

NEW BRUNSWICK ADMIRALTY DISTRICT

St. John
1965

July 23

1966

Jan. 17

BETWEEN :

STE. NOUVELLE D'AFFRÈTEMENT }
ET DE COURTAGE S.A.R.L. } PLAINTIFF;

AND

M. V. BROWIND, HER TACKLE AND }
APPAREL } ... DEFENDANT.

Admiralty—Affidavit to lead warrant—Admiralty Rule 45—Based on "instructions"—Sufficiency of.

Defendant moved to vacate a warrant issued under Admiralty Rule 45 on the grounds that the affidavit to lead warrant sworn by plaintiff's solicitor was defective in that deponent merely stated that he was "instructed" as to the facts to which he deposed and that this was insufficient under Exchequer Court Rule 168 which provides that an affidavit based on belief shall state the grounds of belief.

Held, defendant's objections to the affidavit were not of substance and the motion to vacate the warrant must be dismissed.

Letson v. The Tuladi (1912) 17 B.C.R. 170, 15 Ex. C.R. 134, 4 D.L.R. 157; *Victoria Machinery Depot Co. v. The Canada and The Triumph* (1913) 18 B.C.R. 511, 15 Ex. C.R. 136, 17 D.L.R. 27; *Rouleau v. The S.S. Aledo* (1923) Ex. C.R. 10 distinguished. Admiralty Rules 45, 46, 47, 49, 88, 215; Exchequer Court Rule 168 considered.

E. Neil McKelvey, Q.C. for defendant.

Frederic S. Taylor for plaintiff.

ANGLIN D.J.A.:—This is an application heard in Chambers on July 23, 1965, at Saint John, Province of New Brunswick, Canada, to vacate the warrant issued by the Registrar for the arrest of the defendant vessel. Briefs were submitted and judgment reserved. The delay in delivering it has been due to matters having priority and recently to my acting as Chairman of the Electoral Boundaries Readjustment Commission for the Province, the final report of which to Parliament was completed on January 5, 1966.

1966
 ———
 STE.
 NOUVELLE
 D’AFFRÈTE-
 MENT ET DE
 COURTAGE
 S.A.R.L.
 v.
 M.V.
Browind,
 HER TACKLE
 AND APPAREL
 ———
 Anglin D.J.A.
 ———

The defendant’s notice of motion states that the application is made

on the ground that the affidavit to lead the said warrant sworn herein the 25th day of June, 1965 by Frederic S. Taylor is defective and inadmissible, and that paragraphs 2, 3, 4 and 5 thereof should be struck out, and that no affidavit as prescribed by the Rule has been filed to lead the said warrant.

Mr. Taylor is solicitor of record for the plaintiff, and the paragraphs under reference are contained in his affidavit to lead warrant, which in full is as follows:

(1) That I am the duly authorized agent and solicitor of the above named plaintiff and I am specially instructed by the said plaintiff to make this affidavit.

(2) That I am instructed that the plaintiff is an incorporated company duly incorporated under the laws of the Republic of France with head office at Dinard in said Republic.

(3) That the plaintiff entered into a contract with the owners of the defendant to charter said ship. The owners of the defendant wrongfully repudiated said contract resulting in damages to the plaintiff in the sum of £30,400 Sterling, being the difference between the hire payable under said contract and the market rate as I am instructed.

(4) That I am further instructed that the plaintiff’s claim for said sum of £30,400 Sterling has not been satisfied and that the aid of this Honourable Court is required to enforce it.

(5) That I am also instructed that the said defendant Motor Ship is a Greek vessel registered at Piraeus.

(6) That there is no Consular Officer of the Kingdom of Greece in the New Brunswick Admiralty District.

(7) That to the best of your deponent’s belief there is no owner nor part owner of the ship domiciled in Canada.

Counsel for the defendant says in his brief:

Mr. Taylor’s affidavit is objectionable on two basic grounds:

1. The affidavit is not made on the basis of information and belief in that it simply states that he is instructed as to the facts of which he clearly does not have personal knowledge, and there is no statement as to the deponent’s belief in the facts deposed to.

1966

STE.

NOUVELLE
D'AFFRÈTE-
MENT ET DE
COURTAGE
S.A.R.L.

v.

M.V.
Brownd,
HER TACKLE
AND APPAREL

Anglin D.J.A.

2. The source of his instructions, which certainly can be no better than information, is not identified.

The relevant Rules of the Exchequer Court of Canada on its Admiralty side are:

45. In an action in rem a warrant for the arrest of property may be issued by the Registrar at the time of, or at any time after, the issue of the writ of summons, on an affidavit being filed, as prescribed by the following rules. A form of affidavit to lead warrant will be found in the Appendix hereto, No. 15.

No. 15

Affidavit To Lead Warrant—Rule 45
(Title of Court and action)

I, A.B. (state name and address) make oath and say that I have a claim against the Ship *Mary* for (state nature of claim).

And I further make oath and say that the said claim has not been satisfied, and that the aid of this Court is required to enforce it.

46. The affidavit shall state the nature of the claim, and that the aid of the Court is required.

47. The affidavit shall also state—

. . . .

(d) In an action in rem on any claim—

- (1) Arising out of an agreement relating to the use or hire of a ship . . . the national character of the ship and that to the best of the deponent's belief at the time of the institution of the action no owner or part owner of the ship is domiciled in Canada.

49. The Registrar, if he thinks fit, may issue a warrant, although the affidavit does not contain all the prescribed particulars, . . . or he may refuse to issue a warrant without the order of the Judge.

88 When the application (to the Court or to a Judge) comes on for hearing, . . . the Judge, after hearing the parties . . . may make such order as to him shall seem fit.

215. In all cases not provided for by these Rules the general practice for the time being in force in respect to proceedings in the Exchequer Court of Canada shall be followed.

Rules 99 to 104 respecting "Affidavits" contain nothing relevant to the issue on the present application.

Counsel for the defendant submits that the said Rule 215 brings into effect in Admiralty matters the following rule of the Exchequer Court with respect to other than proceedings in Admiralty:

168. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions on which

statements as to his belief with the grounds thereof may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies or extracts from documents shall be paid by the party filing the same.

Counsel also cites the following passage in McGuffie on British Shipping Laws Vol. 1, Admiralty Practice, 1964, at p. 478:

Although in practice the grounds of a witness's information and belief are frequently not stated, nevertheless the party against whom such an affidavit is made is entitled to take the objection and if the objection is one of substance, the Court is bound to pay regard to it. The Court of Appeal has commented strongly on the irregularity of an affidavit founded upon information and belief merely, without giving the source of such information and belief.

I note in passing that the above passage is in a chapter headed "Preparations for Trial", and that the cases mentioned in the footnote by the learned author, who is Registrar of the Admiralty Court in London, England, include none dealing with affidavits in Admiralty matters.

As Counsel for the defendant further submits there are decisions of the common law courts in Canada with the same ruling as those mentioned in the above footnote in respect of affidavits based on information and belief.

In the brief of Counsel for the plaintiff, *contra*, he submits, *inter alia*, that "in any event the affidavit to lead warrant does sufficiently disclose the grounds for the deponent's belief, namely the plaintiff's instructions". He also refers to a rule of the Exchequer Court:

300. The Court or a Judge may, under special circumstances, depart from any limitation in these rules upon the inherent right or power of the Court or a Judge and, furthermore, may excuse any party from complying with any of the provisions of these rules.

It appears that the sufficiency of an affidavit to lead warrant for arrest has been considered in only three cases in Canadian Admiralty jurisprudence. In *Letson v. The Tuladi*,¹ there was a motion in an action *in rem* for necessities to vacate the warrant for the arrest of the defendant ship. The learned District Judge in Admiralty for British Columbia said:

The affidavit here does not state the national character of the ship, or that the aid of the Court is required. The first omission is of importance, the latter is almost a matter of inference; in other respects I think

¹ (1912) 17 B.C.R. 170; 15 Ex. C.R. 134; 4 D.L.R. 157.

1966
 STE.
 NOUVELLE
 D'AFFRÈTE-
 MENT ET DE
 COURTAGE
 S.A.R.L.
 v.
 M.V.
Browind,
 HER TACKLE
 AND APPAREL
 Anglin D J A

1966

STE.

NOUVELLE
D'AFFRÈTE-
MENT ET DE
COURTAGE
S.A.R.L.

v.

M.V.
Browind,HER TACKLE
AND APPAREL

the affidavit sufficient. Were it not for rule 39 (now 49), I should have thought that as a whole there had not been a substantial compliance with the rules, but I see no escape from the fact that the registrar has, for reasons which must be assumed to be valid, and which are not required to be disclosed on the record, "thought fit" to dispense with some of the prescribed particulars, and in such circumstances I cannot perceive in what respect I am entitled to review the exercise of that discretion any more than I should be under the English rule . . . The motion must be dismissed.

*In Victoria Machinery Depot Co., Ltd. v. The Canada and The Triumph*¹, the headnote is as follows:

Upon an application to vacate warrants issued against a ship under arrest in an action in rem for necessaries, although it appeared that on the facts disclosed in the affidavits filed before the registrar, the Court would not have jurisdiction to issue the warrant for arrest, the plaintiffs were allowed to file supplementary affidavits to shew that there was jurisdiction to issue the warrants and that the case was one in which the discretion of the registrar could be properly exercised.

*In Rouleau v. The S. S. Aledo*², there was an action *in rem* by a seaman for wages against an American ship arrested at Montreal. The affidavit to lead warrant did not contain the particulars with respect to stating the national character of the ship and that notice of the action had been served on the American consul. The latter filed a protest against the prosecution of the action. The Court said:

The American consul had power to deal with the dispute between the plaintiff and the American ship and for the reasons stated in the consul's protest, the court is entitled to exercise its discretion to decline to proceed with the present suit, and for these reasons as well as for the defective affidavit already referred to plaintiff's action is dismissed with costs, and there will be judgment accordingly.

It might be for consideration that in the present matter the defendant does not challenge the substantive matters under reference in the affidavit in question, that upon security being arranged by the parties with respect to the alleged claim the defendant's solicitor endorsed his consent on the release from arrest issued by the Registrar, that such substantive matters, if denied in the pleadings, will be explored at the trial, and that the costs of arrest might be ordered paid in any event by the plaintiff. But, nevertheless, the question remains whether there was such a failure to comply with the prescribed process of the Court that there was no jurisdiction to issue the warrant for arrest.

¹ (1913) 18 B.C.R. 511; 15 Ex. C.R. 136, 17 D.L.R. 27.

² [1923] Ex. C.R. 10.

Anglin D.J.A.

To my mind the defendant's objections to the affidavit to lead warrant are not "of substance". In the English and Canadian cases cited it is patent that the objections to the affidavits based on information and belief were of substance. In addition it may be noted that in the Admiralty Rules dealing with the particulars to be covered in an affidavit to lead warrant it is specified in the said Rule 47 that with respect to the particular of no owner being domiciled in Canada it is "to the best of the deponent's belief". It might be inferred from this that the said Exchequer Court Rule 168 is to be deemed modified with respect to "statements as to his belief with the grounds thereof" in connection with other particulars. In any event, to give the Court jurisdiction to issue a warrant for arrest it is the nature of the particulars and not the wording in which they are presented to the Registrar which is of the essence. Although I think it preferable for practitioners to employ conventional wording, it appears to me that in context the use of "instructed" connotes "belief and the grounds thereof". The source of the instructions is identified in the first paragraph of the affidavit in question.

The application is dismissed with costs in the cause.

1966

STE.

NOUVELLE
D'AFFRÈTE-
MENT ET DE
COURTAGE
S.A.R.L.

v.

M.V.

Brown,
HER TACKLE
AND APPAREL

Anglin D.J.A.