Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

T-1666-97

ACTION *IN REM* AGAINST THE SHIP *"LIMANSKIY"* AND CARGO LATELY LADEN ON BOARD THE SHIP *"LIMANSKIY"*

Between:

KIKU FISHERIES LTD.

Plaintiff,

- and -

CANADIAN NORTH PACIFIC OCEAN CORPORATION;
INTERNATIONAL TRANSPORTATION & FISHING LTD.;
KASPRYBKHOLODFLOT JOINT STOCK COMPANY;
THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP *"LIMANSKIY"*, THE CARGO EX THE SHIP *"LIMANSKIY"* ON BOARD OF WHICH THE CARGO NOW IS OR WAS LATELY LADEN AND YAMAZAKI ENTERPRISE LTD.,

Defendants.

REASONS FOR ORDER

JOHN A. HARGRAVE
PROTHONOTARY

These reasons deal with the motion of Marcom Co. Ltd. ("Marcom") to strike out the *in rem* aspects of the Statement of Claim and to set aside the arrest of the *"Limanskiy"*. Marcom has filed a conditional appearance, styling itself as a bare boat or demise charterer of the *"Limanskiy"*, a small refrigerator ship owned by Kasprybkholodflot ("KAO"). The ship issued and left at large three different sets of bills of lading, causing some confusion and consternation among competing claimants to a parcel of frozen roe herring.

I would normally, on reserving my decision in a fairly complex matter such as this, take a reasonable time to reflect on counsel's submissions before setting

out to write considered reasons. However, there has already been far too much delay. The *"Limanskiy"* has been under arrest in Vancouver for some six weeks. Further, the matter has been quite extensively canvassed for three days. All things considered, the present situation will not be improved by further delay.

In the action giving rise to this motion, Kiku Fisheries Ltd. ("Kiku") seeks, as against the *"Limanskiy"* and KAO, either delivery of the frozen roe herring, which is now under arrest in cold storage arranged for by Yamazaki Enterprises Ltd. ("Yamazaki"), another claimant to the roe herring, or damages in the amount of $225,000.00 (U.S.).

As I said the motion is to strike out the *in rem* portions of the Statement of Claim and to release the vessel by setting aside the arrest warrant. The grounds are that the Statement of Claim contains no reasonable cause of action, or alternatively, is scandalous, frivolous, vexatious or an abuse of process.

None of the Defendants has as yet filed a defence. I am left to piece together what happened from the Statement of Claim, from the often conflicting affidavit material, from the transcripts of cross-examinations of a number of deponents and from the *viva voce* evidence of Mr. Oleg Tchoubarov, a former employee of Canadian North Pacific Ocean Corporation ("CNPOC").

BACKGROUND

The *"Limanskiy"* had aboard some 700 tonnes of frozen Russian roe herring, shipped by an apparently unpaid vendor, International Transportation & Fishing Ltd. ("IT & F") to Vancouver. This shipment was arranged for by CNPOC, a British Columbia company. CNPOC contracted with Kiku, on March 18, 1997, to provide up to 1,200 tonnes of frozen roe herring, at which point Kiku paid the first instalment of the purchase price, $165,000.00. This payment purports, among other things, to give Kiku an interest in the roe herring equivalent

to its payment to CNPOC, a term set out in the eighth paragraph of the eleventh section of the agreement.

Kiku and the Defendant Yamazaki are fish processors. Both have paid substantial sums of money to CNPOC and both hold documents which I shall call Bills of Lading. Both claim an interest in the herring. Whether or not the documents are Bills of Lading is also an issue.

Here I would note that counsel for CNPOC cautions as to making unnecessary findings of fact, for there is other pending litigation. In the present instance the substantial determinations required are of questions of law. There are few if any facts involved which impinge directly on the other Defendants and where there are such, they are to a large degree disputed facts as between the Plaintiff and Marcom.

The cargo loaded aboard the *"Limanskiy"* was a result of a barter transaction in Russia whereby IT & F became its owner. On July 4, 1997, a Mr. Sukanov, who is with both Marcom and IT & F, instructed the Master of the *"Limanskiy"* to produce two different sets of Bills of Lading, both showing CNPOC as consignee, but one with Yamazaki as a notify address and the other with Kiku as a notify address. In passing I would question why, if the notify address is meaningless, as contended by counsel for Marcom, it was necessary to produce two sets of Bills of Lading.

In the result, Kiku holds a Bill of Lading dated July 7, 1997, signed by the Master of the *"Limanskiy"*, under a seal which refers to the owners, KAO and to the ship. On that Bill of Lading IT & F are shown as the shipper, CNPOC as the consignee and Kiku as the notify address. The Bill of Lading was delivered to Kiku on July 18, 1997. It appears to be closely connected with a further advance

of money by Kiku, $60,000, requested by CNPOC, to go toward freight. This advance, perhaps fortunately for Kiku, is collaterally secured.

The Master also issued another Bill of Lading dated July 7, 1997, similar to that held by Kiku, but showing Yamazaki as the notify address. The Master issued a third Bill of Lading, on about July 29, 1997, which was prepared in Vancouver, still showing IT & F as shipper, but with Yamazaki as consignee. This third Bill of Lading is said to have been signed by the Master in error. Unfortunately the Master signed and issued the additional Bills of Lading while Kiku still held the initial July 7, 1997, Bill of Lading. Finally, CNPOC, in the role of voyage charterer of the *"Limanskiy"*, issued its own Bill of Lading, an odd document without a shipper, but showing Kiku as the consignee.

Kiku's evidence is that the Bill of Lading which it holds was sent to it by courier and delivered by the principal of CNPOC, Nikolai Sinitchnikov. For its part, CNPOC seems to deny delivering the Bill of Lading, yet it does not allege that the Bill of Lading was wrongfully taken by Kiku. On July 19, 1997, the day after the July 7, 1997, Bill of Lading signed by the Master was delivered to Kiku, it was cancelled by IT & F, Marcom, and CNPOC. Kiku was not advised of the cancellation.

The next interesting turn of events is a contract headed "Agreement "New"", made on July 21, 1997, between Kiku and CNPOC. It is in part a roe herring processing contract. However, it purports to give some form of possessory interest to Kiku in order that Kiku may recover the $165,000 instalment paid under the original agreement on March 20, 1997. Counsel for Kiku suggests that the interests his client holds, under both agreements, is an equitable interest in the roe herring.

Despite being a notify address, no one advised Kiku either of the pending arrival or of the arrival of the *"Limanskiy"* at Vancouver. Kiku learned, through its own efforts on July 31, 1997, that the herring cargo from the *"Limanskiy"* was in fact being discharged at Vancouver.

Kiku's evidence is that on August 1, 1997, it obtained an endorsement on the reverse of both of its Bills of Lading, that is on the July 7 Bill of Lading signed by the Master and on the subsequent Bill of Lading produced by CNPOC. The endorsement was by a Mr. James Kim, formerly an officer with the American sister company of CNPOC, North Pacific Ocean Corporation ("NPOC"). Here I would note that James Kim was one of the signatories of the original March 18, 1997, contract between CNPOC and Kiku to supply frozen roe herring. Kiku feels that Mr. Kim was held out as having appropriate authority to endorse the Bills of Lading. CNPOC says that Mr. Kim was associated only with the Seattle sister company, NPOC, and that, in any event, was no longer employed either by CNPOC or by NPOC.

Well before Kiku was able to have its Bills of Lading endorsed, it appears that CNPOC gave instruction to IT & F to discharge the roe herring. There is some indication that this instruction, dated July 18, 1997, that the herring go to Yamazaki, was prepared by CNPOC after the arrival of the *"Limanskiy"* at Vancouver on July 29, 1997, and had begun discharging the cargo, with the document being back-dated, by transmitting it between fax machines in the North Vancouver office of CNPOC, the receiving machine having had its dating mechanism reset. Counsel for Marcom spent a good deal of time in argument with submissions as to whether or not there had been a back-dating and whether representatives of Marcom and IT & F had been in CNPOC's offices at the time. The evidence on all of this is quite contradictory and I think not relevant for the purpose of the present motion.

When Kiku realized that the *"Limanskiy"* was at Vancouver and produced its Bill of Lading to the ship, the cargo had already been discharged to cold storage.

As I have indicated, no one has filed a defence, nor has KOA produced affidavit evidence. Therefore this chronology may lack pertinent elements. While there is affidavit evidence which has been produced on behalf of the various Defendants, some of it, including a good deal of opinion evidence, I either do not accept or give little weight. Further, some of the evidence has not, due to interruptions in the flow of cross-examinations, been tested to the extent reasonably to be expected. Thus this chronology is merely a guide, rather than a catalog of facts upon which the merits of the claims of the parties might be settled.

STRIKING OUT

To begin, I will touch on the heavy onus on a party moving to strike out a pleading, here being portions of the statement of claim. It must be plainly, obviously and beyond doubt that the pleading is futile and will not succeed before it will be struck out. When a pleading is challenged on the basis of want of reasonable cause of action, I must accept the statement of claim as if the facts have been proven, unless the facts are patently unreasonable. No affidavit evidence is permitted, when testing for a reasonable cause of action, except where there is a jurisdictional issue. Properly, a motion challenging jurisdiction should be brought under Rule 401, but to bring the motion under Rule 419(1)(a) is not fatal.

The test, when it is alleged that an action is scandalous, frivolous, vexatious or an abuse of process, under Rules 419(1)(c) and (f), is a stringent as or even more stringent than that under Rule 419(1)(a): *Waterside Ocean Navigation Co. Inc. v. The Ship "Laurentian Forest"*, [1977] 2 F.C. 257 at 259,

a decision of Associate Chief Justice Thurlow. Indeed, a court will not deny a party's date in court if there is any chance of the claim succeeding.

Where a claim could possibly succeed if a pleading were amended, such an amendment ought to be allowed. To deny an amendment there must be no scintilla of a cause of action.

In summary, the onus on a party seeking to strike out a pleading is a difficult one to satisfy. All the more so in that serious issues of law, disputed points of law or uncertain points of law ought not to be determined on a summary motion to strike out, but rather such points are better left for decision at trial when all the facts are known: see for example *Manitoba Fisheries Ltd. v. The Queen*, [1976] 1 F.C. 8 at 18 (F.C.T.D.) and *Vulcan Equipment Co. Ltd. v. Coats Co. Inc.* (1982), 58 C.P.R. (2d) 47 at 48 (F.C.A.), leave to appeal to the Supreme Court of Canada refused (1982) 63 C.P.R. (2d) 261. In the present instance there are a number of interesting points of law which do not arise at all frequently and indeed some points of law which may not have been determined either with certainty or at all.

ANALYSIS

The Amended Statement of Claim, to the extent it touched *in rem* on the *"Limanskiy"*, begins with a reference to the March 18, 1997, contract between Kiku and CNPOC to provide up to 1,200 tonnes of roe herring. Marcom objects to this reference as being an indication of a fish processing dispute which it submits is beyond the jurisdiction of the Federal Court. The dispute between CNPOC and Kiku, while touched on in the Statement of Claim, is not the subject of this motion. However, the contract between Kiku and CNPOC is relevant in that it may well be evidence of an earmarking or appropriation of herring to Kiku, in proportion to Kiku's payments, resulting in some form of an equitable interest which might, in certain circumstances, be fleshed out into some greater interest.

To the extent that this portion of the Statement of Claim, set out in paragraph 7, is background information it is not objectionable. To the extent that it shows an interest of Kiku in the frozen roe herring, it is quite relevant.

The Statement of Claim goes on to refer to the July 7, 1997, Bill of Lading, showing Kiku as a "notify party": the term used on the Bill of Lading is actually "notify address". If the difference between the terms is relevant, that might be corrected by a further amendment. There follows a reference to the Bill of Lading produced by CNPOC, in favour of Kiku as consignee, which has no relevance so far as the *in rem* claim against the *"Limanskiy"* is concerned.

The Statement of Claim again refers to an agreement between CNPOC and Kiku, this time the July 21, 1997, agreement. While it might be argued that this agreement is not a marine matter within the Court's jurisdiction, it does grant some sort of an interest in the roe herring to Kiku so that Kiku might recover its first instalment of $165,000.00, paid on March 20, 1997. As such it is a relevant pleading.

There is a subsidiary jurisdictional issue, perhaps not too emphatically argued by counsel, but worth touching on, and that is the relationship of the Plaintiff's claims to the Federal Court's statutory jurisdiction. The acts complained of by Kiku occurred at various stages during the voyage and, indeed, even after the vessel arrived at berth at Vancouver and had completed discharge. Counsel for Kiku says the negligence in issuing additional Bills of Lading allowed Kiku to be displaced and that the alleged breach of duty of the carrier, as bailee for reward, both in failing to deliver the parcel of roe herring to Kiku as the holder of the original Bill of Lading and in failing to notify Kiku of the arrival of the cargo, fall within Section 22(1), the broad general jurisdictional provision, for Canadian maritime law includes claims as to the handling of cargo, even in a terminal after discharge, as in *ITO v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752

at 775-776 and *Monk Corporation v. Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779 at 795 and 799-800.

Of the more specific jurisdictions counsel refers to subsection 22(2)(e) as the basis for the Federal Court's jurisdiction over cargo claims, citing *Tropwood A.G. v. Sivaco Wire & Nail Co.*, [1979] 2 S.C.R. 157 at 160-161 and the operative parts of that subsection, claims for loss of property being loaded off a ship. Subsection 22(2)(i), granting to the Court jurisdiction over claims arising out of the carriage of goods in a ship is also pertinent. Counsel for Marcom correctly took exception when counsel for Kiku tried to stretch the bounds of other jurisdictional provisions of subsection 22(2).

The direct claims which Kiku makes against Marcom, IT & F, KAO and the Master of the *"Limanskiy"* are first, the instruction to issue the July 7, 1997, Bill of Lading which refers to Kiku, followed by a direction of the Master to deliver the cargo to Yamazaki; second, issuing other Bills of Lading when the Master knew that the original Kiku Bill of Lading was still in circulation; third, failing to require the Kiku Bill of Lading be surrendered to the Master before any other bill of lading was recognized; fourth, failing to notify Kiku of the pending arrival of the cargo; and finally, failing to interplead the cargo, as opposed to delivering it up to either CNPOC or Yamazaki for storage.

The critical points in all of this are the nature of the Bill of Lading; whether it binds the ship *in rem*; whether Kiku has an interest in the cargo; and whether there is a duty on the part of the Master or owners to advise Kiku as a notify addressee. Counsel for Marcom and the ship takes the position that these questions bear on areas of the Statement of Claim which are scandalous, frivolous, vexatious or an abuse of process, and therefore may be tested against affidavit evidence. It is unfortunate that the greater part of the affidavit evidence is conflicting, or is opinion, or even makes little sense.

As to the nature of the Kiku Bill of Lading, there is nothing to indicate that it is negotiable, but by the same token it is not stated to be a non-negotiable document or of no legal effect. The Plaintiff relied upon the Bill of Lading delivered to it as evidence that cargo was actually en route to Vancouver. There is an issue as to whether Kiku believed it could obtain the cargo, once it arrived at Vancouver, using the Bill of Lading. However, everyone understood that many commercial transactions, including obtaining letters of credit, could be accomplished with a bill of lading and therefore the Bill of Lading gave some commercial control over the roe herring. Further, counsel for Kiku makes the point that it is misleading if a carrier can issue a document, titled Bill of Lading, and then say it is something less than a bill of lading. To bolster this argument counsel says that if the Kiku Bill of Lading did not in some way entitle the holder to delivery of the goods, there would be no need for the purported cancellation of that Bill of Lading and further, no need to create two Bills of Lading, identical, except for different notify addressees.

Counsel for the Plaintiff raises an interesting point which he submits has never been settled, and that is the effect of whether the delivery of a non-negotiable Bill of Lading transfers any title or possession. Counsel refers to a short statement in the 12th edition of Payne and Ivamy on Carriage of Goods by Sea:

> It has never been settled, however, whether delivery of a bill of lading which is marked "non-negotiable" transfers title at all (p. 82).

Payne and Ivamy refer to *Kum v. Wah Tat Bank Ltd.*, [1971] 1 Lloyd's 439, an appeal to the Privy Council from the Malaysian Court of Appeal. The passage from Payne and Ivamy is a verbatim quote from Lord Devlin's judgment at page 446. Lord Devlin does go on to say that this is not surprising for when the consignor and consignee are in fact seller and buyer, as is usually the case, the *Sale of Goods Act* provides that shipment ordinarily serves as delivery and as an appropriation of the goods, so in that situation it does not really matter whether

the bill of lading is a document of title or not. However, the question still remains. The *in rem* portion of the Statement of Claim ought not to be struck out merely because of some conventional wisdom, possibly faulty, that a transfer of a non-negotiable bill of lading transfers nothing. It is a question that is clearly opened to be argued and to be determined.

Counsel for the Kiku also refers to the Privy Council decision in *C.P. Henderson & Co. v. The Comptoir D'Escompte de Paris* (1873), L.R. 5 P.C. 253 at 261 for the proposition that endorsement and delivery of a bill of lading, even a non-negotiable bill of lading, can give an equitable right to goods even where the bill of lading omits a reference that it is "to order or to assigns".

In the present instance there is an issue as to how Kiku obtained the endorsement on its Bills of Lading and whether the person endorsing them had any authority. Counsel for Kiku submits that James Kim, of the sister enterprise, NPOC of Seattle, whom it must be remembered signed the original agreement between Kiku and CNPOC to provide herring, was held out as having authority. Conversely, counsel for Marcom says that James Kim was neither in the current employ of NPOC nor held out by CNPOC as having any authority. Counsel for Marcom also submits that the holding out is poorly pleaded. In my view the evidence is such, at this stage, that it is impossible to say whether James Kim was held out as an appropriate person to endorse the Bill of Lading and further, if there is a weakness in the pleading as to holding out, that can be rectified at this stage by a further amendment, keeping in mind that the Plaintiff has a right to freely amend until someone files a defence.

At this point I would touch on another arguable issue, and that is whether any equitable interest held by Kiku, as a result of delivery of the July 7, 1997, Bill of Lading, might be fleshed out into something more by reason of the provisions of the two fish processing agreements between CNPOC and Kiku, which grant

some interest in the herring to Kiku and by delivery of the cargo to CNPOC at Vancouver. On this latter point, the evidence is inconclusive as to whether cargo was delivered to CNPOC and then put into storage by Yamazaki, or whether the delivery was to Yamazaki. These are points which must be determined at trial after proper discovery of witnesses and documents, for at this point I am unable to say it is obvious and beyond doubt that this is a futile plea which will not succeed.

Counsel for Marcom makes the point that even if Kiku has some interest under the Bill of Lading, which has been denied or interfered with, it does not necessarily follow that the ship is liable *in rem*. Counsel for Marcom submits that there is a rule that unless an owner is liable *in personam*, the owner's ship cannot be liable *in rem*. This is certainly the case which faces a necessaries claimant. It also has some validity in cargo cases. In the second edition of Tetley on Marine Cargo Claims, Butterworths, 1978, the author sums up the area as follows:

> The bill of lading is signed by the master or on his behalf and such a bill of lading normally binds the owner of the vessel for whom the master acts. The only exception appears to be the case where the master is employed directly by a demise charterer. This does not, however, exclude an action *in rem* against the vessel.
> (p. 83)

There is a similar passage in the 4th edition of Tetley on Marine Cargo Claims, which attributes this principle to *Baumwoll Manufactur Von Carl Scheibler v. Furness*, (1893) A.C. 8 (H.L.), the headnote of which is pertinent:

> The owner of a ship, registered as such, and as the managing owner under the *Merchant Shipping Act 1876*, who has parted with the possession and control of the ship under a charter party to the charterer, is not liable for the loss of goods shipped under bills of lading signed by the captain who is a servant of the charterer and not the owner and who has no authority from the owner to pledge his credit, although the shipper of the goods has no notice of the facts.

This brings us to what I believe is the key issue, whether the *"Limanskiy"* was demise chartered by KOA to Marcom. There is no evidence on the point from KOA, however, the executive director of Marcom has produced a document headed "The Contract No. 2. . . on Joint Activities January 10, 1996. Astrakhan" which he deposes is a demise charter.

The construction of a marine agreement, such as the vessel use contract between Marcom and KAO, is a question of law. The agreement, which is for a ten-year duration, provides for payment to KAO, as the vessel owner, of an unspecified percentage of net profit. Counsel for Marcom points out that KAO shares in the net profit but is not liable for losses. The contract seems to indicate that the operating expenses for the vessel will come out of the gross profit and thus it would appear, in the long run, assuming the vessel was profitable over ten years, that Marcom would not be out of pocket. If a party shares losses as well as profits, there is a strong presumption of partnership: see for example *Green v. Beesley* (1835), 2 Bing N.C. 108, 132 E.R. 43, *Brett v. Beckwith* (1856), 26 L.J. Ch. 130 and *Nokes v. Barlow* (1872), 26 L.T. 136, Ex. Ch. But even if a person or entity shares only the profits of a business, that is *prima facie* evidence that he is a partner in the enterprise: see for example *Rush and Tomkins Construction Ltd. v. Vieweger Construction Co. Ltd.* (1964), 45 D.L.R. (2d) 122 (Alberta Supreme Court), reversed on another point, [1965] S.C.R. 195. This is some indication that the vessel use agreement between KAO and Marcom is not a demise charter, but rather is some form of a partnership or joint venture. However, the better approach in such an analysis is to look at the terms of the arrangement between the parties, considered as a whole.

The Joint Activities contract contains an interesting concept and that is a power of attorney given by KAO to Marcom. That would be a very unusual and perhaps even an unheard of provision in a charter by demise, but perhaps logical in a joint venture.

Turning to the contract as a whole, the construction of an agreement such as the vessel use contract between Marcom and KAO, is a question of law. Such a document is to be construed in the light of its nature and details, looking at any obvious and expressed intent of the parties, as set out in the terms of the agreement. In the present instance, we have some plain and unambiguous words

and phrases, including "Joint Economic Activities", "Management of Joint Business", "Joint Property of the Participants", "Joint Expenditure of the Participants of the Contract" and "Joint Activities". These clear and obvious expressions of intent make it much more likely that the agreement is either one for ship management, or more likely, one for a joint venture, as opposed to a demise charter. This being the case, the owner would be bound by the Master's signature on the Bill of Lading and the action would sound *in rem* against the *"Limanskiy"*. However, this question is complex. It is a question of law, for the parties to the agreement may call the agreement anything they wish, but it is up to the Court to decide what in fact the agreement represents. As I have already pointed out, it is arguable that Kiku has an interest in the cargo under its Bill of Lading. This is not to say that Kiku will succeed on that point, but I am unable to say that it is a forlorn pleading. This whole area is largely a question of law. The question of law ought to be answered at trial, not on an interlocutory motion such as the present.

Counsel for Kiku presented an alternative to the effect that even if the *"Limanskiy"* is on a demise charter,Marcom is, for practical purposes, the owner of the vessel and entitled to subject the vessel to *in rem* liability. This is a much more tenuous argument. However, even if I reject it out of hand at this point, it does not result in any factual portion of the Statement of Claim being struck out. Rather, it is an alternative argument.

Kiku also says that the Master, and by extension the owner, ought not to produce and release a whole series of Bills of Lading without making certain that the prior Bills of Lading are out of circulation. This is neatly put by Lord Devlin in *Kum v. Wah Tat Bank Ltd.* [*supra*] at p. 445:

> . . . The establishment of the mate's receipt as a document of title would necessarily deprive the master of this degree of liberty, for he would then be as much at fault in issuing a bill of lading without the delivery up of the mate's receipt as he would be if he issued a second set of bills of lading without delivery up of the first. [emphasis added].

The final issue, which Marcom again says ought to be struck out, is the plea that a carrier has an obligation to contact a notify addressee when the cargo arrives. Counsel for Kiku refers to *Armstrong v. Canadian Northern Railway Co.* (1914), 6 W.W.R. 1578 at 1580, an appellate decision out of Saskatchewan. There the court found that a direction to notify a bank meant what it said. Granted, this is not a marine decision, but it is certainly arguable that a marine carrier, just as a land carrier, is obliged to send notice to persons as directed on a carriage document. Again, this is a plea which ought not to be struck out as it is not a forlorn plea.

In summary, Marcom has failed to convince me that the claims of Kiku are plainly, obviously and beyond doubt so futile and that they will not succeed. This leads to the last issue, that of a release of the vessel by reason of alleged deficiencies in the Affidavit to Lead Warrant.

AFFIDAVIT TO LEAD WARRANT

Marcom takes exception to the Affidavit to Lead Warrant which, as with many such affidavits prepared in haste by counsel who has received skeletal instructions to arrest a vessel about to depart, displays some inaccuracies that are mildly embarrassing in the cold light of day. This is inevitable, but is not necessarily or even usually fatal, for as Mr. Justice Dubé pointed out in *Magnolia Ocean Shipping Corporation v. The "Soledad Maria"*, [1982] 1 F.C. 205, ". . . the arrest of a vessel is merely procedural, it merely provides a remedy and does not create any special legal vested right in the arresting party which did not exist before the arrest." (p. 208).

Counsel for Marcom submits there ought to be full and complete disclosure of all material, the information of the documents, favourable and unfavourable to an arrest, in an affidavit to lead warrant. Counsel referred indirectly to *Waterside Ocean Navigation Co. Ltd. v. The "Laurentian Forest"*, [1977] 2 F.C. 257. In that

case Associate Chief Justice Thurlow, as he then was, suggested in a footnote that Rule 1003(2), governing the mandatory elements which must appear in an affidavit to lead warrant should, in modern times, to require more than it does at present and that it ought ". . . to show a proper case of circumstances justifying the arrest of the vessel or property." (p. 266).

Counsel did refer to *Armada Lines Ltd. v. Chaleur Fertilizers Ltd.*, [1995] 1 F.C. 3, a decision of the Federal Court of Appeal. A portion of the decision dealing with wrongful arrest was overturned by the Supreme Court of Canada. However, the comments of the Court of Appeal, or perhaps what were the views of the Court, are an interesting gloss on Rule 1003(2) dealing with the content of the affidavit to lead warrant. The Court of Appeal recognized that the Rule sets out the criteria necessary in order to obtain an arrest warrant. The Court also considered the somewhat more onerous requirements for obtaining a Mareva injunction, including full and frank disclosure of all material matters within the plaintiff's knowledge and of providing full particulars of the claim, including fairly stating the points made against the plaintiff by the defendant. Now this is quite laudable, but it is not required on the plain wording of Rule 1003(2) which requires the affidavit to set out:

> (*a*) the name, address and occupation of the applicant for the warrant;
> (*b*) the nature of the claim;
> (*c*) that the claim has not been satisfied;
> (*d*) the nature of the property to be arrested . . .

In commenting on this Rule in *Lorac Transport Ltd. v. The "Atra"* (1984), 9 D.L.R. (4th) 129, Mr. Justice McNair, apropos of the *"Atra"*, noted that there was nothing in the Rule requiring disclosure of beneficial ownership and that if that were a necessary averment it would have been set out in the Rule (p. 133). In my view one need not go beyond a reasonable interpretation of the disclosure required by the Rules.

In *Margem Chartering Inc. v. The "Bocsa"*, an unreported decision of March 5, 1997, in action T-2418-96, I wrote that a plaintiff need not set out the defendant's case in the affidavit to lead warrant, but did take the deponent of an affidavit to lead warrant to task for seeking to arrest a ship when there was no privity of contract between the plaintiff and the owner, such constituting an abuse of process. However, I went on to point out that as the test of abuse of process carried a high onus, a court would try to salvage a warrant, just as a court would give the benefit of any doubt to plaintiffs so they might not be deprived of a day in court.

At one end of the scale is The *"Vasso"*, [1984] 1 Lloyd's 235 (C.A.) in which the plaintiff failed to disclose, in his affidavit to lead warrant, that an arbitration was being actively pursued. The Court found that the only purpose of the arrest was to obtain security and that under the law of England, as it then stood, an arrest could not be exercised merely to provide security for an award which might be made in arbitration proceedings. This constituted a failure to disclose material facts, a vexatious and abusive situation. Such failure to make full and frank disclosure resulted in the discharge of the order for the arrest. The Court said that this might be so even though the facts were such that, with full disclosure, an order for arrest might have been justified.

Alternately, in The *"Nordglimt"*, [1987] 2 Lloyd's 470, the Court dealt with an application to set aside or strike out a warrant in that the affidavit to lead warrant made inaccurate statements of fact and failed to make a full and frank disclosure. The affidavit contained an important misstatement of fact which, if care had been taken, would have been appreciated and indeed, if the inaccuracy had been initially disclosed, the warrant would have been refused (p. 473). However, after chastising counsel, Mr. Justice Hobhouse went on to point out that an inaccuracy in an affidavit to lead warrant did not necessarily justify setting aside the warrant for ". . . it does not automatically follow that the failure to place

the proper facts accurately before the Court will invariably lead to the setting aside of the order so obtained" (p. 474). Key here is the observation that the inaccuracy was neither deliberate nor did it affect the merits for it did not enable the plaintiffs to obtain any relief that they would not have been able to obtain if the correct facts had been stated. In the result he allowed the warrant to stand. This is perhaps in line with Mr. Justice Dubé's comments in The *"Solidad Maria"* [*supra*] to the effect that arrest is merely procedural and does not create any special legal rights which did not exist before the arrest.

In the present instance the Affidavit to Lead Warrant sets out that the Plaintiffs' claim is ". . . for non-delivery of a cargo of 21,939 boxes of frozen roe herring carried aboard the Defendant Ship *"Limanskiy"* from the Sea of Okhotsk to Vancouver, British Columbia". However, Marcom says there ought to be mention of negligence and of breach of duty as a bailee for reward. In my view the description of the claim is factual. It identifies the claim. It does not leave the Defendant shipowner in any doubt as to what the claim is all about and all the more so given what is set out in the Statement of Claim. Counsel for Marcom points out that there is no mention of any contract of carriage or of the parties to that contract. However, this particular Affidavit to Lead Warrant goes a good deal farther than most in that is appends, as an exhibit, two Bills of Lading upon which the Plaintiff relies.

The next submission as to the Affidavit to Lead Warrant that I will deal with is the inclusion as an exhibit of a copy of the contract between CNPOC and Kiku. The submission here is that the contract is not a marine contract involving the carriage of goods on the *"Limanskiy"* and that the owner of the *"Limanskiy"* is not a party to the contract. The exhibiting of this agreement is, by and large, irrelevant. However, given the material in the balance of the Affidavit to Lead Warrant, it is not misleading.

The Affidavit to Lead Warrant then goes on to set out the payments made by Kiku to CNPOC and apparently to IT & F for freight, pilotage, port dues and the like. While it is an indication of Kiku's stake in the action, it is by and large irrelevant. That is does not absolutely accord with what is set out in the Statement of Claim is of no particular moment in that the arrest procedure does not add anything to the Plaintiffs' substantive rights.

Counsel submits in his written brief that

> ". . . the Affidavit to Lead Warrant is intentionally evasive, internally inconsistent, inconsistent with the Statement of Claim and designed to bring what is clearly not a legitimate maritime claim within the maritime jurisdiction of this Honourable Court".

This is going too far. Perhaps the deponent's only fault was that he chose to include too much material in the Affidavit to Lead Warrant.

There is an error in the Affidavit to Lead Warrant at paragraph 7 in that the deponent refers to one of the Bills of Lading as naming CNPOC as the shipper. That particular Bill of Lading was on the letterhead of CNPOC. It showed Kiku Fisheries Ltd. as consignee. It neglected to show any shipper. Under cross-examination counsel quite frankly acknowledged that the Bill of Lading in question was quite unusual in that it didn't name a shipper. However, I would point out that this so-called CNPOC Bill of Lading showing Kiku as consignee is in all probability a nullity. Certainly paragraph 7 is in error and is good evidence that the Affidavit was prepared in haste which, as I have pointed out, is often the case. However, I do not see the point of accusing the deponent of the Affidavit, respected Vancouver Admiralty counsel, of swearing a false affidavit.

Counsel for Marcom goes on to refer to a failure to disclose what is referred to as a fraudulent endorsement on the Kiku Bill of Lading. However, from the material, there is every indication that the endorsement on the reverse,

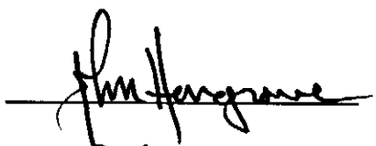
whether or not it was fraudulently obtained, something counsel has not shown at all clearly in the evidence produced to date, was in all likelihood not on the reverse of the Bill of Lading when it was presented to counsel to attach to his affidavit.

Counsel for Marcom goes on to complain that a number of other documents are neither referred to nor exhibited to the Affidavit to Lead Warrant. The documents looked for are not documents which one would ever expect to see exhibited to an Affidavit to Lead Warrant. The documents are those which would be relevant to the action and would be produced on discovery of documents in due course. An affidavit to lead warrant is not an affidavit of documents: to establish the Affidavit to Lead Warrant as such would be to defeat the whole intent and usefulness of the arrest procedure as a quick method of securing claims in appropriate instances. The arrest procedure is particularly valuable in our jurisdiction, for Canada is not a nation with a foreign-going merchant marine and therefore must rely upon offshore carriers, often carriers in effectively judgment-proof jurisdictions. The balance of the alleged shortcomings to the Affidavit are argumentative.

I do not see the actual shortcomings of the Affidavit to Lead Warrant to be, even cumulatively, fatal. Rather they are the product of a hurried arrest. While it is essential that lawyers involved in the arrest procedure attach great importance to affidavits to lead warrants, errors in such affidavits have always, among members of the BC bar, been minimal. In this instance there is neither any indication that the errors in the affidavit were deliberate nor that if the errors had not crept in that the arrest procedure would have affected the Plaintiff's substantive rights in any way. In the result the warrant is not be set aside.

CONCLUSION

The procedure adopted on the present motion, lengthy the affidavits with many exhibits, a number of long days of cross-examination and interim interlocutory motions, culminating in a three-day hearing, is out of proportion to what ought to have been a modest interlocutory motion. Such a proceeding ought not to be looked upon as a trial process, complete with examination for discovery, discovery of documents and extensive argument going well beyond matters relevant to the issues. The expense to the litigants of this undertaking is unfortunate. The motion is dismissed. Counsel may, if they are unable to agree, speak to costs at their convenience.



Prothonotary

September 15, 1997
Vancouver, British Columbia

NAMES OF COUNSEL AND SOLICITORS OF RECORD

STYLE OF CAUSE:	**KIKU FISHERIES LTD.** **- and -** **CANADIAN NORTH PACIFIC OCEAN CORPORATION; INTERNATIONAL TRANSPORTATION & FISHING LTD.; KASPRYBKHOLODFLOT JOINT STOCK COMPANY; THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "*LIMANSKIY*", THE CARGO EX THE SHIP "*LIMANSKIY*" ON BOARD OF WHICH THE CARGO NOW IS OR WAS LATELY LADEN AND YAMAZAKI ENTERPRISE LTD.**
COURT NO.:	**T-1666-97**
PLACE OF HEARING:	**Vancouver, BC**
DATE OF HEARING:	**September 11th, 12th and 14th, 1997**

REASONS FOR ORDER OF
JOHN A. HARGRAVE, PROTHONOTARY
dated September 15, 1997

APPEARANCES:

Mr. Doug Schmitt	**for Plaintiff**
Mr. Glenn Morgan	**for Defendant Marcom Co.**
Mr. Jack Buchan	**for Defendant Yamazaki**
Mr. C. Giaschi	**for Defendant Canadian North Pacific**
Ms. Ellen Bond	**for witness Oleg Tchoubarov**

SOLICITORS OF RECORD:

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Giaschi & Margolis	**for Defendant Canadian North Pacific Group**