Rayon Said Industrias Quimicas S.A. et al (*Plaintiffs*) *v.* **West Coast Lines, S.A. et al** (*Defendants*)

Noël J. in Admiralty, Montreal, December 22, 1969.

Admiralty—Jurisdiction—Foreign defendants—Cargo damaged on voyage from Montreal to Chile—Service of notice of writ ex juris—Motion to set aside—Discretion of judge—Admiralty Rule 20(b).

The consignees of a cargo carried on board the ship *Nordpol* on a voyage from Montreal to Chile brought an action because of damage to the cargo against the shipowner, a Danish company, and the charterers, managers or operators of the ship, two U.S. companies. A judge of this court made an order for service of notice of the writ of summons out of the jurisdiction on the basis of an affidavit averring *inter alia* that defendants failed to properly load, stow, care for and carry the cargo, and also that the ship was not seaworthy.

Held, dismissing a motion to set aside the service, defendants had not established that the judge had wrongly exercised his discretion in making the order. Under Admiralty Rule 20(*b*) the court may be justified in calling a foreign defendant before it where a possible breach of a contractual obligation took place within the court's jurisdiction.

Johnson v. Taylor Bros. & Co. [1920] A.C. 144; *Rein v. Stein* [1892] 1 Q.B. 753; *Vitkovice Horni a Hutni Tezirstvo v. Korner* [1951] 2 All E.R. 334, referred to.

MOTION by defendants to set aside service of notice of writ of summons outside jurisdiction.

B. Cleven for applicants (defendants).

T. H. Bishop and *D. F. Marler* for plaintiffs, *contrâ.*

NOËL J.—These are motions on behalf of three foreign defendants, West Coast Lines, S.A., (New York), West Coast Lines Inc. (New York) (sued as charterers and/or operators and/or managers of the carrying vessel *Nordpol*) and Dampkibsselkabet Nordern A/S (Copenhagen, Denmark), the owner of the said vessel, for an order setting aside the writ of summons and the service thereof pursuant to Rule 26A of the Rules in Admiralty.

The writ of summons was issued on behalf of a Chilean corporation together with two Canadian corporations, in the Montreal Registry of the Exchequer Court of Canada on June 14, 1968.

The endorsement of the writ of summons alleges that

> The Plaintiffs, as owners and consignees of a shipment of Bales of Woodpulp, and owners, holders and endorsees for value of the bills of lading relating to the said shipment, carried on board the Vessel NORDPOL from Montreal, P.Q., to Valparaiso, Chile, arriving on or about August 23, 1967, claim the sum of Thirty-six Thousand Dollars ($36,000.00) . . . jointly and severally against Defendants, in breach of contract, delict and tort, arising out of shortage and damage to the said shipment whilst in the care and control of Defendants, . . .

There is also an allegation that the vessel was not seaworthy before, at the beginning and during the voyage.

The application for leave to serve a writ of summons *in personam* outside the jurisdiction, dated June 6, 1967, was supported by an affidavit of the same date signed by William Tetley, Q.C., who stated that:

(1) he believed that plaintiffs have a good cause of action against the defendants;

(2) the bill of lading was issued in Montreal, P.Q.;

(3) the shipment was discharged in a bad condition in that it was dirty, wet and contaminated with yellow dust, white powder and sea water and wetted and was broken at the corners and in the areas where the steel wires were strapped about the shipment;

(4) it appears from all the facts disclosed to plaintiffs that the defendants failed to properly load, handle, stow, carry, care for, discharge and deliver the plaintiffs' cargo in the same good order and condition as that in which it was received and, therefore, have committed a breach of their legal and contractual obligation.

The application for issuance of a concurrent writ of summons *in personam* for service out of the jurisdiction and for leave to serve a notice of writ of summons *in personam* for service out of the jurisdiction was granted *ex parte* by this court on June 11, 1969, on the strength of the above affidavit with no reasons given and a request to extend the delay within which to serve the writ of summons was granted until June 1970.

Upon service of the notice of writ of summons upon the foreign defendants, a conditional appearance was entered pursuant to Rule 26A of the Rules in Admiralty and Messrs. McMaster, Meighen, Minnion, Patch and Cordeau, appeared for the defendant Dampskibsselskabet Norden, the owners of the vessel *Nordpol,* and Messrs. Beauregard, Brisset and Reycraft appeared for the defendants West Coast Line S.A. and West Coast Line Inc.

Defendants, by their motions to set aside the writ of summons and the service thereof, submit that plaintiffs should not have been authorized to serve outside the jurisdiction of the court as the latter had no right to do so.

The only possible paragraph of Rule 20 of the Rules in Admiralty, under which the present case could fall, is paragraph (*b*) which allows the court to authorize service out of the jurisdiction whenever:

> (*b*) The action is founded on any breach or alleged breach within the district or division in which the action is instituted of any contract wherever made, which according to the terms thereof ought to be performed within such district or division.

The above Rule authorizes the exercise of jurisdiction *in personam* over foreign located defendants in certain circumstances and this is called "assumed" jurisdiction over an absent defendant. It is an extended jurisdiction which may be exercised by the judge or court on proper grounds only and which he does not necessarily have to exercise. If the action is brought

in a forum which is not convenient for the parties or even for the witnesses, it should even be refused[1].

The defendants submit that plaintiffs had and have no right to obtain permission to serve outside the jurisdiction under Rule 20(b) for the following reasons:

(1) there is no allegation anywhere that the breach of contract took place within the jurisdiction;
(2) there is no proof of facts to bring the cause of action within rule 20(*b*), the deponent merely describing the action;
(3) the material does not include a deponent's belief in the cause of action;
(4) the affidavit was not signed by anyone familiar with the facts;
(5) mere allegations in an endorsement on the writ or on a statement of claim are not enough;
(6) great care must be exercised in authorizing service abroad particularly when the foreign defendant is not a British subject;
(7) any doubt should always be resolved in favour of the foreigner;
(8) the forum convenient here was in Chile and not in Canada and all witnesses as to condition of the shipment at the time of discharge and delivery in Chile live in Chile as well as the first plaintiff and, finally,
(9) the affidavit shows no basis of claim against West Coast Line S.A. and West Coast Lines Inc.[2]

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[1] *Cf. Private International Law*, Cheshire, 7th edition, p. 79 etc.

C. *Assumed jurisdiction over actions in personam*

The Rule at common law, that no action *in personam* will lie against a defendant unless he has been served with a writ while present in England, often precludes a plaintiff from enforcing a claim in what under the circumstances is the most appropriate forum. As we have seen, the fact that a tort has been committed or that a contract has been made and broken in England does not alone render the English court competent, even though the defendant is domiciled and ordinarily resident in the country. Again, if before the issue of writ an English debtor escapes abroad or if a foreigner returns home after contracting an obligation here, the judicial machinery of England cannot be put in motion. The only remedy of the aggrieved party in such cases is to follow the wrongdoer to his place of residence in accordance with the maxim *actor sequitur forum rei* . . .

Owing to considerations of this nature an entirely new kind of jurisdiction, generally called "assumed" jurisdiction, was introduced by the Common Law Procedure Act 1852, which gave the courts a discretionary power to summon absent defendants, whether English or foreign . . .

[2] These defendants, according to the statement of claim (paragraphs 9, 14 and 15) are being sued as "charterers and/or operators and/or managers" of the carrying vessel *Nordpol* because "the defendants' dispute amongst themselves as to their responsibility" and "refuse to provide information to the public in general and to plaintiffs in particular as to the contractual arrangements and responsibilities amongst them or as to which if not all are the carrier, or in effect to disclose their principals so that plaintiff is entitled to sue all defendants;".

The plaintiffs, on the other hand, contend that although the damage to their cargo was noted upon its delivery in Chile, and that as far as this obligation is concerned, it was breached outside of the jurisdiction, the original of certificate of damage No. MC-16240, dated at Santiago Chile, November 27, 1967, issued by Afia Chilena Seguros Limitado as well as certificate of analysis of the Warnoch Hersey Company Ltd, dated January 4, 1968, at Toronto, indicate that the defendants failed to properly and carefully load, handle, stow, carry, care and discharge and deliver the plaintiffs' cargo in the same good order and condition as that in which it was received and that the defendants have, therefore, committed a breach within the jurisdiction of their legal and contractual obligations to properly and carefully load, handle, stow, carry and care for the plaintiffs' cargo.

Although it is not specifically alleged that the breach of contract took place within the jurisdiction, it can, I believe, be inferred from the recital of the facts in Mr. Tetley's affidavit, that as the shipment was made from Montreal, where the loading and stowing took place, and as the ship navigated in Canadian waters before reaching the Atlantic ocean, it is possible that if a breach of the above obligations took place, such breach may well have occurred within the jurisdiction of this court.

I should add that the statement of claim filed by counsel for the plaintiffs, after the present motions were argued, confirms that such is the position taken herein.

The main question is, however, whether, in view of the fact that the obligation to deliver being in Chile, the possible breach of an obligation such as to properly load, handle, stow, carry and care for in this country can, in the circumstances of the present case be considered as important or as substantial[3] enough to justify the service of an action taken in Canada on three foreign based corporations, two of which being located in New York City and one in Copenhagen, Denmark.

There is also an allegation that defendants' vessel was not seaworthy before, at the beginning and during the voyage and the importance of this obligation and its possible connection with the cause of the damage must

[3] As pointed out in *Johnson v. Taylor Bros. & Co.*, [1920] A.C. 144 at p. 153, by Viscount Haldane, the Court may "refuse to give such leave in an instance in which the proceeding, though for a breach within the jurisdiction and in the letter within the terms of the rule, is in substance not so", or as pointed out by Lord Buchmaster at pp. 160-161 "It must, however, be remembered that the issue of the writ, even in a case within the words of the rule, can only be made by leave of the Court, and in granting such leave regard ought to be had to the real breach in respect of which the action is brought, and not merely to a breach on which it is necessary to rely, not to obtain relief, but only to found jurisdiction under the rule."

also be examined in order to determine whether it can also be considered as sufficient to enable the plaintiffs to force three foreign parties to defend themselves before this court.

The matter of the *forum conveniens* should also be considered, having regard to the domicile of the parties and the residence of the witnesses.

The issuance of a concurrent writ and the service of a notice of such writ on the basis of Mr. Tetley's affidavit has been authorized by a judge of this court and I am now asked to set aside this order which the judge, in his discretion, had a right to and decided to issue.

The questions of service out of the jurisdiction are of essential importance and, although a judge has made an order for such service, the question of whether the writ ought to have been so served or not is, of course, open to review on argument on an application by the party concerned.

Although I have not been supplied with fuller or better materials than those on which the judge authorized the service, I have had the advantage and opportunity of going into the matter more fully. I have also had full and complete argument on the question as to whether the foreign defendants ought to have been served out of the jurisdiction or not.

Notwithstanding the position I am now in, and although I might not on Mr. Tetley's affidavit alone have granted the leave for service abroad, I am not satisfied that the defendants have sufficiently established that the discretion of the judge who authorized the service has been wrongly exercised so as to justify this court to reverse his judgment. There is indeed authority to the effect that when some part of a contract is to be performed within the jurisdiction and a breach of that part is alleged, the court may be justified in calling a foreign or absent defendant before it under a United Kingdom rule which corresponds to Rule 20(*b*) of the Rules in Admiralty (cf. *Robey & Co. v. The Snaefell Mining Co.*[4] In *Rein v. Stein*[5] Lindley L.J. at p. 757, indeed stated:

> . . . I do not understand that it is the whole of the contract that has to be performed within the jurisdiction. It is sufficient if some part of it is to be performed within the jurisdiction, and if there is a breach of that part of it within the jurisdiction; . . .

In a more recent decision *Vitkovice Horni a Hutni Tezirstvo v. Korner*[6] a judge who had refused service out of the jurisdiction on the basis that he was not satisfied that there had been a breach of contract within the jurisdiction, was reversed on appeal. It was indeed held that:

> . . . on an application for leave to serve notice of a writ of summons out of the jurisdiction under R.S.C., Ord. 11, r. 1 (e), the burden on the plaintiff, under R.S.C., Ord. 11, r. 4, was, not to "satisfy" the Court that he was right, but to make it sufficiently to appear that the case was a proper one for service out of the jurisdiction, and for this purpose, it was not necessary to prove the fact beyond all reasonable doubt, provided that there was a good arguable case; the learned

[4] (1888) 20 Q.B.D. 152.
[5] [1892] 1 Q.B. 753.
[6] [1951] 2 All E.R. 334.

judge, therefore, was wrong in thinking that he had no jurisdiction to grant leave for service out of the jurisdiction because he was not "satisfied" that there had been a breach within the jurisdiction, and, as he did not purport to exercise his discretion, it was competent for the Court of Appeal to review his order and to exercise their discretion under Ord. 11, r. 4; and, on the evidence, the case was a proper one for leave to be given for service out of the jurisdiction.

It follows, of course, that both motions are dismissed. Costs shall be in the cause.