

08-3477-cv(L), 08-3758-cv(XAP)

United States Court of Appeals
for the
Second Circuit

THE SHIPPING CORPORATION OF INDIA LTD.,

Plaintiff-Counter-Defendant-Appellant-Cross-Appellee,

— v. —

JALDHI OVERSEAS PTE LTD.,

Defendant-Counter-Claimant-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR PLAINTIFF-COUNTER-CLAIMANT-
APPELLANT-CROSS-APPELLEE**

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CORPORATE DISCLOSURE STATEMENT

The Shipping Corporation of India, Ltd. hereby discloses that it is owned by the Government of India and listed on the Bombay Stock Exchange Ltd., Mumbai; The National Stock Exchange of India Limited, Mumbai; The Calcutta Stock Exchange Associated Ltd., Kolkata; The Delhi Stock Exchange Association, Ltd., New Delhi and Madras Stock Exchange Ltd., Chennai, India.

Dated: New York, New York
September 29, 2008

Respectfully submitted,

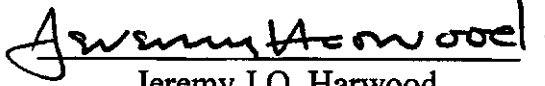

Jeremy J.O. Harwood

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PRELIMINARY STATEMENT

Plaintiff-Appellant, The Shipping Corporation of India Ltd. ("SCI"), submits through its attorneys, Blank Rome LLP, this memorandum of law in support of its appeal from the order dated June 27, 2008 ("Vacatur Order") (JA-85-88)¹ of the United States District Court for the Southern District of New York vacating a valid process of maritime attachment and garnishment ("PMAG") issued pursuant to Supplemental Rule B of the Supplemental Rules for Certain Admiralty and Maritime and Civil Forfeiture Claims of the Federal Rules of Civil Procedure ("Rule B"). The Vacatur Order directed, subject to SCI obtaining a stay pending appeal, the release of electronic fund transfers ("EFTs") in the sum of \$3,533,522 from third parties of which defendant-appellee Jaldhi Overseas Pte Ltd. ("Jaldhi") was the intended beneficiary (the "Beneficiary EFTs").

The Vacatur Order is directly contrary to the controlling law in this Circuit that attachment of EFTs, whether to or from a defendant, is permissible. Winter Storm Shipping, Ltd. v. TPI, 310 F. 3d 263 (2d Cir. 2002) ("Winter Storm"); Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434, 436 (2d Cir. 2006) ("Aqua Stoli"). In this Court's most recent decision, Consub Delaware LLC v. Schahin Engenharia Ltda., 2007 U.S. Dist. LEXIS 10105 *13 (S.D.N.Y. February 13, 2007), affirmed, __ F.3d __, 2008 WL 4304568 (2d Cir. September 23, 2008) the Court stated, in affirming the district court's denial of vacatur of originator EFTs, that "Aqua Stoli

¹ References are to the Joint Appendix and are denoted "JA-[#]"

itself affirmed that the rule set forth in Winter Storm is the law of this jurisdiction.

[citation and footnote omitted].” Id. at *4. As recognized by the Court in Aqua Stoli:

Under the law of this Circuit, EFTs to or from a party are attachable by a court as they pass through banks located in that court’s jurisdiction. See Winter Storm Shipping, Ltd. v. TPL, 310 F.3rd 263 (2d Cir. 2002).

460 F.3d at 436 (footnote omitted emphasis added). That is the Winter Storm “rule.”

Consub Delaware, id. at *4.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

A. SUBJECT MATTER JURISDICTION

SCI’s complaint and amended complaint alleged admiralty jurisdiction pursuant to 28 U.S.C. § 1333 and within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure. JA-7 and JA-19.

B. APPELLATE JURISDICTION

This Court expressly recognized the right of appeal of a vacatur order in the appeal filed from the decision in Seamar Shipping Corp. v. Kremikovtzi Trade Ltd., 461 F. Supp.2d 222 (S.D.N.Y. 2006), citing Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A., 339 U.S. 684, 688-89 (1950) (citing Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949) (“an order vacating a maritime attachment is immediately and ‘squarely within’ the collateral order doctrine”).

STATEMENT OF THE ISSUES PRESENTED AND STANDARD OF REVIEW

1. Did the Lower Court err in failing to follow the clear and binding precedent of this Court as stated in Winter Storm, supra, and as most recently recognized in Aqua

Stoli and, after entry of the Vacatur Order, further confirmed by Consub Delaware, *supra*, to vacate SCI's Rule B attachment of the Beneficiary EFTs?

2. The standard of review as it relates to whether the Beneficiary EFTs are attachable "property" within the meaning of Rule B is a question of law that is reviewed *de novo*. See, Winter Storm, 310 F.3d at 267 ("We review *de novo* the construction of the statutes and rules and the conclusion of law upon which the district court based its opinion"); Aqua Stoli, 460 F.3d at 439 ("Because we are here reviewing the legal predicate for an exercise of discretion, our review is *de novo* [citing Winter Storm, 310 F.3d at 267]).

STATEMENT OF THE CASE

SCI filed its Rule B action to obtain security for its claims in London arbitration. SCI attached EFTs naming Jaldhi in the sum of \$4,816,218 of which \$3,533,522 were the Beneficiary EFTs. The same lower court judge had previously, in Seamar Shipping Corp. v. Kremikovtzi Trade Ltd., 461 F. Supp. 2d 222 (S.D.N.Y. 2006) (Hon. Jed S. Rakoff) vacated attachment of EFTs of which the defendant was a beneficiary. All other District Court judges in the Second Circuit that have considered the issue have followed the Winter Storm "rule", quoted above.

Jaldhi moved under Supplemental Rule E to vacate the Beneficiary EFTs. The District Court granted Jaldhi's motion. Jaldhi provided no bond or undertaking to return the Beneficiary EFTs or the released sum of money to the jurisdiction in the event that the Vacatur Order is reversed. The District Court, recognized that the precise issue was *sub judice* in this Court because of the Consub Delaware appeal and stayed the Vacatur

Order for 90 days pending a decision in that appeal. That stay was further extended by a temporary stay order of this Court dated September 15, 2008.

SCI filed a timely notice of appeal from the Vacatur Order on July 10, 2008. JA-89. The Vacatur Order is contrary to the controlling law in this Circuit permitting attachment of EFTs whether to or from a Rule B defendant.

STATEMENT OF THE FACTS

A. THE CHARTER

SCI chartered its vessel "M/V RISHIKESH" (the "Vessel") to Jaldhi by charter dated March 12, 2008 (the "Charter"). JA-20, ¶ 4. The Charter provides for English law and London arbitration of disputes under it. JA-21, ¶ 13.

B. THE ACCIDENT

The Vessel was delivered to Jaldhi under the Charter on March 29, 2008. On March 30, 2008 the Vessel's crane no. 1 collapsed leading to the death of the crane operator (the "Deceased"). JA-68-69. Cargo operations were halted. Jaldhi placed the Vessel "off-hire."

C. THE CLAIMS

SCI contends the Vessel came back "on-hire" on April 13, 2008 after its cranes passed load testing and that hire invoiced, except as might be conceded for the "off hire" period between the crane breakdown and the acceptance of the Vessel's other cranes by HDC, is due and owing.

D. JALDHI'S COUNTERCLAIMS

Jaldhi's asserted counterclaims based on the declaration of Amit Oza dated May 22, 2008 ("Oza Dec.") (JA-48) and, later, its answer and counterclaims. JA-77. The merits of the claims and counterclaims are subject to London arbitration.

E. THE ATTACHMENTS

SCI attached the sum of \$4,689,247, JA-61. The sum of \$3,533,522 of that total were EFTs transferred to Jaldhi as beneficiary. These Beneficiary EFTs were released by the Vacatur Order, subject to further stay.

SUMMARY OF THE ARGUMENT

The Winter Storm "rule" "is the law of this jurisdiction." Aqua Stoli; 460 F.3d at 436; Consub Delaware. Id. at *4. Consub Delaware further stated that Winter Storm was "correctly decided." Id. at *5. That decision further noted that: "[e]ven if there existed some question as to the viability of Winter Storm" the possible grounds for one panel of the Court to overrule a prior decision did not exist. Id. at *5.

Accordingly, the lower court's reliance on the ratio decidendi of its earlier decision in Seamar, supra. was wrong. On de novo review this Court is bound to follow the Winter Storm "rule," as confirmed by Aqua Stoli, and as Consub Delaware stated was "correctly decided." Supra.

ARGUMENT

POINT I

THE PMAG WAS PROPERLY ISSUED AND, PURSUANT TO THE WINTER STORM "RULE," PROPERLY ATTACHED EFTS OF WHICH JALDHI WAS THE BENEFICIARY

A. THE WINTER STORM RULE

The Winter Storm "rule" is that attachment of electronic funds transfers "to or from" a defendant is permissible. 310 F. 3d 263 (2d Cir. 2002) [emphasis added]; Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434 (2nd Cir. 2006). The lower court impermissibly ignored the rule.

B. LOWER COURT DECISIONS

The Winter Storm "rule" has been recognized and followed by all judges considering the issue of beneficiary EFTs, except Judge Rakoff in Seamar and in this case. In Cia. Sudamericana de Vapores S.A. v. Sinochem Tianjin Co., 2007 WL 100 2265 *3 (S.D.N.Y. Apr. 4, 2007) the District Court stated, citing Winter Storm:

It is well-established that EFTs to or from a party in a maritime action are attachable when passed through banks located within the Court's jurisdiction. [citations omitted].

* * *

It is undisputed, however, that Aqua Stoli ultimately reaffirmed the holding of Winter Storm that EFTs in the hands of an intermediary bank qualify as property subject to attachment under Rule B(1)(a). See Aqua Stoli, 460 F.3d at 443. Moreover, the parties agree that every decision in this District except Seamar Shipping holds that defendants who are beneficiaries of an EFT in the hands of intermediary banks have a sufficient property interest for attachment under Rule B(1)(a). See, e.g., Gen. Tankers Pte. Ltd. v. Kundan

Rice Mills Ltd., No. 06 Civ. 8292 (VM), 2007 WL 541689, at *3 (S.D.N.Y. Feb. 21, 2007) (“Seamar is thus alone in its interpretation of Aqua Stoli as impliedly restricting Winter Storm attachment only to originators.”); AET Inc. v. Procuradoria de Servicos Martimos Cardoso & Fonesca, 464 F. Supp.2d 241, 244-46 (S.D.N.Y. 2006) (“Defendants’ speculation that the Second Circuit at some future time may reverse course and find that EFTs are not attachable is not helpful.”); Dominion Bulk Int’l, S.A. v. Naviera Panoceanica, S.A. C., No. 06 Civ. 6854(LAP), 2006 WL 3408799, at *4 (S.D.N.Y. Nov. 21, 2006) (upholding attachment of an EFT sent by a third-party as payment to defendant as beneficiary and attached the EFT while it was at an intermediary bank); Maersk, Inc. v. Neewra, No. 05 Civ. 4356 (RCC), 2006 WL 2854298, at *2 (S.D.N.Y. Oct. 6, 2006) (“That the court of appeals made mention, in a footnote, of a reason why Winter Storm might have been incorrectly decided is of no moment. Indeed, Aqua Stoli can only be read to reaffirm Winter Storm as the law of this circuit.”); Vamvaship Mar. Ltd. v. Shivnath Rai Harnarain (India) Ltd., No. 06 Civ. 1849(HB), 2006 WL 1030227, at *2 (S.D.N.Y. Apr. 20, 2006) (rejecting argument that defendant has no property interest in attached funds because they were “an advance payment on an executory contract”); [HBC Hamburg Bulk Carriers GmbH v. Proteinax y Oleicos S.A., U. S. Dist. LEXIS 8009 (S.D.N.Y. May 4, 2005)], 2005 WL 1036127, at *3-4 (allowing the attachment of an EFT against both the originator and beneficiary). Accordingly, EFTs are attachable, and this Court will not void the attachment.

See also Noble Shipping Inc. v. Euro-Maritime Chartering Ltd., 2003 U. S. Dist. LEXIS 23008 (S.D.N.Y. Dec. 24, 2003) (beneficiary EFT).

Since Cia. Sudamericana was decided, the only decision to vacate a beneficiary EFT remains Seamar, other than decided in this case by the same judge. See Padre Shipping, Inc. v. Yong He Shipping, 553 F. Supp.2d 328, 334 (S.D.N.Y. Apr 25, 2008) (originator and beneficiary EFTs); Wilhelmsen Premier Marine Fuels AS v. UBS Provedores Pty Ltd., 519 F. Supp.2d 399, 403 (S.D.N.Y. Sep 28, 2007) (originator and

beneficiary EFTs); Ronda Ship Management Inc. v. Doha Asian Games Organising Committee, 511 F. Supp.2d 399, 405 (S.D.N.Y. Sep 20, 2007) (originator and beneficiary EFTs); Ice Flake Maritime Ltd. v. Westcoast AS, 2007 WL 2979471, *2 (S.D.N.Y. Oct 11, 2007) (beneficiary EFT).

In conclusion, Jaldhi's argument below was nothing more than an opportunistic attack on Winter Storm based on the Aqua Stoli "footnote 6" (460 F.3d at 446 n. 6). Although the Court in Consub Delaware (footnote 1) stated that it was not presented with a "beneficiary EFT" case and was not deciding that issue, the reasoning of Consub Delaware makes clear that there should be no doubt that the Winter Storm "rule" applies to beneficiary EFT's.

POINT II

THE LOWER COURT'S EARLIER DECISION PROVIDED NO VALID BASIS FOR IT TO QUESTION THE WINTER STORM "RULE"

The lower court's Seamar decision stated that the Aqua Stoli footnote, 460 F.3d at 446 n. 6 "raises a serious question of whether Winter Storm's implicit holding that EFTs may be considered to be a defendant's property while in transit remains good law." 461 F. Supp.2d at 224. There can be no question that Consub Delaware answers that question:

Our holding today ought to jettison any speculation that this note in Aqua Stoli foretold the demise of Winter Storm.

Id. at *4.

The Seamar decision stated that based on the premise that “Aqua Stoli called Winter Storm into serious doubt,” citing the footnote, “it would be illogical to construe other statements in Aqua Stoli to broaden Winter Storm, 460 F.3d at 225.” Accordingly, Seamar drew a distinction between “originator” and “beneficiary” EFTs and found that “neither Winter Storm nor Aqua Stoli binds this Court in determining whether the instant attachment can stand,” on the basis that the defendant there was the purported beneficiary of the EFTs. Id. at 225.

Consub Delaware while stating the Winter Storm “rule,” as stated in Aqua Stoli, supra, provided its own footnote:

We do not reach today the question of whether the funds involved in an EFT en route to a defendant are subject to a Rule B attachment.

Id. at *9, n.1 (emphasis in original).

The lower court’s assertion in Seamar that neither Winter Storm nor Aqua Stoli were controlling was mistaken. As noted in Ice Flake Maritime, 2007 WL 2979471 at *2 n.1 “some of the EFTs in Aqua Stoli were in the hands of the intermediary on their way ‘to’ the defendant [record citations omitted].” Apart from the purported factual distinction to ignore the Winter Storm “rule” and Aqua Stoli, the Seamar court also relied on the “absence of a federal rule governing whether an EFT is the property of an intended beneficiary while in transit” so as to apply New York’s Uniform Commercial Code, N.Y. U.C.C. § 4-A-502 cmt. 4. Pursuant to such state law the Seamar court ruled that a Rule B defendant has “no property interest” in a beneficiary EFT as required by Rule B(1)(a). Id. at 226. The Vacatur Order adopted that reasoning. JA-85 (“...EFTs directed by third

parties to a defendant do not become the defendant's property until the transfer is completed [citing Seamar]). That mistaken argument is controlled and foreclosed by both the Winter Storm "rule" and by Consub Delaware's statement:

New York law has no effect on the applicability of Rule B to funds involved in EFT's while they are in the hands of intermediary banks: 'Because that rule is derived from federal law, there is no occasion to look for guidance in state law.' Winter Storm, 310 F.3d at 278.

Id. at *7. See also id. at *9, n.4 "Because New York law does not apply here to the issue of the permissibility of the attachment of the EFT funds, we do not reach questions of Schahin's property interest in the funds under New York law."

A debt owed by a third-party to a defendant has always been attachable under Rule B. E.g. Noble Shipping, *supra*; HBC Hamburg, *supra*. The Rule itself requires the garnishee to disclose such debts. See Rule B(3)(a) ("If the garnishee refuses or neglects to answer on oath as to the debts ... of the defendant in the garnishee's hands ..."). Attaching a defendant's interest in a beneficiary EFT at an intermediary bank is nothing more than attaching a debt in the hands of a third-party. Given the scope and breadth of the Winter Storm "rule," it would be contrary to precedent and common sense to eliminate this ancient right of a maritime creditor under Rule B in this context.

Seamar was incorrect and the lower court's reliance on it and adoption of the construction of Rule B and conclusion of law was wrong.

CONCLUSION

Appellant respectfully requests that this Court grant its appeal and vacate the District Court's order dated June 27, 2008 with instructions that the Beneficiary EFTs remain attached and that it grant Appellant such other and further relief as it deems appropriate.

Dated: New York, New York
September 29, 2008

Respectfully submitted,

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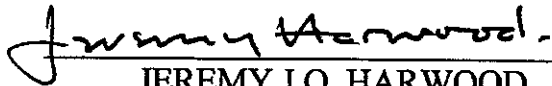
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WITH FED. R. APP. P. 32(A)(7)

JEREMY J.O. HARWOOD declares:

I am a member of Blank Rome LLP, attorneys for Plaintiff-Appellant, The Shipping Corporation of India, Ltd.

In order to determine the number of words, excluding the corporate disclosure statement, the table of contents, and the table of authorities in Plaintiff-Appellant's brief, I used the word-count feature of Microsoft Word 2003, the word-processing program used to prepare the brief. The word count so determined was 2,667. I therefore certify that the brief complies with Federal Rules of Appellate Procedure 32(a)(7)(B).

Dated: New York, New York
September 29, 2008



JEREMY J.O. HARWOOD