

SOUTH AFRICA / JUDGMENT

China National Chartering Co Ltd v MT GC Guangzhou and Others (A71/2011, A70/11, A72/11, A75/11, A77/11, A80/11) [2011] ZAKZDHC 57 (2 September 2011)

[2011] ZAKZDHC 57

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Ploos van Amstel

CASE / FILE NUMBER

A71/2011

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IN THE KWAZULU-NATAL HIGH COURT, DURBAN REPUBLIC OF SOUTH AFRICA

CASE NO: A71/2011

and A 70/11, A72/11, A75/11, A77/11, A80/11

In the matter between;

China National Chartering CO LTDApplicant

and

MT "GC Guangzhou"First Respondent

GC Gaungzhou PTE LTDSecond Respondent

The Master of the MT " GC GaungzhouThird Respondent

Judgement

DATE: 02- SEPTEMBER 2011 Ploos van Amstel, J [1] The mt GC Guangzhou was arrested in July 2011 pursuant to orders granted in a number of applications brought in this court. The applicants in the various applications were Tumac Corporation from the Marshall Islands (case A70/2011), China National Chartering Co Ltd from Beijing (case A71/2011), Shagang Shipping Co Ltd from Hong Kong (case A72/2011), Korea Line Corporation from Seoul (case A75/2011), C Transport Cape Size Ltd from The Isle of Man (case A77/2011) and Eastern Ocean Transportation Co Ltd from Hong Kong (case A80/2011). All the orders were sought and granted in terms of s 5(3) of the Admiralty Jurisdiction Regulation Act of 1983 in order to provide security for claims brought by the applicants in arbitration proceedings in London. [2] By agreement between the parties the

only application which was argued before me was case A71/2011, on the basis that the order which I make will also be made, *mutatis mutandis*, in each of the other applications. The references in this judgment to the applicant and the respondents are therefore references to the parties in case A71/2011. They are China National Chartering Co Ltd, at whose instance the arrest was obtained, the mt GC Guangzhou (the vessel under arrest) and GC Guangzhou Re Ltd (the owner of the vessel). The Master of the vessel is the third respondent but took no part in the proceedings. [3] The vessel under arrest is not the vessel in respect of which the applicant's claim arose. It was arrested on the basis that it and the vessel which is the subject of those claims (the mv Global Commander) are associated ships as contemplated in s 3

(7) of the Act. The vessel was released from the arrest after the claim was secured by way of an escrow agreement, but is deemed to remain under arrest in terms of s 3(10)(a) of the Act. [4] The applicant's claim in the arbitration arises out of a charterparty between it and Grand China Shipping (Hong Kong) Co Ltd

relating to the mv Global Commander. It was a time charter for a voyage from Australia to China for the carriage of a cargo of bulk iron. The applicant in turn concluded a voyage charter with Seawin Chartering Ltd, after which two further sub-charters were concluded. The main charter was terminated before the voyage was undertaken. The reason for this, and the lawfulness thereof, must be determined in the arbitration. The applicant's claim relates to the repayment of hire and damages. [5] The parties before me were agreed that for current purposes it may be accepted that the applicant has a claim as contemplated in s 5(3) and a reasonable need for security. The only issue is whether it has been shown that the vessel under arrest (to which I will refer as 'the vessel') and the mv Global Commander were associated ships at the relevant time. [6] Counsel were agreed that the relevant part of S 3(7), for present purposes, is ss (7)(a)(iii), which, *paraphrased*, provides that an associated ship means a ship other than a ship in respect of which the maritime claim arose, owned by a company which is controlled by a person who controlled the company which owned the ship concerned when the maritime claim arose.

Judgement

DATE: 02- SEPTEMBER 2011

Ploos van Amstel, J

[1] The mt GC Guangzhou was arrested in July 2011 pursuant to orders granted in a number of applications brought in this court. The applicants in the various applications were Tumac Corporation from the Marshall Islands (case A70/2011), China National Chartering Co Ltd from Beijing (case A71/2011), Shagang Shipping Co Ltd from Hong Kong (case A72/2011), Korea Line Corporation from Seoul (case A75/2011), C Transport Cape Size Ltd from The Isle of Man (case A77/2011) and Eastern Ocean Transportation Co Ltd from Hong Kong (case A80/2011). All the orders were sought and granted in terms of s 5(3) of the Admiralty Jurisdiction Regulation Act of 1983 in order to provide security for claims brought by the applicants in arbitration proceedings in London.

- [2] By agreement between the parties the only application which was argued before me was case A71/2011, on the basis that the order which I make will also be made, *mutatis mutandis*, in each of the other applications. The references in this judgment to the applicant and the respondents are therefore references to the parties in case A71/2011. They are China National Chartering Co Ltd, at whose instance the arrest was obtained, the mt GC Guangzhou (the vessel under arrest) and GC Guangzhou Re Ltd (the owner of the vessel). The Master of the vessel is the third respondent but took no part in the proceedings.
- [3] The vessel under arrest is not the vessel in respect of which the applicant's claim arose. It was arrested on the basis that it and the vessel which is the subject of those claims (the mv Global Commander) are associated ships as contemplated in s 3
- (7) of the Act. The vessel was released from the arrest after the claim was secured by way of an escrow agreement, but is deemed to remain under arrest in terms of s 3(10)(a) of the Act.
- [4] The applicant's claim in the arbitration arises out of a charterparty between it and Grand China Shipping (Hong Kong) Co Ltd

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- [6] Counsel were agreed that the relevant part of S 3(7), for present purposes, is ss (7)(a)(iii), which, *paraplrased*, provides that an associated ship means a ship other than a ship in respect of which the maritime claim arose, owned by a company which is controlled by a person who controlled the company which owned the ship concerned when the maritime claim arose.
- [7] I think it is useful to consider first what it means to say, in the context of s 3(7)(a)(iii), that a company is 'controlled' by a person. The starting point is the deeming provision in ss (7)(b) (ii), which provides that for the purposes of para (a) a

person shall be deemed to control a company if he has power, directly or indirectly, to control the company. [8] The sub-section was considered in *mv Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD*.¹ Smalberger JA said in the majority judgment that the sub-section distinguishes between direct and indirect power. Indirect power can only refer to the person who *de facto* wields power through, and hence over, someone else. The latter can only be someone who wields direct power *vis -a- vis* the company and the outside world and who, therefore, in

the eyes of the law (i.e. de jure), controls the shareholding and thus determines the direction and the fate of the company.² [9] Counsel were agreed that although we are dealing with an application to set aside the arrest the onus to justify the arrest remains on the original applicant at whose instance the arrest was obtained. [10] It was common cause before me that the second respondent (the owner of the vessel) is wholly owned by GC Tankers Pte Ltd. The shareholders of GC Tankers are Center Securities Ltd (40%), Hainan American Ltd (10%), Grand Columbia Shipping Ltd (25%) and Grand Mississippi Shipping Ltd (25%). The latter two companies are wholly owned by Mega Bulk Holdings Co Ltd. Both it and Grand China Shipping (Hong Kong), the owner of the mv Global Commander, are subsidiaries of Grand China Logistics Holding Co Ltd, a company in the HNA Group. The HNA Group is a large Chinese conglomerate which operates in the aviation, shipping and other industries through a variety of subsidiary and associated companies. [11] The parties approached the matter before me on the basis that the HNA Group controls the company which owns the mv Global Commander and also controls the two companies which together own 50% of the company which owns the vessel under arrest. [12] The applicant's contention that the ships are associated is based on the averment that the HNA Group probably also controls Hainan America, which owns 10%. In that event it will control 60% of the shareholding in GC Tankers. [13] The basis on which the applicant says the HNA Group probably controls Hainan America is the following: (a) A subsidiary of the HNA Group, Pacific American Corp, was previously known as Hainan America Co Ltd. It was registered in New York in June 1991. (b) That name is virtually identical to the name of Hainan America Ltd (Bermuda), which was incorporated in July 1994. The suggestion by the respondents that Mr Liu chose that name because the province of Hainan had been established as China's largest special economic zone and because the other two shareholders (Ms Ming Liu and Mr Guoqing Chen) lived in America seems unlikely, having regard to the fact that at that time Hainan America Co Ltd (New York) was still known as such. Its name was only changed to Pacific American Corp in 1999. Mr Liu was at the time (and still is) employed by the HNA Group. It is not likely that he would have chosen a name for a private investment company which is so similar to one of his employer's subsidiaries. (c) One of the shareholders in Hainan America (Mr Guoqing Chen) is the chairman and chief executive of Pacific American Corp. (d) Mr Liu is a longstanding employee of the HNA Group and is a former executive of a number of subsidiaries and the current chief

executive of an associated company. (e) If HNA controls 60% of the shareholding in GC Tankers then it controls the board of directors, as four votes constitute a

majority. (f) GC Tankers is referred to in a web site relating to companies in the HNA Group as a subsidiary of Grand China Logistics. This will be an accurate description if the 10% held by Hainan America is held by it for the HNA Group as beneficial owner. [14] There is however a dispute on the papers in this regard. The respondents deny that Hainan America is controlled by the HNA Group and say it is a private investment vehicle owned by Mr Liu, his sister and her husband. [15] Counsel for the applicant urged me to refer the matter to oral evidence. He submitted that the discovery process and cross-examination will probably reveal that the applicant's contention with regard to Hainan America is correct. [16] Counsel for the respondents submitted that there is no point in referring the matter to oral evidence. He argued that even if

the HNA Group controlled 60%, which is disputed, then it will still not have the power to control GC Tankers because of the provisions of the written shareholders agreement. [17] Clause 5.1 of the agreement provides that a quorum for a general meeting of the company shall be four members present in person or by proxy. Clause 5.2 provides that the company shall not without the prior resolution and consent of 75% of the votes of shareholders at a general meeting take any of the actions listed in that clause. Those matters include changing the nature of its business or the manner in which it is conducted, changing the name of the company, purchasing any vessel, chartering any vessel for a period exceeding five years, selling any part of its undertaking or assets, merging with or acquiring shares in another company, and so on. [18] Clause 6 provides for seven directors. Grand Columbia Shipping is entitled to appoint one director, Grand Mississippi Shipping two, Hainan America one and Center Securities three. Decisions of the board are taken by a majority vote. [19] Oral evidence may well show that Hainan America is controlled by the HNA Group. But it seems to me that counsel is correct in submitting that 60% is not enough to control the company in the context of s 3(7). In the light of the shareholders agreement one requires control of 75 % to control the company. It is perfectly in order to arrange one's affairs in such a way as to avoid the effect of statutory provisions, provided of course that the arrangements are genuine and not simulated so as to disguise the true position. [20] This raises the question whether the HNA Group controls Center Securities. Most of the factors which suggest that it may control Hainan America do not apply to Center Securities. [21] Mr Ma is an experienced businessman in the shipbroking industry and has been friends with the chairman and vice-chairman of the HNA Group for a long time. The respondents' case is that Mr Ma and his friends in the HNA Group decided to form a joint venture in the tanker business, which resulted in me IOimauon or viv, lariKers in jauuaiy zwiw. nicy say uuu ivii ivio. was familiar with influential people involved in the Chinese crude oil market and that he had a close relationship with China's biggest oil importer. The arrangement was that the HNA Group and Mr Ma would each own 50% of the shareholding. The HNA shareholding was split between two of its subsidiaries, Grand Columbia Shipping and Grand Mississippi Shipping. Mr Ma offered 10% of his shareholding to a friend, Mr Liu, who put the shares in Hainan America Ltd. [22] The applicant says it is unlikely that a conglomerate of the size of the HNA Group would want to enter into a joint venture with an individual. It also says it is unlikely that Mr Ma would have been able to finance his share of the joint venture, which acquired two tankers (the mt GC Guangzhou and the mt GC Haikou) at a total cost in excess of USD 100m. It says the mt GC Haikou has recently been transferred from GC Haikou Pte Ltd to a newly established company, GC Haikou BB Pte Ltd, the sole shareholder of which is Grand China Asset Management Corp Ltd, which is controlled by the HNA Group. Another new company has been established, with the name GC Guangzhou BB Pte Ltd, with the same shareholder. The mt GC Guangzhou however remains registered in the name of the second respondent. One of the directors of each of the two new companies is Mr Shuang Wang, who is also a director of GC Tankers, having been appointed to that position by Grand Columbia Shipping Ltd. [23] The respondents say there is nothing untoward about this. The funds to acquire the vessels were obtained in the form of bridging finance from private investors, who were willing to provide the loans in the light of the reputations of the HNA Group and Mr Ma. The transfer of the mt GC Haikou to a subsidiary of Grand China Asset Management

Corp was part of the refinancing to replace the bridging finance, which involved the sale of the vessel to the subsidiary and bareboat chartering the vessel back to GC Haikou Pte Ltd, which is a common way of financing the acquisition of a ship. The same arrangement was intended in respect of the mt GC Guangzhou, but has not been implemented yet. [24] The application papers do not make a case for the conclusion that the HNA Group controls the 40% in GC Tankers held by Center

Securities. I am not persuaded that there is a reasonable prospect that oral evidence will show that it does. The applicant has not identified particular witnesses whom it would want to call to testify. I think the suggestion is rather that it would like to obtain discovery of documents and have the opportunity to cross-examine the various persons referred to in the respondents'

affidavits. Most of these people are from China or America. They will have to come to Durban for something akin to a trial on an issue which will not be directly relevant in the arbitration proceedings in London, namely whether or not the vessel under arrest is available as security. I do not think the evidence before me justifies such an exercise. For all I know the evidence may show that the position is as has been described in the respondents' affidavits³. I am in the circumstances not prepared to exercise my discretion to order that oral evidence be heard. [25] It follows that the applicant has not shown that the two vessels are associated ships and the arrest cannot stand. In the result I make the following order: (1) The arrests and deemed arrests of the mt GC Guangzhou m case numbers A 70, A71, A72, A75, A77 and A80 of 2011 are set aside; (2) The sheriff of this court is directed to release the vessel from arrest; (3) The applicant is ordered to pay the costs of the applications to set the arrests aside; (4) The parties are given leave to approach this court on the same papers, supplemented if necessary, if any further orders need to be made relating to costs or the release of security provided pursuant to the arrests. PLOOS van AMSTEL J Appearances: For the Applicants: Mr. S. R. Mullins S C with Mr. P. J. Wallis Instructed by: Shepstone & Wylie Durban For the 1st and 2nd Respondents: Mr. D. Gordon S C Instructed by: Edward Nathan Sonnenberg Durban Date of Hearing: 22 August 2011 Date of Judgment: 02 September 2011

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[25] It follows that the applicant has not shown that the two vessels are associated ships and the arrest cannot stand.

In the result I make the following order:

- (1) The arrests and deemed arrests of the mt GC Guangzhou m case numbers A 70, A71, A72, A75, A77 and A80 of 2011 are set aside;
- (2) The sheriff of this court is directed to release the vessel from arrest;
- (3) The applicant is ordered to pay the costs of the applications to set the arrests aside;
- (4) The parties are given leave to approach this court on the same papers, supplemented if necessary, if any further orders need to be made relating to costs or the release of security provided pursuant to the arrests.

PLOOS van AMSTEL J

Appearances:

For the Applicants: Mr. S. R. Mullins S C with Mr. P. J. Wallis

Instructed by: Shepstone & Wylie Durban

For the 1st and 2nd Respondents: Mr. D. Gordon S C

Instructed by: Edward Nathan Sonnenberg Durban

Date of Hearing: 22 August 2011

Date of Judgment: 02 September 2011

1 1999

(3) SA 1083 SCA

21106 para [9]

³See in this regard *Bocimar NV v Kotor Overseas Shipping Ltd* [1994] ZASCA 5; 1994 (2) SA 563 AD at 5S6E to 5S7G

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