IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-003242
[2014] NZHC 845

UNDER	the Insolvency (Cross-Border) Act 2006
IN THE MATTER	of recognition of an order dated 17 June 2013 of the Fifth Bankruptcy Division of the Seoul Central District Court as foreign main proceeding
BETWEEN	YOU SIK KIM and CHUN IL YU Applicants
AND	STX PAN OCEAN CO. LIMITED Respondent

Hearing: 20 November 2013

Appearances: A J Sherlock for ISS-McKay Ltd, Inchcape Shipping Services (Korea) Co. Ltd and ISS Marine Services Inc.
M W McCarthy for Horizon Shipbrokers Ltd
L O'Gorman and D Broadmore for the Administrators

Judgment: 29 April 2014

JUDGMENT OF GILBERT J

This judgment is delivered by me on 29 April 2014 at 4pm pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Introduction

[1] The claimants[1] seek leave to continue their statutory claims in rem under the Admiralty Act 1973 against the ship *New Giant*.[2]

[2] The respondent, STX Pan Ocean Co. Limited (STX), was at all material times the charterer by demise of *New Giant* and is liable in personam for the claims. STX is now the subject of an administration proceeding in Korea that has been recognised in New Zealand as a foreign main proceeding pursuant to the Insolvency (Cross-border) Act 2006. That recognition had the effect of staying the claimants' admiralty proceedings.

[3] The claimants contend:

(a) they attained rights as secured creditors over the ship from the moment they filed their admiralty claims in rem;

(b) STX's interest in the ship was then restricted to a right to its return after the claims had been paid in full or to the payment of any excess following the sale of the ship;

(c) STX has no right to the monies held in court, assuming the claimants can prove their claims;

(d) the monies held in court should not be paid to the administrators of STX because that would put them in a better position than the company would have been in had it not been placed in administration; and

(e) leave should be granted to allow the claims to continue.

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1 ISS-McKay Limited, Inchcape Shipping Services Pty Limited, Inchcape Shipping Services (Korea) Co. Limited, Inchcape Shipping Services Inc and Horizon Shipbrokers Limited.

2 *ISS-McKay Limited v New Giant* CIV 2013-404-003116.
Inchcape Shipping Services Pty Limited, Inchcape Shipping Services (Korea) Co Limited and Inchcape Shipping Services Inc v New Giant CIV-2013-404-003155.
Horizon Shipbrokers Limited v New Giant CIV-2013-404-003146.

[4] The administrators contend:

(a) the central principle underpinning the Insolvency (Cross-border) Act is that an insolvent party's assets should be dealt with in a single jurisdiction for the benefit of all creditors, avoiding the unfairness and inefficiency resulting from creditors pursuing separate claims in multiple jurisdictions for their particular advantage;

(b) the claimants commenced their proceedings after an interim moratorium was ordered in Korea and they should not be permitted to gain an advantage over other creditors by being given leave to continue with their claims;

(c) the monies should not be held in court in New Zealand as this would impede the administrators' ability to trade the company for the benefit of all creditors;

(d) it would be contrary to the purposes of the Act to grant leave for the admiralty proceedings to continue in New Zealand; and

(e) the monies held in court should be paid to the administrators and made available for the benefit of all creditors in the rehabilitation proceedings on a pari passu basis.

[5] In the event that leave is granted for the claimants to continue their admiralty proceedings, ISS Marine Services Inc seeks to be substituted as plaintiff in place of Inchcape Shipping Services Inc.

[6] The issues to be determined are:

(a) Whether the admiralty proceedings are covered by the New Zealand stay.

(b) If so, should leave be granted to continue the admiralty proceedings?

(c) If leave is granted, should ISS Marine Services Inc be substituted for Inchcape Shipping Services Inc as plaintiff?

Chronology

[7] The timing of relevant events is critical so it is necessary to set out the relevant factual chronology before addressing the issues.

[8] The claimants all provided shore services to STX. Horizon Shipbrokers Ltd brokered charter parties in respect of *New Giant* and other vessels between STX and New Zealand based charterers. ISS-McKay Ltd and the other claimants in the Inchcape group were port agents for STX and provided services to other ships chartered by STX, but not *New Giant*.

[9] On 7 June 2013, STX applied to the Fifth Bankruptcy Division of the Seoul Central District Court for an order commencing rehabilitation proceedings. Rehabilitation proceedings are the Korean equivalent of administration proceedings in New Zealand. The Korean Court made two orders that day under the Debtor Rehabilitation and Bankruptcy Act 2005 (Korea) imposing an interim moratorium pending determination of the application. The first of these orders prevented STX from paying or securing any of its existing liabilities or dealing with its assets. The second order prevented creditors from exercising various recovery rights.

[10] Between 12 and 14 June 2013, the claimants filed the statutory in rem admiralty proceedings against *New Giant*. The ship was arrested on ISS-McKay's application on 14 June 2013. That same day, Horizon obtained a caveat preventing the ship from being released from arrest.

[11] On 17 June 2013, the Korean Court made an order placing STX in rehabilitation and appointed the applicants as administrators. The Court's orders were relevantly as follows:

> 1. Rehabilitation proceedings are hereby commenced regarding the Debtor.
>
> 2. [The administrators] are appointed as the Debtor's administrators.

[12] On 25 June 2013, the administrators applied for recognition in New Zealand of the Korean rehabilitation proceeding as a foreign main proceeding under the Insolvency (Cross border) Act. The proceeding was duly recognised on 1 July 2013 triggering a stay of all proceedings in New Zealand pursuant to art 20 of sch 1 of the Act.

[13] On 5 August 2013, the administrators paid money into court sufficient to meet the in rem claims in full which enabled *New Giant* to be released from arrest.

Are the admiralty proceedings covered by the New Zealand stay?

[14] The claimants initially argued that the stay of proceedings arising by operation of law in New Zealand on recognition of the Korean rehabilitation as a foreign main proceeding does not apply to the admiralty proceedings. This was based on their contention that *New Giant* is not an asset of STX. The claimants conceded at the hearing that the New Zealand stay does cover their claims. Therefore, my reasons for concluding that the admiralty proceedings are covered by the New Zealand stay can be stated briefly.

[15] The terms of the stay are set out in art 20(1) of sch 1 of the Act:

> **Article 20 Effects of recognition of a foreign main proceeding.**
>
> (1) Upon recognition by the High Court of a foreign proceeding that is a foreign main proceeding,
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> (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, right, obligations, or liabilities is stayed;
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> (b) execution against the debtors assets is stayed; and
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> (c) the right to transfer, encumber, or otherwise dispose of any assets of the debtor is suspended.

[16] Section 5 of the Act provides that the Act may be interpreted by referring to the Model Law on Cross-Border Insolvency and any document relating to it originating from the United Nations Commission on International Trade Law or the working group who assisted in preparing the Model Law. Article 8 of sch 1 requires the Court, when interpreting the schedule, to have regard to its international origin and the need to promote uniformity in its application.

[17] The UNCITRAL Legislative Guide on Insolvency Law (Parts One & Two) defines "assets of the debtor" as:

> property, rights and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor's interests in encumbered assets or in third party-owned assets.

[18] STX operated *New Giant* under the terms of a charter by demise. This gave it the right to possession and control of the ship including the right to provide the master and crew. STX also had an option to purchase the ship. It follows that STX's interest under the charter by demise was an asset of STX for the purposes of the Act. Even if this was not the case, the admiralty proceedings concern STX's "rights, obligations or liabilities" in terms of art 20(1)(a).

[19] I conclude that the admiralty proceedings are covered by the stay which came into effect in New Zealand by operation of law following this Court's recognition of the Korean administration proceeding as a foreign main proceeding.

Should leave be granted?

[20] Notwithstanding the automatic stay, the Court has a discretion under art 20(2) to allow a person to commence or continue proceedings.

> (2) Paragraph (1) of this article does not prevent the Court, on the application of any creditor or person, from making an order, subject to such conditions as the Court thinks fit, that the stay or suspension does not apply in respect of any particular action or proceeding, execution, or disposal of assets.

[21] The equivalent provision of the Model Law provides:

> The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this article are subject to *[refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations modifications or termination in respect of the stay and suspension referred to in paragraph 1 of this article]*.

[22] Accompanying the Model Law is a *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*[3] which assists enacting states in drafting the

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[3] *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment* A/CN.9/422

various provisions that are left open by the Model Law and interpreting the Model Law once enacted. It is clear that art 20(2) of the Model Law was intended to allow enacting states to grant protection to those classes of people who would normally receive protection in insolvency proceedings in the enacting state. In the commentary in art 20(2), the guide suggests that this clause may be used to allow the enforcement of claims by secured creditors, payments made by the debtor in the ordinary course of business, the initiation of court action for claims arising after the commencement of the insolvency proceeding or following recognition of a foreign main proceeding, or the completion of open financial-market transactions. The *Guide* notes that art 20(2) is designed to enable persons adversely affected by the stay to apply to the Court for relief.

[23] Rather than identifying any particular exception in enacting the Model Law, Parliament conferred a broad discretion on the Court to grant leave in appropriate cases. This solution was recommended by the Law Commission in its report on enacting the Model Law and is consistent with the general approach taken to stays of execution and proceedings under New Zealand's insolvency regime. The Law Commission considered that each of the consequences that flow from art 20 would occur as a result of most formal insolvency regimes in New Zealand and that the discretion reserved under art 20(2) should enable the High Court to exercise the same type of discretion to override the consequences of stay or suspension as it has under other insolvency provisions. Examples given were s 247 of the Companies Act 1993 which empowers the Court to stay any application or proceeding pending determination of an application to appoint a liquidator, and s 32 of the Insolvency Act 1967 (since repealed) which allowed the Court to grant leave to continue proceedings notwithstanding a stay consequent upon bankruptcy.[4]

[24] The Court has a comparable discretion under s 248(1)(c) of the Companies Act 1993. That section provides:

(1999) at [148].

4 Law Commission *Cross-Border Insolvency – Should New Zealand adopt the UNCITRAL Model Law on Cross-Border Insolvency* (NZLC R52, February 1999) at [180].

248 Effect of commencement of liquidation

(1) With effect from the commencement of the liquidation of a company, –

…

(c) Unless the liquidator agrees or the court orders otherwise, a person must not –
(i) Commence or continue legal proceedings against the company or in relation to its property; or
(ii) Exercise or enforce, or continue to exercise or enforce a right or remedy over or against property of the company.

[25] Before exercising its discretion under this provision, the Court will generally need to be satisfied that the commencement of proceedings will not enable a creditor to gain an advantage over other creditors; the proposed proceeding is the most convenient way of establishing the claimed right; and the claim is at least arguable, so that the assets of the company are not dissipated in wasteful litigation.[5]

[26] In considering whether to grant leave in the present case, it is first necessary to examine the nature of the claimants' rights and when they arose. The claimants do not have maritime liens and therefore did not acquire any secured interest in *New Giant* at the time their services were provided. The claimants have only statutory in rem rights arising under the Admiralty Act.

[27] The English Court of Appeal considered the status of such claims in *Re Aro Co. Ltd*,[6] where admiralty proceedings had similarly been stayed by a foreign insolvency. The Court concluded that a plaintiff entitled to pursue a statutory in rem claim obtains a secured interest in the ship at the time the writ is issued, prior to service. Brightman LJ stated:[7]

> The usual object of suing in rem is to obtain security. The plaintiff becomes entitled upon the institution of his suit to the arrest and detention of the subject matter in the custody of an officer of the court pending adjudication, and on adjudication in his favour to a sale and satisfaction of his judgment out of the net proceeds thereof, subject to other claims ranking in priority to or pari passu with his own. So stated, the rights of a plaintiff suing in rem have points of similarity with the rights of a legal or equitable mortgagee or chargee; such persons are also entitled in appropriate circumstances to have

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5 *Fisher v Isbey* (1999) 13 PRNZ 182 (HC) at [19] and [23].
6 *In Re Aro Co. Limited* [1980] Ch 196 (CA).
7 At 207-209.

> the subject matter of the charge preserved for their benefit, and if the account is in their favour to have it sold in order to satisfy the debt. The similarity is carried a stage further by the decision in *The Monica S*. [1968] P.741, where it was held that the burden of the statutory right of action in rem in a case under s 3(4) of the Administration of Justice Act 1956 ran with the ship so as to enable the plaintiff to serve the writ on the ship notwithstanding a transfer of ownership since the writ was issued. It must follow from that decision that the plaintiff in rem is entitled to have the ship arrested despite change in ownership, and notwithstanding that the writ has not been served. The case is of critical importance to our decision because, applied to the instant case, it means that, had the liquidator sold the ship, he could only have sold subject to the plaintiffs' claim; this does not seem far removed from saying that the liquidator could only sell a proprietary interest equivalent to a right to redeem.

[28] This is consistent with the approach that was taken by Lord Esher MR in *The Cella*, where his Lordship observed:[8]

> But if the money be in court, or the Court has possession of the res, it can give effect to its judgment as if it had been delivered the moment after it took possession of the res. It is contrary to the principle of these cases and to justice that the rights of the parties should depend not upon any act of theirs but upon the amount of business the Court has to do. Therefore the judgment in regard to a thing or to money which is in the hands of the Court, must be taken to have been delivered the moment the thing or the money came into the possession of the Court.

Lopes LJ concurred:[9]

> From the moment of the arrest the ship is held by the Court to abide the result of the action, and the rights of parties must be determined by the state of things at the time of the institution of the action, and cannot be altered by anything which takes place subsequently.

[29] Like the plaintiffs in *Re Aro*, the claimants in this case obtained security against *New Giant* immediately upon issue of the admiralty proceedings, which was before the rehabilitation proceedings commenced in Korea.[10] STX's rights to *New Giant* became immediately subject to these secured claims and were equivalent to a right of redemption, being the right to obtain the release of the ship from arrest upon payment of the proved in rem claims. This is the right that STX had at the time the rehabilitation proceedings commenced and is accordingly the only right that would ordinarily be available to the administrators in Korea to be managed or distributed for the benefit of its creditors. Any sale of the vessel by the administrators, even to a

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8 *The Cella* (1888) 13 P.D. 82 (CA) at 87.

9 At 88.

10 See above at [11].

bona fide purchaser for value without notice of the claimants' claims, would be subject to the claimants' security interests in the vessel.

[30] The Insolvency Cross-border Act is procedural in nature and is designed to facilitate the management or realisation of the debtor's assets in a single jurisdiction in accordance with the pari passu principle. The Act is not intended to deprive creditors of their substantive rights or interests. Consistent with usual practice followed under s 248 of the Companies Act, where leave would normally be given for secured creditors to commence or continue proceedings to establish their security, the claimants would normally be entitled to leave. This would not give them an unfair advantage over other creditors because their respective rights and interests would normally be determined at the time the rehabilitation proceedings commenced. The continuation of the admiralty proceedings is the most effective way of the claimants being able to establish their secured interest in *New Giant* at that time and there is no dispute that the claimants have good arguable claims.

[31] However, because the admiralty proceedings were commenced after the interim moratorium was ordered in Korea, the administrators argue that the Court should decline to grant leave. It is common ground that under the laws of the Republic of Korea, the claimants have in personam rights only and would not have been able to take any in rem action against *New Giant*. The administrators argue that the claimants should not be permitted to promote themselves from unsecured to secured creditor status after the interim moratorium was ordered as this would prejudice STX's other creditors and would be contrary to the purposes of the moratorium.

[32] The Korean Bankruptcy Court made two orders on 7 June 2013. The first was made under art 43 of the Debtor Rehabilitation and Bankruptcy Act 2005, which empowers the Court to make an order, pending a decision on an application for commencement of rehabilitation procedures, for:

> provisional seizure and provisional disposition on the debtor's business and assets or other disposition necessary to preserve the debtor's business and assets until a decision is made on the application for commencement of rehabilitation.

[33] The order under art 43 was in the following terms:

> In regards to this matter, until there is a decision to commence the rehabilitation proceeding, all rehabilitation creditors and secured rehabilitation creditors shall be prohibited from conducting compulsory execution, provisional seizure, provisional disposition or auction sale proceedings to exercise collateral rights based on rehabilitation claims or secured rehabilitation claims.

[34] "Rehabilitation Claims" are defined in art 118 of the Debtor Rehabilitation and Bankruptcy Act to include:

> Claims falling under any of the following subparagraphs shall be made rehabilitation claims:
>
> 1. Asset claims based on grounds that arise before rehabilitation procedures commence for the debtor;

[35] The second order was made pursuant to art 45(1) of the Act. Article 45 links back to art 44 and it is therefore helpful to refer to art 44 to understand the scope of the Court's powers under art 45. Article 44(1) relevantly provides:

> **Article 44 (Order Given to Suspend Other Procedures, etc.)**
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> (1) When it is deemed necessary upon receiving an application for commencing the rehabilitation procedures, the court may order the discontinuation of the procedures falling under any of the following subparagraphs...
>
> 1. The bankruptcy procedures for the debtor;
> 2. The auction procedures (hereinafter referred to as "compulsory execution based on the rehabilitation claim or the rehabilitation security right") that are already in progress on the debtor's assets for the compulsory execution, the provisional seizure, the provisional disposition or the exercise of the security right based on the rehabilitation claim or the rehabilitation security right.
> 3. Litigation procedures for the debtor's assets.
> 4. Procedures for the debtor's assets that are pending in an administrative agency; and
> 5. Any disposition taken to collect taxes in arrears...

[36] Article 45(1) provides:

> **Article 45 (General Order Given to Prohibit Compulsory Execution, etc. Based on Rehabilitation Claims and Rehabilitation Security Rights)**
>
> (1) When it is recognized that special circumstances are feared to prevent the full realization of the purposes of the rehabilitation procedures by the discontinuation order provided for in the

> provisions of Article 44(1) after receiving an application for commencement of rehabilitation procedures, the court may order all rehabilitation creditors and rehabilitation secured creditors, by an application filed by interested persons or by its inherent jurisdiction, to bar the compulsory execution, etc. based on their rehabilitation claims or their rehabilitation security rights by the time a determination is made on the application filed for commencing rehabilitation procedures.

[37] The Court's power in art 45(1) is to bar "compulsory execution, etc." based on rehabilitation claims or rehabilitation security rights. I interpret the reference to "compulsory execution etc." to be a reference to the procedures referred to in art 44(1) given that an order under art 45(1) can only be made when a discontinuation order available under art 44 may be insufficient to secure the purposes of the rehabilitation procedures.

[38] The Court's 7 June 2013 order pursuant to art 45 was in the following terms:

> In regards to this matter, until there is a decision to commence the rehabilitation proceeding, all rehabilitation creditors and secured rehabilitation creditors shall be prohibited from conducting compulsory execution, provisional seizure, provisional disposition, or auction sale proceedings to exercise collateral rights based on rehabilitation claims or secured rehabilitation claims.

[39] Ms O'Gorman argues that this order extended to cover the arrest of *New Giant*, either because it was a "provisional seizure" or "the exercise of the security right" based on the rehabilitation claim or the rehabilitation security right. I do not accept this submission. The order does not to purport to prevent creditors from filing proceedings. The claimants obtained their security interest simply by filing their admiralty proceedings. The subsequent arrest of the ship did not alter their status as secured creditors. I do not consider, in any event, that the arrest of the ship could be categorised as "provisional seizure". Equally, the issue of admiralty proceedings could not be described as "the exercise of a security right". There was no security right until the proceedings were filed. I conclude that the order did not purport to restrict creditors with maritime liens or statutory rights in rem against *New Giant* or any other vessel owned by or under charter by demise to STX from pursuing in rem claims.

[40] Further, the interim order made on 7 June 2013 did not purport to have extra-territorial reach. STX did not immediately apply for recognition of the proceedings; nor did they apply under art 19 for interim relief to protect the assets of STX or the interests of creditors pending determination of a recognition application. Either pathway would have been available at the time the interim orders were issued.

[41] The management of STX and, following their appointment, the administrators, would have known of the location of STX's shipping fleet including *New Giant*. They would have understood that these assets were vulnerable to arrest by maritime lien claimants and other suppliers with rights in rem in admiralty. Yet they took no steps to prevent any such creditors from exercising these rights. There is no evidence that the claimants were even aware of the interim orders.

[42] In these circumstances, I do not consider that the interim orders made on 7 June 2013 affect the analysis or provide any reason why leave should not be granted to the claimants to enable them to pursue their in rem claims and establish their secured rights against the ship.

[43] I conclude that the claimants should be given leave to continue their claims against *New Giant*. At the time the rehabilitation proceedings were commenced on 17 June 2013, STX's rights to *New Giant* were subject to the rights of the claimants, assuming the claimants can prove their claims. STX's residual interest in the vessel, equivalent to a right of redemption, was all that remained. The administrators can only administer such assets as STX had at that time. The grant of leave, enabling this residual asset to be dealt with by the administrators for the benefit of all creditors of STX on a pari passu basis, meets the purposes of the Act. If leave was declined, other creditors would gain a benefit to which they are not entitled and would put them in a better position than they would have been in had STX not been placed in administration. There is nothing in the Act to indicate that such an outcome was intended.

Should ISS Marine Services Inc be substituted for Inchcape Services Inc. as plaintiff?

[44] This is not a case where a plaintiff has been misdescribed. It is simply that the wrong party was named as plaintiff. The result is that ISS Marine Services Inc currently has no secured interest in *New Giant* because it has not yet commenced any in rem proceedings. If an order was made substituting it as a plaintiff in place of Inchcape Services Inc, it would thereby obtain a security right that it did not have at the time the rehabilitation proceedings in Korea commenced and were recognised in New Zealand as a foreign main proceeding. To make the order sought would have the same effect as granting leave for ISS Marine Services Inc to commence proceedings now. It is clear that the reservation of leave in art 20 was not intended to enable a creditor to obtain an advantage over other creditors after recognition of rehabilitation or administration proceedings by allowing them to promote themselves from unsecured to secured creditor status. In my view, this would plainly be contrary to the purposes of the Act. For the same reasons, it would be inappropriate to grant the substitution application.

Result

[45] I make an order in terms of art 20(2) of sch 1 of the Insolvency Cross-border Act that the stay does not apply to the claimants' admiralty proceedings against *New Giant*. The claimants accordingly have leave to continue those proceedings.

[46] The application to substitute ISS Marine Services Inc as a plaintiff in place of Inchcape Services Inc in CIV-2013-404-003155 is declined.

[47] The claimants are entitled to costs on a 2B basis.

M. A. Gilbert J