

LIABILITY FOR CONSEQUENCES OF UNLAWFUL ARREST – PART II

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The recent judgment of the Supreme Court of Canada in *Armada Lines Ltd. v. Chaleur Fertilizers Ltd.* overturned the decision of the Federal Court of Appeal. The judgment is important because it confirms the test of when a party may recover damages arising out of the wrongful arrest of that party's property.

In August 1996 in this column Thomas S. Hawkins reviewed the decision of the Federal Court of Appeal in *Armada Lines Ltd. v. Chaleur Fertilizers Ltd.* This column focuses on the issue of damages for wrongful arrest dealt with in the judgment of the Supreme Court of Canada.

The facts of the case are that Armada Lines Ltd. ("Armada") entered into a contract with Chaleur Fertilizers Ltd. ("Chaleur"), wherein Armada agreed to transport Chaleur's cargo of fertilizer from New Brunswick to Togo. A booking note was signed by both parties on February 25, 1982. By it, the vessel was yet to be nominated. It stipulated that the time for shipment would be about March 20-22, 1982—to be confirmed. The loading dates were not confirmed initially because Chaleur's fertilizer cargo was being shipped from Louisiana and the Louisiana supplier had been delayed in sending the fertilizer. The shipment left Louisiana aboard the *Dahlia D* on March 7. It was expected to arrive in Belledune, New Brunswick on March 14. On March 11, Chaleur advised its agent that the nominated vessel should arrive at Belledune for loading no later than March 31. On March 17, Armada entered into a time charter for the vessel *Yue On* to carry the cargo from Belledune to Togo. On March 16, the *Dahlia D* ran into ice problems in the Gulf of St. Lawrence and was abandoned by her crew when she foundered, about one day's journey from Belledune. Chaleur attempted to get the cargo to Belledune, but could not confirm a loading

date. Armada learned of the *Dahlia D's* difficulties and booked a substitute cargo for the *Yue On*. The *Yue On* proceeded to Montreal to load the substitute cargo. The *Yue On* arrived in Montreal on March 27. Cargo was loaded and *Yue On* departed Montreal on April 8. The *Dahlia D* was towed to the port of Gaspé Bay, arriving there on March 20. The fertilizer cargo was not damaged. The fertilizer was trucked from Gaspé Bay to Belledune and was finally ready for shipment on April 9.

There was considerable discussion whether Chaleur would pay compensation to Armada for the difference between the net revenue that it would have earned had it carried Chaleur's cargo, and the actual revenue that it earned carrying the replacement cargo. On April 16, Armada filed a statement of claim commencing an action *in rem* against the cargo and an action *in personam* against Chaleur, alleging breach of contract. Armada proceeded to arrest the cargo of fertilizer pursuant to Rule 1003 of the Federal Rules of Court. The cargo was released on bail on April 23, with an undertaking being given to pay damages if any should be awarded. The cargo was eventually shipped on April 28 on another vessel.

Approximately 20 months later Chaleur applied to the Court to strike out Armada's statement of claim in the *in rem* action against the cargo. The arrest of the cargo and the undertaking with respect to security was set aside by the order of Rouleau J. on December 12, 1983. Armada continued its action *in personam* alleging breach of contract. Chaleur counter-claimed for damages arising out of the arrest of the cargo fertilizer. At trial, Armada was successful in its claim for breach of contract. Chaleur's counter-claim was dismissed.

The judgment was appealed to the Federal Court of Appeal. The Appeal Court dismissed the breach of contract action and awarded Chaleur damages for the wrongful arrest of the cargo.

The decision of the Federal Court of Appeal was significant for three reasons:

1. there is no obligation to challenge an arrest immediately;
2. the guidelines in English case law respecting Mareva injunctions (restraining the defendant from removing its assets out of the jurisdiction of the court) apply to Canadian maritime law and are consistent with Rule 1003. Therefore, a plaintiff seeking a Mareva injunction, and by implication a plaintiff seeking under Rule 1003 to arrest property relating to a maritime claim or maritime property, must:
 - (a) make full and frank disclosure of all material matters within its knowledge;
 - (b) provide full particulars of its claim;
 - (c) give grounds for believing that the defendants have assets within the jurisdiction;
 - (d) give some grounds for believing that there is a risk that the asset will be removed before the judgment or award is satisfied; and
 - (e) give an undertaking in damages – in case the plaintiff fails in its claim or the injunction turns out to be unjustified.
3. a court order to set aside an arrest of cargo or a ship is finding, by implication at least, that the arrest was unlawful and may result in damages being payable by the arresting party.

The significant difference between the Mareva injunction and an arrest under Rule 1003 is that in order to obtain a Mareva injunction a plaintiff must give an undertaking in damages. By contrast Federal Court Rule 1003 does not mention undertakings. The Court of Appeal in the *Armada Lines* case inferred that although the Federal Court rule does not specifically require an undertaking as to damages for wrongful arrest the Court held that the Plaintiff assumes the consequences of such an arrest if the arrest later turns out to be “illegal”, and the Plaintiff “must

suffer the consequences of illegality.” However, in light of the Supreme Court of Canada decision in *Armada Lines*, discussed below, points 2(e) and 3 regarding damages, above, are unlikely to apply in cases of arrest under Rule 1003.

The Supreme Court of Canada considered whether the Court of Appeal had erred in awarding damages of \$36,651.27 to Chaleur for the loss of use of working capital under the heading “damages for wrongful arrest”. The Court of Appeal found that Armada had arrested the cargo “without legal justification” and Armada must suffer the consequences of that illegality and compensate Chaleur for the damage which flowed from the arrest. Therefore, the Court of Appeal applied a lower standard in departing from the long-standing rule governing when a party can claim damages for wrongful arrest laid down in the decision of the Privy Council in *The “Evangelismos”* (1858), 14 ER 945.

In that case the British brig *Hind* was anchored at the mouth of the river Thames. An unidentified vessel was swept by wind and tide down upon the *Hind*. The port forerigging of the vessel caught and carried away the *Hind’s* jib-boom and bowsprit which went through the foresail of the unidentified vessel, and the port-bow of the vessel then collided with the port-bow of the *Hind*. The unidentified vessel sailed away under cover of darkness, but was closely followed by the *Hind’s* boat. The unidentified vessel anchored and those in the *Hind’s* boat made her fast astern of a schooner nearby. At daylight the *Hind’s* boat went alongside the vessel as she weighed anchor. Her crew were sighted repairing damage to the port bow. The day after the collision the *Evangelismos* was found in the docks. Her appearance coincided with the unidentified vessel which had collided with the *Hind*, she was identified as being the vessel which had been followed by the *Hind’s* boat immediately after the collision, her port bow had sustained damage, and her foresail was split. The owner of the *Hind* arrested the *Evangelismos*. The Court dismissed the claim by finding that the identity of the vessel doing the damage had not been sufficiently proved. The owners of the *Evangelismos* then applied to the Court for damages and loss which had been sustained in the *Evangelismos* having been arrested and detained. The Court considered that the arrest of the *Evangelismos* had been made in the *bona fide* belief that she was the vessel which had been in collision with the *Hind*, that there had been no *mala fides* in the proceedings, and the Court refused to condemn the owners of the *Hind* in damages as well as costs.

The case was appealed to the Privy Council. The Privy Council upheld the decision of the lower court.

The Supreme Court of Canada stated that the rule governing when a party can claim damages for wrongful arrest was laid down in The “*Evangelimos*” and quoted the Privy Council in that case as follows:

“Undoubtedly there may be cases in which there is either mala fides, or that crassa negligentia, which implies malice, which would justify a Court of Admiralty giving damages

The real question ... comes to this: is there or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff, or that gross negligence which is equivalent to it?”

The Court also quoted an American case, *Frontera Fruit Co. v. Dowling*, which explained the principle as follows:

“The gravamen of the right to recover damages for wrongful seizure or detention of vessels is the bad faith, malice, or gross negligence of the offending party.”

The Supreme Court of Canada stated that the rule in The “*Evangelimos*” survives to this day and that any change in the law to award damages for wrongful arrest in the absence of conduct amounting to either malice or gross negligence must be effected by the legislature and not the courts. In the common law jurisdictions only Australia has departed from the rule in The “*Evangelimos*” by enacting legislation that provides that a party may recover damages arising out of the arrest of property if the arrest was obtained “unreasonably and without good cause”, a lower standard than the standard in The “*Evangelimos*”: malice or gross negligence.

Applying the rule to the facts in the *Armada Lines* case, since neither the Trial Court nor the Court of Appeal found that Armada had acted with either bad faith or gross negligence in arresting the cargo there was no support for a claim for damages for wrongful arrest.

The second issue dealt with by the Supreme Court of Canada in *Armada Lines* was whether the Court of Appeal was correct to award damages to compensate Chaleur for the \$3,800 in interest paid on the loan which was taken out in order to post security to release the cargo from arrest. The Supreme Court held that the Court of Appeal had been correct in awarding \$3,800 because Rule 344 of the Rules gives the Court full discretionary power for the payment of costs of all parties involved in the proceedings. An award of costs may include those expenses which arise directly from maintaining the security provided in order to obtain the release of the arrested property.

Therefore, the judgment of the Supreme Court of Canada is significant for the following reasons:

1. The rule in *The “Evangelismos”* remains good law in Canada. A court setting aside an arrest on the grounds that the arrest was without legal justification does not necessarily lead to the conclusion that the plaintiff must be liable for the consequences of its act in damages. The court must find conduct amounting to either malice or gross negligence to award damages for wrongful arrest.
2. The guidelines in English case law respecting Mareva injunctions are similar to the maritime arrest procedure and may have applicability to Canadian maritime law. However, following from point 1 above, while the Mareva injunction requires a plaintiff seeking a Mareva injunction to give an undertaking as to the payment of any damages in case the claim fails or the injunction is unjustified, it cannot be said that there is an inference that the party effecting an arrest under Rule 1003 of the Federal Court Rules assumes the consequences of such an arrest in damages for wrongful arrest.