The "Vasiliy Golovnin"
[2007] SGHC 116

Case Number : Adm in Rem 25/2006, RA 214/2006, 216/2006

Decision Date : 31 July 2007

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Vivian Ang, Kenny Yap and Leona Wong (Allen & Gledhill LLP) for the appellants/plaintiffs in RA 214/2006 and the respondents/plaintiffs in RA 216/2006; Steven Chong SC and Kohe Noor bte M Hasan (Rajah & Tann) for the respondent/defendant in RA 214/2006 and the appellant/defendant in RA 216/2006

Parties : —

Admiralty and Shipping – Admiralty jurisdiction and arrest – Action in Rem – Arrest of vessel – Disclosure of material facts

Civil Procedure – Issue Estoppel – Whether arrest of a vessel in Singapore previously arrested in another jurisdiction and subsequently released by court order is an abuse of process

Civil Procedure – Striking out – Whether case wholly and clearly unarguable – O18 r 19 Rules of Court (Cap 322, R5, 2006 Rev Ed)

31 July 2007 Judgment reserved

Tan Lee Meng J

1 The second and third plaintiffs, Credit Agricole (Suisse) SA and Banque Cantonale De Geneve SA respectively (both referred to as "the banks"), who arrested a vessel, *The Chelyabinsk*, in Lome in Togo on 21 February 2006, arrested her sister ship, *The Vasiliy Golovnin,* in Singapore on 18 March 2006. On 10 July 2006, the defendant, Far Eastern Shipping Co Plc ("FESCO"), the owners of the two said vessels, managed to persuade the Assistant Registrar, Ms Ang Ching Pin ("AR Ang"), to set aside the warrant of arrest of *The Vasiliy Golovnin* and strike out the banks' writ of summons. AR Ang did not award FESCO damages for the arrest of *The Vasiliy Golovnin*.

2 Two appeals were filed against AR Ang's decision. In RA No 214 of 2006, the banks appealed against the setting aside of the arrest of *The Vasiliy Golovnin* and the striking out of their claim. In RA No 216 of 2006, FESCO appealed against AR Ang's decision not to award damages for the arrest of *The Vasiliy Golovnin.*

Background

3 On 9 September 2005, FESCO chartered *The Chelyabinsk* ("the chartered vessel") on amended New York Produce Exchange (NYPE) terms ("the head charterparty") to Sea Transport Contractors Ltd ("STC"), who sub-chartered the said vessel, also on amended NYPE terms ("the sub-charterparty"), to Rustal SA ("Rustal"). The banks came into the picture because they provided financing to Rustal and held the bills of lading relied upon by the parties to the present proceedings.

4 Pursuant to the terms of the head charterparty, STC instructed the chartered vessel to load a cargo of 5,100 mt of Chinese rice at Nanjing for discharge at "any African port". Three bills of lading were issued and all referred to the head charterparty dated 9 September 2005. Only one of these bills of lading is in issue in these proceedings and it required the cargo in respect of which it was issued to

be discharged at "any African port" ("the African port bill of lading").

5 After loading the Chinese rice, the chartered vessel was ordered to proceed to Kakinada, India, to load about 15,000 mt of Indian rice. Part of this cargo was discharged in Abidjan and only 9,000 mt of the Indian rice is relevant to the present proceedings. All the bills of lading for the 9,000 mt tons of Indian rice named Lome as the port of discharge.

6 After part of the Indian rice had been discharged in Abidjan, Rustal requested STC in early December 2005 to arrange for the switching of the remaining bills of lading in order to, among other things, alter the port of discharge from Lome to Douala in Cameroon. When requested by STC to effect the said switch, FESCO agreed to do so provided the original bills of lading were surrendered in exchange for the new bills of lading. The switch was scheduled to take place on 12 December 2005 at the office of FESCO's chartering brokers in Surrey, England, but neither Rustal's staff nor their agents turned up at the appointed place to effect the switch. As such, the original bills of lading were never switched.

7 Although STC initially instructed the chartered vessel to sail to Douala, it revoked its instructions to discharge the cargo at that port on 13 December 2005, and gave instructions that the chartered vessel was not to enter Douala or berth there without its consent. Apparently, STC had a dispute with Rustal with respect to the payment of hire for the chartered vessel and on 14 December 2005, STC instructed FESCO not to switch the bills of lading unless further ordered by it to do so. On 19 December 2005, STC instructed the vessel to proceed to Lome to discharge the cargo.

8 On 21 December 2005, FESCO received a request from M/s Waterson Hicks, the solicitors of Banque Cantonale de Geneve SA ("Banque Cantonale"), the third plaintiff in these proceedings, to discharge the cargo of rice at Douala on the basis of a letter of indemnity for the proposed change of the port of discharge. FESCO contended that in the light of the head charterer's instructions and the fact that three of the four bills of lading for the cargo of rice named Lome as the port of discharge, it could not accede to Banque Cantonale's request. Following FESCO's refusal to accede to Banque Cantonale's request, the latter's solicitors sought confirmation that the cargo would be discharged in Lome in accordance with their clients' instructions.

9 On 22 December 2005, STC applied for, and obtained from, the Lome Court an order ("Ruling No 2062/2005") for the detention of 15,541 mt of rice on board the chartered vessel ("the STC Court Order"). Under this order, the cargo was to be detained in Lome as security for STC's claim for unpaid hire against Rustal under the sub-charterparty. After the vessel arrived at Lome on 23 December 2005, she was served the STC Court Order.

10 Thereafter, several orders were issued by the Lome Court. On 24 December 2005, Rustal obtained an order from the Lome Court ("Ruling No 2081/2005") to prevent the discharge of the cargo.

11 On 27 December 2005, STC obtained a court order ("Ruling No 2093/2005") authorising the discharge of the cargo ("the discharge order").

12 Thereafter, the banks took steps to have the discharge order set aside and reinstate Ruling No 2081/2005 that had been obtained by Rustal.

13 On 16 January 2006, the Lome Court set aside Ruling No 2081/2005 that had been 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.

14 The banks and Rustal then obtained separate rulings for a temporary stay of execution of the ruling.

15 On 2 February 2006, the Lome Court ordered the lifting of the stay of execution of Ruling No 0023/2006, which enabled that the cargo be discharged in Lome. In view of this, FESCO commenced discharging operations. The discharge of the cargo was completed in mid-February 2006.

16 After the discharge of the cargo had been completed, the banks obtained a court order in Lome for the arrest of the chartered vessel on 21 February 2006 ("the Lome arrest order").

17 On 24 February 2006, FESCO succeeded in having the arrest of the chartered vessel set aside by the Lome Court ("Ruling No 0164/2006") ("the Lome Release Order"). The banks did not appeal to the Lome Court of Appeal against the Lome Release Order and the chartered vessel left Lome on 25 February 2006. The time allowed for an appeal against the Lome Release Order expired on 17 March 2006.

18 On 18 March 2006, the banks arrested *The Vasiliy Golovnin*, a sister vessel of the chartered vessel, in Singapore.

19 On 28 March 2006, the Lome Court of Appeal reversed Ruling No 0023/2006 and allowed the banks' appeal against the order that the cargo be discharged in Lome. This had nothing to do with the Lome Release Order.

20 On 10 July 2006, upon FESCO's application, the Assistant Registrar set aside the arrest of *The Vasiliy Golovnin* and struck out the banks' writ against FESCO. As has been mentioned, she did not award FESCO damages for wrongful arrest of *The Vasiliy Golovnin.*

Setting aside the warrant of arrest and striking out the writ

21 The banks' appeal in RA No 214 of 2006 against the setting aside of their warrant of arrest and the striking out of their writ will first be considered. AR Ang, who set aside the warrant of arrest and struck out the writ, found that there was non-disclosure or lack of disclosure of material facts at the *ex parte* hearing of the application for a warrant of arrest, issue estoppel and the lack of an arguable case by the banks against FESCO.

(i) Non-disclosure of material facts

22 In an *ex parte* application for a warrant of arrest of a vessel, the arresting party is obliged to make full and frank disclosure of all the material facts to the court. In *The "Rainbow Spring"* [2003] 3 SLR 362 at 376, Judith Prakash J, who delivered the judgment of the Court of Appeal, noted that as the arrest of a vessel is a drastic remedy given on an *ex parte* basis, the duty to make full and frank disclosure to the court is an important bulwark against the abuse of the arrest process.

23 In *The "Damavand"* [1993] 2 SLR 717 at 731, LP Thean J, as he then was, who delivered the judgment of the Court of Appeal, referred to the test of materiality for non-disclosure in the following terms:

> [W]hether the fact is relevant to the making of the decision whether or not to issue the warrant of arrest, that is, a fact which should properly be taken into consideration when weighing all the circumstances of the case, though it need not have the effect of leading to a different decision being made.

24 FESCO contended that five material facts had not been disclosed by the banks to Assistant Registrar David Lee ("AR Lee"), who heard the *ex parte* application for the arrest of *The Vasiliy Golovnin*. They are as follows:

(a) the chartered vessel had been released from arrest by the Lome Court following an *inter partes* hearing;

(b) Lome was the contractual port of discharge under three of the four bills of lading;

(c) the purpose of switching the bills of lading in question was, among other things, to change the port of discharge from Lome to Douala;

(d) Banque Cantonale had offered a letter of indemnity to FESCO on 21 December 2005 in consideration of the cargo being discharged at Douala instead of Lome; and

(e) after failing to persuade FESCO to discharge the cargo at Douala, Banque Cantonale had sought FESCO's confirmation that the cargo would be discharged in Lome according to its instructions.

25 AR Ang upheld FESCO's contentions in relation to the first and fourth facts stated above. She ruled that there was no non-disclosure in relation to the remaining three facts.

Non-disclosure of the inter parteshearing in Lome

26 As for the banks' failure to disclose to AR Lee that there had been a contested hearing in Lome before the chartered vessel was released, AR Ang stated in her grounds of decision at [38] as follows:

In my opinion, the fact that the *Chelyabinsk* was released from arrest in Lome pursuant to an order of court after an *inter partes* hearing would have been something that a duty registrar would have wanted to know in deciding whether to issue a warrant of arrest. I agree with FESCO's submission that the duty registrar's attention would then be drawn to the fact that another court of competent jurisdiction had already determined that there was no right of arrest for the same claims by the plaintiffs. The duty registrar might well have required further clarification as to whether a warrant of arrest should still be issued in Singapore despite the prior arrest having been set aside.

27 The banks contended that while they had not specifically mentioned the contested hearing in Lome to AR Lee, the fact that there had been a contested hearing at Lome may be gleaned from the exhibits in the affidavit filed in support of the application for arrest. They also pointed out that AR Lee had intimated that he had read the arrest papers. AR Ang rightly noted that there was room for doubt as to whether AR Lee had read the entire affidavit, including all the exhibits contained therein, which occupied around 400 pages. She referred to *Intergraph Corporation v Solid Systems Cad Services Ltd* [1993] FSR 617, where Baker J, who accepted that the court's attention need not have to be drawn to what it said it had seen, rightly added at 625 as follows:

To present a judge with 600 pages of material on an *ex parte* application is coming a bit near abuse, unless he is firmly and carefully guided, through the material. Of course I recognise at once that legal advisors are in a difficult situation. If they do not put enough in, they get attacked because they have not made full disclosure. On the other hand if they put too much in then complaints arise that the judge cannot cope with it. That is something that legal advisors

have to live with, because clearly it is of no use putting it in if the judge either cannot or does not read it. It is just as much not disclosed as if it had not been put in at all. *Unless the document is presented to the eyes and/or the ears of the judge, it is not disclosed.*

[emphasis added]

28 I would add that with regard to the banks' assertion that the fact that there was a contested hearing in Lome may be gleaned from the exhibits in the affidavit in support of the application for arrest, it is pertinent to note that in *National Bank of Sharjah v Dellborg* [1993] 2 Bank LR 109, Lloyd LJ, with whom Ralph Gibson LJ and Sir Michael Kerr agreed, said as follows at [112]:

> [T]he place to disclose the facts, both favourable and adverse, is in the affidavit and not in the exhibits. No doubt it will usually be convenient to exhibit a few key documents where it is necessary to do so to explain the case. But the recent tendency to overload the case at the ex parte stage and to burden the judge with masses of documents in case something is left out, ought to be firmly resisted. If the facts are not fairly stated in the affidavit, it will not assist the plaintiff to be able to point to some exhibit from which that fact might be extracted.

29 I thus affirm AR Ang's decision that the fact that there had been an *inter partes* hearing on the arrest of the chartered vessel in Lome should have been disclosed to AR Lee. That the Lome Court had already considered and dismissed the banks' arguments as to whether the chartered vessel could be arrested by them at Lome is a material fact to be taken into account by AR Lee when considering whether or not a warrant of arrest of *The Vasiliy Golovnin* should be issued.

Non-disclosure of Banque Cantonale's offer of a letter of indemnity

30 FESCO asserted that Banque Cantonale's offer of a letter of indemnity on 21 December 2005 to discharge the cargo at Douala showed that it accepted that it was not entitled to insist on the cargo being discharged in Douala instead of Lome. It pointed out that this fact was not disclosed in the affidavit filed on behalf of the banks in support of the application for arrest. As such, it was not considered by AR Lee at the *ex parte* hearing for the warrant of arrest. FESCO argued that this argument was rightly accepted by AR Ang who stated as follows in her grounds of decision at [43]:

> I disagreed with the plaintiffs that the fourth point did not have to be disclosed to AR Lee. It directly impinged on [Banque Cantonale's] claims against FESCO since it went towards establishing whether an agreement had been reached between the parties to discharge the cargo at Douala instead of Lome, and whether FESCO was in breach of contract for discharging the cargo in Lome. The duty registrar would have wanted to know these matters before deciding whether BCG had a *prima facie* claim against FESCO for which an arrest could be made.

31 I agree with AR Ang that the offer of a letter of indemnity was a material fact to be taken into account by AR Lee when deciding whether or not to order the arrest of *The Vasiliy Golovnin.*

Failure to disclose intention to record the change of the discharge port

32 In my view, the banks had failed to disclose another material fact, namely that the main purpose of switching the bills of lading was to change the port of discharge from Lome to Douala. In the affidavit filed in support of the issuance of a warrant of arrest, the banks had given the impression that there was an agreement to switch the bills of lading in order to cut them into different proportions.

33 AR Ang pointed out at [4] of her grounds of decision that AR Lee was aware of the existence of the bills of lading and that there had been a request for the cargo to be discharged at Douala. However, the fact that the request was for the new bills of lading to change the port of discharge from Lome to Douala would have drawn AR Lee's attention to the fact that without the switch of bills, FESCO performed the terms of the contract of carriage, as recorded in the bills of lading, by carrying the cargo to Lome. That was why it was important to have the bills of lading replaced by new ones. In view of this, the reason for the proposed switch of bills of lading is relevant and ought to have been disclosed to AR Lee.

Other allegations of non-disclosure

34 As for FESCO's assertion that there were two other facts that ought to have been disclosed, I see no reason to disagree with AR Ang's decision that this assertion was not substantiated. First, in regard to the contention that AR Lee had not been expressly informed that Lome was the contractual port of discharge, AR Ang rightly noted that this was a material fact and AR Lee's attention had been drawn to the bills of lading at tab 2 of the affidavit filed in support of the application for arrest. As for the other fact, which was that the banks had failed to mention that Banque Cantonale had sought FESCO's confirmation that the cargo would be discharged in Lome according to its instructions, I agree with AR Ang's view in [44] of her grounds of decision that "this was not a material non-disclosure as it did not unequivocally point to [Banque Cantonale] desiring to take delivery in Lome but could just as well point to them making the best of the situation in the circumstances".

Conclusion on the issue of non-disclosure

35 As the banks had failed to disclose three material facts at the *ex parte* hearing before AR Lee, I agree with AR Ang that the warrant of arrest should be set aside on the ground of non-disclosure.

(ii) Issue estoppel

36 The second ground relied on by AR Ang for setting aside the warrant of arrest was issue estoppel. It is trite that a foreign judgment can give rise to an issue estoppel so as to prevent a party to that foreign action from vexing another party to that action by seeking to re-open an issue already resolved by the foreign court: see *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241. In fact, it is an abuse of process to ask a court to rule on an issue that has been resolved by a foreign court when the parties to both the actions are the same as in the foreign proceedings.

37 The arrest in Singapore of a vessel which was previously released from arrest in another jurisdiction by a court order is, without more, not an abuse of process. In *The Tjakskemolen* [1997] 2 Lloyd's Rep 476 at 481, Clarke J explained how a second arrest may be an abuse of process as follows:

> I do not think that the mere fact that a plaintiff has arrested a vessel which has previously been released by order of this Court or another Court of competent jurisdiction will amount to an abuse of the process of the Court. All will depend upon the circumstances. So, for example if a plaintiff were to seek to arrest a vessel *in respect of the same claim in one jurisdiction after another* might well be an abuse of process to permit an arrest here on the ground that to do so would be oppressive and vexatious and thus an abuse of the process.
>
> [emphasis added]

38 There will thus be an abuse of process if a vessel is arrested on grounds in respect of which

there is issue estoppel. For issue estoppel to arise with respect to the arrest of *The Vasiliy Golovnin* in Singapore, three requirements must be satisfied:

(a) The Lome court is one of competent jurisdiction and its judgment is final and conclusive and on the merits of the case;

(b) The parties to the action in Lome are the same as those in the present action; and

(c) The issues before this court are identical to those considered by the Lome court.

39 As for the first requirement, it was not disputed that the Lome Release Order was a judgment of a court of competent jurisdiction. Indeed, the banks themselves invoked the jurisdiction of the Lome court to seek relief and they did not object to the Lome court determining whether or not they had the right to arrest the chartered vessel in Lome.

40 As for whether a judgment is with respect to "the merits of the case", in *The Sennar* [1985] 1 WLR 490 at 499, Lord Brandon helpfully explained the position as follows:

> Looking at the matter negatively a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned.

41 In the present case, the Lome court considered the merits of the case for an arrest of the chartered vessel and took note of the same arguments that were advanced by the parties in the present case before deciding to release the chartered vessel from arrest.

42 For a judgment to be conclusive and final, it must be one that cannot be re-opened by the court that pronounced it. FESCO's Togolese lawyer, Mr Lawson-Banku's assertion that the Lome Release Order could only have been overturned by way of an appeal to the Lome Court of Appeal was not controverted by the banks' Togolese lawyer, Mr Adama Doe-Bruce ("Mr Doe-Bruce"). For whatever reason, no appeal was lodged against the Lome Release Order. As such, the Lome Release Order is, without more, final and conclusive.

43 The parties disagreed on the effect of the French words "*l'execution provisoire"* in the Lome Release Order, which were translated as "provisional enforcement". As AR Ang noted, these words might, at first blush, suggest a lack of finality in the Lome Release Order. These words were considered in *The Irini A (No 2)* [1999] 1 Lloyd's Rep 189 at 192 by Tuckey J, who said that they have a legal meaning, the effect of which regard must be had to the evidence from Togolese lawyers submitted by the parties. After considering the evidence, his Lordship said as follows at 193:

> [O]n the facts I think that the decision of the Lome Court was final in the sense required to found issue estoppel. It is incapable of revision by the Court which pronounced it. It is enforceable and has been enforced. That process is only provisional in the sense that if the Court of Appeal reverses the judgement the execution no longer stands … That is no different from the position here where the fact that a judgement is under appeal does not mean that it is not final.

44 It should be noted that in *The Irini A (No 2)*, an appeal had been filed against the Lome court's decision and was pending at the time the matter was considered by the English Court. In contrast, in the present case, no appeal against the Lome Release Order was lodged and the time within which an

appeal may be lodged had long passed. Furthermore, the Lome Release Order contained a direction that "the present ruling will be enforceable immediately notwithstanding all paths for appeal and before registration".

45 In para 42 of his affidavit, the banks' Togolese lawyer, Mr Doe-Bruce, referred to Art 160 of the Togo Code of Civil Procedure, which 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". Whether or not he is correct, there is no evidence of "fresh circumstances". The decision of the Lome Court of Appeal in relation to STC's right to a lien over the cargo in question has no bearing on the validity of the Lome Release Order and cannot constitute "fresh circumstances". As such, I find that the decision of the Lome court that issued the Lome Release Order after a hearing on the merits of the case was conclusive and final for the purpose of issue estoppel.

46 As for the second requirement of issue estoppel, which is that the parties must be the same parties in both proceedings, the banks and FESCO were parties to the Lome proceedings regarding the arrest of the chartered vessel and are parties to the present proceedings regarding the arrest of the chartered vessel's sister ship, *The Vasiliy Golovnin*.

47 As for the third requirement of issue estoppel, which is that the issues before the court must be identical with that previously determined, the banks contended that the issues are not identical because this court is only required to determine whether or not it is "entitled to and ought to exercise its admiralty jurisdiction over the vessel intended to be arrested" and that the merits of arrest are considered against the procedural and substantive requirements of each jurisdiction. This is an unmeritorious argument that was rightly dismissed by AR Ang. Indeed, if the issue before the Singapore court is framed in the manner suggested by the banks, no question of issue estoppel can ever arise in Singapore in the case of the arrest of a vessel and the arresting party can resurrect all the arguments in favour of an arrest in Singapore even though these have been exhaustively considered and decisively rejected by, for instance, an English court.

48 FESCO's counsel rightly asserted that the parties' arguments on the merits of the case had been considered by the Togolese court. In fact, when 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) Douala was not listed as a port of discharge on the bills of lading although the banks claimed that the cargo was bound for Douala; and

(d) Sufficient security had been given for the claims for loss and damage to the cargo.

49 Considering the arguments raised in the present case by the banks, the inescapable conclusion is that the third requirement of identical issues for issue estoppel was satisfied.

Security for claim for damage to cargo

50 I now turn to the banks' assertion during the hearing of the appeal that they were entitled to

arrest *The Vasiliy Golovnin* as they required security for their claim for damage to cargo. AR Ang did not deal with this issue at length for the simple reason that no such submission was made before her. Even so, she pointed out in her grounds of decision at [16] that the Lome Court had found that sufficient security had been given for the claim for loss and damage of the cargo. The Lome Court took the view that security for the cargo damage had been provided by the UK P & I Club in the form of a Letter of Undertaking dated 16 February 2006. The banks complained that this undertaking to pay not more than 113,411.00 euros was addressed to the cargo underwriters of the cargo on board the chartered vessel. FESCO's counsel, Mr Steven Chong SC, pointed out that the banks were not disadvantaged by this as any loss resulting from cargo damage will first be claimed from the cargo insurers. What is relevant to this court is that the Lome court had specifically declared that security for the damaged and missing goods ascertained during the loading had already been provided for. Whether or not this court agrees or disagrees with the Lome court is irrelevant as this issue cannot be reopened in the absence of fresh circumstances. This was the approach adopted in *The Irini A (No 2)* ([43] supra) by Tuckey J, who stressed at 193 that whether the Togolese Court had not done what an English Court would have done and whether an English Court might have reached a different conclusion is not relevant. Reference may also be made to the following useful passage from *Cheshire and North's Private International Law,* 13th ed, (Butterworths, 1999) at 429:

> Erroneous judgments delivered by a foreign court are not void in England. The merits of the case have been argued and determined, and if one of the parties is discontented with the decision his proper course is to take appellate proceedings in the forum of the judgment. The English tribunal, in other words, cannot sit as a Court of Appeal against a judgment pronounced by a court which was competent to exercise jurisdiction over the parties.

51 To sum up, issue estoppel prevents this court from considering whether the banks have a right to arrest *The Vasiliy Golovnin*.

(iii) No sustainable cause of action

52 AR Ang also set aside the warrant of arrest and struck out the *in rem* writ on the ground that the banks had no sustainable cause of action against FESCO.

53 The banks' arrest of *The Vasiliy Golovnin* was based on ss 3(1)*(g)* and 3(1)*(h)* of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Rev Ed), which provide as follows:

> 3 (1) The admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims:
>
> …
>
> *(g)* any claim for loss of damage to goods carried in a ship;
>
> *(h)* any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;

54 The court will not exercise its discretion to strike out a writ or pleading under O 18 r 19 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) or under its inherent jurisdiction unless there is a very clear case for this to be done. In *Tan Eng Khiam v Ultra Realty Pte Ltd* [1991] SLR 798, Selvam JC, as he then was, stated at [31] that "this is anchored on the judicial policy to afford the litigant the right to institute a bona fide claim before the courts and to prosecute in the usual way" and that the court will, whenever possible, let the plaintiff proceed with the action unless his case is wholly and clearly

unarguable.

55 At this juncture, the banks' indorsement of claim, which is as follows, ought to be noted:

> The Plaintiffs' claim is for damages for breach of written and/or oral contracts *evidenced by and/or contained in various Bills of Lading* dated in or around September and/or October 2005 and/or a Charterparty and/or for conversion and/or wrongful detention and/or wrongful interference and/or breach of bailment and/or breach of duty and/or negligence in and about the bailment, loading, handling, custody, care delivery and discharge of the Plaintiffs' cargo of rice and the carriage thereof on board the ship or vessel "CHELYABINSK" from Nanjing, China and Kakinanda, India to Douala, Cameroon during September-December 2005 and/or for a declaration for an indemnity and/or for an indemnity for all loss and/or liability suffered and/or incurred and/or injury to the Plaintiffs' reversionary interests in the said cargo of which the Plaintiffs are or were owners and/or lawful bills of lading holders and/or insurers and/or persons in possession and/or entitled to immediate possession of the said cargo and/or which was at their risk which resulted in loss and/or damage and/or delay and/or expenses and/or liability being suffered and/or incurred.
>
> [emphasis added]

56 AR Ang noted that when asserting that they had an arguable case against FESCO, the banks relied on seven grounds. As summarised by her at [29] of her grounds of decision, these related to FESCO's:

(a) purported breach of Art III r 2 of the Hague Rules

(b) purported breach of its duty as bailees of the cargo

(c) purported breach of an agreement to discharge the cargo at Douala;

(d) alleged wrongful compliance with STC's instructions to proceed to Lome;

(e) refusal to comply with the banks' instructions to discharge the cargo at Douala;

(f) failure to deliver the cargo to the banks as holders of the bills of lading; and

(g) alleged wrongful failure to discharge the cargo under the African port bill of lading at Douala.

57 In her written submissions for the appeal, the banks' counsel, Ms Vivian Ang, stated at [2] that the banks' claim is straightforward and arises out of two matters:

(a) the non-delivery of the cargo that was carried on board *The Chelyabinsk* to them, who are the lawful holders of the bills of lading and the named consignees on the bills of lading; and

(b) the damage suffered by the cargo whilst it was in the care and custody of FESCO.

The non-delivery of the cargo to the banks

58 FESCO's counsel, Mr Steven Chong SC, submitted that all seven grounds relied on by the banks for their assertion that they had an arguable case against FESCO are premised on FESCO having committed a breach by discharging the cargo at Lome instead of at Douala.

59 It must be noted at the outset that the banks are the indorsees of the bills of lading in question. It is clear that as against an indorsee, the terms of a bill of lading are, without more, the only terms that govern the indorsee's contract of carriage with the carrier. That is why antecedent arrangements between the shipper and the carrier do not bind an indorsee of a bill of lading: see *Leduc v Ward* (1888) 20 QBD 475. It follows that under the terms of the bills of lading in question, FESCO's duty is to deliver goods at the port of discharge named in a bill of lading. As the bills of lading had not, as had been originally proposed, been switched at the appointed time in England, the fact remains that three of the four bills of lading in question named Lome as the port of discharge while the remaining bill of lading provided for the discharge of the cargo in respect of which it was issued at "any African port". In so far as the three bills of lading that named Lome as the port of discharge are concerned, FESCO cannot be faulted for carrying the cargo to Lome as it was performing the terms of the said bills of lading.

60 As for the cargo covered by the African port bill of lading, it was not disputed that the said cargo was stowed under the other cargo, which were to be discharged at Lome. As such, it would be convenient that the cargo due for Lome be discharged first. It was also not disputed that when the chartered vessel reached Lome, she was ordered to discharge *all* her cargo at that port by Ruling No 0023/2006, which was an Order of Court. In view of this, FESCO had no option but to discharge all her cargo, including that shipped under the African port bill of lading, at Lome and the discharge of the cargo covered by the African port bill of lading also did not involve a breach of contract by FESCO.

61 As was noted by AR Ang, the banks did not contend that FESCO could have legitimately refused to comply with the Order of Court that required it to discharge all the cargo at Lome. A refusal by FESCO to unload all the said cargo at Lome would have been a contempt of court. What the banks argued was that FESCO would not have had to contend with this Lome Order of Court had it avoided Lome altogether. They asserted that FESCO knew that STC would claim the cargo if the chartered vessel entered Lome and that FESCO had been expressly warned by the banks' solicitors that the cargo would be arrested by STC. The banks' counsel, Ms Vivian Ang, submitted that FESCO knew or must have known that under the terms of the "freight pre-paid" bills of lading between FESCO and the banks, STC had no right whatsoever to arrest or exercise a lien over the cargo at Lome and that exercise of such a lien would be clearly wrongful. She added that in view of this, FESCO had a duty to deviate from Lome and proceed to another port to discharge the cargo.

62 The banks sought to rely on two cases for their argument that, notwithstanding the terms of the bills of lading, FESCO should have avoided Lome altogether. The first case was *Nobel's Explosives Company v Jenkins and Company* [1896] 2 QB 326. In that case, the defendant carriers agreed to carry the plaintiffs' goods, which were contraband of war, from London to Yokohama under a bill of lading containing the exception of "restraint of princes". On the day the vessel arrived in Hong Kong, war broke out between China and Japan and had the vessel sailed from Hong Kong with the plaintiffs' goods, there was a serious danger that the goods would have been seized and confiscated by Chinese warships in and near Hong Kong. As such, the master landed the goods in Hong Kong. Matthew J held that apart from the stated exception in the bill of lading, the master's duty to care for the goods justified the landing of the goods in Hong Kong. These facts are thus very far removed from those presently being considered where the danger faced by the banks' cargo was merely an order of the Lome court favouring a claimant of the goods.

63 The second case relied on by the banks was *The Iran Bohanar* [1983] 2 Lloyd's Rep 620. According to the banks, that case supported their assertion that FESCO had a *duty* to deviate to another port because of the danger faced by their cargo at Lome. In that case, the plaintiffs, an

American international commodity trading company, sold 6,000 tonnes of Brazilian crude soya oil to a buyer in Iran on fob terms, with payment to be effected against documents. The buyer did not pay for the goods. The first defendant, which owned the vessel on which the cargo was loaded, was an Iranian State Corporation while the second defendant, another Iranian state corporation, was effectively the sole importers in Iran of soya beans and the only potential buyers of the plaintiffs' oil. Apparently, the second defendants had at one stage negotiated to buy the oil from the plaintiffs but, having paid no one for the oil, were setting up title to the goods without any apparent basis. In the then state of diplomatic relations between the United States and Iran, it was quite impossible for the American plaintiffs to make arrangements for the cargo to be received on their behalf in Iran. In these circumstances, the plaintiffs sought and obtained from the English court an order that the first defendants direct their vessel to a safe port outside.

64 *The Iran Bohanar* is distinguishable from the present case because the "danger" to the banks' right to the cargo of rice arose out of a private dispute between the sub-charterers, who were financed by the banks, and the head charterer, STC, to whom FESCO owed contractual duties. FESCO's counsel, Mr Steven Chong SC, rightly pointed out that the essence of the banks' case is that if a carrier is aware of a dispute between the cargo owners and some third party that would prevent the lawful holders of the bills of lading from taking delivery, the carrier is obliged to comply with instructions from the lawful holders of the bill of lading to proceed to an alternative port. There is no authority for such a startling proposition, and understandably so, because contracts of carriage by sea cannot be performed properly if a bill of lading holder is entitled to order the carrier to divert to another port for his own purposes. If there is a dispute between the lawful holders of bills of lading and third parties over the fate of the cargo, the carrier must perform his obligations under the bill of lading, and leave it to the disputing parties to seek appropriate relief from the courts at the place of discharge. I thus agree with AR Ang that FESCO had not breached the contract evidenced by the bills of lading in question by discharging the entire cargo of rice at Lome.

65 The banks also complained of a breach of Art III r 2 of the Hague-Visby Rules, which provides as follows:

> Subject to the provisions of Article 4, the carrier shall properly and carefully load, stow, carry, keep, care for and discharge the goods carried.

66 In so far as the complaint that the goods had been discharged in Lome instead of Douala is concerned, FESCO did not beach Art III r 2. Discharge and delivery are different operations and the question of wrongful delivery or misdelivery does not arise because the goods had been discharged pursuant to an Order of Court and were put into the custody of the Lome Court pending further directions. As such, FESCO has not failed to properly carry, keep, care for and discharge the goods carried by the chartered vessel.

Wrongfully obeying STC's instructions

67 Another argument raised by the banks is that FESCO had wrongfully obeyed STC's instructions. They contended that it follows from *The EVPO AGSA* [1992] 2 SLR 487 that as there is a chain of charterers, FESCO should have ignored STC's instructions not to discharge the cargo at Douala and followed the instructions of Rustal, the last charterers in the chain. The correctness of such an argument and the ramifications of *The EVPO AGSA* need not be further discussed as the banks have not furnished any authority for the proposition that where a bill of lading is in the hands of a transferee such as the banks in this case, a sub-charterer is entitled to give instructions that require the carrier to perform its obligations in a manner that is inconsistent with the terms of a bill of lading, including a term which specifies the port at which the cargo is to be discharged.

Breach of an agreement to switch bills of lading

68 In regard to the banks' claim that there was an agreement to switch bills of lading, it must be noted that in the banks' indorsement of claim, the banks are claiming damages for, *inter alia*:

> [B]reach of written and/or oral contracts evidenced by and/or contained in various Bills of Lading dated in or around September and/or October 2005....
>
> [emphasis added]

69 As the only contracts referred to in the indorsement of claim in the banks' writ are those evidenced by and/or contained in the *original* bills of lading, which were issued in September and October 2005 and were not switched, the terms of the original bills of lading continue to govern the contract of carriage. For reasons already stated, FESCO did not breach the terms of those bills of lading by discharging the cargo at Lome under compulsion of an Order of Court. All the banks' other claims, other than that concerning cargo damage, whether they relate to conversion, wrongful detention, wrongful interference or breach of a bailor's duties, are based on the assertion that the cargo in question should have been discharged at Douala instead of Lome. As the underlying contracts on which these other claims are premised are the contracts evidenced by and/or contained in the original bills of lading, there is no room for the argument that there was a *binding* agreement to switch the bills.

Damage to cargo

70 All the banks' claims against FESCO that have been considered thus far should be struck out. However, the banks' claim for damage to part of the cargo delivered at Lome stands on a different footing. The Lome court found, rightly or wrongly, that sufficient security had been furnished for this claim. For reasons already stated, this finding prevents the banks from arresting *The Vasiliy Golovnin* to obtain security for the claim with respect to damage to cargo. Although this claim cannot be the basis for an *in rem* action against FESCO, it does not mean that it cannot be pursued as a claim *in personam.* In *The August 8,* [1983] 2 AC 450, Lord Brandon of Oakbrook, stated as follows at 456:

> By the law of England, once a defendant in an admiralty action in rem has entered an appearance in such action, he has submitted himself personally to the jurisdiction of the English Admiralty Court, and the result of that is that, from then on, the action continues against him not only as an action in rem but also as an action in personam: *The Genma* [1899] P 285, 292 per AL Smith LJ. There is no reason to suppose that the admiralty law of Singapore differs from the admiralty law of England so far as this important principle is concerned. On the contrary there is every reason to suppose that it is the same.

71 Lord Brandon's view was adopted by the Court of Appeal in *The "Ohm Mariana" ex "Peony"* [1993] 2 SLR 698. In that case, Thean J, as he then was, who delivered the judgment of the Court, said at 712 that even if the action *in rem* in that case had been wrongly instituted, he saw no impediment to it continuing as a claim *in personam*.

72 In the present case, FESCO's memorandum of appearance was filed on 23 March 2006. As such, the banks' claim for damage to the cargo discharged at Lome is still maintainable even though it is, for reasons already stated earlier on, not a ground for arresting *The Vasiliy Golovnin*. It is worth noting that despite this finding, this part of the banks' claim is unlikely to be heard in Singapore as the parties have agreed to resolve their differences by means of arbitration in London.

FESCO'S claim for damages for wrongful arrest

73 RA No 216 of 2006, which concerns FESCO's appeal against AR Ang's ruling on damages for wrongful arrest, will next be considered. For FESCO to be entitled to damages for wrongful arrest, it must be established that there was mala fides or *crassa negligentia* on the part of the banks: see *The Evangelismos* (1858) 12 Moo PC 352; *The Kiku Pacific* [1999] 2 SLR 595 at [30] and *The" Inai Selasih"* at [2006] 2 SLR 181 at [28].

74 In *The Kiku Pacific* [1999] 2 SLR 595, Karthigesu JA approved of the test for awarding damages for wrongful arrest that was enunciated in *The Evangelismos* (1858) 12 Moo PC 352 by the Rt Hon Pemberton Leigh in the following terms at 359:

> The real question, in this case, following the principles laid down with regard to actions of this description comes to this: is there or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it implies malice on the part of the plaintiff, or that gross negligence which is equivalent to it?

75 FESCO contended that an inquiry as to whether the banks ought to be ordered to pay damages for wrongful arrest may begin with their pleaded cause of action, which is premised on the assertion that FESCO was in breach of contract in proceeding to Lome and discharging the cargo there despite instructions from them to discharge the said cargo at Douala. However, AR Ang found that as the banks had honestly believed that they had valid claims against FESCO that had not been protected at Lome, they should not be required to pay damages for wrongful arrest. She pointed out that in *The Inai Selasih* [2006] 2 SLR 181, Chao Hick Tin JA had noted at [32] that where an applicant has been wrong in its interpretation or perception of arrangements, it does not follow that there is malice. As for non-disclosure of material facts, which can lead to an award of damages for wrongful arrest if it was intentional or malicious, a point reiterated in *The AAV* [2001] 1 SLR 207, AR Ang found that the banks' non-disclosure in the present case was neither deliberate nor calculated at misleading or distorting the truth.

76 I accept AR Ang's reasoning and saw no reason why she should be overruled on the issue of damages for wrongful arrest. As such, the appeal against her refusal to order damages for wrongful arrest of *The Vasiliy Golovnin* in RA No 216 of 2006 is dismissed.

Costs

77 FESCO is entitled to 70% of the costs in RA No 214 of 2006, which was the main appeal, whereas the banks are entitled to costs in RA No 216 of 2006, which only concerned the question of damages for wrongful arrest.