

Brunswick of Canada Ltd (Plaintiff) v. The Bounty III (Defendant)

Walsh, J. in Admiralty, Toronto, November 16; Ottawa, November 26, 1970.

Admiralty—Jurisdiction—Claim for possession of ship—Default under conditional sale agreement—Whether owner deprived by force, violence or fraud—Admiralty Act, s. 18(2)—Former jurisdiction of Court of Admiralty in England—Writ of summons—Endorsement, sufficiency of.

The plaintiff's claim endorsed on the writ of summons in this action was for possession of *The Bounty III* under a conditional sale contract which was alleged to be in default. The endorsement also declared: "The ship was removed without the consent of the plaintiff . . . and the claim is made for re-possession to preserve the [plaintiff's] rights". Defendant moved to set aside the writ and subsequent proceedings (including the arrest of the ship at Belleville, Ontario) for lack of jurisdiction. Affidavits before the court indicated that the purchaser named in the conditional sale contract, viz *Yachtaire Ltd*, was a non-existent corporation, that one *K*, who had signed the contract for the purchaser, had twice forcibly taken possession of the ship after it had been seized by the plaintiff's bailiff, that there were 12 unsatisfied executions outstanding against *K* in Ontario, and that he planned to take the ship to Florida.

Held, rejecting defendant's motion, this court has the jurisdiction formerly vested in the Admiralty Court in England to decree possession of a vessel to an owner who had been deprived of it by force, violence, or fraud. A claim falling within that jurisdiction was sufficiently indicated by the endorsement on the writ of summons.

Re Blanshard (1823) 2 B. & C. 244; 107 E.R. 374; *The Beatrice* (1867) L.J. 36 N.S. 9, followed; *Wyman v. The "Duart Castle"*, 6 Ex.C.R. 387; *MacMillan Bloedel Ltd. v. Can. Stevedoring Co.* [1969] 2 Ex.C.R. 375, referred to.

MOTION.

Peter Jones for defendant, applicant.

H. Donald Langdon, Q.C., for plaintiff, *contrâ*.

WALSH J:—This is a motion to set aside the writ of summons and all subsequent proceedings on the ground that the court has no jurisdiction to entertain proceedings *in rem* against the ship *The Bounty III* in respect of plaintiff's claim herein. The action is for "possession of the ship pursuant to terms of conditional sale contract" and the writ states:

The plaintiff's claim is for the possession of *The Bounty III* under the provisions of conditional sale contract dated July 29th, 1969 made between *Brunswick*

of *Canada Ltd.*, the plaintiff herein, and *Yachtaire Ltd* as purchaser. The balance owing to the plaintiff under the aforementioned contract is \$76,162.53 of which the sum of \$16,949.79 represents arrears. The ship was removed without the consent of the plaintiff from Penetanguishene, Ontario, and this claim is made for re-possession to preserve the rights of the plaintiff.

The affidavit of Robert James Culver, treasurer and assistant secretary of *Brunswick of Canada Ltd.*, sets out the details of the conditional sale contract for the yacht in question, the total purchase price being \$91,925.53 of which a down-payment of \$15,763 was made, leaving an unpaid balance of \$76,162.53. Monthly payments with interest were due by virtue of the contract in reduction of the unpaid balance and the contract contains the usual conditions requiring the buyer to keep the goods insured for the full insurable value thereof, and that if the buyer fails to pay any money on the day it becomes due or fulfil its other obligations under the contract or causes the property to be removed from the premises mentioned in the contract without the written consent of the seller, the seller may, without notice, demand or legal process take possession of the goods wherever located. The affidavit sets out that the overdue instalments as of the date of the affidavit, which was sworn on October 23, 1970, amount to \$16,949.79 and that accordingly a bailiff's warrant was signed instructing the bailiff, Claude Graham, of Trenton, to seize the boat. The boat had been removed from its port at Penetanguishene, Ontario, by William Kraft, an officer of *Yachtaire Ltd.*, allegedly for the purpose of taking it to the United States of America. On the evening of Thursday, October 22, 1970, the bailiff seized the boat and served William Kraft with a copy of the bailiff's warrant at Trenton.

The affidavit further sets forth that, according to information of John J. McMaster, assistant secretary and assistant treasurer of *Brunswick of Canada Ltd.*, who was present at the time, the bailiff caused the boat to be tied up as a part of his process of seizure but that William Kraft broke the lines securing the boat and when the bailiff for a second time secured the boat by a line tied to the shore, William Kraft again broke the line and, despite the protests of the bailiff and Mr. McMaster, moved the boat from the shore into the centre of the bay at Trenton, advising them that he proposed to take the boat to Florida. The affidavit further sets forth on information of Mr. McMaster, that the boat had been removed out of the area of Trenton Bay and might be on its way either through the waters of the County of Hastings or the County of Northumberland *en route* to the United States of America and accordingly requested that the warrant for seizure of the boat should be directed to the sheriff of the county of Hastings and the sheriff of the county of Northumberland and the sheriff of the county of Prince Edward.

Following this, the writ was issued and in due course it was served on October 23, 1970, on the ship *The Bounty III* with a copy being delivered to William Kraft, the person in charge of the ship at Belleville Marina in Belleville, Ontario. The warrant was affixed to the steering wheel and a copy left with the said William Kraft. A copy of the warrant was affixed to the steering wheel on October 28, 1970, and by judgment of the Sur-

rogate Judge in Chambers, C. S. Marriott, dated October 29, 1970, this was found to be a sufficient service and defendant's motion to set aside the service of the summons and warrant on the grounds that this did not comply with Rule 10 of the Admiralty Rules was dismissed with costs.

Two other affidavits are in the record. One of these is the affidavit of John William Craig, one of defendant's solicitors, which, in addition to dealing with the question of service which is no longer an issue before this court, states:

(e) to his knowledge there is no incorporated company with the name Yachtaire Limited. The signature appearing on the conditional sale contract dated July 29, 1969 is his own (i.e. William Kraft's).

This statement is made on the basis of information provided to Mr. Craig by William Kraft. The affidavit of Richard John Elliott, one of plaintiff's solicitors, states that he caused a certificate to be obtained from the sheriff of the County of York for the purpose of ascertaining whether or not there were any outstanding judgments or executions against William Kraft, and annexed to the affidavit in exhibit is copy of a sheriff's certificate from the office of the sheriff of the County of York showing twelve unsatisfied executions on record against him. The affidavit further states that he is informed by Douglas E. Rollo, Q.C., that he is solicitor for Club Yachtaire Inc., a non-share club operating at Penetang and had never heard of Yachtaire Limited until he discovered the registration of a lien given by Yachtaire Ltd. to Brunswick of Canada Ltd., and he thereupon required William Kraft to remove the registration and was informed by him that this had been attended to but no steps were taken to remove it. Mr. Rollo further informed the deponent that the corporate seal fixed to the conditional sale contract between Brunswick of Canada Ltd., vendor, and Yachtaire Ltd. as purchaser bearing the name Yachtaire is not the seal of Club Yachtaire Inc., that there has been no transaction between Club Yachtaire Inc. and Brunswick of Canada Ltd. for the purchase of the ship *The Bounty III* and that he knows nothing of the sale to Yachtaire Ltd.

Mr. Elliott's affidavit further states that he is informed by Robert Wilson, credit manager of Brunswick of Canada Ltd., that during interviews and negotiations with William Kraft for the purchase of the ship, he was informed by Kraft that the buyer was Yachtaire Limited and that he (Kraft) was general manager and a director of that company and that in a credit application, Kraft signed himself as general manager and director of Yachtaire Ltd. and even supplied an opinion of value from a member of the Ontario Real Estate Board indicating that the property and equipment "at this particular marina had a replacement cost in excess of \$400,000". (At the hearing before me counsel explained that this was marina property of Club Yachtaire Inc.) The affidavit also sets forth that a Dun and Bradstreet business information report was obtained on May 5, 1969, confirming substantial assets but did not list Mr. Kraft as an officer or director. In the conditional sale contract the name Yachtaire Ltd. appears and a corporate seal Yachtaire is affixed, and the contract is then signed by William Kraft. The affidavit further sets forth that Wilson stated that credit approval for

the sale was given on the basis of this information and that if Wilson had been aware that such information was false there would have been no approval given for the sale. Subsequently, after payments became due on account, various counter claims were made by William Kraft and finally, in July 1970, an allowance of \$2,000 was made for allegedly inferior teak decks, on the promise that the arrears of the account would then be brought up to date. Subsequently, Kraft avoided all of Brunswick's attempts to communicate with him. The affidavit further states that the deponent is informed by the said Robert Wilson that he believes that if the ship is removed to an unknown destination off the coast of Florida or in the Caribbean waters, the security held by Brunswick on the ship will be lost forever and Brunswick will be unable to recover any of its losses from the said William Kraft having regard to his financial position based on the outstanding executions filed against him, and that Wilson has further been informed that the fire insurance policies providing coverage on the boat, which had been given to Brunswick of Canada Ltd. in the name of Yachtaire Ltd. were subsequently cancelled effective September 20, 1970, and that there is presently no insurance coverage of any kind in respect of this ship to protect the interests of Brunswick of Canada Ltd.

Much of the information in these affidavits is based on hearsay and would have to be properly proved in due course at the hearing on the merits if the action proceeds that far, but in deciding the present motion it is necessary to take some cognizance of this extraordinary situation in which the purchase of the ship was made, perhaps fraudulently, in the name of a corporation which allegedly does not exist. It is clear, if this is so, that the purchaser was really Kraft himself, who carried out all of the negotiations with the vendor, signed the purchase agreement, though allegedly on behalf of the non-existent corporation, and was in possession and control of the ship at the time efforts were made by the vendor to recover possession of it under the terms of the conditional sale contract, and at the time of the seizure of the ship in the present proceedings. It is also clear, if the information in the affidavits is correct, that the vendor would never have agreed to sell to Kraft personally and that the sale was only made to the allegedly non-existent corporation Yachtaire Ltd. as a result of confusion of that corporation, whether such confusion was induced by Kraft himself or not, with Club Yachtaire Inc., an existing corporation with substantial assets, with whom Kraft allegedly has no connection whatsoever. Plaintiff's counsel explained that this is why they did not institute proceedings against the purchaser in the Supreme Court of Ontario based on the conditional sale contract accompanied by whatever steps he might have taken before that court to seize the vessel pending the outcome of the proceedings, as he would have been in the position of suing a non-existent defendant, whereas in this court he has brought proceedings *in rem* against the vessel itself. It is hardly necessary to state, however, that the difficulties which a plaintiff may encounter in bringing proceedings in another court, or the question of whether other proceedings, whether of a civil or criminal nature, would lie, are not matters which can be taken into consideration in deciding whether this court has jurisdiction or not.

Section 18(1) of the *Admiralty Act* provides that the jurisdiction of the court shall

... subject to the provisions of this Act, be over the like places, persons, matters and things as the Admiralty jurisdiction now possessed by the High Court of Justice in England, whether existing by virtue of any statute or otherwise, and be exercised by the Court in like manner and to as full an extent as by such High Court.

Section 18(2) incorporates into our law s. 22 of the *Supreme Court of Judicature (Consolidation) Act, 1925*, of the Parliament of the United Kingdom in so far as it can be applied by the court. The provisions of that Act which may have some bearing on the present proceedings are as follows:

22. (1) The High Court shall, in relation to admiralty matters, have the following jurisdiction (in this Act referred to as "admiralty jurisdiction") that is to say:

(a) Jurisdiction to hear and determine any of the following questions or claims:

(i) Any question as to the title to or ownership of a ship, or the proceeds of sale of a ship remaining in the admiralty registry, arising in an action of possession, salvage, damage, necessities, wages or bottomry;

* * *

(ix) Any claim in respect of a mortgage of any ship, being a mortgage duly registered in accordance with the provisions of the *Merchant Shipping Acts, 1894 to 1923*, or in respect of any mortgage of a ship which is, or the proceeds whereof are, under the arrest of the Court;

* * *

(b) Any other jurisdiction formerly vested in the High Court of Admiralty;

* * *

While the present proceedings are an action for possession of the ship, there is no question as to the title to or ownership of it or the proceeds of the sale of it so as to vest jurisdiction in the court under the terms of s. 22(1)(a)(i). Neither is the sale agreement, which agreement is entitled "Retail Installment Contract—Marine Equipment", a mortgage of a ship nor one which could be registered against it as such within the provisions of the *Canada Shipping Act*¹. Plaintiff's counsel argued that s. 74 of that Act indicates that this agreement is in the nature of a mortgage since that section states that

... the intention of this Act is, that ... interests arising under contract or other equitable interests may be enforced by or against owners and mortgagees of ships in respect of their interest therein in the same manner as in respect of any other personal property.

This, however, merely makes provision to protect the rights of the holders of an equitable interest in a ship even though same cannot be registered against it as a mortgage and has nothing to do with the jurisdiction of the Court. Even if it were held that plaintiff's rights in the ship are equivalent to an unregistered mortgage, I am not of the view that s. 22(1)(a)(ix)

¹R.S.C. 1952, c. 29.

would apply since it appears clear that, in addition to rights arising from a registered mortgage, this gives certain rights to a mortgagee with respect to an unregistered mortgage but only when the ship or the proceeds of the sale thereof are already under the arrest of the court, and cannot be construed so as to give the court jurisdiction to have a ship arrested as a result of proceedings based on an unregistered mortgage. (See *J. Strong v. Smith (The Atalanta)*² where it is stated at pages 62-63:

The jurisdiction of this court in proceedings in Admiralty depends upon the Admiralty jurisdiction of the High Court in England (*The Colonial Courts of Admiralty Act*, 1890, s. 2; *The Admiralty Act*, 1891, s. 3; 3 Hagg. 402). Prior to the passing of the *Act of the Parliament of the United Kingdom*, 3rd and 4th Vict., c. 65, a mortgagee of a vessel could not initiate proceedings in the High Court of Admiralty, and it was doubtful as to whether or not he could intervene to protect his interest when a suit had already been instituted by parties competent to do so (*The Percy; The Dowthorpe; The Fortitude*; 2 Wm. Rob. 82, 222). To meet that difficulty the 3rd section of that Act, which extended to unregistered and equitable mortgages as well as to registered mortgages, provides that whenever any ship or vessel shall be under arrest by process issuing from the High Court of Admiralty, or the proceeds of any ship or vessel, having been so arrested, shall have been brought into and be in the registry, the court shall have full jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or causes of action. But that provision is limited to cases where the vessel is under arrest by process issuing from the court, or where the proceeds of the vessel having been so arrested, have been brought into the registry of the court, and does not extend to such a case as the present.

See also *Finnigan v. SS. Northwest*³. *Mayers*, in his book *Admiralty Law and Practice in Canada*, has this to say at page 70 in reference to the *Admiralty Courts Act, 1840*, which extended the jurisdiction of the British High Court of Admiralty:

The jurisdiction conferred by this section, though limited to cases where the mortgaged ship is already arrested, or the proceeds are in Court, extends to unregistered and equitable mortgages as well as to registered mortgages (*The Atalanta*, 5 Ex. C.R. at 62) . . .

We now come to consideration of s. 22(1)(b) of the British statute which gives the High Court jurisdiction over "any other jurisdiction formerly vested in the High Court of Admiralty". The nature and significance of this was carefully considered by Jackett P. in the case of *MacMillan Bloedel Ltd v. Can. Stevedoring Co.*⁴ where he states at pages 382-83:

The first question that has to be decided is whether section 22(1)(b) is so worded as to extend to any jurisdiction that the High Court of Admiralty possessed at any time in the past or whether it refers only to jurisdiction vested in the court at the time when its jurisdiction was transferred to the High Court.

My conclusion is that section 22(1)(b) when it was enacted in 1925 was intended to sweep within the concept of the "admiralty jurisdiction" of the High Court any jurisdiction which at any time in the past was vested in the High Court of Admiralty.

In the first place, that view is the view that flows from the plain ordinary meaning of the word "formerly" in the context of section 22(1)(b) enacted in 1925 with reference to a court that ceased to exist in 1875.

² (1895-97) 5 Ex. C.R. 57.

³ (1917-21) 20 Ex. C.R. 180.

⁴ [1969] 2 Ex. C.R. 375.

In the second place, it is apparent from section 22(1)(c) that Parliament had in mind how to identify a particular point of time, and it is therefore a fair inference that if Parliament had intended to refer to the situation as it was in 1873, it would have done so.

Finally, the background against which the legislation was enacted helps one to reach a view as to what was meant. From early times until well into the nineteenth century there was a very strenuous contest between the High Court of Admiralty and the *common law* courts for jurisdiction and, when Parliament grudgingly gave back jurisdiction to the High Court of Admiralty as it did in 1840 and 1861, it did so in as restricted a manner as was consistent with permitting access to the Admiralty procedures in the cases where that was obviously expedient, apparently because it was deemed wise to encourage resort to the *common law* courts wherever possible. In 1925, however, there was only one English court in the picture and the apparent purpose of section 22(1), and particularly section 22(1)(b), was to make sure that that English court would have all the Admiralty jurisdiction that had ever been exercised in England.

We may therefore look at the old British jurisprudence and, in this connection, I would refer to the case of *Re Blanshard*,⁵ the headnote of which reads:

The Court of Admiralty have, in a cause of possession, jurisdiction to take a vessel from a mere wrongdoer and to deliver it to the rightful owner; and therefore, where it appeared upon a rule *nisi* for a prohibition to restrain the Admiralty Court from proceeding in a cause of possession, that the proctor for the defendants had merely asserted them to be owners generally, and the other party had put in an allegation, by which it appeared that he was the registered owner, and that the vessel had wrongfully come into the possession of the defendants and the latter had not pleaded any title, the Court discharged the rule for a prohibition.

In rendering judgment in that case, Abbott C.J. said, at pages 376-77 (E.R.):

... I must observe, that this proceeding, by which the thing itself is taken out of the possession of a wrong-doer, and put into that of the right owner, is a most useful part of the jurisprudence of the country. Unless it were allowed, a ship-owner might, in many cases, sustain a serious injury and be without any remedy; for if he could only sue the wrong-doer, the latter might be unable to pay the value of the ship, and might, pending the suit, send it out of the country. Inasmuch then as it does not appear by the proceedings, that the Court of Admiralty are about to determine any question over which they have no jurisdiction, I am of opinion that this rule must be discharged.

A similar finding was made in the British High Court of Admiralty in the case of *The Beatrice*, otherwise *The Rappahannock*,⁶ which held:

The High Court of Admiralty had, even when its jurisdiction was more restricted, authority to decree possession of a vessel to the owner, who had been deprived of it by force, violence or fraud.

The judgment reads in part:

... This is a cause of possession, and it is worth while to consider shortly what is the nature of such a cause. Until the passing of a recent statute, cases of this kind were rarely brought into this Court; but even in Lord Stowell's time the Court

⁵ (1823) 2 B. & C. 244, 107 E.R. 374.

⁶ (1867) L.J. 36 N.S. 9.

was in the habit of decreeing possession to a party who had been by force, violence or fraud dispossessed of his vessel. See the case of *The Pitt* (1 Hagg. Ad. Rep. 243). In the present case I consider that the contract to purchase did not justify the officers of the *Confederate States*, through whom the plaintiffs must claim, in dispossessing Mr. Coleman of his vessel. He was, therefore, in my opinion, constructively in legal possession at the time of its arrest, and his having been dispossessed by fraud would, under the cases which I mentioned justify me in restoring her to him.

See also *Halsbury's Laws of England*, 3rd Ed., page 51, number 96, where under the heading "Disputes as to possession" he states:

The Admiralty jurisdiction of the High Court to entertain suits of possession is derived from the inherent jurisdiction of the Admiralty Court to take ships or vessels out of the hands of wrong-doers and restore them to the true owners, . . .

Defendant's counsel argued that no question of fraud was raised by the endorsement on the writ and cites the case of *Wyman v. The Duart Castle*⁷ as authority for the proposition that "plaintiff's claim is confined to the particulars endorsed on the summons". Rule 5 of this court requires that a writ of summons

. . . shall be endorsed with a statement of the nature of the claim and of the relief or remedy required, and of the amount claimed, if any.

In the present case, it is stated that the claim is "for the possession of *The Bounty III*" and the last sentence states "The ship was removed without the consent of the Plaintiff from Penetanguishene, Ontario, and this claim is made for re-possession to preserve the rights of the Plaintiff". While the word "fraud" is not used, there is certainly at least an implication that the ship was removed in contravention of the sale agreement since it was "removed without the consent of the plaintiff". The facts set out in the various affidavits would, if proved, establish that possession of the ship was obtained in the first instance by fraudulent means as the sale would never have been made nor possession delivered to Kraft on receipt of the down-payment had plaintiff been aware that the corporation Yachtaire Ltd. did not exist. Even if this were not sufficient to lead to a conclusion that Kraft had obtained possession by fraudulent means, the fact that when on two occasions plaintiff, exercising its rights under the conditional sale contract, took possession of the vessel through a bailiff and secured it by cables, these cables were allegedly cut by Kraft in order that he could recover possession of the vessel and leave port with her. These two incidents would indicate a forcible taking of possession by him and, again, certainly justify the conclusion that there is a serious contestation as to the possession of this ship.

Moreover, there seems to be at this stage good reason to believe that, if the writ of summons and warrant of arrest herein are set aside for want of jurisdiction of this court or on the ground that the endorsement to the writ of summons does not contain a statement of the nature of the plaintiff's claim, the ship will be removed to an unknown destination in Florida or

⁷ (1896-1900) 6 Ex. C.R. 387.

the Caribbean thereby defeating the security held by plaintiff in the ship, and that plaintiff will be unable to recover any of the losses incurred from William Kraft having regard to his financial position based on the outstanding executions filed against him, the whole as set out in par. 13 of the affidavit of Mr. Elliott, whereas, on the other hand, should the ship remain under seizure in the present proceedings, and should defendant eventually succeed in having plaintiff's action dismissed on the merits, there is nothing in the record to indicate that defendant or the said William Kraft will be unable to recover from plaintiff any damages and costs which may result as a consequence of the present proceedings and seizure of the ship. Defendant's motion is therefore dismissed, with costs.
