LLOYD'S LAW REPORTS

Editor:
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HOUSE OF LORDS

Feb. 17, 18, 19, 20, 1975

ALEXANDER WARD & CO. LTD. v. SAMYANG NAVIGATION CO. LTD.

Before Lord CROSS OF CHELSEA, Lord MORRIS OF BORTH-Y-GEST, Lord HAILSHAM OF ST. MARYLEBONE, Lord KILBRANDON and Lord SALMON

Company — Directors — Articles of association stating that business of company to be managed by directors — Summons and arrestment of vessel issued by persons without authority — No directors appointed at time — Company subsequently in liquidation—Whether company through its liquidator could ratify issue of summons and arrestment.

Principal and Agent — Ratification — Summons and arrestment issued on behalf of company by unauthorized persons—No effective directors at time — Whether subsequent ratification by company of summons and arrestment valid.

Admiralty practice — Arrestment of vessel ad fundandam jurisdictionem—Nature of process.

The pursuer company, which was registered in Hong Kong, desired to recover a sum of £161,088.12 owing by the defender company which was registered in Korea. The articles of association of the pursuer company stated (inter alia):

> 74. The business of the Company shall be managed by the Directors, who . . . may exercise all such powers of the Company as are not by the (Hong Kong) Ordinance or by these Articles required by the Company in General Meeting . . .

On Nov. 5, 1970, at a time when the pursuer company had no directors, a summons was obtained by W. and I., purporting to act for the pursuers, and a vessel lying in a Scottish shipyard was arrested under a process of arrestment ad fundandam jurisdictionem. The pursuer company went into liquidation, and on July 7, 1972, H. was appointed liquidator. He was subsequently added as a pursuer in the action. The defender company contended, as a preliminary point of law, that (i) the arrestment ad fundandam jurisdictionem was not available to the liquidator since it had been laid by W. and I. without the authority of the pursuer company, and the arrestment was available only to him who had used it; and (ii) the liquidator could not ratify the laying on of the arrestment or the raising of the action since at that time the pursuer company was not competent to perform those acts by an agent.

————*Held*, by the Lord Ordinary (Lord BRAND), that the company had no title to sue. On appeal by the pursuer company:

————*Held*, by the Second Division of the Court of Session (The Lord Justice-Clerk, Lord KISSEN and Lord FRASER) that the proceedings were properly constituted.

Appeal allowed.

On appeal by the defender company:

————*Held*, by H. L. (Lord CROSS OF CHELSEA, Lord MORRIS OF BORTH-Y-GEST, Lord HAILSHAM OF ST. MARYLEBONE, Lord KILBRANDON and Lord SALMON), that (1) the pursuer company acting through the liquidator had effectively ratified the raising of the action for the company was fully competent to do so since it could have raised the action either by appointing directors or by authorized proceedings in general meeting which in the absence of an effective board of directors had a residual authority to use the company's powers (*see* p. 3, col. 1; p. 4, col. 2; p. 5, col. 1; p. 8, col. 2);

————*Danish Mercantile Co. Ltd. v. Beaumont*, [1951] Ch. 680, applied.

(2) (*per* Lord MORRIS OF BORTH-Y-GEST and Lord HAILSHAM OF ST. MARYLEBONE), the pursuer company was also competent to ratify the arrestment ad fundandam jurisdictionem for arrestment was a preliminary step in the action itself and the ratification of the action would retrospectively validate the arrestment (*see* p. 3, col. 1; p. 6, col. 2);

(3) (obiter) (*per* Lord CROSS OF CHELSEA, Lord HILSHAM OF ST. MARYLEBONE, Lord KILBRANDON and Lord SALMON), the defender company had not effectively pleaded the Court's lack of jurisdiction to entertain the action (*see* p. 6, col. 2; p. 11, col. 1).

Appeal dismissed.

The following cases were referred to in the judgments:

American Mortgage Co. of Scotland Ltd. (Liquidator) v. Sidway, (1907) 14 S.L.T. 924;

Andersen v. Harboe, (1871) 10 M. 217;

Assets Co. Ltd. v. Falla's Trustee (1894) 22 R. 178;

Bamford v. Bamford, (C.A.) [1970] Ch. 212;

Bird v. Brown, (1854) 4 Exch. 786;

Carlberg v. Borjesson, (1877) 5 R. 188;

Craig v. Brunsgaard, Kjosterud & Co., (1896) 23 R. 500;

Danish Mercantile Co. Ltd. v. Beaumont, (C.A.) [1951] Ch. 680;

Dibbins v. Dibbins, [1896] 2 Ch. 348;

Firth v. Staines, [1897] 2 Q.B. 70;

Fraser-Johnston Engineering Co. Ltd. v. Jeffs, (1920) S.C. 222;

Hope v. Derwent Rolling Mills Co. Ltd., (1905) 7 F. 837;

Leggat Bros. v. Gray, (1908) S.C. 67;

North v. Stewart, (1890) 17 R. (H.L.) 60.

This was an appeal by Samyang Navigation Co. Ltd., from a decision of the Second Division of the Court of Session (The Lord Justice-Clerk, Lord Kissen and Lord Fraser) giving judgment in favour of the respondents, Alexander Ward & Co. Ltd., in an action by the respondents in which a warrant for arrestment ad fundandam jurisdictionem of a vessel owned by the appellants and lying in a Scottish shipyard had been issued, the respondents alleging that the appellants owed them about £160,000. The principal question in dispute was whether the respondents had power to bring the action or cause the warrant for arrestment to be issued since at the relevant time there were no directors of the company.

Mr. C. E. Jauncey, Q.C., and Mr. J. A. D. Hope (instructed by Messrs. Asher, Fishman & Co. agents for Messrs. Weir & MacGregor, Edinburgh, and Moncrieff Warren, Paterson & Co., Glasgow) for the appellants; Mr. Donald Ross, Q.C., Dean of the Faculty, and Mr. Michael Bruce (instructed by Messrs. Stephenson, Harwood & Tatham agents for Messrs. J. & F. Anderson, Edinburgh) for the respondents.

The facts are stated in the judgment of Lord Kilbrandon.

Judgment was reserved.

Wednesday, Apr. 16, 1975

JUDGMENT

Lord CROSS OF CHELSEA: My Lords, I have had the advantage of reading in advance the opinion of my noble and learned friend Lord Kilbrandon, and for the reasons he gives I would dismiss the appeal.

Lord MORRIS OF BORTH-Y-GEST: The interlocutor of the Lord Ordinary (of July 6, 1973) was pronounced following upon a preliminary proof which took place on Feb. 8 and 9, 1973. That preliminary proof was restricted to the matters raised by the defenders' fourth plea-in-law. That plea was as follows: "The pursuers not being the Company have no title to sue". But in the course of the reclaiming motion before the Second Division leave to amend was given, one result of which was that there was substituted a plea-in-law as follows:

> The Company not having authorised the raising of the action it should be dismissed.

In his opinion in the Second Division Lord Fraser pointed out that the defenders had no separate plea to the jurisdiction but he considered that the matter was sufficiently raised by the substituted plea above referred to. A study of the various opinions shows the only sense in which any question as to jurisdiction was raised.

It was not suggested that there could not have been a summons to bring the defenders before the Court: it was not suggested that the Court could not have power to adjudicate upon the claim which was presented: the effective point was whether the defenders were entitled to have the action dismissed if the position was that it had been raised by two individuals, viz. Messrs. Ward and Irons, who at the time had acted without the authority of the company as pursuers.

It cannot in my view be said that the pursuers were in any way disentitled to raise the action. As pursuers it was at all relevant times competent for them to sue. Furthermore there was no reason why they could not invoke any appropriate procedure to bring the defenders before the Court. Nor is it said that the procedural steps as such were not taken. What is said is that those who gave instructions for such steps to be taken did not at the time have the authority of the pursuers (the respondent company). On that basis it seems to me that the fundamental question now presented is whether the company could ratify the steps

which were taken in the name of the company.

If therefore those who obtained the summons dated Nov. 5, 1970, and then availed themselves of its warrant for arrestment ad fundandam jurisdictionem and then caused service to be effected upon the defenders did not have the authority of the pursuers in whose name they acted, is there any reason why the pursuers could not say that they approved and adopted and ratified all that had been done in their name? What Lord Kissen called "the basic right to sue" certainly remained with the pursuers. The liquidator was added in his capacity as liquidator but not in any ordinary sense as an additional pursuer. As Lord Kincraig (by whose interlocutor the liquidator was sisted) said, the nature of the action was not altered when the liquidator was sisted. The action was still one at the instance of the company. If the action succeeds the benefits will accrue in just the same manner as they would before the liquidator was added. If ratification could take place of what had been done in relation to the issue of the summons and the raising of the action it would be ratification by the company. The liquidator has undoubtedly purported to ratify on behalf of the company.

Is there then any reason why ratification could not take place? In agreement with Lord Kissen and Lord Fraser it seems to me that the arrestment to found jurisdiction was an essential part of or a preliminary step in the raising of the action. If as the action proceeds it is said to the company that those who in the name of the company obtained the summons of Nov. 5, 1970, and acted on it, lacked at the time the authority of the company, it seems to me that it is clearly open to the company to say that they fully adopt all that was done. If something which at the time when it is done is done without authority but is done in the name of and in the purported capacity as an agent for a principal who later ratifies all that was done the ratification relates back: retrospectively it clothes what was done with authority. I agree therefore with Lord Fraser when he said that if arrestment is properly regarded as a preliminary step in the action itself then the ratification of the action will draw back and will retrospectively validate the arrestment in the same way as it validates the rest of the action.

I would dismiss the appeal.

Lord HAILSHAM OF ST. MARYLEBONE: My Lords, I would dismiss this appeal.

These proceedings originated on Nov. 5, 1970, when the pursuers (now respondents to this appeal) issued a summons which constituted at the same time warrants for the laying on of arrestments ad fundandam jurisdictionem and on the dependence. The conclusion of the summons was for the payment of a sum of money a little in excess of £160,000.

The original pursuers (the respondent company) are a limited company registered in Hong Kong. The appellants (defenders in the proceedings) are a limited company registered in Korea. Nothing, apart from the arrestment ad fundandam jurisdictionem which was executed upon a ship owned by the appellants and lying in a Scottish shipyard, would have given the Scottish Courts jurisdiction to try the issues between the parties. The actual arrestments were recalled by interlocutor of Dec. 5, 1970, the appellants having consigned the sum of £165,000 by way of caution pursuant to an interlocutor of the Lord Ordinary of the previous day.

In due course the appellants lodged defences including a plea-in-law in the following terms:

> 4. The pursuers not being the Company have no title to sue.

By interlocutor dated Dec. 17, 1971, the Lord Ordinary allowed the parties to a preliminary proof

> restricted to the matters raised by the defenders' fourth plea-in-law.

This preliminary proof was not, however, decided until July 6, 1973, by which time the respondent company had gone into liquidation, and on Jan. 12, 1973, their liquidator, the respondent Walter Hume, had been sisted despite the opposition of the appellants as a party pursuer to the action in addition to the respondent company. Though leave was given to the appellants to reclaim, no appeal was in fact made from the interlocutor sisting the liquidator.

After the hearing of the preliminary proof on July 6, 1973, the Lord Ordinary (Lord Brand) sustained the fourth plea-in-law of the appellants, and dismissed the cause. The respondents thereupon reclaimed. The reclaiming motion was heard by the Second Division of the Court of Session (The Lord Justice-Clerk, and the

Lords Kissen and Fraser), and on June 21, 1974, the Second Division allowed the motion and recalled the interlocutors of the Lord Ordinary. By this time the appellants had been allowed to amend their defences by deleting the original fourth plea-in-law (to which the preliminary proof had been restricted) and substituting the following:

> 5. The Company not having authorised the raising of the action, it should be dismissed.

This plea-in-law, together with a third plea which challenged a plea for the pursuers alleging ratification (of which more later) is therefore the matter of the present appeal to your Lordships' House which is from the interlocutor of the Second Division embodying these decisions.

The facts, as they must be assumed from the pleadings and the preliminary proof, are that, at the time of the issue of the summons and the warrants for the arrestments, the proceedings had not been properly constituted, having been initiated on the instructions of two individuals named Ward and Irons, who acted without authority from the respondent company. At the time of the issue of the proceedings, and, until it went into liquidation, the company had no directors, and had held no general meetings at least since 1967. It was conceded that the proceedings were within the ambit of the memorandum of association and no question of ultra vires in this sense was raised. But by art. 74 of the articles of association (which was identical with art. 67 of the Table "A" of the 1929 Companies Act and art. 80 of Table "A" of the 1948 Companies Act), the company had provided that the business of the company should be managed by directors, and since the Lord Ordinary found that there were no directors at the relevant time and that there had been no relevant general meetings of the company, the proceedings have been conducted throughout on the assumption that as originally constituted the action had not been properly raised. The law of Hong Kong, so far as it relates to companies, is contained in an Ordinance which so far as is relevant is identical with the Companies Act, 1929.

The result of the appeal accordingly turns on the respondents' plea of ratification, which the appellants challenged by their third plea-in-law. The respondents' plea of ratification was in these terms:

> 3. Separatim. Esto the Company did not originally authorise the laying of arrestments, and the raising of the present action, the said Walter Hume J.P., Solicitor, as Liquidator thereof, having been sisted as a party pursuer on 12th January 1973 has effectively ratified the laying of arrestments, the raising of the action and all subsequent proceedings therein.

In the course of his cogent and erudite argument before your Lordships' House, Counsel for the appellants rested his case upon two principal contentions:

(1) That the arrestment ad fundandam jurisdictionem is not available to the liquidator since both arrestments had been laid by Ward and Irons without authority from the company and this arrestment is available only to him who has used it.

(2) That the liquidator could not ratify either the laying on of the arrestments or the raising of the action as at that time the respondent company was not competent to perform these acts by any agent let alone the two persons who in fact had performed them.

I will deal with the second contention first, since, as will be seen, this is the real point in the case, and, on the view I take, the decision on the first flows from the decision on the second.

I begin by pointing out, not as a pure piece of pedantry, but as bearing on my opinion on both parts of the case, that the ratification relied on is not that of the liquidator, but that of the company acting by the liquidator. The proceedings were ab initio in the name of the company. By the time he was sisted and adopted the proceedings, the liquidator was authorized to act for the company. It is not simply an exercise in semantics to point out that if there was a ratification of the acts of Ward and Irons, it was a ratification by the company acting through the liqidator, and not by the liquidator acting on his own behalf. The question for consideration is whether the company could ratify through the liquidator, and not whether the liquidator could ratify for the benefit of the company.

Clearly, if and in so far as the company could ratify the acts of Ward and Irons, the company has done so by adopting the proceedings, and, on the general principle governing the law of ratification, "Omnis ratihabitio retrotrahitur et mandato priori

aequiparatur " the ratification dates back to the acts ratified, and so to the time when the arrestments were laid, and the summons issued.

Appellant's Counsel relied, however, basically on the contention that none of these acts can be ratified by the company as, he urged, the second of the three conditions laid down by Mr. Justice Wright in *Firth v. Staines,* [1897] 2 Q.B. 70, 75, viz. that

> at the time the act was done the agent must have had a competent principal

had not been fulfilled, because the respondent company had neither appointed directors nor held a general meeting and so was incapable of instructing solicitors or other agents to do the acts alleged to have been ratified. Thus, it was contended, the company was not a competent principal within the meaning of the requirement.

With respect, however, this argument is a non sequitur which would only become cogent if one adopted a false and question-begging meaning to the word " competent ". In my opinion, at the relevant time the company was fully competent either to lay arrestments or to raise proceedings in the Scottish Courts. The company could have done so either by appointing directors, or, as I think, by authorizing proceedings in general meeting, which in the absence of an effective board, has a residual authority to use the company's powers. It had not taken, and did not take, the steps necessary to give authority to perform the necessary actions. But it was competent to have done so, and in my view it was therefore a competent principal within the meaning of the second of Mr. Justice Wright's three conditions. So far as regards the powers of general meeting in Gower's Modern Company Law it is stated (1969 3rd ed., pp. 136, 137):

> It seems that if for some reason the board cannot or will not exercise the powers vested in them, the general meeting may do so. On this ground, action by the general meeting has been held effective where there was a deadlock on the board, where an effective quorum could not be obtained, where the directors are disqualified from voting, or, more obviously, where the directors have purported to borrow in excess of the amount authorised by the articles. Moreover, although the general meeting cannot restrain the directors from conducting actions in the name of the company, it still seems to be the law (as laid down in *Marshall's Valve Gear Co. v. Manning, Wardle & Co.*) that the general meeting can commence proceedings on behalf of the company if the directors fail to do so.

Counsel attempted to draw a distinction between the cases supposed in this passage, where the directors were for some reason unable or unwilling to act, and the instant case where there were no directors. I see no difference in this distinction and this also would appear to be the opinion of Lord Justice Harman in *Bamford v. Bamford,* [1970] Ch. 212, 237, though the question at issue there was very different.

In my view this part of the present case is indistinguishable from *Danish Mercantile Co. Ltd. v. Beaumont,* [1951] Ch. 680, and appellants' Counsel was only able to draw a distinction between that case and the present by pointing to the fact that that was a case of deadlock between directors and not of absence of any directors. In my view, as I have said, that is a distinction without a relevant difference, and, if that case was rightly decided, which I consider it was, the appellants' case on this part of the argument falls to the ground.

This brings me to the second, and very interesting, argument advanced on the part of the appellants which relates to the peculiarly Scottish procedure known as arrestment ad fundandam jurisdictionem or jurisdictionis fundandae causa. Both Counsel for the appellants and the learned Dean of Faculty for the respondents initiated us with zeal, thoroughness and learning into the mysteries of this procedure which has, for 300 years at least, formed part of the Scottish law. We are informed that it was originally an importation from Holland, providing an exception for reasons of " expediency and the encouragement of trade " to the general principle—" Actor sequitur forum rei ". The appellants argued with great force that there was serious authority for the proposition that this means of securing jurisdiction was anomalous and should not be extended. I fully concur in this opinion which in any event seems well established. But in my view we are not being asked to extend the doctrine. There is no question here but that, if properly authorized, the procedure was applicable to the present case. The question is whether the arrestment and the proceedings which followed are a nullity by reason of the fact that they were not authorized, or whether