

TOPIC:

ADMIRALTY LAW,
ARREST

COURT OF APPEAL RULES ON WRONGFUL SHIP ARREST

In *The Vasily Golovnin* [2008] SGCA 39 the Court of Appeal set aside the arrest of a vessel on the basis that the arresting party did not have a good arguable case and had failed to make full and frank disclosure in the arrest application. The court also awarded the owners damages for wrongful arrest.

Given that Singapore is one of the world's busiest ports and has always been an attractive jurisdiction for arrests, this decision will be of interest to claimants that are considering an arrest in Singapore as an avenue for obtaining security.

The court's decision clarifies the law in Singapore on:

- the standard that a claimant must meet in establishing its case when applying for arrest;
- the claimant's duty to give full and frank disclosure in an arrest application; and the application of the test set down by the Privy Council in *The Evangelismos* to determine whether defendants are

entitled to damages for wrongful arrest.

The *Vasily Golovnin* and the *Chelyabinsk* were sister ships owned by The Far East Shipping Co plc (FESCO).

FESCO had time-chartered the *Chelyabinsk* to a charterer that in turn sub-chartered the vessel. Thus, the entities involved included a charterer, a sub-charterer and two banks that had provided financing to the sub-charterer.

In December 2005 the *Chelyabinsk* was loaded with a cargo of rice destined for ports in Africa. Bills of lading issued in respect of the cargo named either Lomé, the main port of Togo, or "any African port" as the intended discharge port.

After FESCO had issued the bills of lading, the sub-charterer requested that the Lomé bills of lading be switched for bills naming Doula, Cameroon as the discharge port. Although FESCO initially agreed to the switch, it was never carried out. Mean-

while, disputes had arisen between the charterer and the sub-charterer over payment of sub-hire. The charterer revoked its earlier instructions for the vessel to sail to Doula and instead instructed the vessel to head to Lomé. The charterer intended to discharge the cargo at Lomé and detain it as security for the unpaid sub-hire.

The banks, which by this time were the holders of the bills of lading, were concerned by this turn of events and demanded that the vessel sail to Doula. FESCO rightly felt obliged to follow the charterer's instructions. Therefore, the vessel proceeded to Lomé.

When the vessel arrived at Lomé, it was served with an order from a Lomé court, obtained by the charterer, for the detention of the cargo. Following a flurry of opposing applications by the banks and the sub-charterer on one side and the charterer on the other, the charterer prevailed and the Lomé court finally issued an order authorizing the

discharge of the cargo.

However, the banks did not stop there and arrested the Chelyabinsk at Lomé, bringing their claim on the grounds that (i) the cargo had allegedly been damaged, and (ii) FESCO should have complied with the banks' instructions to order the vessel to sail to Doula for the discharge of the cargo. FESCO immediately applied to set aside the Lomé arrest. Following an *inter partes* hearing before the Lomé Court of First Instance, the vessel was released. The court found that:

- the banks knew or should have known that FESCO was bound to follow the charterer's instructions;
- FESCO was not at fault for routing the vessel to Lomé at the charterer's instructions;
- the banks' claim that the cargo should have been delivered at Doula should be rejected, as Doula was not named in the bills of lading;
- the cargo was discharged at Lomé in fulfillment of the orders by the Lomé court;
- sufficient security had already been provided for the alleged cargo

damage claim; and

- the banks had no right to arrest the vessel.

The banks did not appeal the Lomé court's decision, but chose to move against the Vasilii Golovnin in Singapore with a sister ship arrest. The application for the arrest in Singapore was made on the day after the expiry of the period allowed for an appeal against the Lomé court decision.

The arrest in Singapore was allowed at the first *ex parte* application, but was subsequently set aside on the basis that:

- the application had been tainted by material non-disclosure;
- there had been issue estoppel; and
- the banks did not have an arguable case.

FESCO and one of the banks brought cross-appeals to the Court of Appeal - FESCO's appeal was against the lower court's decision not to award damages for wrongful arrest, whereas the bank appealed against the order that the arrest be set aside.

Court of Appeal Decision

The court held not only that the lower court had been correct to set aside the arrest, but also that the arrest had been wrongful and that FESCO should be awarded damages.

Good arguable case

At the early stage where an *ex parte* arrest application is made, the claimant need show only that there is a good arguable case that the claim falls within the court's admiralty jurisdiction (ie, one of the categories of claim under Section 3(1) of the High Court (Admiralty Jurisdiction) Act). The claimant is not required to establish at the arrest stage that it has a cause of action which is likely to prevail in the final analysis. However, it must be prepared, when challenged, to show that it was entitled to the arrest from the outset.

The court found that the banks clearly did not have a good arguable case that the cargo should have been discharged at Doula instead of Lomé. FESCO could not be faulted for having discharged the cargo at Lomé in accordance with the bills of lading, the charterer's instructions

and the order for discharge by the Lomé court.

Applicant's disclosure of material facts

A party bringing an *ex parte* arrest application has a duty to disclose all material facts within its knowledge, even if such facts are prejudicial to its application. A 'material fact' is a fact that should properly be taken into consideration by the judge when weighing all the circumstances of a case, although it need not have the effect of leading to a different decision.

The duty to disclose extends to material facts that could reasonably be ascertained and plausible defences that might reasonably be raised. However, the applicant is not required to deal with all conceivable or theoretical defences.

The scope of disclosure should be determined by what is reasonable at the time of the arrest - this is ultimately a question of common sense. A defendant may not allege that the claimant failed to disclose material facts that, at the time of the arrest, it could not reasonably be expected to have known or discovered through proper enquiries.

Even if there has been material non-disclosure, the court retains discretion in deciding whether to set aside the arrest for this reason. The court must apply the principle of proportionality in weighing the gravity of the omission against the impact of such default.

Burden of disclosure

The burden of disclosure is not discharged by the mere inclusion of voluminous documents - from which a fact could be noted - in the exhibits of the affidavit. The place to disclose material facts is in the content of the affidavit, not in the exhibits.

The court noted that the exhibits ran to 400 pages, whereas the narrative text of the affidavit ran to only 11 pages.

In particular, the text of the affidavit did not mention the material facts that there had been a Lomé arrest in respect of the same claims that were being pursued in Singapore, let alone that the Lomé court had set aside the arrest following an *inter partes* hearing and that grounds of decision had been given. Moreover, it did not mention that the purpose of the proposed

switching of bills of lading was to change the discharge port from Lomé to Doula. The disclosure of this fact would have alerted the court to the fact that FESCO had correctly performed the terms of the contract of carriage by delivering cargo to Lomé.

Arbitration agreements

Claimants must disclose an arbitration agreement on which they intend to rely at the arrest application. This enables the court to decide whether to stay the arrest or to issue other appropriate directions pending the award under Section 7 of the International Arbitration Act (eg, directing the security provided by owners to stand as security in a foreign arbitration).

Test for wrongful arrest

The test to be applied in Singapore in determining whether an arrest is wrongful remains as stated in the Privy Council decision in *The Evangelismos*: were the action and the arrest so unwarrantably brought, or brought with so little colour or foundation, as to imply malice or gross negligence on the plaintiff's part?

Other common law jurisdictions, such as Australia,

Nigeria and South Africa, have specifically enacted legislation that ties the test for wrongful arrest to a concept of reasonableness and the existence of good cause, thus making it easier for an arrest to be found wrongful in those jurisdictions. However, the higher threshold as stated in *The Evangelismos* still applies in Singapore.

There were three good reasons for this arrest to be viewed as having been initiated so unwarrantably or with so little foundation as to amount to gross negligence:

- The bank had persisted in arresting a sister ship in Singapore notwithstanding that the Lomé court had disposed of the bank's claim and had ruled that sufficient security had been provided in respect of the alleged cargo damage claim;
- The bank's claim for breach of contract of carriage, which was based on the allegation that cargo should have been delivered at Doula, was without substance or foundation; and
- The bank failed to disclose material facts at the *ex parte* arrest application

The court found that the arrest did not result from an honest belief that the bank had valid claims; rather, it arose from an "ill-conceived and reckless attempt to steal a march on FESCO and to force its hand in providing additional security for [the bank's] claims".

Accordingly, the court awarded damages for wrongful arrest to FESCO.

The decision sends a clear signal that an arrest will be considered wrongful in Singapore only if there has been malice or gross negligence on the plaintiff's part, not merely unreasonableness. However, the courts will not hesitate to award damages for a wrongful arrest where this higher threshold has been crossed and the claimants have abused the arrest mechanism. Based on the facts before it, the court could not be faulted for finding that the circumstances implied at least gross negligence on the bank's part.

It was unquestionably relevant that a competent court had set aside a prior arrest for an identical claim. If the bank wished to proceed with the arrest in Singapore notwithstanding the Lomé court's

earlier decision, it should (at least) have disclosed the Lomé court's decision and explained at the arrest stage how the Singapore action differed from the proceedings that were brought in Lomé.

Furthermore, the Court of Appeal clearly considered that the bank could not honestly have believed that it had a valid claim against FESCO for discharging cargo at Lomé. The bank was unable to show that it had a good arguable case, given that it was clear on the facts that FESCO had been right to deliver the cargo at Lomé. If the bank had wished to proceed with the arrest notwithstanding FESCO's obvious defences, it should have disclosed the relevant facts at the arrest application - that is, the existence of the bills of lading naming Lomé, the charterer's instructions to discharge cargo at Lomé and the Lomé court order for cargo discharge. It would then have been for the bank to explain why it had an arguable claim notwithstanding these circumstances.

The judgment should not be understood as an indication that findings of wrongful arrest will become more common in Singapore. The court

has clearly not sought to make an arresting party's disclosure obligations more onerous or to make it easier for a defendant to seek damages for wrongful arrest. Thus, Singapore's position as a favourable jurisdiction for arrests remains unchanged.

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