

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2009-404-003019

BETWEEN	LAMORENG HOLDINGS LIMITED Plaintiff
AND	THE SHIP "TPC TAURANGA" Defendant
AND	TPC KOREA CO LIMITED Applicant
AND	KUANG MING SHIPPING CORPORATION Intended Intervenor

Hearing: 30 July 2009

Appearances: W N NcCarthy for the Plaintiff
No appearance for the Defendant
J M Hayes for the Applicant
K Crooks for the Intended Intervenor

Judgment: 30 July 2009

[ORAL] JUDGMENT OF WYLIE J

Solicitors:

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[1] The plaintiff, Lamoreng Holdings Limited has issued proceedings *in rem* against the ship TPC Tauranga under s 4(1)(h) of the Admiralty Act 1973. It alleges breach of a charterparty entered into between North China Shipping Limited and TPC Korea Co Limited over another vessel, Maritime Setoshio. The plaintiff alleges that it is the assignee of all hire, damages and other monies due under the charterparty. The notice of proceedings is dated 21 May 2009 and it was filed on that day.

[2] The ship TPC Tauranga was arrested on 22 May 2009. The ship is currently berthed at the port of Tauranga and it remains under arrest. No judgment has as yet been entered against the ship TPC Tauranga.

Application seeking to enter an appearance

[3] TPC Korea Co Limited is the owner of the ship TCP Tauranga. It has made an application seeking leave to enter an appearance in the proceedings. That application is dated 13 July 2009.

[4] Under r 25.14 of the High Court Rules, any appearance by TPC Korea Co Limited should have been entered within 10 working days of the date of service. I am told by Mrs Hayes appearing for TPC Korea Co Limited that that 10 working day period expired on 8 June 2009.

[5] Rule 25.14(2) permits a party to enter an appearance either with the consent of the other parties or by leave of a Judge after the expiry of the specified period.

[6] The application for leave to enter an appearance is not opposed by Lamoreng Holdings Limited. Mr McCarthy appearing this morning for that company advises me that the proceedings have been largely settled, but that there is still one term of settlement which needs to be completed. He anticipates that if that occurs, the writ of arrest will be lifted. Mr McCarthy has made it clear that the plaintiff reserves its right to claim the costs of arrest already incurred as a priority payment against the vessel.

[7] Lamoreng Holdings Limited takes no position in relation to whether or not TPC Korea Co Limited should be granted leave. It does not however formally consent. As a result leave must be granted by this Court.

[8] I have not been referred to any authority relevant to applications for leave under r 25.14(2). The rule itself is silent as to the circumstances in which leave can be granted. Clearly there must be some acceptable explanation for the delay, and I accept Mrs Hayes' submissions that a Court considering an application should balance the competing interests of the parties who will be affected, and determine whether or not granting leave is in the overall interests of justice.

[9] An affirmation has been filed by a Mr Dong Pyo Lim. He is the Director of TCP Korea Co Limited's Planning Division and he was authorised to make the affirmation on its behalf. I have read that affirmation and I am satisfied that TPC Korea Co Limited had reasonable grounds for failing to enter an appearance within time. It deferred filing the required memorandum because it was confident that it could negotiate the release of the ship with the plaintiff. In the event it seems likely that its endeavours will succeed. There does not seem to be any prejudice to any other party. Lamoreng Holdings Limited takes no position. Insofar as I can glean from the papers filed, it would be prejudicial to TPC Korea Co Limited, as a foreign defendant, if it were to be precluded from having the opportunity to defend the claim given that the ship is one of its assets, and given that it has been seized and detained in this country.

[10] In the circumstances, I grant leave to TPC Korea Co Limited to enter a conditional appearance in these proceedings.

[11] Mrs Hayes has asked me to record that the appearance is a conditional appearance because TPC Korea Co Limited reserves its right to protest the jurisdiction of the Court. In particular it reserves its right to apply for a stay of the proceedings in favour of an arbitration. I am advised that there is an arbitration provision in the charterparty agreement.

[12] In the absence of any opposition, and given the intimation by Mrs Hayes, it is appropriate to order that the appearance is a conditional appearance and I do so under r 25.12(3).

Notice of intention to intervene

[13] A notice of intention to intervene has also been filed on behalf of Kuang Ming Shipping Corporation. That notice is given pursuant to r 25.50 of the High Court Rules.

[14] Ms Crooks has appeared before me today on behalf of Kuang Ming Shipping Corporation. She has, out of abundant caution, sought the leave of the Court so that her client can intervene in the proceedings.

[15] It is not obvious to me that leave is necessary. Rule 25.50(1) does not put in place a leave requirement. I note however that the synopsis of the rule appearing in *McGeechan on Procedure* does suggest that the leave of the Court is necessary. I suspect that the synopsis is wrong. I do not finally determine this issue because counsel has not addressed it in any detail, and they were not ready to argue it.

[16] I record that Mr McCarthy again took no position in relation to the notice of intention to intervene. Mrs Hayes had received a copy of the notice of intention to intervene, but she had no formal instructions in relation to the same. Nor has the notice of intention to intervene been served on the ship, TCP Tauranga. Assuming that leave is required, I note that there is no supporting affidavit confirming the assertions made in paragraph 2 of the notice.

[17] In the circumstances, it seems to me that the most appropriate course is to defer further consideration of the notice of intention to intervene to give Kuang Ming Shipping Corporation time:

- a) to effect service;

- b) to consider whether leave from the Court is necessary; and
- c) to file such affidavits as it wishes to lodge with the Court in the event that it decides leave is required.

A deferral will also give Mrs Hayes the opportunity to seek formal instructions.

[18] I direct that the notice of intention to intervene should be called before the Duty Judge at 10.00am on Thursday 6 August 2009. If Mrs Hayes reaches the conclusion that leave is necessary and obtains instructions to consent, then I would request that the parties should file a consent memorandum to that effect. Any appearance will then be excused. Similarly if the parties agree that no leave is necessary, then a consent memorandum can be filed and again any appearance is excused.

[19] Ms Crooks sought that copies of any papers filed in the interim should be served on her on behalf of Kuang Ming Shipping Corporation Limited. She has lodged a caveat dated 23 July 2009 against the issue of a release of the arrested ship and against the payment out of the proceeds of sale should the Court order that the ship be sold.

[20] There was some debate before me as to whether or not that caveat does or does not entitle Kuang Ming Shipping Corporation to copies of any papers filed. In the event Mr McCarthy on behalf of Lamoreng Holdings Limited was happy to undertake that copies of any papers filed by his client will be served on Ms Crooks on behalf of Kuang Ming Shipping Corporation. Mrs Hayes did not have instructions to agree to that course. She will have to consider whether or not the leave of the Court is necessary or whether the fact that a notice of intention to intervene has been filed suffices and requires that copies of any papers filed should be served on Kuang Ming Shipping Corporation.

Costs

[21] The costs of today's hearing in relation to both applications are reserved.

Wylie J