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Material Non-disclosure: Court of Appeal Clarifies Burden on Arresting Party

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Summary

The High Court has clarified the degree of disclosure required on an application for a warrant of arrest following *The Vasiliy Golovnin*.(1) An arresting party is not required to show that it is likely to win the case on the merits before invoking the Singapore court's admiralty jurisdiction. Rather, it must merely show that the court has *prima facie* jurisdiction *in rem* in the matter under the High Court (Admiralty Jurisdiction) Act.(2) The duty to make full and frank disclosure is meant to ensure that the Singapore court's power of arrest is not being abused or misused by the arresting party.

This decision is timely and clarifies the threshold of an arresting party's duty to make full and frank disclosure following *The Vasiliy Golovnin*, a major admiralty decision by the Singapore Court of Appeal in 2008 (for further details please see "Court of Appeal rules on wrongful ship arrest").

Facts

The plaintiffs were the disponent owners of the TS Bangkok, which had sub-chartered the vessel to the defendants. During the sub-charter the TS Bangkok grounded in Tanjong Priok, an unsafe port or berth, sustaining hull and propeller damage. The head owner of the TS Bangkok sought to recover damages from the plaintiffs; they, in turn, sought to recover from the defendants. The defendants' insurers failed to offer security, despite repeated demands from the plaintiffs' lawyers. Therefore, the plaintiffs arrested the defendants' vessel, the Eagle Prestige, in Singapore. Unknown to the plaintiffs, the Eagle Prestige had been sold to a third party, Capital Gate Holdings, after the writ *in rem* had been issued. Capital Gate Holdings intervened, applied

to set aside the arrest and claimed damages for wrongful arrest.

The intervener's principal argument in the application was that the plaintiffs had failed to make full and frank disclosure of material information at the arrest application. In particular, the intervener alleged that the plaintiffs had not disclosed: (i) Clause 90 of the sub-charterparty, which the intervener claimed would have completely absolved the defendants of liability; and (ii) the fact that they were defending the head owner's claim by relying on Clauses 90 and 102 of the head charterparty.

Furthermore, the intervener argued that in *The Vasiliy Golovnin*, the Court of Appeal had decided that a party seeking an arrest must show in the arrest application that there is a good arguable case on the merits of the claim. It claimed that the court had enlarged the arresting party's duty to disclose material facts, which included plausible defences on the merits. Therefore, because of that enlargement, there was a need to show a good arguable case on the merits at the application stage.(3) The plaintiffs argued that the intervener's arguments had "muddled the issues of a lack of jurisdiction with issues of non-disclosure".(4)

Decision

Rejecting the intervener's arguments, the High Court found for the plaintiffs and declined to set aside the arrest. The court held that the decision in *The Vasiliy Golovnin* did not purport to depart from the legal principles enunciated in *The St Elefterio*(5) by enlarging the duty of full and frank disclosure.

The court also clarified that *The Vasiliy Golovnin* stands for the proposition that an arresting party need merely prove that it has a good arguable case that the "cause of action falls within one of the categories" provided for in Section 3(1) of the act. This section sets out the types of claim for which a vessel can be arrested, including claims for repairs and materials supplied, and for damage caused by a ship. The arresting party need not go further and prove at the arrest stage that it has a good arguable case on the merits.

The court reaffirmed that although shipowners may have plausible defences on the merits, this does not negate the court's admiralty jurisdiction *in rem*. The court clarified that the disclosure of plausible defences during the application for a warrant of arrest would be relevant only in order to ensure that there is no abuse of process.

At an application for arrest, the court is generally concerned with questions of its jurisdiction *in rem* and a concern that its discretionary powers of arrest should not be abused. The arresting party merely needs to show a good arguable case that the claim falls within Section 3(1); it need not show that the claim will ultimately succeed. The omission to disclose defences on the merits

would therefore not generally be characterised as a failure to make full and frank disclosure.

The merits of the case arise only when there is a strong defence that will deliver "a knock-out blow" to the claim summarily, and it is obvious that its non-disclosure at the application stage constitutes (or is tantamount to) an abuse of process. In this regard, the High Court implicitly distinguished *The Vasiliy Golovnin*, in which there was such a 'knock-out' defence on the facts of that case.(6)

The court confirmed that parties can still strike out a writ *in rem* and warrant of arrest at an early stage. Such proceedings can be halted *in limine* (ie, before hearing the main matter) because they are frivolous or vexatious under Order 18, Rule 19 of the Rules of Court or under the court's inherent jurisdiction. In such situations, the court must assess the sustainability of the action - it is at this stage that the validity or strength of the claim is relevant. The burden is on the defendant to show that the case is wholly and clearly unarguable.

Comment

The decision settles the scope of an arresting party's duty to make full and frank disclosure, and confirms that it has not become more difficult to arrest a vessel in Singapore following the Court of Appeal's decision in *The Vasiliy Golovnin*.

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Endnotes

(1) [2008] 4 SLR(R) 994.

(2) Cap 123, Revised Edition 2001.

(3) *The Eagle Prestige*, Paragraph 40.

(4) *Id*, Paragraph 30.

(5) [1957] 1 Lloyd's Rep 283.

(6) *The Eagle Prestige*, Paragraph 54.