Wrongful Arrest by John Harris, Adv. & Yoav Harris, Adv., Harris & Co Maritime Law Office (Israel)

Introduction - The two detentions of Vasiliy Golovnin

Admiral Vasiliy Mikhaylovich Golovnin was a 19th century Russian navigator and explorer. In 1811, while attempting to survey one of the Kuril Islands, sandwiched between Russia and Japan and subject then of rival sovereignty claims by both countries, he was accused by the Japanese of having strayed too close to the island[1]. He spent the next two years in a Japanese prison – as at the time there were no established international conventions on how to deal with such transgressions[2].

Almost 200 years later, again a Vasiliy Golovnin was arrested - this time an arrest of a vessel named after the Russian admiral, which was arrested by the Singapore court. This time, thanks to international maritime law conventions and Singapore shipping practice, the vessel was promptly released, the maritime claim was denied, and the question of awarding damages for wrongful arrest was to be decided.

The Saga that lead to the Arrest

The saga, as described by the Singapore Court of Appeal, began around September 2005 with “FESCO”, the Owners of the vessels named "*Chelyabinsk*" and “*The Vasiliy Golovnin”*, chartering the *Chelyabinsk* to main charterers named "STC" which in turn sub-chartered the vessel to a company named "Rustal SA”[3].

Rustal SA was financed by two Swiss banks ("Credit Agricole" and "BCG") (collectively "the Banks") who received the relevant Bills of Lading relating to the cargos carried by the vessel, as security.

[1] https://en.wikipedia.org/wiki/Vasily_Golovnin;

[2] Suit No: CA 109/2007, 110/2007, Adm n Rem 25/2006, RA 214/2006, RA 214/2006, 216/2006, The "Vasiliy Golovnin", Singapore Court of Appeal, Decision dated 19 Sep, 2008, paragraph 1,2.

[3] Foot note 2 above "The Vasiliy Golovnin", paragraphs 9- 25.

The chartered vessel *Chelyabinsk* began its voyage, first with the loading of what was named as a cargo of 5,100 m/t "Chinese Rice" at Nanjing for discharge at "any African Port". Three B/L were issued. Thereafter, the vessel proceeded to Kakinada, India where it loaded a cargo of 15,000 m/t "Indian Rice". Five B/L were issued stipulating the port of discharge as the port of Lome', Togo.

After a request by Rustal, STC instructed the vessel to proceed to Abidjan where part of the Indian rice (two of the total five B/L) was discharged in exchange for letters of indemnity issued by STC. In early December 2005, Rustal also requested STC to affect a switch of the Lome' B/L's and have the cargo discharged at Douala, Cameroon.

The switch of STC's letters of indemnity with FESCO's original B/Ls and the surrender of the new B/L's was scheduled to take place at FESCO's brokers' offices in Surrey, England. However, neither Rustal's staff nor its agents turned up at the appointed time to effect the switch, and the Lome' B/Ls were never switched.

STC ordered FESCO not to switch the Lome' bill of ladings, ordered it not to enter the port of Douala and to navigate to the port of Lome' and have the cargo discharged there. It now emerged that STC [the main charterer) was in dispute with Rustal [the sub-charterer] about un-paid hire.

At the same time, the Owners, FESCO, received conflicting requests from the Bank's solicitors, to discharge the cargo at Douala in exchange for letters of indemnity. FESCO followed the main charterer (STC) instructions and discharged the cargo at Lome'.

STC obtained from the Lome' Court an order for the detention after discharge of the cargo as a security for its claim against Rustal. When the cargo was discharged (at Lome' Port) STC argued that part of the cargo was damaged and the Owner's P&I club provided a letter of undertaking as security.

The Banks also joined the "legal happening" and arrested the vessel for what was alleged as Owner's refusal to discharge the cargo at Douala and for the alleged damage to the cargo. Within 3 days, the arrest

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was lifted as the Court of Lome' held, inter alia, the following: (**1**) That the Banks must have known that the Owners were bound to follow the instructions provided by STC; (**2**) That the cargo was discharged at Lome' which was the port stipulated as port of discharge in the B/L's and was also discharged following the orders of the Court of Lome'; (**3**) That sufficient security was already provided for the alleged claim for damage to the cargo; (**4**) That, accordingly, the Banks had no right to arrest the vessel.

The Banks ex-parte sistership arrest in Singapore

The Banks did not appeal against the Lome' Court's release order and one day after the time allowed for such an appeal had expired, the Banks applied ex-parte to the duty register in the Singapore Court and arrested the M/V Vasiliy Golovnin as a sister-ship arrest, on the very same claims earlier made, unsuccessfully to the court in Lome'.

The Singapore Court's decision

Following an application filed by FESCO the arrest-order was set aside by the Singapore Court which held, inter alia, the following: (1) That it was an abuse of process for the Banks to arrest one of FESCO's vessels again, as an issue of estoppel had arisen by the reasoning of the earlier decision of the Togolese Court; (2) That the Banks claim was unmeritorious as the Banks had no arguable claim against FESCO; (3) That the Banks failed to disclose material facts to the duty register when applying *ex parte* for the arrest.

Nevertheless, the Singapore Court did not award FESCO damages for wrongful arrest as the Judge felt that the Banks had honestly believed that they had valid claims against FESCO.

The Appeal before the Singapore Court of Appeal

An appeal was filed by FESCO, and the Singapore Court of Appeal began its legal voyage in the matter of wrongful arrest by introducing the Evangelismos Test of 1858[4] which sets a high threshold for awarding damages in wrongful arrest cases.

In that matter, a vessel was arrested on the cause of action of damage done by a ship in relation to a collision where a vessel hit a barge. However, it turned out that the arrested vessel was not the one that had been in collision with the barge. No damages for wrongful arrest were ordered as the court found that the arrest was a genuine mistake supported by an honest belief.

The Evangelismos test (1858):

The Evangelismos test laid out in the following two terms:

The first term: *"Undoubtfully there may be cases in which there is either mala-fides, or that crassa negligentia, which implies malice, which would justify a court of admiralty giving damages, as in action brought in Common law damages may be obtained"*. The other part of the test states the following: *"The real question in this case… 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 with so little foundation, that it rather implies malice on behalf of the Plaintiff, or that gross negligence which is equivalent to it?"*[5].

Some understanding of the above Evangelismos test of 1858, can be found in number of following decisions.

In *The Cheshire Witch*[6] (1864) the vessel was arrested "in a cause of damage". The defendant shipowners couldn't procure bail and the vessel remained under arrest until the claim was heard and denied in a judgement awarding also costs in favor of the defendant shipowner. Although the claimant did not file a notice of appeal he applied to the court and obtained an order for the vessel to be detained for a further period of 12 days while he considered filing an appeal. At the end of the 12 day period, the claimant decided not to appeal. The vessel was released and damages for wrongful arrest were awarded.

In *The Margaret Jane*[7] (1869) a "receiver of the wreck" had valued a salvaged vessel at £746, which was

[4] The Evangelismos (1858) 12 M00 Pc 352;

[5] Foot note 2 above "The Vasiliy Golovnin", paragraph 113.
[6] *The Cheshire Witch* (1864) Br& Lush 362;
[7] *The Margaret Jane* (1869) LR 2 A & E 345

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below the minimum value of £1000 required for the admiralty court to have jurisdiction over the property the salvors having commenced proceedings in the Admiralty Court claiming £2,500.

The salvors applied for an appraisement of the vessel and eventually abandoned the claim. The shipowner claimed damages for wrongful arrest on the grounds that when the salvors instituted the suit, they were aware that the admiralty court had no jurisdiction as the value of the property salvaged was below £1,000. It was held, that there was no mala fides in this case but the salvors must have been aware within a short time after taking out their appraisement application, that the valued fixed by the receiver was correct, and that they were therefore liable in damages for the period from that point of time and until they released the vessel.

In *The Catchart* (1867)[8] the parties were involved in a financial scheme, including a mortgage, involving a vessel. The Plaintiff arrested the vessel, inter alia, on grounds of non-payment under the terms of the mortgage. It transpired that the contractual arrangement clearly did not support such a claim. Dr Lushington held that it must have been obvious to the plaintiff that they had arrested the vessel when no moneys were due to them and just on the eve of commencing a profitable voyage. The court held that the plaintiffs liable for damages and costs. This case suggests that a gross mistake can amount to *crassa negligentia*.

Most of the above cases were considered in *The Kommunar (No 3*). In an earlier judgement (The Kommunar (No 2) [1997] Lloyd's Rep 8), the court set aside the arrest of the vessel given that the defendant owners at the time of the arrest were not the same legal entity as the owners, charterers or party in possession of the vessel at the time when the cause of action arose. However, due to the fact that the change of ownership was a result of Russian Federation privatization legislation, the court held that there was no proof of mala fides or crassa negligentia on part of the plaintiffs, and the owners claim for damages for wrongful arrest was denied.

[8] The Catchart (1867) LR 1 A & E 314;

The Reasoning for the Evangelismos test:

Despite being decided 150 years ago, the Evangelismos test continues to prevail in several other parts of the commonwealth countries including Canada, New Zealand, Hong Kong and United States.

Considering the well-known fact that even a delay of few hours in a sailing vessel's schedule might cause the shipowner financial damages, the question is, what is the rationale with this strict rule (from shipowners' point of view) that has withstood the test of time in many commonwealth countries?

The answer to this is as follows[9], at the time when the Evangelismos matter was decided in 1858, in-rem proceedings were commenced by a warrant of arrest and the jurisdiction of the admiralty court was properly invoked only upon the arrest of the ship. In other words, the arrest of the vessel was required for the act of "opening the courts file". For this reason, same as a "regular" commercial claimant should not be held liable for damages simply for using his right to file a claim, liability for wrongful arrest would only arise in a situation analogous to malicious prosecution where the action was commenced with malice.

But that answer would allegedly be persuasive only until the year 1873 when the Supreme Court of Judicature Act (c 66) (UK) was enacted and changed the practice of commencing admiralty proceedings – to the introduction of a writ of summons. Which means, in other simple words, that since 1873 there was no need for an arrest of the vessel to "simply open the courts' file", a writ of summons was sufficient.

The historical reason for the high threshold of the Evangelismos test seemed to have sailed away in the year 1873, but still the test remained.

And the reason being, that still, the Evangelismos test serves a wider maritime-law economic policy.

Although the admiralty jurisdiction of the court can now be invoked without an arrest, still the arrest of the vessel provides security for the maritime claim which can't be defeated by insolvency, and which is

[9] Foot note 2 above "The Vasiliy Golovnin", paragraph 124

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exclusively available only to maritime claims. The arrest has an effect of bringing the shipowner to furnish security which in today's modern world can be provided by a letter of undertaking from the owner's P&I Club and have the vessel relatively quickly released.[10]

Therefore, for the time being, the Singapore Court of Appeal did not depart from the Evangelismos test when deciding if FESCO is entitled to damages for a wrongful arrest. However, the Court did provide a different application of the test.

The Singapore Court's emphasis on the second part of the test:

Instead of focusing on the first part of the test - seeking for mala-fides in the subjective plaintiff's state of mind, the Court held that the focus should be made on the second part of the test. The facts are to be used in order to assess if the action and the arrest were brought "unwarrantedly" or with "so little color" or "with little foundation" - which implies malice on behalf of the plaintiff.

Coming back to the current matter of the Banks arresting the *M/V Vasili Golovinin*, after observing the relevant facts, the Court held that the Banks couldn't be fairly said that they had an honest belief that they had a valid claim. First, the Banks unreasonably persisted in arresting the sister-ship of the chartered vessel in Singapore, after their claim had been disposed of in Lome', not-withstanding that the Lome' Court had already ruled that sufficient security had been provided for the loss and damage of the cargo-claim. Second, the alleged breach of contract claim (against FESCO) was entirely without substance and indeed without any foundation whatsoever. Third, the Banks failed to disclose material facts in the ex-parte hearing before the duty register. The Court found that a groundless claim was filed by the Bank and the material facts were omitted and that a draconian remedy was recklessly sought. The Banks were to accept the painful consequences of having abused the judicial process and that damages against the Banks are to be assessed.

After Thoughts

It seems that one of the key examinations is, according to the facts, a plaintiff arrested a vessel ex-parte under an action brought with so little color and with little foundation, would be the manner in which the plaintiff did or did not disclose material facts. The deliberate non-disclosure of material facts would imply that the plaintiff is aware of the fact that the claim is without sufficient foundation, which might lead to the conclusion that the plaintiff did not have the subjective, honest belief that the claim was properly brought. This is an example of how an objective examination of the facts disclosed in the pleadings can result in a conclusion as to the subjective state of mind, and pushing the owners over the threshold of the 1858 Evangelismos test.

In this article we have focused on the common law approach as presented by the Singapore Court of Appeal and its approach as to the manner in which the Evangelismos test of 1858 should be interpreted.

After the CMI meeting in Hamburg 2014 an international working group ("IWG") on the liability for wrongful arrest was established. Further developments and the diversity between different jurisdictions and the terminology of the degree of the behavior of the applicant-arrestor when assessing liability for wrongful arrest can be found in the IWG's paper works, and should be followed. [11]

[10] Foot note 2 above "The Vasiliy Golovnin", paragraph 131

[11] Discussion Papare on Liability for wriongful Arrest of Ships. Proposed by Dr. Aleka Sheppard, the Chairman of the IWG of CMI, for debate at the CMI meeting to be held on 9 November 2018, London.

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