



COURT OF MAGISTRATES (MALTA)

**MAGISTRATE DR.
GABRIELLA VELLA**

Sitting of the 31 st January, 2012

Avviz Number. 260/2011

Stephen Bajada (I.D. Card No. 363273M)

Vs

Dr. Martin Fenech appointed by Decree dated 5th October 2011 as Curator to represent the vessel M.Y. Drenec, and by Decree dated 13th October 2011 Sark Limited continued the suit instead of the Curator Dr. Martin Fenech in representation of the vessel M.Y. Drenec

The Court,

Considered the Application filed by Stephen Bajada on the 8th August 2011, by means of which he requests that the vessel M.Y. Drenec be condemned to pay him the sum of eight thousand nine hundred and eighty nine Euros and sixty two cents (€8,989.62) being the balance from a larger sum due to him for works and services rendered and material supplied to the said vessel, as results from copies of invoices marked from Doc. "A" to

Doc. "L" and a statement of account marked as Doc. "M" attached with the Application, together with legal interest calculated from date of invoices to date of actual payment and judicial expenses against the defendant vessel;

Considered the documents attached and submitted together with the Application a folio 12 to 17 of the records of the proceedings;

Considered the application filed by Stephen Bajada on the 8th August 2011, by means of which he requests the appointment of Curators to represent the defendant vessel in these proceedings since it isn't known whether the master of the vessel is in Malta or whether there is an agent for the vessel in Malta;

Considered the Decree dated 5th October 2011 by means of which Dr. Martin Fenech was appointed as Curator to represent the vessel M.Y. Drenec in these proceedings;

Considered the Note filed by Sark Limited on the 27th September 2011, by means of which it declared that as owner of the vessel M.Y. Drenec it wanted to continue the suit in representation of the said vessel instead of the Curator appointed by the Court;

Considered that during the sitting held on the 13th October 2011, Sark Limited accepted service of the Application and the appointment of the sitting for the vessel M.Y. Drenec and thus continued the suit in representation of the said vessel instead of Dr. Martin Fenech, whose appointment as a Curator in representation of the vessel was revoked during the said sitting;

Considered the Reply submitted by Sark Limited in representation of the vessel M.Y. Drenec filed on the 19th October 2011, by means of which it pleads: (i) by way of preliminary plea, that the action as instituted by the plaintiff is not an action in rem as claimed by him because he did not file the action directly against the vessel M.Y. Drenec but against Curators in representation of the said vessel; (ii) without prejudice to the preliminary plea, that

the sum of €8,989.62 which the plaintiff is requesting the defendant vessel to pay as a balance from a larger sum representing works and services rendered and material supplied is not due by Sark Limited; (iii) there is no judicial relationship between Sark Limited and the plaintiff and therefore the plaintiff's claim must be rejected; (iv) the works carried out by the plaintiff were not of the required standards of practice and therefore no payment is due to him; (v) the works carried out by the plaintiff were not of the agreed quality, so much so that another contractor had to be engaged to replace the works carried out by the plaintiff with works appropriate of their intended use; (vi) the amount being claimed by the plaintiff is not due; (vii) the defendant vessel appointed a Maltese registered company named The Mediterranean Wellbeing Company Limited to act as project manager for the works which had to be carried out on the vessel and it was this company which directly entered into contracts with the various contractors involved in works on the vessel; (viii) The Mediterranean Wellbeing Company Limited must be joined in this suit; and that (ix) the plaintiff's claim is unfounded in fact and at law;

Heard oral submissions by the parties regarding the preliminary plea put forth by Sark Limited in representation of the vessel M.Y. Dre nec;

Considered:

By means of these proceedings the plaintiff is requesting the Court to condemn the vessel M.Y. Dre nec to pay him the sum of €8,989.62, representing the balance from a larger sum for works and services rendered and material supplied to the said vessel. On instituting the proceedings against the vessel, the plaintiff requested the appointment of Curators to represent the said vessel in these proceedings since it is not known whether the master of the vessel is in Malta or whether there is an agent in Malta for the said vessel. The plaintiff's request was upheld and on the 5th October 2011 and the Court appointed Dr. Martin Fenech as a Curator to represent the defendant vessel in these proceedings. This appointment was

however revoked on the 13th October 2011, upon a request by Sark Limited which accepted service of the Application and the appointment of the sitting for the vessel and thus continues to appear in and defend these proceedings in the interest of the defendant vessel instead of the Curator appointed by the Court.

The request and consequent appointment of Curators to appear in and defend these proceedings in the interest of the vessel M.Y. Drenec form the grounds on which Sark Limited, in representation of the said vessel, puts forth its preliminary plea aimed which is aimed directly at the legal validity of the action instituted by the plaintiff. Sark Limited claims that once these proceedings have been instituted against Curators in representation of the vessel, they do not constitute an action in rem as claimed by the plaintiff but an action in personam and therefore as instituted are null. Sark Limited further substantiates its claim by stating that Section 929 of Chapter 12 of the Laws of Malta does not provide for, and therefore does not permit, the appointment of Curators to represent vessels in judicial proceedings. According to the said company, this fact further proves that the proceedings instituted by the plaintiff are not an action in rem but an action in personam and thus null as instituted.

The plaintiff opposes the plea and consequent claims raised by Sark Limited and states that the action filed by him is a valid action in rem instituted against the vessel M.Y. Drenec and that the appointment of Curators to represent the said vessel in these proceedings was requested and subsequently obtained in the strength of Sections 181A(3) and 187(7) of Chapter 12 of the Laws of Malta.

The elements which must subsist for an action to be a valid action in rem have been set out in a number of judgements delivered by the Maltese Courts, amongst which the judgement in the names **Valfracht Roro Line Limited v. Dr. Louis Cassar Pullicino noe, Writ No. 1605/00** delivered by the First Hall Civil Court on the 10th April 2003. The elements necessary for an action to

qualify as an action in rem are: (a) *kreditu li jaqa' taht wiehed mill-irjus imfissrin f'xi wahda mill-ligijiet imharsa bl-Ordinanza dwar it-Trasferiment tal-Gurisdizzjoni tal-Qorti tal-Vici-Ammiraljat* – today substituted by Section 742B of Chapter 12 of the Laws of Malta by means of Act XIV of 2006; (b) *azzjoni immexxija specifikament kontra l-bastiment*; (c) *il-prezenza tal-bastiment fit-territorju li jaqa' fil-gurisdizzjoni tal-Qorti*; u (d) *iz-zamma tal-bastiment fil-gurisdizzjoni jew il-hrug ta' garanzija tajba bizzjed biex kull sentenza li tista' tinghata kontra l-bastiment tista' tigi ezegwita*.

From the said judgement it clearly results that an action in re is an action filed directly against a vessel and in fact Section 181(A)(3) of Chapter 12 of the Laws of Malta provides that: *when a written pleading is to be filed by or against a ship or other vessel, it shall be sufficient if there is designated the name of such ship or other vessel, as the case may be, and it shall not be necessary to mention the name of any person to represent such ship or other vessel: provided that the written pleadings mentioned in this subarticle shall be served in accordance with the provisions of article 187(7)*. The proviso to the said section of the Law is very important, particularly for the just determination of the issue currently being examined.

Section 187(7) of Chapter 12 of the Laws of Malta provides that: *In the case of an action against a ship or other vessel, service shall be affected by the delivery of a copy of the pleading to the master thereof or any other person acting in that behalf or, in the absence of such persons, on the agent of the ship or other vessel, as the case may be, or in the absence of such persons and agent, on curators appointed by the court in terms of article 929: Provided that the Court may also adopt such other measures as it may deem fit to bring the pleading to the notice of the person upon who the same is to be served*.

From the said section of the Law it is immediately clear that Sark Limited is not correct in stating that the appointment of Curators to represent a vessel in

proceedings instituted before a Court of Law renders those proceedings an action in personam and consequently null as instituted. Neither is it correct in stating that the Law does not permit the appointment of Curators to represent a vessel in judicial proceedings. Even though no mention is made for such an appointment under Section 929 of Chapter 12 of the Laws of Malta, the appointment of Curators to represent vessels is clearly provided for in the above-mentioned Section 187(7) of Chapter 12 of the Laws of Malta.

A vessel, though being a defendant in judicial proceedings, is an inanimate object which, when faced with such proceedings needs to and must be represented by a physical individual – the master, the agent or in the absence thereof a Curator appointed by the Court – who will appear in and defend the proceedings in its interest. This is the very reason why the filing of an action in rem against the master of the vessel, the agent for the vessel or a Curator appointed by the Court, as the case may be, in representation of the defendant vessel, does not render that action an action in personam and consequently null as instituted.

The importance of such an indication, that is of the master of the vessel, the agent for the vessel or a Curator appointed by the Court, as the case may be, in representation of the vessel in actions in rem has been also noted by the Court of Appeal in the judgement in the names **Dr. Max Ganado noe v. Captain Sebastiano Pizzimenti noe, Appeal No. 107/95** delivered on the 30th November 2011, where the said Court stated that *huwa fatt inkontestat li l-azzjoni in rem trid tigi intavolata kontra l-bastiment, li hu konvenut fil-kawza, minghajr in-necessità li jissewew is-sidien tal-bastiment. L-azzjoni hija separata mill-azzjoni in personam. L-appellant nomine huwa korrett meta jissottometti li bl-emendi li saru fil-Kodici ta' Organizzazzjoni u Procedura Civili, meta tigi intentata kawza kontra bastiment huwa bizzejjed li jissewewma' l-istess bastiment biss, u li skond il-Kap.234 bastiment jikkostitwixxi klassi partikolari ta' immobbli distinta mill-proprietà tas-sidien għall-garanzija ta' l-azzjonijiet u krediti li għalihom ikun suggett il-vapur. Izda bastiment huwa*

oggett inanimu, u kif sewwa jissottometti l-appellat nomine, il-liqi tirrikjedi li f'azzjonijiet kontra l-bastiment in-notifika ssir lil persuna fizika u mhux bizzejjed li din titwahhal jew tigi mhollija fuq il-vapur, ghar-ragun ovvja li hija l-persuna fizika li tista' tressaq difiza ghal dak allegat kontra l-bastiment¹.

The Court further points out that whilst Section 181A(3) of Chapter 12 of the Laws of Malta states that in an action in rem it is sufficient to designate the name of the ship or vessel without the need to mention the name of any person to represent the ship or vessel, it however likewise implies that should the plaintiff in the designation of the case mention the name of any person to represent the ship or vessel, including therefore the master of the vessel or the agent for the vessel or in the absence thereof a Curator appointed by the Court, in so doing the action filed by him against the ship or vessel does not change its legal nature and is not null as instituted.

The fact that Sark Limited is now appearing in and defending these proceedings in the interest of the vessel M.Y. Drenec instead of the Curator appointed by the Court, does not change the legal nature of the proceedings as instituted by the plaintiff. It is an established principle under Maltese Law that the legal nature of an action is set and determined by the way the Application filed by the plaintiff is designated and by the way his claims are put forth therein. The established legal nature of the action cannot be varied by an act or plea of the defendant or his representative.

The action as instituted by the plaintiff is an action in rem and not an action in personam as claimed by Sark Limited in representation of the defendant vessel and consequently as instituted it is not null. Therefore, the preliminary plea raised by Sark Limited in representation of the defendant vessel cannot be upheld.

¹ Underlining by the Court.

In view of this conclusion the Court deems that these proceedings must be designated as follows: “Stephen Bajada v. Dr. Martin Fenech appointed by Decree dated 5th October 2011 as Curator to represent the vessel M.Y. Dre nec, and by Decree dated 13th October 2011 Sark Limited continued the suit instead of the Curator Dr. Martin Fenech in representation of the vessel M.Y. Dre nec” where ever necessary in the records of these proceedings.

On the basis of the above-mentioned reasons, the Court rejects the preliminary plea put forth by Sark Limited in representation of the defendant vessel and orders the continuation of the case. The Court further orders that these proceedings be designated as follows: “Stephen Bajada v. Dr. Martin Fenech appointed by Decree dated 5th October 2011 as Curator to represent the vessel M.Y. Dre nec, and by Decree dated 13th October 2011 Sark Limited continued the suit instead of the Curator Dr. Martin Fenech in representation of the vessel M.Y. Dre nec”, and orders the insertion of such designation where ever necessary in the records of these proceedings.

Judicial costs pertinent to the preliminary plea and this judgement are to be borne by the defendant vessel.

< Partial Sentence >

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