COMMERCIAL S A v ASSURANCEFORENINGEN SKULD (GJENSIDIG)

2011 SCJ 432

IN CHAMBERS
Record No. CH 607/11 (Bis)

IN THE SUPREME COURT OF MAURITIUS
(COMMERCIAL DIVISION)

In the matter of:

Assuranceforeningen SKULD (Gjensidig)

Applicant

v.

1. **Navinord S.A.**
2. **Commercial S.A.**
3. **The shipping vessel MARKELLA**

Respondents

In the presence of:

1. **The Director of Shipping**
2. **The Port Master**

Co-Respondents

Ex Parte

Assuranceforeningen SKULD (Gjensidig)

Applicant

AND

And in the matter of:

Commercial S.A.

Applicant

v.

Assuranceforeningen SKULD (Gjensidig)

Respondent

In the presence of:

1. **Navinord S.A.**
2. **The shipping vessel MARKELLA**
3. **The Director of Shipping**
4. **The Port Master**

Third Parties

And in the matter of:
Record No. 635/11

Ex Parte

Assuranceforeningen SKULD (Gjensidig)

Applicant

And in the matter of:

Assuranceforeningen SKULD (Gjensidig)

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In the presence of:

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JUDGMENT

On 16 September 2011 Assuranceforeningen Skuld (Ggensidig) hereinafter referred to as Skuld made an *ex parte* application under **Article 256-4** of the **Code de Commerce** for a *saisie conservatoire* of shipping vessel the "Markella" flying the Panamanian flag, then berthed at Port Louis harbour. The said application was granted by the Judge in Chambers at the applicant's own risks and perils and the Director of Shipping and Port Master were directed to withhold permission for the said vessel from leaving Mauritius.

The affidavit in support of that application averred that Skuld is a Norwegian Company engaged in providing insurance for ships whereas the first applicant Commercial S.A, is the manager of shipping vessel the Markella along with other vessels; the Markella is owned by Navinord S.A.

The purport of the "*saisie"* was to obtain security for claims by Skuld against Commercial S.A and Navinord S.A. It is averred that the latter have both entered into a protection and indemnity insurance with the Skuld and Commercial S.A has also entered into insurance agreements with Skuld so as to insure various shipping vessels under its management.

Under the insurance agreements, Commercial S.A was required to pay annual premiums, deductibles, release calls and interest invoices for the insurance cover of the Markella and the other vessels under its management. Commercial S.A. has defaulted with the payment of the amounts due under the insurance agreement in respect of the Markella and the other vessels. The sum presently due under these policies amount to USD 776,220.57 and despite several reminders, the said sum has not been settled and is now due and demandable. Skuld, fearing that the said sum would not be paid by Commercial S.A, applied for and obtained a *saisie conservatoire* of the Markella before the Judge in Chambers on 16 September 2011.

Commercial S.A. and Navinord S.A have now each made separate applications under **Section 71(1)(d)** of the **Courts Act** for the immediate discharge of the Judge's order of the 16 September 2011 and for an order allowing the Markella to leave Mauritius. Both applications which involve common parties and issues, have been consolidated at the hearing before me. I propose to deliver a single judgment, a copy of which will be filed in the second case.

In the affidavit in support of the applications one Christina Liakakou has averred that:

(i) there is an agreement between the parties to go to arbitration to settle their differences;

(ii) the *saisie conservatoire* was made in an *ex parte* application by Skuld and Navinord and Markella were not given an opportunity to express their views;

(iii) the conditions for the granting of a *mainlevée* have been satisfied;

(iv) there is no sum due by Navinord and Markella to Skuld with the exception of sums which became due after the arrest was made, which Navinord and Markella have always been ready and willing to pay;

(v) Navinord and Markella support the views of Commercial S.A. and aver that its application for the *mainlevée* should succeed.

It is the contention of applicants Navinord S.A. and the Markella that –

(i) Skuld should have declared a dispute pursuant to the terms of the Rules and Statutes governing the agreement.

(ii) The proper jurisdiction under the **International Arbitration Act** is the Supreme Court composed of three Judges.

(iii) The Judge in Chambers has no jurisdiction to issue interim measures under the Act.

(iv) Skuld's claim in the sum of USD 776,220.57 is not a maritime claim.

(v) There is no *créance fondée en son principe*.

(vi) Skuld has failed to abide by the terms of **Articles 256-6** and following of the **Code de Commerce**.

The main issues raised by Commercial S.A. in support of its application are as follows:

(i) The arrest of the "Markella" was wrongful.

(ii) Skuld has failed to abide by the terms of **Articles 256-6** of the **Code de Commerce**.
(iii) There is a dispute between Skuld and Commercial S.A. and Skuld have had recourse to arbitration pursuant to the Statutes and Rules.

Regarding the procedure for *"mainlevée*" we read the following from **Encyclopédie Dalloz Commercial Vol. IV v° Navire Notes 227, 228**:

> *«**227**. La mainlevée de la saisie peut, aux termes des articles 50 et 417 du Code de Procédure Civile, être demandée … contre consignation de sommes suffisantes pour en garantir les causes »*
>
> *« **228**. La mainlevée peut toutefois être ordonnée sans que le demandeur ait à fournir caution … si les conditions légales de la saisie ne sont pas réunies (par exemple si le demandeur parvient à convaincre le juge que la créance n'est pas fondée en son principe)*» (Emphasis added).

In order for the *mainlevée* to be granted, the applicants have to establish that the *"créance"* which the respondent relied upon to obtain the *"saisie*" of the ship, is not "*fondée en son principe*".

The applicants have initially raised a preliminary issue concerning the jurisdiction of the Judge in Chambers in Mauritius to entertain the application for the arrest of the ship. They have contended that the Judge in Chambers had no jurisdiction to order the arrest of the vessel inasmuch as the Rules and Statutes governing the agreement between the parties, provide that any "dispute" has to be referred to arbitration. It was not open for Skuld to have made the application for the arrest of the Markella in connection with the insurance claims, it ought to have had recourse to arbitration.

This issue which was raised as a preliminary issue, has already been dealt with in the interlocutory judgment delivered on 14 October 2011 but it was reiterated on the merits of the

application. For the reasons set out in the Interlocutory Judgment,I set aside the preliminary objection and held that the Judge in Chambers had jurisdiction to entertain the application for the arrest of the vessel inasmuch as the order for the arrest of the vessel was merely a "*mesure conservatoire"* pending the determination of the merits of the case before the appropriate forum and it did not purport to determine the case on its merits.

In addition to the reasons already given in the interlocutory judgment, I am comforted in my views from the tenor of the following extract from **Rep. Pr. Civ Dalloz -Saisie des bateaux, navires et aéronefs, Note 53**which directly addresses the question and provides the answer thereto –

> "*L'existence d'une clause compromissoire fait-elle obstacle à ce qu'un juge (en l'occurrence français) soit saisi pour autoriser une saisie conservatoire sur navire? La réponse est négative. Un arrêt de la Cour de cassation du 18 novembre 1986 …. a décidé que … , il était permis de s'adresser au juge étatique pour demander des mesures conservatoires destinées à garantir l'exécution de la sentence à venir. Cet arrêt fait cependant état d'exceptions par l'effet desquelles le juge étatique devient incompétent. Tel est le cas lorsque les parties au litige se sont privées, par une convention expresse, de la possibilité de demander au juge étatique le prononcé d'une mesure conservatoire. Tel est encore le cas lorsque ces mêmes parties ont adopté conventionnellement un règlement d'arbitrage les privant de la faculté de saisir un juge étatique pour voir ordonner des mesures conservatoires. L'arrêt du 18 novembre 1986 est une décision importante dont la solution s'applique à tout type d'arbitrage. Cette solution a été confirmée par un arrêt de la deuxième chambre civile de la Cour de cassation du 8 juin 1995 (no. 93-11.446, Bull. civ.II no. 170).*

Indeed the abovementioned «*arrêt*» of the Cour de cassation of 8 June 1995 (No. 93-11, 446, Bull.civ. no. 170), goes even further and provides that there may be a request for a *saisie conservatoire* of a ship even after arbitration proceedings have been initiated–

> *"Ce dernier arrêt apporte deux précisions : tout d'abord la saisie conservatoire d'un navire peut être sollicitée auprès d'un juge même après la saisine du tribunal d'arbitral, ensuite, cette saisie peut être autorisée même si elle n'est pas destinée à garantir l'exécution de la sentence à venir, dès l'instant où les*

> *conditions requises pour que la saisie soit autorisée sont remplies (la finalité de la saisie n'a donc pas à être précisée).»*

In the present case there is no evidence of any "*convention expresse"* or any "*règlement d'arbitrage"* as mentioned in the above Note from **Dalloz** between the parties expressly ousting the jurisdiction of the *"juge étatique"*, so that the Judge in Chambers in Mauritius is not precluded from entertaining an application for the *"saisie conservatoire"* of the vessel subject to all the requisite conditions for such an application having been met.

One of the arguments raised by the Markella and Navinord S.A in support of the application for *mainlevée* is that Skuld's claim is not a maritime claim and as such cannot form the basis of the arrest of the vessel. They have based their argument on the Brussels "International Convention Relating to the Arrest of Sea Going Ships" of 10 May 1952 to which Mauritius is a party. **Article 1(1)** of the said Convention gives a list of claims considered as a "maritime claim" within the meaning of the Convention and an insurance claim such as the present one, is not classified as a maritime claim.

In this context it is also apt to bear in mind **Article 2** of the **Convention** which reads as follows**:**

> *"A ship flying the flag of one of the contracting States may be arrested in the jurisdiction of any of the contracting States in respect of any maritime claim but in respect of no other claim."* (emphasis added)

It is clear therefore that even if Skuld's claim were to fall within the definition of a maritime claim, it can only form the basis of the arrest of the Markella if the latter is flying the flag of a contracting State. In the present case the Markella is flying the flag of Panama which is not a contracting State so that at any rate the Convention is not applicable.

A common ground raised by all the applicants for the release of the vessel is the failure of Skuld to comply with the provisions of **Article 256-6** and following of the **Code de Commerce**. These set out the procedure to be followed for a creditor to proceed with the sale of the vessel subject matter of the *"saisie"*.

It is the contention of Commercial S.A. and Navinord S.A. that Skuld has failed to proceed with any action seeking to establish the debt challenged by Commercial S.A. and obtain a "*titre exécutoire"* or to transform the *saisie conservatoire* into a *"saisie execution"* by causing a *"commandement à payer"* to be served on Commercial S.A. as prescribed by **Article 256-6** of the **Code de Commerce** which is to the following effect:

> «*Il ne peut être procédé à la saisie-exécution que vingt-quatre heures après le commandement de payer.»*

Nor has it started any arbitration or analogous proceedings likely to resolve the dispute between the parties so that the Markella after having been arrested *ex parte,*is being detained in *abstracto* and indefinitely. In view of Skuld's failure to initiate any action since the *saisie* on 16 September 2011, it is contended that the *saisie* is rendered "*caduque".*

On this issue, I note that our **Code de Commerce** unlike the situation in France, does not prescribe any delay within which the seizing party must initiate action towards obtaining a *titre exécutoire*; in France la loi du 9 juillet 1991 prescribes a one month delay for so doing. The absence of a prescribed delay in our law however does not mean that indolence on the part of the seizing party is acceptable,the requisite actions must be initiated within a reasonable period. At the hearing of the present application, counsel for Skuld undertook that such proceedings will be initiated within a week of the hearing.

I find that the time lapse to initiate such action is not unreasonable in the circumstances taking into account the fact that Commercial S.A. and Navinord S.A. also raised a preliminary objection challenging the very jurisdiction of the present court which was ruled upon on 14 October 2011.

The most important ground raised by the applicants in the application for *mainlevée* is that the *créance* is not "*fondée en son principe".*

In support of this contention Navinord S.A and Markella have submitted that neither the Markella nor its owner Navinord S.A, are in any way concerned with any sum allegedly due by Commercial S.A, the manager of the ship, to Skuld, Navinord S.A has contended that as at the date of the issue of the *ex parte* order, there was no payment outstanding on its part and Navinord S.A is not a debtor of Commercial S.A. Navinord S.A has also submitted that it did not apply to Skuld to have the Markella insured as part of the fleet of Commercial S.A, nor did Commercial S.A. do so on its behalf. They have pointed out that in fact there is no clause in the insurance policy attesting that Markella had benefited from a fleet entry inserted in the insurance policy and therefore Navinord S.A should not be held liable for the debt of other ships managed by Commercial S.A.

In reply to the above, Skuld has averred in its affidavit of 14 November 2011 that when it accepts entries of vessels and the vessels are placed under the name of a management company, then all the vessels listed under that policy are considered a fleet entry. This is mandatory for any person who enters vessels with Mutual Associations under the laws of Norway.

Skuld has further averred that the insurance company retains the discretion to accept one entry as a fleet and it is the established practice for it to accept entries only in fleet terms unless otherwise stated in written correspondence and there is an agreement to enter specific vessels as such, instead of a fleet entry.

Skuld's Statutes and Rules make provision for a fleet entry, under Rule 1.2.4 as follows:

"The Association may accept the entry of more than one vessel as a fleet entry".

It is to be noted that in the present case all the vessels concerned have been entered in the name of Commercial S.A, which is their management company and there is no evidence of any correspondence to the effect that the said vessels have been entered as a single entry.

Generally a *saisie conservatoire* of a vessel can only be resorted to if the debtor is the owner of a vessel. In the present case the vessel belongs to Navinord S.A whereas the debt is due by Commercial S.A in respect of unpaid insurance claims for several vessels managed by it including the Markella. However if the owner of a particular vessel has bound himself contractually jointly and *in solido* with the manager to pay all contributions including the premiums due under joint insurance policies, then the situation is different and the said owner becomes liable jointly and severally in respect of all dues unpaid by the other vessels in the fleet.

The documents on record would tend to lend support to Skuld's contention of a fleet entry. An annexe to Skuld's affidavit of 14 November (annexe 2 refers) is an email dated 21 February 2011 from Skuld to Commercial S.A. giving notice of termination of the insurance cover for non-payment of premiums. Reference is made therein to Skuld's Association Rules of

2010/11 “the final year of your entered “fleet entry”” and *inter alia* draws attention specifically to Rule 45.1 “Joint Members, Company assureds, affiliates and fleet entries”. The notice is also stated to “serve as notice to all joint members and company assureds”.

Further to the above there is a second mail dated 24 February 2011 informing Commercial S.A. that “insurances for your fleet entry with the Association are now terminated”.

The Certificate of Entry on record would again tend to confirm a fleet entry for the vessels in respect of which the insurance claims are being made. The Certificate of Entry providing insurance cover for a one year period as from 20 February 2009 for vessels “Arctic Mariner”, “New Prosperity”, “Magellanic”, “Markella”, all under Commercial S.A’s management, all bear the same policy No. 20360623. The Certificate of Entry for the same ships for the following year effective as from 20 February 2010, are all found under the same policy No. 20387734.

Further the contents of the said policy are revealing. It is certified therein that Navinord S.A, a ship owning company and Commercial S.A, a manager/managing owner, are members registered with the Association in respect of the Markella.

Reference is made to Skuld’s Statutes and Rules and “particular attention” drawn to *inter alia “*Rule 1, 4 and 45 which deal with Members, Joint Members, Co-Assureds , Affiliates and Fleet entries and the payment of premiums, calls and other sums. Joint Members and Co-Assureds shall be jointly and severally liable in respect of all premiums, calls and other sums due to the Association. Members or Joint Members named in the Certificate of Entry for one or more ships forming part of a fleet entry shall be jointly and severally liable in respect of premiums, calls and other sums due to the Association for any or all vessels in the fleet”.

It is also worth noting that there is no evidence that either Commercial S.A. or Navinord S.A objected to same. As such the above vessels having been registered as a fleet entry under a joint policy, the owners of all the vessels are all jointly and severally liable for all the contributions under the joint policies.

The Markella, according to the evidence having been a fleet entry along with the other vessels mentioned in the policy, under Commercial S.A's management, Navinord S.A as owner of Markella, is jointly and severally liable for the amounts due by Commercial S.A. under the policy, under Skuld's Rules and Statutes.

The relevant Rule, Rule 45.1 referred to in the above mail, reads as follows:

> "*Every entry shall be jointly and severally liable in respect of all premiums, calls and other sums due to the Association in respect of the entered vessel."*

Further Rule 46.9 provides that:

> *"Members or joint members named in a certificate of entry for one or more ships forming part of a fleet entry shall be jointly and severally liable in respect of premiums, calls and other sums due to the Association for any or all vessels in the fleet."*

In the light of the evidence adduced before me, I find that the applicants have not been able to substantiate their claim that the *créance* is not *fondée en son principe*. The annexes to Skuld's application for the arrest of the vessel, support the total claim of USD 776,220.57 (Annexes 3, 4, 5 of the Skuld's affidavit of 16 September 2011 refer). The exchange of emails between Skuld and Commercial S.A. do not reveal disputes about the claim but instead show that Commercial S.A. was seeking a discount upon the payment as well as a delay for payment, that negotiations were ongoing between the parties and that in fact a discount of 30% on the

sums due, was agreed upon. This correspondence between Skuld and Commercial S.A accordingly reveals a tacit acknowledgment of the amount claimed under the Insurance Agreement and the Protection and Indemnity Insurance. Indeed Skuld has averred that Commercial S.A did make certain payments but thereafter failed to pay the full amount that was agreed upon on the discounted claim.

In view of all the above, I find that the *créance* is *fondée en son principe* and that the applicants have not been able to justify their case for a *mainlevée* of the *saisie.*

An ancillary issue raised by the parties concerns situating the responsibility of maintaining the ship and its crew whilst it is under the "*saisie"*.

It is interesting in that connection to refer to **Dalloz Rep. Com. Navire (saisie et vente publique)** -

> **Note 119**:
> *«Il ne faut pas perdre de vue que la saisie conservatoire maintient intacts les droits du propriétaire sur le navire. Dans cette optique, il serait logique d'obliger le propriétaire à veiller lui-même à la conservation et à la sauvegarde du navire. Sauf dans le cas où un gardien est constitué, la charge de la conservation et da sauvegarde du navire devrait donc peser sur le propriétaire lui-même (cette solution serait conforme au droit commun qui fait normalement du débiteur le gardien des biens saisis; … »*
>
> **Note 120:**
> *«Par un arrêt du 3 mars 1998 … la chambre commerciale de la Cour de cassation a décidé que «la saisie conservatoire d'un navire qui ne porte pas atteinte aux droits du propriétaire, n'a pas pour effet de mettre à charge du créancier l'entretien courant du navire qu'il a fait saisir, que, par suite, la perte du bâtiment résultant du manque d'entretien pendant le cours de sa saisie ne peut être imputée au saisissant, sauf au propriétaire à établir qu'il a été empêché d'entretenir son navire par la faute de ce dernier.» Il s'agissait en l'espèce de savoir à qui attribuer la charge de l'entretien courant du navire saisi. La Cour de cassation a décidé en vertu de l'article 30 du décret du 27 octobre1967 que cette charge pèse sur le propriétaire» … Comme le relève J. P. Rémery … «la responsabilité du saisissant ne devront être retenue que si son attitude [a] fait obstacle à l'exercice par le gardien de la saisie, voire par le débiteur saisi, de la garde du navire.»*

The purport of a *"saisie conservatoire"* is only limited to preventing the vessel from leaving the port where it is berthed. The ship is thus temporarily immobilised and the owner continues to be responsible for *"la conservation et la sauvegarde du navire"* and for its current maintenance.

Before concluding I need to address the concerns expressed by the Director of Shipping and the Port Master with the approach of the cyclonic period and the potential danger that the presence of the vessel constitutes. In view of the above, I order that the *saisie conservatoire* shall be without prejudice to the exercise of the powers of the Port Master under the Ports Act to ensure the security of the port and the welfare of persons working or living in any part of the port.

For the above stated reasons I set aside both applications for a *mainlevée*. With costs.

R. Mungly-Gulbul
Judge

21 December 2011

For Assuranceforeningen SKULD (Gjensidig): **Miss S. Bhima, of Counsel**
Mr. Attorney G. Noel

For Navinord S.A and shipping vessel Markella: **Mr. M. Sauzier, SC**
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For Commercial S.A **: Mrs. A. Coquet-Desveaux de Marigny, of counsel**
Mr. T. Koenig, SA