The Vasiliy Golovnin
[2006] SGHC 247

Case Number : Adm 25/2006, SUM 1418/2006

Decision Date : 10 July 2006

Tribunal/Court : High Court

Coram : Ang Ching Pin AR

Counsel Name(s) : Steven Chong SC, Ian Teo and Kohe Hassan (Rajah & Tann) for the defendants; Kenny Yap and Joanne Chia (Allen & Gledhill) for the plaintiffs

Parties : —

10 Jul 2006

Ang Ching Pin, Assistant Registrar

To Strike Out Proceedings

Ct: Orders in terms of prayers (2), (3), (4) of the defendants' application.

Query (6) for striking out of the first plaintiffs' names?

DC: That is by consent

PC: Not necessary as Your Honour is granting (2) and (3).

Ct: Submissions on costs?

DC: There were 13 affidavits filed with foreign lawyers involved. It went on for two days with many authorities and would think that it is better if costs are fixed before Your Honour. Submit costs of $20,000 excluding disbursements.

PC: Leave it in Your Honour's hands. Would be about $20,000 inclusive of disbursements so would submit $15,000 without disbursements.

Ct: Costs fixed at $20,000 to the defendants exclusive of disbursements,

PC: My clients are asking to appeal and wondering if Your Honour wants to grant a stay at this stage.

Ct: Would rather the plaintiffs file a former application.

PC: Suggesting a stay unitl a formal application for the stay of the order is heard.

DC: The amount of security is about US$7m and we explained that there is counter security by cash. Suggesting that Your Honour directs Learned Friend to file the application for stay within 48 hours for it be heard by Friday.

Ct: The plaintiffs are to file their application for stay of the order pending appeal by Wednesday 12 July 2006 4pm, failing which the security will be returned forthwith to the

defendants.

Ct: My grounds of decision are as follows:

1) The defendants, Far Eastern Shipping Co Plc ("**FESCO**"), were at all material times the owners of the *Chelyabinsk*. Under a charterparty dated 9 September 2005, FESCO chartered the *Chelyabinsk* to Sea Transport Contractors Ltd ("**STC**") who in turn sub-chartered it to Rustal SA ("**Rustal**"(. The plaintiffs are Swiss banks who provided financing to Rustal and were holders of certain bills of lading issued by FESCO to set aside the writ of summons and warrant of arrest of the *Vasily Golovnin*, a sister vessel of the *Chelyabinsk*, in respect of the plaintiff's claim against FESCO for, inter alia, losses sustained in relation to cargo carried on the *Chelyabinsk*. Extensive affidavits from both sides were filed, dealing with the history of the matter as well as interpretations of Togolese law by the parties' respective Togolese lawyers. Be that as it may, I was satisfied that it was possible to determine the issues at hand on the affidavit evidence.

Background

2) In September and October 2005, rice cargo were loaded onboard the *Chelyabinsk* at China and India respectively under eight separate bills of lading. Only four of them are relevant for present purposes. The first bill of lading, *Chelyabinsk* 01-A, was dated 17 September 2005 and pertained to the loading of cargo at Nanjing for discharge at "any African port". The other three bills of lading, KKD/LT/01, KKD/LT/02 and KKD/LT/04 were dated 10 October 2005 and pertained to the loading of cargo at Kakinada for discharge at "Lome, Togo". The second plaintiffs, Credit Agricole Suisse SA ("**CA**") were the holders of *Chelyabinsk* 01-A, KKD/LT/01 and KKD/LT/02, while the third plaintiffs, Banque Cantonale Geneve ("**BCG**") were the holders of KKD/LT/04.

3) Another bank, BNP Paribas, were the holders of bills of lading *Chelyabinsk* 01-B and *Chelyabinsk* 02 which provided for the discharge of cargo at "any African port". BNP Paribas were not parties to the present proceedings. In addition, another two bills of lading, KKD/LT/03 and KKD/LT/05, owned by CA and BCG respectively, provided for discharge at "Lome, Togo". These four bills of lading were not the subject of the plaintiffs' claims.

4) After the cargo had been loaded in China and then in India, the *Chelyabinsk* proceeded to the port of Abidjan in the Ivory Coast to discharge the cargo under bills KKD/LT/03 and KKD/LT/05. The cargo discharged under these two bills of lading were subject to letters of indemnity issued by STC which had instructed FESCO to discharge the cargo at Abidjan instead of the contractual port of discharge at Lome. Thereafter, pursuant to the other bills of lading, the remaining cargo would have been bound for Lome and/or any African port.

5) In early December 2005, Rustal requested STC to switch the bills of lading to change the discharge port from Lome to Douala. On or about 5 December 2005, STC made the request known to FESCO who were in principle agreeable to the request provided the original bills of lading were surrendered in exchange. The arrangements for the switch were made between FESCO's agents in the United Kingdom, Cornavin Shipping, and Rustal's London solicitors, Middleton Potts. The parties agreed to effect the switch at Cornavin's office on 12 December 2005 but neither Rustal nor Middleton Potts attended at Cornavin's office on that day or any other subsequent date for that purpose.

FESCO's version of events

6) It was FESCO's position that the switched bills of lading providing for discharge at Douala were never issued and the contracts of carriage continued to be governed by the original bills of lading which stipulated Lome as the port of discharge. FESCO claimed that whereas STC had initially directed that the *Chelyabinsk* proceed to Douala for discharge, STC had revoked these instructions on or about 13 December 2005. STC then directed on 14 December 2005 that FESCO should not switch the bills of lading until further instructions from STC to do so. The next day, on 15 December, STC reminded the Master of the *Chelyabinsk* that it should not enter and beth in Douala without STC's approval. On 19 December 2005, STC instructed FESCO to proceed to Lome to discharge the cargo. As such, the *Chelyabinsk* proceeded to Lome to discharge the cargo in accordance with the bills of lading.

7) On 21 December 2005, FESCO received a request from BCG's solicitors, Waterson Hicks, to discharge the cargo under KKD/LT/04 in Douala, in exchange for a letter of indemnity. FESCO rejected the request. Following FESCO's reply that it would not accede to BCG's request, Waterson Hicks sent another email on the same day seeking confirmation that the cargo would be discharged in Lome in accordance with BCG's instructions.

8) FESCO acknowledged that CA also requested to discharge the cargo under their bills of lading at Douala but FESCO disputes the date that the request was received. While CA claimed that they had sent their request on 16 December 2005, FESCO maintained that the request was only received on 29 December 2005.

The plaintiffs' version of events

9) The plaintiffs' position was that FESCO, STC and Rustal had agreed to the switching of the bills of lading and that the cargo should be discharged at Douala. On or about 12 December 2005, the Chelyabinsk had in fact sailed to the port of Douala in Cameroon and tendered notice of readiness to discharge the cargo. The plaintiffs asserted that there had been no attendance at Cornavin's office because they had received a "bizarre fax" from STC's solicitors advising that the *Chelyabinsk* was being withdrawn from charter service. They further asserted that the switch did not take place only because FESCO reneged on the agreement to do so.

10) The plaintiffs contended that on 14 December and 16 December 2005, BC had instructed FESCO to discharge the cargo under the bills of lading held by them in Douala. On 16 December 2005, CA also instructed FESCO to re-cut the bills of lading held by them and discharge the cargo under the bills of lading at Douala. However, FESCO did not comply with the instructions given on all these occasions. On 21 December 2005, the *Chelyabinsk* departed from Douala without discharging any cargo and arrived in Lome on 23 December 2005.

Events in Lome

11) On 22 December 2005, STC obtained a court order in Lome ("**Ruling No. 2062/2005**") for the arrest and detention of the cargo onboard the Chelyabinsk as security for STC's claim against Rustal for unpaid hire under the sub-charterparty. It was the plaintiffs' contention that their lawyer, Mr Robert Parson, had warned FESCO on the same day not to proceed to Lome as STC had obtained a lien order on the cargo. This was disputed by FESCO. On 24 December 2005, Rustal obtained a court order from the Lome Court ("**Ruling No. 2081/2005**") to prevent the discharge of the cargo from the *Chelyabinsk*.

12) After the *Chelyabinsk* arrived in Lome on 23 December 2005, Ruling No. 2062/2005 was duly served on it. STC then obtained a court order on 27 December 2005 ("**Ruling No. 2093/2005**") that

the cargo be unloaded and discharged into the custody of the *Compagnie Maritime d'Agence et d'Affretement*, the agent for the *Chelyabinsk*.

13) On 29 December 2005, the banks applied to the Lome Court to set aside Ruling No. 2093/2005 and reinstate Ruling No. 2081/2005 obtained by Rustal. FESCO was also granted a right of audience by the Lome Court in the proceedings by the banks. On 16 January 2006, the Lome Court set aside Ruling No. 2081/2005 obtained by Rustal and ordered the cargo to be discharged in Lome ("**Ruling No. 0023/2006**"). The Lome Court also found that STC was entitled to retain the cargo as security for their dispute with Rustal. Shortly after Ruling No. 0023/2006 was delivered, both Rustal and the banks obtained separate rulings for a temporary stay of execution of the ruling.

14) On 2 February 2006, the Lome Court of Appeal ordered the lifting of the stay of execution of Ruling No. 0023/2006. In compliance with Ruling No. 0023/2006, FESCO commenced discharge of the cargo on 4 February 2006 which discharge was completed in about mid February. As STC alleged that there was damaged and missing cargo, the *Chelyabinsk's* P&I Club issued security for STC's claim in the sum of €113,411. On 17 February 2006, STC obtained from the Lome Court an order for the arrest of the *Chelyabinsk* as security for its claim for damage to some of the cargo. This arrest order was set aside on 21 February 2006 but on the same day, the banks (CA, BCG and BNP Paribas) obtained a court ruling in Lome for the arrest of the *Chelyabinsk*.

15) The banks' claims in support of the arrest in Lome were essentially that:

(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 Douala in Cameroon where buyers had been found for the cargo;

(b) the *Chelyabinsk* had arrived in Douala 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; and

(c) in violation of the banks' instructions, the *Chelyabinsk* had sailed to Lome where the cargo was arrested, causing huge losses to the banks estimated at USD5.05m arising out of the discharge and detention of the cargo.

16) The arrest of the *Chelyabinsk* by the banks was set aside by the Lome Court on 24 February 2006 ("**Ruling No. 0164/2006**"). It is pertinent to note that in setting aside the arrest, the Lome Court made the following findings:

(a) that 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) that 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) that 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;

(d) that 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. As such, the *Chelyabinsk* would be

released and the banks were ordered to pay costs.

17) The next day, on 25 February 2006, the *Chelyabinsk* departed from Lome. There was no appeal to the Lome Court of Appeal against Ruling No. 0164/2006. Subsequently on 18 March 2006, the plaintiffs obtained a warrant of arrest against the *Vasily Golovnin* ("**the vessel**") in Singapore for the same claims as was brought in Lome. In the meantime, on 28 March 2006, the Lome Court of Appeal overturned Ruling No. 0023/2006, allowing the banks' appeal against the order that the cargo be discharged in Lome.

18) The plaintiffs asserted that they were unable to take up the cargo despite succeeding in their appeal on 28 March 2006. As they continue to be deprived of the cargo, they say that they are entitled to be secured for the full value of the cargo. Even if they were to eventually succeed in recovering the cargo, they would not be able to sell the cargo at a price equal to or above the price which the cargo would have fetched if it had been discharged and sold in Douala. Since the arrest against the *Chelyabinsk* was set aside in Lome, the plaintiffs arrested the vessel in Singapore as security for their claim.

The present proceedings

19) Counsel for FESCO, Mr Steven Chong SC, contended that the banks were not entitled to seek security in Singapore. Accordingly, FESCO sought to set aside the warrant of arrest and the writ of summons, and to obtain an award of damages for alleged wrongful arrest of the vessel. The grounds for FESCO's application were threefold. First, that there was an operative issue estoppel on the plaintiffs' rights to arrest the vessel in respect of the present claims; secondly, that this was a hopeless case which was doomed to fail; and thirdly, that there was massive and material non-disclosure by the plaintiffs when they obtained the warrant of arrest against the vessel. I shall deal with each argument in turn.

Issue estoppel

20) In *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241, the English Court of Appeal recognized that it was an abuse of process for an issue to be re-litigated in one jurisdiction after it had already been litigated in another jurisdiction. It is FESCO's position that the arrest of the vessel in Singapore constituted an abuse of process for which the warrant of arrest should be set aside. Mr Chong clarified that the issue estoppel raised by FESCO in the instant case specifically referred to the plaintiffs' right of arrest of the vessel in respect of the same claims under the bills of lading for which the Lome Court had already dealt with under Ruling No. 0164/2006.

21) The elements of issue estoppel were not in dispute here and they were, to my mind, satisfied in the circumstances. For present purposes, I agreed with the submissions raised by FESCO which were accurately and succinctly enumerated in their skeletal submissions. I do not propose to repeat them but only wish to highlight two points.

22) At first blush, the express reference in Ruling No. 0164/2006 to "provisional enforcement" (or "*l'execution proviso ire*" in French) suggested that there was a lack of finality in Ruling No. 0164/2006 for the purposes of founding issue estoppel. Going on a similar line of argument, the plaintiffs' Togolese lawyer, Mr Doe-Bruce, asserted that Ruling No. 0164/2006 was made by way of a provisional injunction and the Lome Court 8 had not determined the plaintiffs' claims against FESCO. Article 160 of the Togo Code of Civil Procedure also provided that provisional injunction rulings did not assume the nature of a final judgment but could be amended or resubmitted to the Court if fresh circumstances arose. In the the circumstances, the Lome Court of Appeal's ruling of 28 March 2006

constituted fresh circumstances which enabled the plaintiffs to institute fresh arrest proceedings in Lome.

23) Fortuitously, some guidance on this point can be sought from *The Irini A* [1999] 1 Lloyd's Report 189 where Tuckey J considered the nature of a Lome court order containing the same phase "*l'execution provisoire*" as was found in Ruling No.0164/2006. Essentially, Tuckey J found that the Lome court order was not in any sense interim or provisional. It was final and was incapable of revision by the court which pronounced it and would stand unless reversed on appeal. As such, the Lome court order satisfied the test for determining finality of a judgment as set out in *Nouvion v Freeman* (1889) App Cas 1, ie. Whether the judgment could be reopened by the same court which pronounced it.

24) In my opinion, *The Irini A* bolstered FESCO's stand that Ruling No. 0164/2006 was final and conclusive. The *Irini A* also supported the views of FESCO's Togolese lawyer, Mr Lawson-Banku, who confirmed that Ruling No. 0164/2006 could only be overturned by way of an appeal to the Lome Court of Appeal. As it was undisputed that the plaintiffs did not appeal against Ruling No. 0164/2006, it followed that Ruling No. 0164/2006 remained final and conclusive. Mr Doe-Bruce had also not at any time stated that Ruling No. 0164/2006 fell within Article 160. Moreover, I agreed with FESCO's argument that Mr Doe-Bruce's interpretation of Article 160 merely meant, at best, that the plaintiffs would be able to institute a *fresh* arrest in Lome if there were new circumstances arising. It did not mean that the fresh circumstances would allow the plaintiffs to *reopen* Ruling No. 0164/2006 before the same court which pronounced it. These were two very different situations.

25) Another point which merits highlighting was the plaintiffs' constant refrain that there was no identity of issues for the purposes of founding issue estoppel since the proper issue to be decided in Singapore was whether the plaintiffs were entitled to invoke the High Court's jurisdiction under the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) to arrest FESCO's vessel. The plaintiffs argued that this was different from the issue before the Lome court which was whether they had the right to arrest FESCO's vessel for their claims.

26) I was of the view that this argument was plainly unmeritorious. Where issue estoppel was raised in respect of an earlier foreign judgment, it was clear that the foreign judgment would have to be decided in accordance with the laws and the procedures of that country. The fact that the Singapore courts would have reached a different conclusion was immaterial. As was recognized in *The Sennar (No 2)* [1985] 1 WLR 490, issue estoppel operated regardless of whether or not an English (or Singapore) court would regard the reasoning of the foreign judgment as open to criticism. To adopt the plaintiffs' argument would lead to the peculiar situation where a foreign judgment could never give rise to an issue estoppel and this could not be correct.

No arguable case

27) It was FESCO's position that the plaintiffs' claims were wholly unmeritorious and doomed to fail. The arrest of the vessel was based on ss 3(1)(g) and 3(1)(h) of the High Court (Admiralty Jurisdiction) Act which provided that:

> 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 or 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;

28) FESCO submitted that the plaintiffs did not have an arguable case under ss 3(1)(g) and 3(1)(h) and the proceedings should be set aside in *limine*. Their reasoning went as follows. The essence of the plaintiffs' claims was that FESCO had breached the contracts of carriage by discharging the cargo in Lome and not Douala. It was apparent from the indorsement of claim that the plaintiffs' claims were based on the bills of lading and not on any collateral contracts. Three of the four bills of lading expressly stated Lome as the contractual port of discharge, and the plaintiffs themselves acknowledged this fact. Thus, FESCO had not acted in breach of any contracts of carriage contained in or evidenced by the bills of lading of which the plaintiffs were holders. Insofar as the plaintiffs' claims sought to contradict the bills of lading, they were seeking to introduce extrinsic terms which contradicted the written contracts. As such, the parol evidence rule applied to bind the hands of the plaintiffs who were not the shippers. The terms of the bills of lading were conclusive in the hands of the plaintiffs: *Bills of Lading: Law and Contract* at pars 2.22 to 2.24; *Carver on Bills of Lading* 2nd Ed 2005 at para 5-027; *Leducv Ward* (1888) 20 QBD 475.

29) In their first set of supplemental skeletal arguments, the plaintiffs raised seven grounds in contending that they had an arguable case against FESCO. The seven grounds related to FESCO's (a) purported breach of Article III rule 2 of the Hague Rules; (b) purported breach of duty as bailees of the cargo; (c) purported breach of agreement to discharge in Douala; (d) alleged wrongful compliance with STC's instructions to proceed to Lome; (e) refusal to comply with the plaintiffs' instructions to discharge at Douala; (f) failure to deliver the cargo to the plaintiffs as holders of the bills of lading; and (g) alleged wrongful failure to discharge the cargo under *Chelyabinsk O1-A* in Douala when the contractual port of discharge provided for "any African port". Counsel for the plaintiffs, Mr Kenny Yap, asserted that FESCO's argument as to the parol evidence rule was a narrow one and the plaintiffs were not proceeding solely on the basis of the bills of lading. For instance, their argument on Article III Rule 2 of the Hague Rules was not tied up with the bills of lading.

30) To my mind, any arguments by the plaintiffs that the discharge in Lome had breached any agreement or instructions to discharge at Douala were inconsequential as these did not impinge on the original contracts of carriage which clearly provided for Lome as the port of discharge. It remained that no agreement had been reached by the parties to switch the bills of lading and change the discharge port to Douala. Moreover, FESCO had been under both a legal as well was a contractual duty to discharge the cargo in Lome in February 2006 (although Ruling No. 0023/2006 was eventually overturned on appeal in March), and the plaintiffs did not contend that FESCO could have legitimately refused to comply with the said ruling then. In this light, the plaintiffs would have been hard pressed to take delivery in Lome even if FESCO had wanted to deliver the cargo to them. I also accepted that the discharge of the cargo bound for "any African port" in Lome did not constitute a breach of the bill of lading.

31) The plaintiffs' point on Art III rule 2 of the Hague Rules was that Art III rule 2 obliged the carrier to carry and care for the cargo. Accordingly, FESCO would be in breach of the said rule if they acted recklessly in carrying the cargo to Lome knowing that it would be arrested by STC. While Art III rule 2 was subject to the defence of 'restraint of princes' under Art IV rule 2(g), it was argued that the defence was not applicable to FESCO because it had foreseen the seizure of the cargo under legal process (since FESCO had purportedly been warned by Mr Robert Parson on 22 December 2005 of the lien order obtained by STC). Mr Yap contended that the plaintiffs' claim under Art III rule 2 would not contravene the parol evidence rule since it was not tied up with a claim under the bills of lading.

32) I was of the view that this argument did not advance the plaintiffs' case. The fact remained that their case, as indorsed on the writ of summons, was based on the bills of lading which provided for discharge of the cargo at Lome. FESCO had performed according to the express terms of the contract and discharged the cargo at Lome under legal compulsion (and under contract). As such, no issue arose as to whether FESCO needed to rely on the defence under Art IV rule 2(g) of the Hague Rules since it had, at all materials times, adhered to the terms of the contracts of carriage and declined to follow any directions by the plaintiffs which contradicted the express terms of the contracts of carriage. In the circumstances, it was clear that the plaintiffs' claims against FESCO under the bills of lading, as indorsed on the writ, were unsustainable.

Material non-disclosure

33) At the outset, Mr Chong highlighted that the affidavit filed in support of the arrest of the vessel ("**the affidavit**"), including exhibits, was substantial as it came up to about 399 pages altogether. The body of the affidavit comprised only about 16 pages.

34) Five main points were raised in support of FESCO's claim that there was material non-disclosure by the plaintiffs. First, the plaintiffs did not expressly inform the Assistant Registrar Mr David Lee ("**AR Lee**") who heard the application for a warrant of arrest that it was the Lome Court which had set aside the arrest of the Chelyabinsk following an *inter partes* hearing ("**the first point**"). Secondly, the plaintiffs' claims against FESCO were based on the bills of lading but they failed to expressly inform AR Lee that Lome was the contractual port of discharge under the bills ("**the second point**"). Thirdly, the plaintiffs failed to disclose explicitly that the purpose of switching the bills of lading, other than cutting them into different proportions, was to change the port of discharge from Lome to Douala ("**the third point**"). In respect of BCG, there were two counts of material non-disclosure in that the plaintiffs failed to mention that BCG had offered a letter of indemnity to FESCO on 21 December 2005 in consideration for discharging the cargo in Douala ("**the fourth point**"); and that the plaintiffs failed to mention that BCG had sought FESCO's confirmation that the cargo would be discharged in Lome according to BCG's instructions ("**the fifth point**").

35) In response, Mr Yap sought leave during the hearing before me to admit a fresh affidavit wherein he deposed to the events that transpired at the *ex parte* hearing before AR Lee. I did not accede to Mr Yap's request as I was of the view that it was neither appropriate nor fair to Mr Chong that the affidavit be admitted at that late juncture. Moreover, the second joint affidavit of Jean-Pierre Delahie and Pierre Dubouchet ("**the second joint affidavit**") had set out Mr Yap's version of events of the *ex parte* hearing. In the main, the second joint affidavit stated that the arrest papers and affidavit were given to AR Lee before the hearing who then had ample opportunity to read the affidavit and exhibits referred to therein. During the hearing, AR Lee informed Allen & Gledhill that he had read the arrest paper as well as the affidavit, and he did not require Allen & Gledhill to take him through the affidavit. A&G was asked to address certain specific issues as documented in the AR Lee's minute sheet. As such, A&G had no reason to believe that AR Lee had not read the affidavit beforehand.

36) In view of AR Lee's purported assertion that he had read the arrest papers and the affidavit and there was no need for counsel to bring him through it, Mr Yap argued that the above points raised by FESCO were unmeritorious. While it was not the plaintiffs' position that the first and second points were not material, they maintained that sufficient disclosure had been made to AR Lee. In respect of the first point, the Lome Release Order had been exhibited in the affidavit and they averred that AR Lee would also have seen the table of contents of the affidavit which revealed an exhibit described as "Copies of Lome Court Orders for release of vessel", evincing that the release of the *Chelyabinsk* was court ordered. As for the second point, Mr Yap argued that AR Lee's minute

sheet made it apparent that AR Lee had been referred to "tab 2" of the affidavit during the hearing, where the bills of lading were exhibited.

37) To my mind, the second point was a material fact which should have been disclosed to AR Lee at the *ex parte* hearing. However, I accepted Mr Yap's explanation in respect that AR Lee's attention had been drawn to the bills of lading at tab 2 of the affidavit even if it had been done in the context of reserving the plaintiffs' rights.

38) I also viewed the first point to be material but found that there had not been full and frank disclosure of that point. While Mr Yap sought to convince me that the first point had somehow been disclosed, I was unable to agree with his technical arguments. 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 submissions 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.

39) Even if AR Lee had intimated that he had read the affidavit, bearing in mind that the plaintiffs had submitted a lengthy affidavit running into hundreds of pages, it was incumbent on them to specifically bring such a material fact to AR Lee's attention during the hearing. I would concur with Baker J in *Intergraph Corporation v Solid Systems Cad Services Ltd* [1993] FSR 617 where he observed at page 625 that:

> 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 advises 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 the legal advises 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 it is presented to the eyes and/or the ears of the judge, it is not disclosed.

40) While Baker J also suggested that the court's attention did not have to be drawn to what it said it had seen, it is pertinent to note that the second joint affidavit of Jean-Pierre Delahie and Pierre Dubouchet did not distinguish between whether AR Lee had seen the exhibits in addition to reading the body of the affidavit. At the hearing before me, Mr Yap also said that AR Lee did not make any distinction between the body of the affidavit and the exhibits contained therein, nor put in any caveat that he had only seen the body and not the exhibits of the affidavit. In my view, if there was any room for doubt as to whether AR Lee had read the entire affidavit, including the exhibits, the onus would be on counsel to seek clarification. It cannot be emphasized enough that in an *ex parte* application for a drastic remedy of arrest, the applicant must ensure that all which should be seen by the court is in fact seen.

41) In respect of the third point, bearing in mind my finding that AR Lee's attention had been drawn to the bills of lading, I did not think that there was any material non-disclosure of the matter since express mention was made in the affidavit of CA's request to FESCO to discharge the cargo at Douala.

42) I next consider the fourth and fifth points. It was the plaintiffs' contention that the fourth

point was not something material which had to be disclosed to AR Lee. They argued that Waterson Hicks had not "offered" FESCO an LOI for the change in destination of the cargo, but had only "enquired" whether FESCO would be willing to discharge at Douala against a letter of indemnity. This merely served to assuage FESCO's concern that they were receiving conflicting instructions from STC. Moreover, the letter of indemnity was never in fact offered.

43) I disagreed with the plaintiffs that the fourth point did not have to be disclosed to AR Lee. It directly impinged on BCG'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.

44) As for the fifth point, I concurred with the plaintiffs that this was not a material non-disclosure as it did not unequivocally point to BCG desiring to take delivery in Lome but could just as well point to them making the best of the situation in the circumstances.

Whether damages should be ordered against the plaintiffs

45) In light of the foregoing, I found in favour of FESCO and set aside the writ of summons and the warrant of arrest. However, the fact that a writ or a warrant of arrest was set aside did not necessarily mean that damages should be automatically awarded to FESCO for the arrest of the vessel: *The Inai Selasih* [2006] 2 SLR 181. In *The Inai Selasih*, the Court of Appeal reiterated the principles governing a claim for damages for wrongful arrest, namely, that it must be shown that there was *mala fides* or malicious negligence, or *crassa negligentia*, on the part of the plaintiffs: *The Evangelismos* (1858) 12 Moo PC; 14 ER 945; *The Strathnaver* (1875) 1 App Cas 58 and *The Kiku Pacific* [1999] 2 SLR 595.

46) Applying these principles to the instant case, I did not think that the plaintiffs had acted maliciously or had been grossly negligent in applying for the warrant of arrest. They had honestly believed that they had valid claims against FESCO which they had been unable to satisfy in Lome. As Chao JA (as he then was) held in *The Inai Selasih*, being shown to be wrong could not *per se* amount to being malicious. I also found that the plaintiffs' non-disclosure of material facts before AR Lee was not deliberate or calculated at misleading or distorting the truth.