BRITISH COLUMBIA ADMIRALTY DISTRICT

Vancouver 1966 Jan. 26-28 Feb. 8

BETWEEN:

CHEMAINUS TOWING CO. LTD. .....PLAINTIFF;

AND

THE SHIP *CAPETAN YIANNIS* FIANZA COMP. NAV. S.A., and NORTH PACIFIC SHIPPING CO. LTD. ..... DEFENDANTS.

Shipping—Writ in rem against ship not served within limitation period—Power of court to renew—Whether plaintiff had reasonable opportunity to arrest vessel within jurisdiction—Admiralty R. 200—Canada Shipping Act R.S.C. 1952, c. 29, s. 655(1) and (2).

On November 18th 1963 the defendant ship allegedly damaged plaintiff's scow and on August 27th 1964 a writ was issued against defendant owners *in personam* and against defendant ship *in rem*, and was served on defendant owners but not on defendant ship. On January 5th 1966 on an *ex parte* application plaintiff obtained an order under Admiralty R. 200 renewing the writ and extending the time for service on the ground that the ship was then in Vancouver and had not been within the jurisdiction previously. Application was made to set aside the order on the ground that the ship had been in Vancouver from May 24th to June 2nd 1964, though plaintiff was ignorant of this because the ship had been omitted from the Shipping Guide.

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Held, the order for renewal of the writ should be set aside. While Admiralty R. 200 and s. 655(2) of the *Canada Shipping Act*, R.S.C. 1952, c. 29 permit a writ to be renewed after its expiry even though the time limited by s. 655(1) for bringing the action has elapsed, plaintiff had, within the language of s. 655(2), a "reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court" before the expiration of the limitation period provided by s. 655(1), *viz* during the time she was in Vancouver from May 24th to June 2nd 1964. *Battersby v. Anglo-American Oil Co.*, [1945] K.B. 23, per Lord Goddard at p. 28; *The Espanoleto* [1920] P. 223, per Hill J. at p. 226; *A/S Motor Tramp v. Ironco Products Ltd.* [1959] Ex. C.R. 299 per Kearney J.; *Clark v. Thomas J. Gaytee Studios Inc.* [1930] 3 W.W.R. 489; *The Arraiz* [1924] 132 L.T. 715, per Pollock M.R. at p. 716; *The Kashmir* [1923] P. 85, per Hill J. at p. 90; *The James Westoll* [1923] P. 94, per Lord Parker of Waddington at p. 95; *H.M.S Archer* [1919] P. 1, per Hill J. at p. 6, considered.

D. B. Smith and *G. Donegan* for plaintiff.

J. R. Cunningham for defendant.

SHEPPARD D.J.:—This application is by the defendant owners of the ship *Capetan Yiannis* to set aside an order made *ex parte* on the 5th January, 1966, extending the time of the service of the writ *in rem* upon the ship. The facts follow.

On the 17th November, 1963, the ship allegedly damaged the plaintiff's scow through negligence. On the 27th August, 1964, a writ was issued against co-defendants *in personam* and against the defendant ship *in rem*. The writ was served upon the co-defendants but was not served upon the defendant ship, hence under Rule 17[1] the writ ceased to be in force after twelve months, including the date thereof, and under Sec. 655(1) of the *Canada Shipping Act* (R.S.C. 1952, Chap. 29) the statutory limitation of two years applied to bar further action.

On the 17th January, 1965, the plaintiff applied *ex parte*

[1] Rule 17 (enacted 19th September, 1963):—

No writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Judge for leave to renew the writ; and the Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order that the writ of summons be renewed for twelve months from the date of such renewal inclusive, and so from time to time during the currency of the renewal writ. The writ of summons shall, after service, be filed with an affidavit of such service.

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under Rule 200[1] for an order to renew the writ and to extend the time for service on the ground that the ship was then in Vancouver and had not been within the jurisdiction previously. Accordingly the order was made. This application is to set aside that order on the ground that the ship had been in Vancouver for the period of 24th May, 1964, to 2nd June, 1964. The plaintiff was ignorant of that fact because the ship had been omitted from the Shipping Guide and hence the plaintiff's solicitors being ignorant that the ship had called, applied in good faith.

The applicants contend:

(1) That the application to extend the time for service must be made before the writ expires as provided in Rule 17, and not later, and

(2) That there are no special circumstances to permit the granting of the extension.

First, this defendant contends that the express provisions of Rule 17 for renewal before expiry impliedly excludes any renewal otherwise than as provided for in Rule 17 and therefore excludes any renewal after expiry under Rule 200 which authorizes a Judge to enlarge the time prescribed by the Rules on application before or after expiry. That contention should not succeed.

The former English Rules, Order 8, Rule 1 (M.R. 45) and Order 64, Rule 7 (M.R. 967): see Annual Practice 1961, pp. 3, 1813; were the equivalent of Canadian Admiralty Rules 17 and 200 and the express provision of Order 8, Rule 1 for renewal before expiry did not exclude an application under Order 64, Rule 7 to renew after expiry.

An application to renew after expiry was considered under Order 64, Rule 7 in *Doyle v. Kaufman*[2] and in *Hewett v. Barr*[3]. In *Battersby v. Anglo-American Oil Company, Ltd.*[4], Lord Goddard stated at p. 28:

The plaintiffs, however, contend, and in this have the support of the decision in *Holman v. George Elliot & Co., Ltd.* ([1944] K.B. 591) that the

[1] Rule 200:—

The judge may enlarge or abridge the time prescribed by these rules or forms or by any order made under them for doing any act or taking any proceeding, upon such terms as to him shall seem fit, and any such enlargement may be ordered after the expiration of the time prescribed.

[2] (1877) 3 Q.B.D. 7 and 340. [3] [1891] 1 Q.B. 98.

[4] [1945] K.B. 23.

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court has a discretion under Or. 64, r. 7, to enlarge the time for renewing the writ, and that it was, accordingly, open to Stable J. to renew the writ notwithstanding that the application was made more than twelve months after the date of issue. That the widest discretion is given to the court under that rule none will deny, but there is a line of authority, unbroken till the recent decision in *Holman's* case, that the court will not exercise that discretion in favour of renewal, nor allow an amendment of pleadings to be made, if the effect of so doing be to deprive a defendant of the benefit of a limitation which has already accrued.

Order 64, Rule 7 was applied to renew after expiry in the Admiralty Division in *The Espanoleto*[1], where Hill J. at p. 226 stated:

> That brings me to the real point in the case: was the plaintiff entitled to a renewal of the writ, the twelve months having expired and expired some time? The original writ was issued within two years, but it was not renewed within the proper time. The Court has power to extend the time and to give leave to renew. That is quite clear from the decision in *In re Jones* ((1877) 25 W.R. 303) and the cases I am about to mention. Whether the leave should be granted after the time has expired must depend, like every other question of granting an extension of time, upon the circumstances of the particular case.

Such judgments preclude the application of Canadian Admiralty Rule 17 as the exclusive authority for renewal and as impliedly excluding an application to renew after expiry under Canadian Admiralty Rule 200. Further, Kearney J. in *A/S Motor Tramp v. Ironco Products Ltd.*[2] held that Rule 200 did permit renewal of a writ after expiry. Moreover, Rule 200, in purporting to enlarge the jurisdiction of the Court to permit an action to proceed to trial on the merits, should receive the widest interpretation of which the words are reasonably capable. The need for such jurisdiction is evident in cases such as *Clark v. Thomas J. Gaytee Studios Inc.*[3], where the Court in the circumstances should properly take away the legal defence of statutory limitation. In the result an application in Admiralty before expiry of the writ comes within Rule 17 and after expiry within Rule 200.

Secondly, the defendants contend that the claim became barred by Sec. 655(1) of the *Canada Shipping Act* upon the expiry of the writ under Rule 17, and that the Court should thereafter not renew it so as to take away the statutory limitation at all as in *Doyle v. Kaufman, supra,* in *Hewett v. Barr, supra,* and in *Battersby v. Anglo-*

[1] [1920] P. 223.
[2] [1959] Ex. C.R. 299.
[3] [1930] 3 W.W.R. 489.

American Oil Company Ltd., supra, or at least not without special circumstances, here absent. Whatever may be the effect elsewhere of such Rules, namely 17 and 200, as for example in the Queen's Bench Division according to *Battersby v. Anglo-American Oil Company Ltd.*, on the other hand, in Admiralty the effect of such Rules is subject to certain peculiar statutory provisions: in Canada subject to Sec. 655 of the *Canada Shipping Act,* and in England subject to Sec. 8 of the *Maritime Conventions Act*[1], an equivalent section. Section 655(1) of the *Canada Shipping Act* provides a statutory limitation of two years, and Sec. 655(2) empowers the Court to grant extensions of time, notwithstanding Section 655(1).

In *The Espanoleto,* Hill J. at p. 226 states the effect of the equivalent section as follows:

> In general, leave will not be granted if, but for the enlargement of time, the plaintiff's claim would be barred by a statute of limitations. That is to say, it will not be granted to revive a barred cause of action: see *Doyle v. Kaufman* ((1877) 3 Q.B.D. 7, 340); and with reference to that case *Smallpage v. Tonge* ((1886) 17 Q.B.D. 644, 648) and especially *Hewett v Barr* ([1891] 1 Q.B. 98) In general the Court must not by renewal deprive a defendant of an existing right to the benefit of a statute of limitations But s 8 of the Maritime Conventions Act is a limitation section of a very peculiar kind, for it contains a proviso unknown to any other statute of limitations; in one event—namely, if there has not been any reasonable opportunity of arresting the defendant vessel within the period—it directs

[1] Section 8, *Maritime Conventions Act, 1911*:—

No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of any salvage services, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered, and an action shall not be maintainable under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment:

Provided that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period, to such extent and on such conditions as it thinks fit and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity.

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the extension of the limited period of two years, and further gives the Court power to extend it on any other sufficient grounds.

In my judgment, when an application to extend the time for the renewal of a writ in an action which comes within s. 8 is made, the matter is not to be disposed of merely by saying that the two years have elapsed and the claim is statute barred and no renewal can be granted. The application to renew must be considered on its merits, and the Court must inquire whether the circumstances are such that the Court would give leave to issue a writ, notwithstanding that the time had expired.

and in *The Arraiz*[1] Pollock M.R. at p. 716:

All that is quite true: but to the section there is a proviso. It is in two parts; and the first says that the court may extend the period to such an extent and on such conditions as it thinks fit. Now it seems to me that those words give the widest possible discretion to the court.

The second part of the proviso says that the court shall if satisfied in a particular way extend the period to an extent sufficient to give a reasonable opportunity to arrest the ship.

It is clear, therefore, that Sec. 655(2) is divided into two parts. The first is prefaced by the words, "to such extent and on such conditions as it thinks fit", and that is deemed to require special circumstances described in *The Kashmir*[2], by Hill J. at p. 90 as follows:

The only reason alleged in the present case for interfering is that the plaintiff, though she knew of the loss of her son, did not know that the loss gave her any cause of action. It seems to me that that is a wholly insufficient ground for depriving the defendants of a right which they had otherwise acquired, especially after so long an interval.

and in *The James Westoll*[3], by Lord Parker of Waddington at p. 95 as follows:

It appears to me that what the Court has to do is to consider the special circumstances of the case and see whether there is any real reason why the statutory limitation should not take effect. I have carefully read the affidavit which has been filed and really it only amounts to this, that it was not until a comparatively recent date, namely, April, 1913, that the amount of the claim could be ascertained. I think that is not a sufficient reason.

Those do not here apply.

The second part of Sec. 655(2) is prefaced by the words, "and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court", etc. This part is

[1] (1924) 132 L.T. 715. [2] [1923] P. 85.
[3] [1923] P. 94.

explained in *The Espanoleto, supra,* by Hill J. at p. 227 as follows:

> The question, to my mind, is whether, in these circumstances, first, the case comes within the obligatory part of the proviso, ...

The word "shall" is regarded by that learned Judge as making the extension "obligatory" provided the facts come within this part of the subsection. Hence, the decisive question is whether there has been "during such period" a reasonable opportunity of arresting the defendant ship. "Such period" is referred to in Sec. 655(1) as "within two years from the date when the damage or loss or injury was caused", and therefore does not commence with the date on which the writ was issued. The fact that the ship was in Vancouver within such period, that is, within two years from the date when the damage was caused, did provide the plaintiff with a reasonable opportunity for service of the writ. The ship was in Vancouver before the writ was issued. This fact does not exclude the possibility of that having been a reasonable opportunity to the plaintiff to have issued the writ in sufficient time to have served it. It may be argued that the plaintiff did not know that it had such opportunity because the ship was omitted from the Shipping Guide. However knowledge that the ship was in Vancouver is not the test. The section does not require that the plaintiff know it has a reasonable opportunity, but rather that the plaintiff have such reasonable opportunity. In other words, that an alert plaintiff could have issued and served the writ is apparent from the fact that the ship was in Vancouver for some days and the opportunity was not affected by any conduct of the defendants. In *The Kashmir, supra,* the plaintiff did not know that she had a cause of action. This fact was held not to be a sufficient reason for interfering with the operation of the statutory limitation.

For these reasons, to determine this aplication, I adopt the words Hill J. in *H.M.S. Archer*[1] at p. 6 which follow:

> Now that I have had the matter fully argued by counsel on both sides, and having considered the affidavit before me, I am satisfied that the discretion ought not to have been exercised and the order made.

The application will be allowed and the order made *ex parte* on the 5th January, 1966, will be set aside.

[1] [1919] P. 1