IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

527

AD No. 135

Admiralty Action in Rem

BETWEEN GENERAL MOTORS NEW ZEALAND LIMITED and others

Plaintiffs

A N D THE SHIP "PACIFIC CHARGER"

Defendant

Hearing:	24 July 1981
Counsel:	C.R. Carruthers for defendant in support B.M. Rudkin for plaintiffs to oppose
Judgment:	24 July 1981
Reasons for Judgment:	27 July 1981

REASONS FOR JUDGMENT OF SAVAGE J.

In this case some 14 plaintiffs issued a Writ of Summons in rem to the owners and all others interested in the ship "Pacific Charger", which is the named defendant. The writ claims some seven million dollars for damages to cargo belonging to the plaintiffs and for salvage and general average charges being levied against the plaintiffs and other expenses including interest. The ship was then arrested on 13 July 1981 under a warrant of arrest issued under the Admiralty Rules 1975.

The defendant moved on Wednesday 22 July 1981 for an order that a release of the ship "Pacific Charger" be issued. The motion was supported by an affidavit made by Ian Munro Mackay. At the same time the defendant moved for an order abridging the time required between the filing and service of the motion and the hearing of it, so that it might be heard on Friday, 24 July. The plaintiffs, on 23 July, then moved for an order directing that Ian Munro Mackay be presented for cross-examination on his affidavit. There was also a similar motion for an order

abridging time. When the motions came on for hearing before me, counsel for the plaintiffs consented to an order in terms of the defendant's motion to the abridging of time; and counsel for the defendant consented to an order in terms of the plaintiffs' motion to the abridging of time and intimated that, if the Court was satisfied that there were special circumstances, as required by r.184(2) of the Code of Civil Procedure, then he was content that an order be made for the cross-examination of Mr Mackay on his affidavit. In these circumstances I ordered that time be abridged on both motions and, being satisfied that there were special circumstances, ordered that Mr Mackay be presented for cross-examination. He was then cross-examined by counsel for the plaintiffs.

At the conclusion of the oral evidence I heard submissions from counsel which continued until about 3.30 p.m. I then retired to consider the matter, as it was most desirable that a judgment should be given that day, particularly as I was not going to be in Wellington during the following week. At 4.30 p.m. I gave my judgment, which is elsewhere recorded, and indicated that I would give my reasons, shortly and in writing, within a few days.

It will be apparent from the above summary of the course of the proceedings that Mr Mackay's affidavit was the only one before the court. His evidence was accordingly uncontradicted, though some of it was challenged in the cross-examination. At the end of the taking of the oral evidence by way of cross-examination and re-examination I was left with an even clearer view that Mr Mackay's evidence was unshaken and could safely be relied upon. Mr Mackay is the senior partner in P & I Services, a partnership whose business includes acting as the general correspondents in New Zealand for some 13 or 14

shipping protection and indemnity associations which belong to a body called the International Group, to which I refer again later. P & I Services handle in New Zealand claims on behalf of the International Group. Mr Mackay has had some 24 years experience in New Zealand in this class of work and is in regular contact with other P & I correspondents around the world. In addition he is the Chairman of the Waterfront Industry Commission, a director of the Shipping Corporation of New Zealand, a director of Container Terminals Ltd and Chairman of the Maritime Law Association. In my view he was plainly a person who spoke with authority and knowledge in the field upon which he gave evidence.

I do not propose in this judgment to canvass all the evidence. The matter has had to be dealt with promptly and at short notice; but I will refer to some parts of the evidence when dealing with submissions of counsel.

Mr Carruthers submitted that there were four ways or methods by which a release from arrest could be obtained. The first two were withdrawal in terms of r.17(2) of the Admiralty Rules 1975 and by consent of all the parties in terms of r.17(4), but these two ways do not concern us in this matter. The third method is release by the Registrar in terms of r.17(5). It, too, does not concern us, except to the extent that the rule deals with the form of security that must be given in such cases, and it is to be noted that if security is given in terms of that rule and r.20 then ordinarily a release will be issued. The fourth method is the one invoked in this case and is release by order of the Court in terms of r.17(4).

The relevant part of r.17(4) reads as follows:

> "r.17(4) A release may be issued at the instance of a party interested in the property under arrest if the Court so orders, or, ..."

The Court has a complete discretion in the matter as there is no restriction on its power in the rules. The Court could, in my view, order a release without imposing any terms as to security at all if it chose and it might do so if the ship owner defendant was a New Zealand enterprise with ample assets in New Zealand to cover any possible judgment that the Court might give against it. The purpose of requiring security before a release is given is to ensure that the plaintiff who recovers judgment against a ship and its owners or charterers or others interested in it will be able to satisfy that judgment.

The third method of obtaining a release by order of the Registrar referred to earlier provides for a standard kind of security which is prescribed in the rules. If that security is given then release ordinarily follows. In my view it is obvious that the Court is not obliged to require such a security for if it was there would be little point in making provision for application to the Court; a release could equally well be ordered by the Registrar. In my view the duty of the Court is to satisfy itself that the security ordered will be adequate to achieve the object for which it is required, namely, to ensure that any judgment that is ultimately given will be satisfied. The Court may require security in terms of r.20 but, if satisfied that some other form of security is sufficient to ensure that the judgment will be satisfied, it may order such other security.

The security that is offered by the defendant is described in paragraphs 3 and 4 of Mr Mackay's affidavit as expanded upon in his oral evidence. It is generally described as a "club letter" and in form is an undertaking by the Britannia Steam Ship Insurance Association Ltd of London to pay whatever sum may be adjudged by this Court to be paid in the action together with interest and costs to the extent of its liability as

provided in the instrument. It further expressly undertakes to submit to the jurisdiction of this Court for the purpose of any process for the enforcement of the undertaking.

Mr Carruthers made several submissions as to the reasons why the Court should accept this proposed security as being adequate and, in the circumstances, appropriate. These submissions related to the general acceptability internationally of such "club letters", and in particular he referred to paragraphs 8 and 9 of Mr Mackay's affidavit, and to the delays, difficulties and expense involved in other forms of security, particulars of which were set out in the affidavit.

Mr Rudkin, on the other hand, submitted that the security offered should be rejected. He submitted there were two main objections to a "club letter". The first was the difficulty that the plaintiffs in New Zealand would experience "in collecting upon it" given that it was, in his submission, a London-based mutual uncapitalised association, and he referred to Mr Mackay's oral evidence as to that. I do not consider that enforcing a judgment against the Britannia Steam Ship Insurance Association Ltd in London would occasion particular difficulty. Mr Rudkin did not argue that a judgment could not be enforced against it in Britain under the reciprocal enforcement of judgments legislation, and his main argument appeared to be that it could well be that the company would not have sufficient funds to meet the judgment. The evidence was that a "club letter" security is underwritten as to the first $US750,000 by "the club" (i.e., the Britannia company), then the excess up to $US6,000,000 by the International Group referred to earlier, and the excess beyond that up to

$US450,000,000 by the international reinsurance market at Lloyds. The evidence shows that the International Group covers about 90% of the world's total shipping tonnage. Mr Rudkin's submission in reply to this evidence was that if there were two or three or more "Torrey Canyon" oil tanker disasters then the funds of "the club" and the International Group could well be exhausted and any judgment his plaintiffs obtained would not be satisfied. Apart from the fact that he offered no evidence or figures as to what was involved in a "Torrey Canyon" disaster, I consider this submission as extravagant as the events are unlikely. I do not regard this objection as being a good ground for rejecting a "club letter" as security.

Mr Rudkin's second main objection was that the plaintiffs who are to accept the security should have some faith, or be permitted to express their lack of faith, in the bona fides of those who offer the security. He then stated that he could tell the Court from the bar of the lack of bona fides of the defendants and their advisers. I informed him that he would not be permitted to make such allegations from the bar; people were not to have their honesty impugned by statements from the bar and it would only be permitted if there was evidence to support it. Mr Rudkin then asked for an adjournment to call such evidence. I refused the application for two reasons. First that he had consented to the abridgement of time, as is mentioned earlier in this judgment, and litigation should not ordinarily be permitted to drag on so as to enable parties to remedy deficiencies in their cases. Secondly, and in any event, it was not in my view a question of the plaintiffs having or not having faith in the bona fides of those putting the security forward but whether the security offered was in fact adequate.

Mr Rudkin then made a number of submissions which I have considered but do not intend to set out at length in relation to the possibility of obtaining insurance or bank security in place of what was offered.

In my view the "club letter" type of security is adequate to ensure that any judgment the plaintiffs obtain will be satisfied. It therefore meets the test I postulated earlier in this judgment and in my view, in the light of the delay, difficulty and expense of alternative securities, is acceptable. In my formal judgment I gave certain directions as to the form of the "club letter" to be given as security as in my view the form attached as a draft to Mr Mackay's affidavit was not entirely appropriate. I do not need to repeat that formal judgment here. I do, however, record two matters in relation to it.

The first is this: Mr Mackay in his evidence has stated that he is authorised by the Britannia Steam Ship Insurance Association to sign the "club letter" on its behalf. Mr Rudkin raised no objection in his submissions or during argument to this method of executing the "club letter". He directed his submissions to the unacceptability from his clients' point of view of the "club letter" at all but appeared to accept that there would be no question as to its validity if executed by Mr Mackay on the company's behalf. The second matter relates to the form of the "club letter" to which I have already made reference. Mr Carruthers accepted that it would require redrafting in view of the fact that it was in a form which was appropriate for a situation where the parties had agreed as to the course to be followed but not where it was to take effect following a court order. Mr Rudkin, when I asked him for

submissions as to the form that he considered appropriate, indicated that he had not given any consideration to the question and was apparently unprepared to make any submissions as to the form of obligation that should be cast upon the Britannia Steam Ship Insurance Association under a "club letter". In the circumstances, and because, as I have already said, time was very short, I made the order more fully set out in the formal judgment.

There is one final matter which I propose to record in these reasons for my judgment. Mr Rudkin appeared for the 14 plaintiffs and he assured the Court that his instructions were that all 14 plaintiffs objected to a "club letter" as security. Mr Mackay in his affidavit referred to information he had received from the Tokyo Marine and Fire Insurance Company as indemnifiers of Toyota New Zealand Limited, one of the plaintiffs in this matter. That information was to the effect that the Tokyo Marine and Fire Insurance Company regarded a "club letter" as quite acceptable and that Toyota New Zealand Limited were plaintiffs in respect of at least $2,500,000 worth of the insured loss. I made it plain to Mr Carruthers that I did not regard it as acceptable for the defendant to try and put before the Court material to suggest that the plaintiffs' counsel was wrong as to the position of one of the parties he represented at the hearing. That is a matter between the Tokyo Marine and Fire Insurance Company, as insurers, and Toyota New Zealand Limited, as the insured, and does not concern the Court. The Court accepts what counsel says as to his instructions. Mr Carruthers did not pursue the matter further.

Davison J

SOLICITORS:
Messrs Chapman, Tripp
Mr B.M. Rudkin