

Rena K, The

[1979] QB 377, [1979] 1 All ER 397, [1978] 3 WLR 431, [1978] 1 Lloyd's Rep 545, 122 Sol Jo 315

Court: QBD

Judgment Date: 17/02/1978

Catchwords & Digest

ADMIRALTY - JURISDICTION OF THE HIGH COURT - CONFLICTS OF JURISDICTION - ARBITRATION AGREEMENT

The owners of a ruined cargo of sugar began an action in rem against the ship which had carried it for the cargo's value plus interest and costs. The ship was arrested. The shipowners applied for a stay, contending that the dispute should have been referred to arbitration. The cargo-owners counter-claimed that their arbitration agreement was incapable of performance within the meaning of the Arbitration Act 1975 s 1, and that the stay should be refused as the shipowners were not in a position to satisfy any award made against them: Held (i) although the shipowners were incapable of meeting any award, it was possible that the P and I club of which they were a member could. Since the cargo-owners had failed to show that the club could not, the stay would be granted. However, the shipowners' contentions that the ship should automatically be released upon the grant of a stay, and that no security at all had to be provided for any claim against them, was wrong. The court had a discretion under RSC Ord 75 r 13(4) to refuse to release the ship unless alternative security was provided. It was only proper to release a ship unconditionally where the stay would almost certainly be final and no judgment would subsequently be in need of satisfaction. This was not such a case.

(ii) The arbitration agreement was perfectly capable of performance; it was irrelevant for the purposes of the 1975 Act that a party was unable to satisfy an award made. The vital factor was whether that party was capable of involvement in the proceedings up until the date of award.

ARBITRATION - REFERENCE TO ARBITRATION - ARBITRATION AGREEMENTS - SCOPE OF ARBITRATION AGREEMENT - CONSTRUCTION OF AGREEMENT - WHETHER ARBITRATION CLAUSE IS INCORPORATED - CLAUSE IN CHARTER-PARTY -- INCORPORATION IN BILL OF LADING

The *Rena K* was owned by a Panamanian company ('the shipowners'), a oneship company managed and controlled from Greece. A Mauritian company ('the charterers') chartered the ship in 1977 under a voyage charterparty to carry from Mauritius to Liverpool a cargo of sugar sold on c.i.f. terms by the charterers to an English company ('the cargo owners'). The charterparty contained a London arbitration clause and the bills of lading issued in respect of the shipment provided that 'All terms, clauses, conditions and exceptions including the Arbitration Clause [in the charterparty were] hereby incorporated'. The bills of lading were endorsed to the cargo owners. During the voyage almost a quarter of the sugar was ruined and had to be jettisoned. While the voyage was still in progress the cargo owners brought an action in rem against the *Rena K* and in personam against the shipowners claiming, under the bills of lading, damages of £549,000, with interest, for breach of contract in relation to the carriage of the cargo. The *Rena K* was entered in the books of a protection and indemnity association ('the P and I club') which agreed to indemnify the shipowners in respect of liability for loss of, or damage to, cargo carried in her. Rule 6 of the P and I club's rules provided, however, that the club was not obliged to indemnify a member in respect of liability unless and until the member had himself first discharged the liability out of moneys belonging to him absolutely and not by way of loan or otherwise. Rule 8(k) further provided that the club might reduce the amount of a member's claim if he had not taken such steps to protect his interests as he would have done if the ship had not been entered for protection and indemnity. The *Rena K* arrived in Liverpool in July 1977 and the cargo owners applied ex parte for a Mareva injunction restraining the shipowners from dealing with moneys payable to their bankers

in London in respect of freight due under the charterparty. An interim injunction was granted. On 27 July the Rena K was arrested. On 28 July the shipowners entered an appearance in the action and issued a notice of motion seeking (i) a stay of the action, under s 1 of the Arbitration Act 1975, on the ground that the dispute to which the action related was one which the parties had agreed should be referred to arbitration, and (ii) the release of the Rena K from arrest. Pending the determination of the questions raised by the notice of motion an agreement was reached between the cargo owners on the one hand and the shipowners and the P and I club on the other whereby it was arranged that, without prejudice to any rights which the cargo owners might have, the Rena K would be released from arrest and the club would put up security for the claim on behalf of the shipowners in the form of a letter of undertaking in the sum of £390,000 (being the current value of the ship). The letter was to be cancelled and returned to the club if the court subsequently decided (i) that the shipowners were entitled to a stay, (ii) that as a result of the stay the Rena K should be unconditionally released, and (iii) that the cargo owners were not entitled, by way of alternative security for their claim, to a Mareva injunction. On 8 December the shipowners and the P and I club applied by summons for the determination of the question whether by virtue of the agreement the club was entitled to the cancellation and return to it of the letter of undertaking given pursuant to it. By consent the summons and the application for a stay of the original action were heard together. At the hearing the cargo owners contended, inter alia, (i) that since the dispute between them and the shipowners arose under the bills of lading, and the arbitration clause in the charterparty related only to disputes arising under it, there was no agreement to refer the matter to arbitration, (ii) that, in any event, the court should refuse to order a stay of the action because the arbitration was 'incapable of being performed', within the meaning of s 1(1) of the 1975 Act, as the shipowners' financial resources were such that, if an award was made against them, they would not be able to pay the full amount of it, (iii) that, even if the shipowners were entitled to a stay, they were not automatically entitled to an order for the unconditional release of the ship from arrest, and (iv) that, even if the shipowners were entitled to such an order, the cargo owners were entitled, by way of alternative security for their claim, to a Mareva injunction in respect of the ship notwithstanding that the arbitration had not been commenced: Held (1) the fact that the arbitration clause in the charterparty was expressly incorporated into the bills of lading showed that the parties to the bills of lading had intended the provisions of that clause to apply to disputes arising under the bills of lading. It followed that the dispute was one which the parties had agreed to refer to arbitration; (2) the shipowners were entitled, as at 28 July, to a stay of the cargo owners' action because - (i) on the true construction of s 1(1) of the 1975 Act the words 'incapable of being performed' referred only to the question whether an arbitration agreement was capable of being performed up to the stage when it resulted in an award and did not extend to the question whether, once an award was made, the party against whom it was made would be capable of satisfying it. Accordingly, for the purposes of s 1(1), it was irrelevant whether the shipowners would be capable of satisfying any award made against them; (ii) in any event, the cargo owners had failed to show that if they were to succeed in the arbitration and obtain an award in respect of the full amount of their claim the shipowners would be incapable of satisfying it, for although it had been established that the shipowners would not be able to satisfy more than half of it out of their own resources, the possibility that the P and I club would in fact satisfy the award direct on its member's behalf had not been eliminated; (3) there was nothing in s 1(1) of the 1975 Act which obliged the court, whenever it granted a stay of action in rem in which security had been obtained, to make an order for the unconditional release of that security. Under RSC Ord 75, r 13(4), the court had a discretion as to what order it would make with regard to such security. In a case where the stay would in all probability be final, and there would in consequence be no judgment in the action to be satisfied, the court should exercise its discretion by ordering the release of the security, but in a case where the stay might not be final and there might therefore be a judgment in the action to be satisfied, the court should exercise its discretion either by refusing to release the security or by releasing it subject to a condition that the defendant provide alternative security for payment of any award in the arbitration. In the instant case, if an award was made against the shipowners and they were unable to satisfy it, the cargo owners would be entitled to have the stay of the action removed and to proceed to a judgment in rem in it because a cause of action in rem did not become merged in an arbitration award. It followed (i) that the shipowners were not entitled, as at 28 July, along with and consequent on the stay of the action, to the unconditional release of the ship from arrest, and (ii) that the P and I club was not entitled to the return and cancellation of its letter of undertaking.

Per curiam: under s 12(6)(f) and (h) of the Arbitration Act 1950 the court has power to grant a Mareva injunction for the purpose of, and in relation to, an arbitration which has not yet been commenced, and to do

so subject to a term providing for the arbitration to be commenced within a specified time, together with such other terms, if any, as the court thinks fit.

Cases referring to this case

Annotations: All Cases **Court:** ALL COURTS

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Treatment	Case Name	Citations	Court	Date	CaseSearch
Considered	Western Bulk PTE Ltd v Ispat Industries Ltd	[2011] EWHC 93 (Comm), [2011] All ER (D) 239 (Jan)	Comm Ct	31/01/2011	CaseSearch Entry
Considered	Sotrade Denizcilik Sanayi Ve Ticaret SA v Amadou Lo, The Duden	[2008] EWHC 2762 (Comm), [2009] 1 Lloyd's Rep 145, [2008] All ER (D) 214 (Nov)	Comm Ct	19/11/2008	CaseSearch Entry
Applied	Delos, The, Owners of cargo lately laden on board the MV Delos v Delos Shipping Ltd	[2001] 1 All ER (Comm) 763, [2001] 1 Lloyd's Rep 703, [2001] ArbLR 47, [2001] All ER (D) 243 (Jan)	QBD	31/01/2001	CaseSearch Entry
Applied	Gidrxslme Shipping Co Ltd v Tantomar-Transportes Maritimos Lda	[1994] 4 All ER 507, [1995] 1 WLR 299, [1994] 27 LS Gaz R 37, 138 Sol Jo LB 127	QBD	11/05/1994	CaseSearch Entry
Applied	Tuyuti, The	[1984] QB 838, [1984] 2 All ER 545, [1984] 3 WLR 231, [1984] 2 Lloyd's Rep 51, 128 Sol Jo 498, [1984] LS Gaz R 1362	CA	01/04/1984	CaseSearch Entry
Distinguished	Vasso (owners) v Vasso (cargo owners), The Vasso	[1984] QB 477, [1984] 1 All ER 1126, [1984] 2 WLR 570, [1984] 1 Lloyd's Rep 235, 128 Sol Jo 260	CA	19/12/1983	CaseSearch Entry
dictum Brandon J Applied	Astro Valiente Compania Naviera SA v Pakistan Ministry of Food and Agriculture (No 2), The Emmanuel Colocotronis (No 2)	[1982] 1 All ER 823, [1982] 1 WLR 1096, [1982] 1 Lloyd's Rep 286, 126 Sol Jo 343	QBD	circa 1982	CaseSearch Entry

Cases considered by this case

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Treatment	Case Name	Citations	Court	Date	CaseSearch
Considered	Golden Trader, The	[1975] QB 348, [1974] 2 All ER 686, [1974] 3 WLR 16, [1974] 1 Lloyd's Rep 378, 118 Sol Jo 441	QBD	circa 1975	CaseSearch Entry
Distinguished	Annefield, The, An-	[1971] P 168, [1971] 1	CA	circa 1971	CaseSearch

	nefield (Owners) v Annefield (Cargo Owners)	All ER 394, [1971] 2 WLR 320, 114 Sol Jo 862			Entry
Considered	Cap Bon, The	[1967] 1 Lloyd's Rep 543	P, D and Admlty	circa 1967	CaseSearch Entry
Distinguished	Atlas Levante-Linie Akt v Gesellschaft Fuer Getriedehandel AG and Becher, The Phönizien	[1966] 1 Lloyd's Rep 150	QBD	circa 1966	CaseSearch Entry
Distinguished	Njegos, The	[1936] P 90, 105 LJP 49, 18 Asp MLC 609, 41 Com Cas 149, [1935] All ER Rep 863, 155 LT 109, 52 TLR 216	P, D and Admlty	circa 1936	CaseSearch Entry
Distinguished	Thomas & Co Ltd v Portsea Steamship Co Ltd	[1912] AC 1, 12 Asp MLC 23	HL	circa 1912	CaseSearch Entry