

The "Vasiliy Golovnin"
[2006] SGHC 188

Case Number : Adm in Rem 25/2006, SUM 3977/2006
Decision Date : 18 October 2006
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : Vivian Ang, Kenny Yap and Joanne Chia (Allen & Gledhill) for the plaintiffs;
Steven Chong SC, Ian Teo and Kohe Noor Hasan (Rajah & Tann) for the
defendant
Parties : —

*Civil Procedure – Appeals – Registrar's appeal – Admission of further affidavit supporting appeal
– Whether court should allow further affidavit to be admitted as evidence*

18 October 2006

Tan Lee Meng J:

1 The plaintiffs, Credit Agricole (Suisse) SA and Banque Cantonale De Genève SA (collectively referred to as "the banks"), who arrested the *Vasiliy Golovnin*, a vessel owned by the defendant, Far East Shipping Co plc ("FESCO"), appealed against the decision of the assistant registrar, Ms Ang Ching Pin, who set aside their writ against FESCO and their warrant of arrest of the said vessel on 10 July 2006. The appeal has yet to be heard. In the meantime, the banks sought leave to admit a further affidavit (the "further affidavit") by a Togolese lawyer, Mr Adama Doe-Bruce ("Mr Doe-Bruce"), for the purpose of the hearing of the appeal. I dismissed the application to admit the further affidavit and now give the reasons for my decision.

Background

2 FESCO chartered their vessel, the *Chelyabinsk*, to Sea Transport Contractors Ltd ("STC"). STC subchartered the vessel to Rustal SA ("Rustal"). Pursuant to the subcharter, a cargo of rice was loaded onto the vessel at China and India. The material bills of lading issued for the cargo named Lome in Togo as the port of discharge. The banks provided financing to Rustal and are holders of the said bills of lading for the cargo of rice on board the *Chelyabinsk*.

3 In early December 2005, Rustal requested the issuance of switch bills of lading to alter the port of discharge from Lome to Duola in Cameroon. FESCO was agreeable in principle to the request provided that the original bills of lading were surrendered in exchange for the switch bills. The parties agreed to effect the change on 12 December 2005 but neither Rustal's officials nor their agents turned up at the appointed place for the switch. As such, the vessel proceeded to the port of discharge stated in the bills of lading, namely, Lome.

4 A dispute arose between the charterers, STC, and the subcharterers, Rustal, over the subcharter hire. Both of them applied for a number of orders from the Lome courts. On 22 December 2005, STC obtained a court order in Lome ("Ruling No 2062/2005") for the arrest and detention of the cargo on board the *Chelyabinsk* as security for its claim against Rustal for unpaid hire under the subcharterparty. The banks contended that FESCO was warned on the same day not to proceed to Lome because STC had obtained a lien order on the cargo. This was disputed by FESCO.

5 After the *Chelyabinsk* arrived at Lome on 23 December, 2005, Ruling No 2062/2005 was

served on her. However, on 24 December 2005, Rustal obtained an order from the Lome court ("Ruling No 2081/2005") to prevent the discharge of the cargo from the *Chelyabinsk*. STC then obtained a court order dated 27 December 2005 ("Ruling No 2093/2005") to have the cargo unloaded and discharged into the custody of the agent for the *Chelyabinsk*.

6 On 29 December 2005, the banks applied to the Lome court to set aside Ruling No 2093/2005 and reinstate Ruling No 2081/2005 that had been obtained by Rustal.

7 On 16 January 2006, the Lome court set aside the ruling obtained by Rustal and ordered the cargo to be discharged in Lome ("Ruling No 0023/2006"). The court also found that STC was entitled to retain the cargo as security for their dispute with Rustal. The banks and Rustal then obtained separate rulings for a temporary stay of execution of the ruling. However, on 2 February 2006, the Lome court ordered the lifting of the stay of execution of Ruling No 0023/2006, which had ordered that the cargo be discharged in Lome. FESCO commenced discharging operations and the discharge was completed in mid-February.

8 On 21 February 2006, the banks obtained a court order in Lome for the arrest of the *Chelyabinsk*. The banks' reasons for the arrest were essentially as follows:

(a) They had given firm instructions to the *Chelyabinsk* to rescind the bills of lading with a view to making it easier to market and unload the cargo at Duola in Cameroon where buyers had been found for the cargo.

(b) The *Chelyabinsk* had arrived in Duola on 12 December 2005 but refused to unload the cargo there and sailed to Lome despite the warnings from the banks that there were no customers for the cargo in Togo and that it would be difficult to find buyers for one part of the cargo in particular.

(c) The *Chelyabinsk* had in violation of the bank's instructions sailed to Lome where the cargo was arrested, causing huge losses to the banks estimated at US\$5.05m.

9 On the application of FESCO, the arrest of the vessel was set aside by the Lome court on 24 February 2006 ("Ruling No 0164/2006"). In setting aside the arrest and ordering the banks to pay costs, the Lome court made the following findings:

(a) The banks could not deal directly with FESCO without going through Rustal and STC, and FESCO could only follow STC's instructions since Lome was stipulated as the port of discharge in a number of the bills of lading.

(b) FESCO had not been at fault in proceeding to Lome on STC's instructions since STC had control over the commercial management of the *Chelyabinsk* as charterers.

(c) Duola was not listed as a port of discharge on the bills of lading although the banks claimed that the cargo was bound for Duola.

(d) Sufficient security was given for the claims for loss and damage to the cargo and the banks could not claim that they had suffered any loss.

10 The *Chelyabinsk* left Lome on 25 February 2006. The banks did not appeal to the Lome Court of Appeal against Ruling No 0164/2006, which set aside the arrest of the *Chelyabinsk*. The time allowed for an appeal against this ruling expired on 17 March 2006.

11 On 18 March 2006, the banks arrested the *Vasily Golovnin*, a sister vessel of the *Chelyabinsk*, in Singapore.

12 On 28 March 2006, the Lome Court of Appeal reversed Ruling No 0023/2006 and allowed the bank's appeal against the order that the cargo be discharged in Lome. This had nothing to do with Ruling No 0164/2006, which set aside the arrest of the *Chelyabinsk* in Togo.

13 FESCO persuaded the assistant registrar to set aside the arrest and to strike out the suit that the banks had instituted against them with respect to the discharge of the cargo on board the *Chelyabinsk* in Lome. She found in favour of FESCO for three reasons, namely issue estoppel, non-disclosure or insufficient disclosure of material facts and the lack of an arguable case against the shipowners.

The application to admit the further affidavit

14 As has been mentioned, the banks have appealed against the assistant registrar's decision and for the purpose of the hearing of the appeal, they sought to admit a second affidavit by Mr Doe-Bruce, who had already filed an earlier affidavit that had been considered in the hearing below.

15 A judge hearing an appeal against a decision of an assistant registrar has the discretion whether to admit new evidence for the purpose of the hearing of the appeal. In *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 2 SLR 233, the Court of Appeal noted (at [38]) as follows:

A judge-in-chambers who hears an appeal from the registrar is entitled to treat the matter as though it came before him for the first time. The judge-in-chambers in effect exercises confirmatory jurisdiction. The judge's discretion is in no way fettered by the decision below, and he is free to allow the admission of fresh evidence in the absence of contrary reasons. On appeal to the Court of Appeal, case law has established that the Court of Appeal will not interfere with the discretion of the judge unless satisfied that the judge's discretion has been wrongly exercised.

16 When determining whether a further affidavit is required for the hearing of the appeal, it ought to be noted at the outset that the proposed further affidavit of Mr Doe-Bruce is only in relation to one of the three grounds on which the assistant registrar found in favour of FESCO, namely issue estoppel.

17 In their affidavit dated 25 August 2006 in support of the admission of the further affidavit ("the supporting affidavit"), Mr Pierre Dubochet and Mr Jerome Bonnard, who are members of the second plaintiff's management committee, said that the further evidence of Mr Doe-Bruce related "essentially to the following issues":

(a) Whether "provisional enforcement" ("*l'exécution provisoire*") under Togolese law is similar to provisional injunction" (*Ordonnance de Référé*) ("the first issue").

(b) Whether the Togolese court's Ruling No 0164/2006 dated 24 February 2006 was a "provisional injunction" ruling within the meaning of Art 160 of the Togo Code of Civil Procedure ("the second issue").

(c) Whether the judgment of the Togolese court that was considered in *Ascot Commodities NV v Northern Pacific Shipping (The "Irimi A") (No 2)* [1999] 1 Lloyd's Rep 189 ("*The Irimi A*") was

of the same type and nature as the ruling given by the Togolese court in the present case ("the third issue").

18 If the three issues referred to above are carefully considered, there is absolutely no need for any further affidavit by Mr Doe-Bruce.

19 As for what the banks termed the first issue, namely whether "provisional enforcement" (*"l'exécution provisoire"*) under Togolese law is similar to "provisional injunction", the defendant's counsel, Mr Steven Chong SC, said that FESCO was prepared to accept that a "provisional enforcement" is different from a "provisional injunction" in that one relates to enforcement and the other relates to an injunction. He also pointed out that this issue did not arise in the hearing below and is not an issue in the hearing of the appeal. There is no need for Mr Doe-Bruce to file a further affidavit for the purpose of the first issue.

20 As for the second issue, it is the banks' case that Mr Doe-Bruce had already stated his position in his first affidavit. In fact, in para 13 of the supporting affidavit, Mr Pierre Dubochet and Mr Jerome Bonnard stated that Mr Doe-Bruce had already stated in para 34 of his first affidavit that the ruling of 24 February 2006 by the Togolese court was made by way of a provisional injunction. Furthermore, they pointed out that at para 42 of the first affidavit, Mr Doe-Bruce had also stated that Art 160 of the Togo Code of Civil Procedure provides that "provisional injunction rulings do not assume the nature of a final judgment; they can be amended or re-submitted to the Court if fresh circumstances arise". More importantly, in para 37 of his proposed further affidavit, he stated as follows:

... I do not understand how the Assistant Registrar can say that I did not at any time state that Ruling No. 0164/2006 fell within Article 160, when it is clear from paragraphs 34 and 42 of my 1st affidavit that Ruling 0164/2006 was a provisional injunction and provisional injunctions fall within Article 160 of the TCCP.

21 As the plaintiffs have stated in more ways than one that the second issue had already been dealt with by Mr Doe-Bruce in his first affidavit, there was no need for any further affidavit on the second issue.

22 As for the third issue, namely, whether the judgment of the Togolese court that was considered in *The Irini A* ([17] *supra*) is of the same type and nature as the ruling given by the Togolese court in the present case, the defendant's counsel, Mr Steven Chong, pointed out that his clients accepted that the two rulings are different. In view of this, there is no "third issue", in respect of which any evidence is required from Mr Doe-Buce.

Conclusion

23 For the reasons mentioned above, I refused to exercise my discretion in favour of allowing the plaintiffs to file the further affidavit by Mr Doe-Bruce for the hearing of their appeal against the Order of Court dated 10 July 2006. FESCO is entitled to costs.