
Vancouver 1967 Oct. 30 Nov. 1

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

SUMITOMO SHOJI CANADA LTD. .....PLAINTIFF;

AND

THE SHIP *WAKAMIYASAN MARU*, HER OWNERS, MITSUI O.S.K. LINES, LTD., AND THEIR AGENTS, C. GARDNER JOHNSON LTD. .... DEFENDANTS.

AND BETWEEN:

SUMITOMO SHOJI CANADA LTD. .....PLAINTIFF;

AND

THE SHIP *KENSHO MARU*, HER OWNERS, MITSUI O.S.K. LINES, LTD. AND THEIR AGENTS, C. GARDNER JOHNSON LTD. ..... DEFENDANTS.

Shipping—Practice—Damage to cargo—Non-resident defendant—Motion for leave to serve notice of writ in foreign country—Supporting affidavit—Essential requirements of—Admiralty Rules 20, 21, 22, 23, 24, 25—Exchequer Court Rule 215.

Plaintiff issued a writ of summons *in rem* against a ship and *in personam* against its owner and agent claiming for damage to cargo carried into Vancouver and applied for leave to serve notice of the writs on the owner in Japan. The motion was supported by an affidavit by plain-

1967

SUMITOMO SHOJI CANADA LTD. v. THE SHIP *Wakamiya-san Maru et al*

tiff's solicitor deposing (1) that the action was for damage by negligence to cargo carried into Vancouver, (2) that the owner had a head office in Tokyo and deponent believed it was a company incorporated by the laws of Japan, and (3) that deponent believed plaintiff had a good cause of action.

Held, the motion must be dismissed for non-compliance with the rules.

1. Admiralty Rules 20 and 21 require that the supporting material disclose by reasonable evidence a cause of action and that the cause of action is within Rule 20. It is not enough merely to state what the action is about and that deponent believes there is a good cause of action. *Chemische Fabrik Vormals Sandoz v. Badische Anilin und Soda Fabriks* [1904-7] All E.R. 234, *Orr v. Brown* [1932] 2 W.W.R. 626, 45 B.C.R. 323, *Shore v. Hewson* (1908) 7 W.L.R. 634, *Collins v. North British and Mercantile Ins. Co.* [1894] 3 Ch. D. 228, referred to.

2. The supporting material did not disclose that the owner could not be found in British Columbia, as required by Rule 21, or that the owner was not in a British Dominion, as required by Rule 23.

3. The proper order on such a motion should be for leave to issue a writ for service out of the jurisdiction in Form 7 and to serve such writ in Japan by notice under Admiralty Rule 22. Where as here the action is commenced by writ for service within the jurisdiction the writ issued for service out of the jurisdiction should bear *teste* the date of the original writ in the same manner as a concurrent writ in accordance with the practice authorized by Exchequer Court Rule 2 which is made applicable by Admiralty Rule 215.

MOTION.

E. C. Chiasson for plaintiff.

SHEPPARD D.J.:—In each of two actions the plaintiff has moved *ex parte* for leave to serve out of the jurisdiction on the defendant Mitsui O.S.K. Lines, Ltd., owners of the ship, the writ of summons issued for service in the jurisdiction by serving notice thereof.

In each action the plaintiff, according to the endorsement on the writ of summons, has claimed for damage to cargo carried into Vancouver by the ship *Wakamiyasan Maru* in Action 28/67 and by the ship *Kensho Maru* in Action 29/67. In each action the plaintiff issued a writ *in rem* against the ship and *in personam* against the owners, Mitsui Co. and their agents, C. Gardner Johnson Ltd., claiming for such damage, and has now applied for leave to serve each such writ of summons in Japan on the defendant Mitsui Co. by serving notice of that writ. Each motion is supported by an affidavit of Rolf Weddigen, a barrister and solicitor associated with the plaintiff's solicitors, who deposed:

(1) That the action is for damages by negligence to a cargo carried into Vancouver, B.C.;

1967

SUMITOMO SHOJI CANADA LTD. v. THE SHIP *Wakamiya-san Maru et al*

Sheppard D.J.

(2) That the ship was owned by the defendant, Mitsui Co., which has a head office in Tokyo, Japan, and which he verily believes is a company incorporated by the laws of Japan;

(3) That the deponent verily believes that the plaintiff has a good cause of action.

The material does not permit an order for service out of the jurisdiction as not complying with the Admiralty Rules. Service out of the jurisdiction is provided in Admiralty Rules 20 to 24[1] inclusive; Rule 20 defines the causes of action in which such service may be ordered and the remaining Rules, particularly Rule 21 provide for matters to be dealt with in the material supporting the application.

---

[1] 20. Service out of the jurisdiction of a writ of summons or a third party notice, may be allowed by the Court whenever:—

(*a*) Any relief is sought against any person domiciled or ordinarily resident within the district or division in which the action is instituted;

(*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;

(*c*) Any injunction is sought as to anything to be done within the district or division in which the action is instituted;

(*d*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the district or division in which the action is instituted;

(*e*) The action is in tort in respect of goods carried on a ship into a port within the district or division of the registry in which the action is instituted.

21. Every application for leave to serve a writ of summons, or notice of a writ of summons, on a defendant out of the jurisdiction shall be supported by affidavit, or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction.

22. Any order giving leave to effect such service, or give such notice, shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country, where or within which, the writ is to be served or the notice given.

23. When the defendant is neither a British subject nor in British Dominions, notice of the writ, and not the writ itself, is to be served upon him. A form of notice will be found in the Appendix hereto, Form 8.

24. Notice in lieu of service shall be given in the manner in which writs of summons are served.

Admiralty Rules 20 and 21 are similar in part to the Rules found in the Supreme Court of Judicature in England (Annual Practice, 1957, Order 11, Rules 1 and 4) and followed in various provinces, and such Rules have been construed to require the following proof to obtain an order for service out of the jurisdiction:

1. That facts be proven to disclose a reasonable cause of action.

In *Chemische Fabrik Vormals Sandoz v. Badische Anilin und Soda Fabriks*[2], Lord Davey at p. 236 said:

> If the court is judicially satisfied that the alleged facts, if proved, will not support the action, I think the court ought to say so, and dismiss the application or discharge the order.

In *Orr v. Brown et al*[3], M. A. Macdonald J.A. at p. 630 stated:

> This appeal may be disposed of on one ground. The material in support of the application must disclose, by reasonable evidence, a cause of action: *Van Hemelryck v. Lyall Shipbuilding Co.* [1921] 1 A.C. 698, at 701, 90 L.J.P.C. 96.

and applied in *K. J. Preiswerck Limited v. Los Angeles-Seattle Motor Express Incorporated et al*[4] where Lord J. at p. 94 said:

> The material in support of the application must disclose, by reasonable evidence, a cause of action: *Orr v. Brown* [1932] 2 W.W.R. 626, 45 B.C.R. 323. See also O. 11, R. 4, Supreme Court Rules.

See also *Bell Bros. Transport Ltd. v. Cummins Diesel Power Ltd. et al*[5], per Johnson J.A. at p. 171.

2. That such facts bring the cause of action within Rule 20.

In *Chemische Fabrik Vormals Sandoz v. Badische Anilin und Soda Fabriks, supra,* Lord Davey at p. 236 said:

> Rule 1 of Ord. 11 (the equivalent of Admiralty Rule 20) enumerates the cases in which the court may give leave to serve a writ out of the jurisdiction.

and in *Vitkovice Horni a Hutni Tezirstvo v. Korner*[6], Lord Radcliffe at p. 882 said:

> Rule 1 defines the circumstances in which a judge may in his discretion allow such a writ to be served; . . .

Hemelryck v. William Lyall Shipbuilding Company, Ltd.[7], per Lord Buckmaster at pp. 700-701.

---

[2] [1904-7] All E.R. 234.
[3] [1932] 2 W.W.R. 626 (B.C.).
[4] (1957) 22 W.W.R. 93 (B.C.).
[5] (1962) 40 W.W.R. 169 (Alta.).
[6] [1951] A.C. 869.
[7] [1921] 1 A.C. 698.

1967

SUMITOMO SHOJI CANADA LTD. v. THE SHIP *Wakamiya-san Maru et al*

Sheppard D.J.

In the affidavits in support of the applications there is no proof of facts disclosing a cause of action nor proof of facts to bring such cause of action within Admiralty Rule 20. The deponent merely states what the action is about.

On this ground the applications fail.

3. That Rule 21 expressly states that the application "shall be supported by affidavit or other evidence stating that in the belief of the deponent the plaintiff has a good cause of action".

It has been held that it is not necessary to state in those words that the plaintiff has a good cause of action.

In *Shore v. Hewson*[8] Lamont J. at p. 636 said:

> In Fowler v. Barslow, 51 L.J. Ch. 104, Jessel, M.R., said: "The rule is that when the facts are stated in the affidavit, it is not necessary to say in words 'there is a good cause of action'." The affidavit of the plaintiff sets out facts which satisfy me that he had a good cause of action.

However, a mere statement of the facts of the plaintiff's case does not exclude the possibility of a defence, and therefore does not necessarily imply the deponent's belief in a good cause of action. Hence the material should include a statement of the deponent's belief in the cause of action as directed by the Rule: *Collins v. North British and Mercantile Insurance Company*[9].

It is to be observed that every order for service out of the jurisdiction, although complying with the Rules is, nevertheless, discretionary. In *Vitkovice Horni a Hutni Tezirstvo v. Korner, supra,* at p. 882, Lord Radcliffe said: "Rule 1 defines the circumstances in which a judge may in his discretion allow such a writ to be served;" and in *Chemische Fabrik Vormals Sandoz v. Badische Anilin und Soda Fabriks, supra,* Lord James of Hereford at p. 236 said:

> To bring those who may be foreigners from far away—without knowledge of our language or procedure—without possible means of proof at hand, imposes a burden and difficulty which ought not to be lightly inflicted. But this power does exist, and the conditions under which it is to be exercised are to be found in Ord. 11, rr. 1 and 4.

That discretion is expressly provided for in Admiralty Rule 21 which states: "and no such leave shall be granted unless it shall be made efficiently to appear to the Court that the case is a proper one for service out of the jurisdiction".

---

[8] [1908] 7 W.L.R. 634 (Sask.).

[9] [1894] 3 Ch. D. 228 at p. 235.

By reason of such discretion the deponent or other witness to support the application is restricted. In *Chemische Fabrik Vormals Sandoz v. Badische Anilin und Soda Fabriks, supra,* Lord Davey at p. 236, after referring to the rules, said:

> This does not, of course, mean that a mere statement by any deponent who is put forward to make the affidavit that he believes that there is a good cause of action is sufficient . . . . But I think that the application should be supported by an affidavit stating facts which, if proved, would be a sufficient foundation for the alleged cause of action, and, as a rule, the affidavit should be by some person acquainted with the facts, or, at any rate, should specify the sources or persons from whom the deponent derives his information.

There is the question whether the affidavits disclose such knowledge of the facts as to make the deponent a proper deponent of belief in the action under *Chemische Fabrik Vormals Sandoz v. Badische Anilin und Soda Fabriks, supra,* but that appears to be a matter of weight and not the omission of something required by a rule. As a matter of weight it is rather more important on a motion to set aside the order on the ground that this jurisdiction is not *forum conveniens* as in *K. J. Preiswerck Limited v. Los Angeles-Seattle Motor Express Incorporated et al*[10] per Lord J. at p. 575. A solicitor for the plaintiff would usually have inquired of the cause of action and also of any possible defence, hence a belief by such solicitor or his associate would permit an order for service out of the jurisdiction, particularly here where the affidavit states inquiries were made.

4. Rule 21 requires the affidavit or other evidence to show "in what place or country such defendant is or probably may be found", and under Rule 23 there is required evidence whether or not the defendant is a British subject or in a British Dominion.

The material should show "in what place or country such defendant is or probably may be found" (Admiralty Rule 21). There is evidence the Mitsui Company was incorporated in Japan and has its head office there. There is no evidence that it cannot be found in British Columbia so as to make service out of the jurisdiction unnecessary, or that it is not in a British Dominion within Rule 23. It follows that the material in support of the application is deficient.

[10] (1957) 23 W.W.R. 574 (B.C.).

1967

SUMITOMO SHOJI CANADA LTD. v. THE SHIP *Wakamiya-san Maru et al*

Sheppard D.J.

The plaintiff asks for service by notice of the writ of summons issued in the action. That has been issued for service within the jurisdiction. Notice of the writ is merely an alternative method of effecting service of the writ. When the defendant is neither a British subject nor in a British Dominion, then the notice of the writ and not the writ is served (Admiralty Rule 23) but otherwise the writ is served.

A writ of summons for service out of the jurisdiction is in Form 7 and is in contrast to a writ *in personam* for service within the jurisdiction, which is Form 6. In a writ for service within the jurisdiction the time for appearance is fixed by the Rules (Rule 25 and Form 6), whereas the time for appearance to a writ for service out of the jurisdiction is fixed by order of the Court (Rule 22). Hence whether the writ or notice thereof be served, the writ must be in Form 7 for service out of the jurisdiction and the notice is a "Notice in lieu of Writ for Service out of Jurisdiction" (Form 8).

It follows that the proper order should be for leave to issue a writ for service out of the jurisdiction in Form 7, and to serve such writ in Japan by notice (Rule 22). While there is no express rule permitting a concurrent writ, nevertheless, as this action has been commenced by writ for service within the jurisdiction and this proposed writ is issued only for the purpose of service, it should bear *teste* of the date of the original writ in the same manner as a concurrent writ. This practice is authorized by the Exchequer Rule 2 made applicable by Admiralty Rule 215.

In conclusion, the applications of the plaintiff are refused and there is leave to apply.