Neutral Citation Number: [2024] EWCA Civ 549

Case No: CA-2023-001021

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE CHANCERY DIVISION
Mr Justice Mellor
[2023] EWHC 1625 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2024

Before :

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE LEWISON
and
LORD JUSTICE WARBY

- -

Between :

MYCK DJURBERG

Appellant

-and-

(1) THAMES PROPERTIES (HAMPTON) LIMITED
(2) RODRIGUEZ DOLL
(3) GREGORY COLLIER

Respondents

- -

The Appellant was not represented.
Steven Woolf (instructed by **Gunnercooke LLP**) for the **Respondents**

Hearing date: 14/05/2024

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Approved Judgment

This judgment was handed down remotely at 11.00am on 21/05/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

1. Mr Djurberg is a private individual who is or was trading as Hampton Riviera. In that capacity he says that he permitted a houseboat to moor at a mooring in the river Thames over which he had a mooring licence. He claims to be entitled to a maritime lien which, he says, arises out of unpaid mooring charges. Three parcels of land feature in the case. Two (The Chalet and the Boatyard) were formerly owned by Mr Djurberg but are now owned by the First Respondent. The Second and Third Respondents are directors of the First Respondent. The third parcel is St Albans Garden Riverside. Mr Djurberg claims to have some rights over that parcel, although this is disputed. While the alleged lien subsisted Mr Djurberg says that without his consent the First Respondent arranged for the removal of the houseboat from its mooring alongside St Albans Garden Riverside. In consequence he asserts that the Respondents are liable in damages for tortious interference with goods.

2. The Particulars of Claim, issued on 17 May 2023, contain a great many scurrilous and irrelevant allegations, but it is possible to extract from them an articulated claim. In paragraph 8 of his Particulars of Claim Mr Djurberg pleads:

> "Located in a mooring at St Albans Garden Riverside, under the licence and ownership of C was a houseboat known as HRB1, belonging to Mr Saltis and his business partner Mr Fulford, that benefited of a Moored at Will License, subject to pending legal matters by the same owners and a third party, a Mr David Maxwell H-Hoskinson."

3. Paragraph 9 asserts that the houseboat was "repossessed under a Maritime Lien Notice by C for outstanding mooring fees". That allegation is repeated in paragraph 13. Mr Djurberg alleges in his claim form that on 11 May 2023 (wrongly pleaded as 11 May 2022 in the Particulars of Claim) he was informed that the boat had been removed from its location without the knowledge or consent either of "the owner" or his own. It would appear that the pleaded reference to "the owner" is a reference to Mr Saltis and Mr Fulford. Later in the pleading, however, he asserts that the Defendants trespassed onto his property and removed the vessel on 15 November 2022. The discrepancy between these two dates is not explained.

4. On 15 May 2023 Mr Djurberg applied for an interim injunction compelling the return of the houseboat. On 24 May 2023 Mellor J not only refused the injunction but struck out the whole action on the ground that it failed to disclose any cause of action against the Defendants. This appears to be a reference to the power to strike out a claim under CPR rule 3.4 (2) (a). The exercise of that power depends on an examination of the statement of case, rather than any evidential basis underlying it. It does not appear that the Defendants issued any formal application notice to strike out the claim, but Mr Collier, in his evidence contesting the application for the injunction did invite the court to take that course. Nugee LJ granted Mr Djurberg permission to appeal on one ground only; namely that there may be an arguable case to the effect that the Defendants had committed the tort of interference with goods. I will come to the precise way in which Nugee LJ expressed that ground.

5. The houseboat, referred to as HRB1, in fact belongs to a Mr and Mrs Hattersley-Hoskinson. That was decided by Deputy Master Arkush and recorded in an order

made by him on 6 September 2022 in proceedings to which Mr Djurberg, Mr Fulford and Mr Saltis were all party. How Mr Djurberg came to plead that Mr Saltis and Mr Fulford were the owners of the boat many months after the contrary had been decided, is one of the many unexplained features of the case. The Particulars of Claim do not assert (or at least do not clearly assert) that Mr and Mrs Hattersley-Hoskinson are liable for the unpaid mooring fees.

6. Earlier in the action which culminated in the Deputy Master's order, Miles J had granted an interim injunction. Since the injunction was granted "until after final judgment or further order" it necessarily expired when the Deputy Master made his order. But of interest to this appeal is paragraph 3 of the order, directed at Mr Djurberg alone, which required him to notify the existence of the order to any trustee in bankruptcy, other insolvency practitioner or official appointed in relation to his estate or affairs. In his evidence opposing Mr Djurberg's application Mr Collier stated that he was aware that Mr Djurberg was bankrupt. That statement is not challenged; and Mr Djurberg told us that a bankruptcy order was made against him in 2021. He has not yet been discharged from bankruptcy.

7. In granting permission to appeal Nugee LJ said that if Mr Djurberg can establish (i) that he licensed the houseboat on terms that fees would be payable and that he would have a lien on the houseboat for unpaid fees (see clause 9.3 of the standard licence), (ii) that fees were due and unpaid and (iii) that he duly asserted the claim, then it was arguable that the lien would have given him sufficient possessory right to enable him to sustain a claim for the tort of wrongful interference with goods in the form of both conversion and trespass to goods.

8. Mr Djurberg produced a print of a standard form of berthing licence (to which Nugee LJ referred), which relevantly provides:

> "2.1 The Berth at the Marina or premises shall be licensed for the period and at the Charges on the Cover Sheet.
>
> 2.2 This licence shall not be automatically renewed but will end on the End Date specified on the Cover Sheet if not terminated sooner by HRB or the Owner under the provisions of Clauses 8 or 10.
>
> …
>
> 9.1 Where HRB accepts a Vessel… for… storage HRB does so subject to the provisions of the Torts (Interference with Goods) Act 1977. This Act confers a Right of Sale on HRB in circumstances where a customer fails to collect or accept re-delivery of the goods (which includes a Vessel…). Such sale will not take place until HRB has given notice to the customer in accordance with the Act. …
>
> 9.2 Maritime Law entitles HRB in certain other circumstances to bring action against a Vessel to recover debt or damages. Such action may involve the arrest of the Vessel through the Courts and its eventual sale by the Court …

> 9.3 HRB reserves a general right ("a general lien") to detain and hold onto the Owner's Vessel or other property ending payment by the Owner of any sums due to HRB. … The Owner shall at any time be entitled to remove the Vesel or other property upon providing proper security, for example a letter of guarantee from a Bank or a cash deposit, sufficient to cover the debt with interest …"

9. The example of the standard form of licence included in the papers includes no cover sheet, is unsigned, undated, and contains no information about any vessel to which it is said to apply. Moreover, it appears on its face to be a licence for a fixed term, rather than a "Moored at Will" licence as pleaded. Mr Djurberg explained, after some questioning, that the standard form is contained in a brochure which is on his web site; and that it contains his terms of business. Anyone who leaves a boat at a mooring would have notice of those terms.

10. The Particulars of Claim assert in paragraph 13 that "C will also be at liberty to apply a Part 20 if it is later found that the owner of the boat concocted with Ds for the removal of the Vessel from C's property that was repossessed under a Marine Lien Notice for outstanding mooring fees". Quite what this means is obscure, but the reference to a "Marine Lien Notice" appears to be the legal foundation of Mr Djurberg's claim. The reference to a "Marine Lien" also appears to be a reference to clause 9.2 of the standard form which refers to liens created by maritime law. Paragraph 17 asserts that the houseboat "was under possession of the Claimant".

11. In broad terms a lien is a right to retain possession of property until a claim in respect of that property has been satisfied. It depends upon possession and lasts for so long as possession is retained. Fletcher Moulton LJ explained its general nature in *Great Eastern Railway Co v Lord's Trustee* [1908] 2 KB 54 at 63-65:

> "A lien under English law is a very peculiar right, but its precise nature has been conclusively settled by a long line of decisions. In contrast to the operations of pledging or pawning the creation of the lien does not, strictly speaking, give to the holder any property in the goods subject to it … It is merely a right to retain the goods until the amount of the lien has been paid. During the period that the goods are so retained the true owner may be in very complete possession of the goods and have and exercise over them most of the ordinary powers of an owner; and indeed in my opinion it is correct to say that there is nothing in English law which prevents his possessing and exercising any and every right of an owner in possession which is not inconsistent with the maintenance by the holder of the lien of his right to retain. … But, although the innkeeper not only may but under certain circumstances must thus leave the goods in the actual possession of the owner, there are limits which he may not pass without losing his lien. He must not permit the traveller to take the goods out of the inn, or, to put it more generally, he must not do anything that amounts to an abandonment of the power to exercise his right of retention."

12. It follows from this description that once the goods have been removed, the lien is destroyed. It is no doubt for that reason that it is the lienee that is entitled to sue in conversion.

13. A maritime lien is a sub-category of lien. It is described in Halsbury's Laws of England Vol 68 (2021) paragraph 909 as follows:

> "A maritime lien is a claim or privilege on a ship, freight or cargo in respect of service done to it or damage caused by it. Such a lien does not import or require possession of the ship, freight or cargo, for it is a claim or privilege on that property to be carried into effect by legal process. …
>
> The maritime liens recognised by English law are those in respect of bottomry and respondentia bonds, salvage of property, seamen's wages, damage and a salvor's rights under any international convention or national law. A maritime lien has been held not to exist in respect of towage, the supply of goods, materials etc or insurance contributions. It is doubtful whether a maritime lien exists in respect of pilotage dues. There is jurisprudence to suggest that an owner's lien over cargoes or subfreights is contractual only, and creates a right only as between the parties to the contract in which it is contained. However, this view has been doubted in later authorities where it is suggested that in fact such a right can be assigned as it takes effect in equity.
>
> Statutory rights and remedies similar to those enjoyed by the holder of a maritime lien, and enforced in similar manner, include claims in respect of the wages, disbursements and liabilities of the master of a ship; claims in respect of damage to land caused by persons rendering services to a vessel wrecked, stranded or in distress; claims in respect of the fees and expenses of a receiver of wreck; and claims in respect of the expenses of a local authority incurred on account of the burial or destruction of the carcase of any animal or carcase thrown or washed from any vessel.
>
> A statutory lien attaches when property is arrested in a claim in rem under Admiralty jurisdiction."

14. Bottomry and respondentia are the mortgaging of the vessel and cargo respectively. As can be seen, this list does not include an alleged lien in respect of mooring fees. Mr Djurberg was unable to produce any authority in support of his assertion that English law recognises a lien in respect of unpaid mooring charges.

15. In his skeleton argument, Mr Djurberg says that he repossessed the vessel in 2021 for outstanding mooring fees. The power to do that, he said, was contained in section 45 of the Harbour Docks and Piers Clauses Act 1847. That section provides:

> "If default be made in the payment of the rates payable in respect of any such goods, the collector of rates may distrain or arrest, of his own authority, such goods, and for that purpose may enter any vessel within the limits of the harbour, dock, or pier in which the goods may be, with such assistance as he shall deem necessary, or, if the said goods have been removed without payment of such rates, he may distrain or arrest any other goods within the limits of the harbour, dock, or pier, or the premises of the undertakers, belonging to the person liable to pay such rates, and may sell the goods so distrained or arrested, and out of the proceeds of such sale pay the rates due to the undertakers, rendering the overplus, if any, to the owner of such goods, on demand; or the undertakers may recover such rates by action in any court having competent jurisdiction."

16. Section 45 is concerned with default in payment of rates payable in respect of "such goods". That is a reference back to section 37 which requires the master of a vessel to give information relating to goods to be unshipped within the harbour; and to section 39 which requires shippers of goods to give information about goods to be shipped. Section 45 does not, therefore, appear to apply to unpaid mooring charges. More fundamentally, however, section 1 of the Act provides that the Act only applies "only to such harbours, docks, or piers as shall be authorized by any Act of Parliament hereafter to be passed which shall declare that this Act shall be incorporated therewith". So, it does not apply to Mr Djurberg anyway.

17. Nevertheless, a lien may be created by contract. As I have said, Nugee LJ considered that there might be an arguable claim based on clause 9.3 of the standard form of licence. The building blocks necessary to establish that the houseboat was moored under the terms of the standard form licence have not so far been either pleaded or evidenced. At this stage in the action, however, it seems to me that we must assume that it may become an argument that is open to him. He does, however, plead that mooring fees were due and unpaid and that he asserted the alleged lien.

18. If Mr Djurberg can establish the features identified by Nugee LJ, then in principle he has title to sue in conversion. That is illustrated by *Legg v Evans* (1840) 6 M & W 36, to which Nugee LJ referred. Mr Legg was a carver and gilder who had carried out work on certain picture frames. He was entitled to lien at common law for his fee. While the frames were still in his possession, they were seized by the sheriff under a writ of fi fa. He was held to be entitled to judgment against the sheriff. The general importance of such a lien, however, is not that it protects the repairer against seizure of the goods by execution, but that it prevents the removal of the goods by the customer before fees are paid. In more modern times, in *Court Enforcement Services Ltd v Marston Legal Services Ltd* [2020] EWCA Civ 588, [2021] QB 129, Lord Leggatt JSC said:

> "[63] … Where goods are subject to a lien, the holder of the lien is entitled to sue for conversion (and indeed is the only person who can bring such an action as the owner's right of possession is excluded): see Clerk & Lindsell on Torts, 22nd ed (2018), para 17-60; *Lord v Price* (1874) LR 9 Exch 54. Thus, in *Rogers v Kennay* (1846) 9 QB 592 it was held that a person

> who had a lien over goods of the debtor taken in execution by the sheriff was entitled to sue the sheriff for conversion of those goods.
>
> [64] In the cases involving liens, however, the holder of the lien who had title to sue was in actual possession of the goods when they were taken by the defendant and had the right to keep possession of the goods until the lien was discharged (by payment of a sum owed)."

19. Here, Mr Djurberg does assert that he was in actual possession of the boat.

20. In a Respondents' Notice Mr Woolf, for the Respondents, argued that even if Mr Djurberg has a claim for outstanding mooring fees against Mr and Mrs Hattersley-Hoskinson, that claim cannot extend to third parties like the Respondents who had no knowledge of the claim and who arranged for the boat to be moved at the request of Mr and Mrs Hattersley-Hoskinson.

21. I do not consider that the claim can be so easily dismissed at this stage; and Mr Woolf did not strenuously advance that argument in oral submissions.

22. In principle, a defendant is liable in conversion whether or not he knew or had reasons to believe that what he was doing infringed the claimant's rights: Clerk & Lindsell on Torts (24th ed) para 16-73. In *Marfani and Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956 Diplock LJ said at 970:

> "At common law, one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions which are irrelevant for the purposes of the present case, it matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known, of his neighbour's interest in the goods. The duty is absolute; he acts at his peril."

23. Nor do I consider that even if the boat was moved on the instructions of its owners that would amount to a defence. The point about the lien (if it exists) is that Mr Djurberg was entitled *as against the owner*, to retain possession of the boat until the outstanding mooring fees were paid. A third party, acting on the instructions of the owner, can have no better right.

24. Mr Djurberg has referred to a number of authorities concerning easements and the ability to acquire title by adverse possession over a river bed. I cannot see that they are of any relevance to the sole ground on which Mr Djurberg has permission to appeal.

25. There are also a number of procedural shortcomings in the way in which the judge dealt with the case. First, Mr Djurberg was (and is) acting in person. Accordingly, CPR rule 3.1A applied. This requires the court, when exercising any case management powers, to have regard to the fact that at least one party is unrepresented.

Second, the informal request to dismiss the whole claim was made in Mr Collier's witness statement dated 22 May 2023. As mentioned, the judge heard Mr Djurberg's application and dismissed it two days later on 24 May 2023, at which time he also struck out the whole action. Where a party wishes to make an application, they must file an application notice unless the court dispenses with the requirement (CPR rule 23.3); and must do so at least 3 days before the court is to deal with it (CPR rule 23.7). If the application is for summary judgment, the respondent to the application must be given 14 days' notice (CPR rule 24.4 (5)); the application notice must state that the applicant is applying for summary judgment and, among other things, draw the respondent's attention to their right to rely on evidence opposing the application (CPR rule 24.5). None of these procedural requirements was observed. Mr Woolf suggested that there was not enough time to comply with the requirements of the CPR. But at the stage when the judge was considering the case, all that the Defendants needed to do was to defend themselves against the claim for the injunction. They did not need to go on the offensive and ask for the entire claim to be struck out. Nor did the judge explain why he was dispensing with the requirements of the CPR (if that is what he did). In the case of a litigant in person, that disregard for procedural safeguards must be discouraged.

26. Subject to three final points, therefore, I consider that the judge was wrong to strike out the claim summarily. First, since Mr Djurberg is bankrupt any monetary claim that he might otherwise have to the underlying debt may be vested in his trustee in bankruptcy: Insolvency Act 1986 s. 306; *Heath v Tang* [1993] 1 WLR 1424; *Cowey v Insol Funding Ltd* [2012] EWHC 2421 (Ch), [2012] BPIR 958. Whether in such circumstances the lien also vests in his trustee was not explored before us. If the current claim is after-acquired property it may be open to his trustee to claim the benefit of it. But that is not a point that has been relied on. Second, Mr Djurberg will have to amend his Particulars of Claim to plead (a) the contract under which he says the houseboat was moored, including its date, the parties to it and the relevant clauses; (b) how the alleged unpaid mooring fees arose and who owes them; and (c) what interest in or rights over St Albans Garden Riverside he claims to have and how those rights were created. Third, on the basis that the action survives, it may be possible for the Defendants to make a proper application for summary judgment, fulfilling the requirements of the CPR, in which event Mr Djurberg will have to provide some evidential basis for his claim.

27. I would allow the appeal on the sole ground for which Nugee LJ gave permission to appeal.

Lord Justice Warby:

28. I agree.

Sir Geoffrey Vos, Master of the Rolls:

29. I also agree.