333457);
 - (iii) "MY FERRY 2" (Official No. 334178).
- (b) the collision happened at Kuala Kedah Cargo Jetty where "My Ferry 2" berthed; and
- (c) "Wantas 17" collided into "My Ferry 2" at the time when "Wantas 17" was towed by tug boat "KKD00132-T".

[16] It is clear that the Plaintiffs Writ of Summons dated and filed on 28 December 2018 was founded on the above facts. Based on such facts the Plaintiffs, through their solicitors, issued a letter of demand dated 15 January 2019 to WANTAS Shipping (Langkawi) Sdn Bhd whom the Plaintiffs alleged are owners of the "KKD00132-T" and "Wantas 17". A copy of the said letter was also sent to the insurers of the vessel "KKD00132-T", QBE Insurance (M) Bhd ("QBE Insurance").

[17] On 16 January 2019, QBE Insurance rejected the Plaintiffs' demand on the ground that the collision was by vessel "KKD00059-T" (which was not insured by QBE Insurance) and not the vessel "KKD00132-T" (insured by QBE Insurance).

[18] It is to be noted that besides producing Exhibit KAR-2 (which is the original Marine Department Report of a Shipping Casualty dated 30 December 2016) the Plaintiffs also produced an amended version of the Marine Department Report of a Shipping Casualty dated 30 December 2016 which is marked as Exhibit KAR-9 of enclosure 15. In Exhibit KAR-9, all references to "KKD00132-T" was deleted by striking through the word "KKD00132-T" and substituted with "KKD00059-T". It was the Plaintiffs' contentions that for the purpose of their application for a warrant of arrest against "Wantas 17", the details of the vessel which towed "Wantas 17" is irrelevant as it is "Wantas 17" which is responsible for the damage done to "My Ferry 2".

[19] Thus, based on the documents at Exhibit KAR-2 and Exhibit KAR-9, it is crystal clear that the vessel that collided into "My Ferry 2" was the 2nd Defendant's "Wantas 17". The fact that "Wantas 17" collided into "My Ferry 2" is not disputed by the 2nd Defendant. The 2nd Defendant however deny liability in respect of the loss or damage suffered by the Plaintiffs in relation to the collision on the sole ground that "Wantas 17" is a dumb barge with no self-propelling abilities and can only manoeuvre by being towed by a tug which is the controlling mind to the navigation of "Wantas 17". In other words, the 2nd Defendant contends that liability is on the vessel which towed "Wantas 17".

[20] The Plaintiffs' claim is premised on maritime lien. In Admiralty Law And Practice, Second Edition, by Toh Kian Sing, SC the learned author states –

... A damage maritime lien comes within the subject matter of admiralty jurisdiction as it amounts to 'damage done by a ship' and, as with all claims vested, can be enforced by an action in rem against the ship which is encumbered with it.

*The accrual of a damage maritime lien requires the satisfaction of two conditions, which are that **the damage must be the result of a wrongful or negligent act or manoeuvre by persons engaged in the navigation or management of the ship** and **the ship must be the actual instrument by which damage is done**. In the words of Lord Watson in *Currie v M'Knight*:*

I think it is of the essence of the rule that the damage is respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manoeuvre of the ship to which it attaches. Such an act or manoeuvre is necessarily due to the want of skill or negligence of the persons by whom the vessel is navigated; but it is, in the language of maritime law, attributed to the ship because the ship in their negligent or unskilful hands in the instrument which causes the damage.

(emphasis added)

[21] Thus for a claim base on maritime lien, it must be shown that the damage is the result of a wrongful or negligent act or manoeuvre by persons engaged in the navigation or management of the ship and that the ship must be the actual instrument by which damage is done.

[22] It is the Plaintiffs argument that based on Exhibit KAR-4 and KAR-9, both the requirements are fulfilled. It is noted that Exhibit KAR-4 states "KKD00132-T" which towed "Wantas 17" which collided into "My Ferry 2", whereas Exhibit KAR-9 states it was "KKD00059-T" which towed "Wantas 17". At this juncture, this court is of the view for the purpose of the 2nd Defendant's application enclosure 24, the identity of the vessel (whether "KKD00132-T" or "KKD00059-T") which towed "Wantas 17" at the time the collision happened is not relevant.

[23] Even though there is conflicting facts as to the identity of the vessel which towed "Wantas 17", the undisputed facts is that while "Wantas 17" (a dumb barge) was being navigated or managed, it collided into and caused damage to "My Ferry 2". Thus in so far as the claim against the 2nd Defendant as owner of "Wantas 17" is concerned, the Plaintiffs' claim against the 2nd Defendant founded on maritime lien appears to be sustainable.

[24] The issue whether there is wrongful or negligent act or manoeuvre on the part of the persons charged with the navigation or management of "Wantas 17" is a question of fact which should be determined by vivo voce evidence. The conflicting facts with respect to the identity of the vessel which towed "Wantas 17" should not be a factor to strike out the Plaintiffs' Writ in Rem action against the 2nd Defendant especially when it is not disputed that "Wantas 17" collided into "My Ferry 2"

[25] The 2nd Defendant's also argued that "Wantas 17" has no control and management of the vessel which towed it and it is therefore unjust to impose liability on the 2nd Defendant. On this issue reference is made to The Law of Tug and Tow And Offshore Contracts 4rd Edition –

11.55 The mere fact of the tug or the tow having control over the navigation will not of itself be necessarily decisive of liability for the collision. No vessel is passive spectator. Each vessel remains always under an obligation to exercise reasonable care in and about her navigation simply as a matter of self-help and of a duty owed to others (see Buckley LJ's dictum in The Devonshire [1912] P 21, cited above (see Chapter 2 above). Thus, if a tug is in control of the navigation of a dumb barge manned by a lighterman and she proceeds too fast, causing the barge to bear down on another vessel, the barge may be solely at fault, irrespective of the question of control, if the collision could have been avoided by merely slipping the tow-line in good time. Similarly, where a tug is under the orders of the tow which is directing navigation and has control of the same, the tug will still be solely to blame if she negligently manoeuvres in executing an otherwise proper order given to her by the tow. The tug may also be liable if the order given by the tow is one which, if the tug had exercised its own seamanlike appreciation of the position, was patently negligent and should not have been followed, but which the tug nevertheless heedlessly obeys (emphasis added)

[26] Thus the fact that a tug or even a tow having control over the navigation is not necessarily a decisive factor of liability in respect of a collision. It entirely depends on factual circumstances as illustrated in the paragraph extracted above.

[27] In *The Devonshire* [1912] P 21, *Leslie*, a wooden dumb barge was on the river Mersey whilst in tow of a tug *St. Winifred* which was responsible for the navigation, collided with steamship *Devonshire*. *Leslie* sustained injury and sank. Owner of the barge *Leslie* filed an action against owners of *The Devonshire* to recover the whole loss. It was held by the President of the Admiralty Division that both the tug and *The Devonshire* was at fault and the barge *Leslie* was not in any way to be blamed. On liability it was held that the owners of the barge *Leslie* can claim the whole loss against the owners of *The Devonshire*. The appeal of the owners of *The Devonshire* was dismissed. The appellate court rejected the owner's argument that the *Leslie* can recover against *The Devonshire* only half her loss because negligence of the tug *St Winifred* is constructive negligence of the tow *Leslie*. On the facts it was found there were no evidence to support the argument that *Leslie* is responsible for the wrongful acts of the tug *St Winifred*. In determining the issue, the court considered the relations between the tug *St Winifred* and the tow *Leslie* – whether the said tug and tow is to be regarded as one vessel so that the blameworthy conduct of the one must be treated as bringing blame on the other.

[28] Premised on the above, in collision during towage which involves a tug, tow and a third party's vessel, one of the issue to be determined is identifying where control for the navigation lies. Such crucial issue is obviously a question of facts to be determined in each case according to its own circumstances.

[29] The 2nd Defendant cited the case *The Owners of the ship 'MV Hong Leong' v The Owners of the ship MT Man Hua No 3 & Anor* [1994] 3 MLJ 800 and *Trans Resources Corp Sdn Bhd v Inai Kiara Sdn Bhd & Ors* [2015] 8 MLJ 157 to support its case. However it must be noted that in both the said cases the finding of the court that the collision occurred as a result of the negligent act of the tug vessel in navigating its tow was made based on the oral testimony of witnesses during trial. The court found the evidence adduced shows that at the time of the collision the tow was under the control and management of the servants or agents of the tug boat.

[30] In the instant case, the fact that "Wantas 17" was towed by a tug boat (be it "KKD00132-T" or "KKD00059-T") is not necessarily conclusive factor that the tug boat is in control of the navigation or manoeuvre of "Wantas 17" as to exonerate "Wantas 17" from all liabilities in relation to its collision with "My Ferry 2". Such factor depend on the factual circumstances, including the relations between the tug and "Wantas 17", which requires further investigation based on oral evidence.

[31] Even the contentions that "Wantas 17" is a dumb barge with no self-propelling abilities and therefore incapable of navigating on her own is not supported by cogent evidence. Based on the Certificate of Malaysian Registry of "Wantas 17" which is produced as Exhibit LCH-1 of enclosure 25, it is difficult to figure out from the tiny print the features of "Wantas 17". Besides that, it would require some technical input in order to conclude the data on the said certificate is evident of "Wantas 17" is in fact a barge without self-propelling abilities.

Conclusion

[32] Premised on the reasons stated above, it cannot be concluded for sure that the Plaintiff's claim against the 2nd Defendant is obviously unsustainable. The identity of the tug vessel / boat may be in dispute but the undisputed fact that the 2nd Defendant's "Wantas 17", while being towed, came into direct contact and collided with the Plaintiff's "My Ferry 2" raises bona fide issues in relation to "Wantas 17" liabilities pertaining to the collision. Under the circumstances the Plaintiff's claim against the 2nd Defendant does not fall within the context of Order 18 rule 19 (1) (a), (b) and / or (d) of the RoC 2012. Enclosure 24 was accordingly dismissed.

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