



Court Of Appeal

Judges

**THE HON. CHIEF JUSTICE MARK CHETCUTI
THE HON. MR. JUSTICE CHRISTIAN FALZON SCERRI
THE HON. MADAM JUSTICE JOSETTE DEMICOLI**

Sitting of Thursday, 25th April, 2024.

Number 10

Sworn application number 552/2020 AF

**Adv. Dr Cedric Mifsud in the name and in representation of the
foreign company Adria Yachting N.V.**

v.

**Stephan Christoph Schlosser of Swiss nationality holder of Swiss
passport number F2801638 and in virtue of decree dated 26th
August 2020, Dr Justine Scerri Herrera was appointed as a curator
to represent the said Stephan Christoph Schlosser**

The Court:

1. This is an appeal filed by the defendant against the preliminary judgment of the first Court dismissing the plea raised by the said defendant, which reads as follows:

«That in view of Clause number 7.6 of the Novation Agreement dated 24th April 2018 which relates to various matters regarding the relationship between Altra Foundation and the defendant, and in particular clause number 3.7.5 which related to the revocation and termination of the rights of use granted to the defendant over the vessel SY Adria 1934, the defendant is invoking the non-jurisdiction of this court since the parties had agreed to give exclusive jurisdiction to the performance of the contract in Zurich, Switzerland. Therefore, this court cannot take cognisance of the plaintiffs' claims.»

2. The First Court considered as follows:

«The Court considered that this case was filed by plaintiff nomine requesting the Court to order defendant to return the vessel S/Y Adria to the applicant company. Plaintiff has also advanced a claim for the liquidation of damages allegedly incurred by the applicant company in view of the fact that the defendant detained the said vessel without its permission.

In addition to the various pleas raised in his sworn reply, the defendant filed an additional plea whereby he challenged the jurisdiction of this Court to preside over the case in question. The main argument raised by defendant in this regard is that the Novation Agreement signed on the 24th April 2018 between Altra Foundation and the defendant expressly states that exclusive jurisdiction in matters relating to the said agreement shall lie with the Court in Zurich.

The Court has duly examined all the documentation forming the acts of proceedings including the afore-mentioned novation agreement. This Court notes that the said agreement refers exclusively to debts that accrued between the parties' signatories to the said agreement. The novation agreement makes absolutely no reference to the vessel in question.

The Court also notes that the crux of this case relates to the identification of the lawful owner of the vessel. Applicant company claims that it is still the owner of the said vessel and hence it instituted these proceeding to claim back possession of the vessel which from the acts of the case transpires to be still registered in the name of the said applicant company. Court also notes that the applicant company is not a party to the novation agreement hence it is neither bound by those terms and conditions neither has it got any rights or obligations arising therefrom in relation to the vessel of which it claims to be the rightful owner. Now therefore, without delving into the merits of the case, it is the opinion of this Court that if the applicant company wishes to advance claims of ownership of the vessel it certainly could not do so in terms of the novation agreement. The only possible way for the applicant company to enforce its claim vis-à-vis the said vessel, whether rightfully or not, was precisely that of initiating separate proceedings against the defendant.

Having established that the applicant company is not bound by the terms and conditions of the novation agreement and having established that the question of ownership of the vessel is not dealt with in the novation agreement, the Court will now pass on to make its considerations with regards to the merits of the plea of jurisdiction of these courts.

In virtue of Article 742 (1)(c) of the Code of Organisation and Civil Procedure:

«742 (1) Save as otherwise expressly provided by law, the civil courts of Malta shall have jurisdiction to try and determine all actions, without any distinction or privilege, concerning the persons hereinafter mentioned: -

...

(c) any person, in matters relating to property situate or existing in Malta.»

From the acts of the case it transpires that the vessel in question is still in Maltese territorial waters to the extent that it has been arrested in virtue of the precautionary warrant mentioned above, which warrant was requested and granted on the application of the applicant company in view of the rights which it claims to have over the said vessel.

*As stated in the case **Avv. Dr Philip Manduca noe v. Avv. Dr Mark Chetcuti et noe** decided by the Commercial Court on the 25th February 1993, although this ground that warrants the jurisdiction of the courts is generally applicable when the matter relates to property that is situated in Malta, the same provision also applies with regards to movables as long as the movable is located in Malta and the merits of the case concern specifically that movable.*

The jurisdiction of this Court is rooted in the merits of the claims being put forward in the sworn application. The principal claim refers to the ownership of the vessel which is presently found in Maltese territorial waters whilst the other claims referring to the issue of damages are only ancillary and secondary to the principal claim. Hence, given that the principal issue in these proceedings is the question of ownership of an immovable that is found within the Maltese territory, and given also that should the applicant company succeed in proving its' claims, the principal remedy being sought is that of returning the vessel to the rightful owner.

For the reasons above, the Court is hereby rejecting the additional plea raised by the defendant and declares that in virtue of Article 742(1)(c) of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, it has jurisdiction to try and determine this case.»

3. The defendant's grievance following this preliminary judgement relates to the submission made by the defendant that the novation agreement did not deal solely with debts accrued between the parties' signatory to the agreement but also referred to the vessel in question and its right of use as per paragraph 3.7.5 of the agreement which reads:

«SCS undertakes to exercise with care the rights of use granted to it in relation to the Akouette II and III helicopters, the SY Adrian 1934 on the classic cars on the 'July 2017' list and today Coen measures necessary to preserve their value without delay and in a proper manner, including protection by liability and property insurance at least equivalent to market value.

AF is entitled to revoke or terminate the rights of use granted to SCS at any time in its absolute discretion.»

4. He further submits that in clause 1 (statement of fact) of the agreement, the parties refer to various prior agreements between them. Since novation extinguishes the prior agreements, the parties are bound by the new agreement, in which the exclusive jurisdiction and place of performance of the agreement shall be Zurich as per clause 7.6 of the agreement. Therefore, proceedings had to be instituted before the Courts of Zurich.

5. Plaintiff replies that the novation agreement only regulates debts accrued between the parties' signatories to the agreement to which plaintiff company was not a party. Secondly, when the parties to the agreement referred to prior agreements no specific mention was made of any particular agreement. Thirdly, the ownership of the vessel SY Adria

1934 does not form part of the agreement.

Considerations:

6. The Court considers the appeal to be unfounded. **Article 1180 of the Maltese Civil Code** states that novation is not presumed but has to be clearly shown in the agreement; and that there is no novation if the prior objection is not extinguished.

7. A major obstacle to the grievance put forward by the appellant is the undisputable fact that plaintiff company is not a party to the agreement made between Altra Foundation and the defendant, and therefore, cannot be bound by any agreement made between them. The records show that plaintiff company is claiming that it is the owner of the vessel in dispute; and has brought forward *prima facie* evidence of such ownership by filing certification documents in the case records showing the vessel's registration in its name. The case records also show that Altra Foundation is the majority shareholder of plaintiff company. However, this does not mean that Altra Foundation can enter into an agreement on behalf of another company even though it is affiliated with it because of the principle of distinct juridical personality. Even if the plaintiff company forms part of a group of companies within Altra Foundation, an agreement concluded by one does not bind the other unless such company or companies are party to the agreement. **Article 19 of Schedule 2 of the**

Civil Code stipulates that:

«19.(1) Legal persons are distinct from their promoters, founders, administrators and members, if any. The acts of legal persons bind no one but themselves except as provided by law.

...

(7) An organisation forming part of a group of organisations, whether as founder or as a member of the group, shall not be liable for the obligations of other members of the group except to the extent it expressly undertakes in writing or as otherwise provided in any provision of this Code.»

8. This principle is also reflected in **Articles 999 and 1001 of the Civil Code**, wherein it is clearly stated that a person cannot stipulate except for himself. If he binds himself in favour of another person for the performance of an obligation by a third party and the third party refuses to perform the obligation, the person who bound himself shall only be liable for the payment of an indemnity.

9. The novation agreement does not give provide any evidence on a balance of probability that plaintiff company is bound by it. The reference to 'various agreements' concluded between the defendant and Altra Foundation on the 24th April 2018 is generic and do not refer to the agreement between the parties to this suit dated 19th June 2012.

Decision

For these reasons and without prejudice to the other pleas and merits of

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the suit, the Court **rejects** the defendant's appeal and upholds the decision of the First Court, with expenses of the First Court and the appeal to be borne by defendant.

The Court sends the case records back to the First Court for continuance.

Mark Chetcuti
Chief Justice

Christian Falzon Scerri
Judge

Josette Demicoli
Judge

Deputy Registrar
SS