Admiralty Practicum

Volume 2008
Issue 1 *Summer 2008*

Article 8

Chiquita International Ltd. v. M/V BOSSE United States District Court for the Southern District of New York 518 F.Supp.2d 589 (Decided October 11, 2007)

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DENIAL OF MOTIONS FOR VACATUR OF MARITIME ATTACHMENT AND GARNISHMENT UNDER SUPPLEMENTARY ADMIRALTY RULE B OF THE FEDERAL RULES OF CIVIL PROCEDURE

M/V BOSSE, Bosse Shipping Limited, and Holy House Shipping AB were denied vacatur of an attachment made by Chiquita International Limited and Great White Fleet Limited for damaged bananas under Supplementary Admiralty Rule E and B because Chiquita International and Great White Fleet had made a *prima facie* case and had met its required burden. Great White Fleet was granted vacatur of an attachment made by Bosse Shipping in accordance with an indemnity agreement because Bosse Shipping failed to act in accordance with the purposes of maritime attachment

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Chiquita International Ltd. ("Chiquita") and its transportation arm, Great White Fleet Ltd. ("GWF"), both plaintiffs in this action, ship bananas from Costa Rica to European ports. To achieve this end, Chiquita and GWF chartered the M/V BOSSE, from Bosse Shipping Limited ("Bosse") and Holy House Shipping AB ("Holy House"), the named defendants. Unfortunately trouble arose when the ship was detained in Tartous, Syria. The detention was a result of a past due customs fine from 2001 when the ship was under a different name and different ownership. The vessel was released seven days later, after Bosse paid the $420,000 fine; however, the bananas were damaged and could not be brought to the next port for sale. The bananas were sold in Tartous at a reduced price.

Chiquita sought reimbursement for its losses. Bosse settled a portion of the 2001 fine with the vessel's previous owner and sought the remaining portion of the fine plus interest from GWF, allegedly consistent with an indemnity agreement. Bosse also sought the amount GWF withheld for the fuel used during the delay in Tartous.

On July 27, 2007, Chiquita and GWF filed suit (the "Chiquita action") against all three defendants to issue process of maritime attachment and garnishment pursuant to Supplemental Admiralty Rule B of the Federal Rules in Civil Procedure for the amount of $800,610.03. The Court issued the order three days later. On September 5, 2007, the defendants moved for an order to vacate the attachment under Supplemental Admiralty Rule E(4)(f).

In mid-August, Bosse demanded that the action be settled via arbitration in London regarding the matter with GWF, and also filed an action in the Southern District of New York seeking security from the same party (the "Bosse action"). The Bosse action derived from the same facts as the Chiquita action. The same day an attachment and garnishment against GWF was ordered in the amount of $1,485,934.85. Later, GWF moved to dismiss Bosse's complaint and/or vacate that order pursuant to Supplemental Admiralty Rule E(4)(f).

The court used the burden shifting standard set out in *Aqua Stoli v. Gardner Smith* to analyze the actions brought by Chiquita and Bosse.[1] Initially, "[w]hen a defendant moves to vacate an attachment pursuant to Supplemental Admiralty Rule E, the plaintiff bears the burden of showing that the filing and service requirements of Supplemental Admiralty Rules B and E were met and that: (1) it has a *valid prima facie* admiralty claim against the defendant; (2) the defendant *cannot be found* within the district; (3) the defendant's property may be found *within the district*; and (4) there is no statutory or maritime

[1] Aqua Stoli v. Gardner Smith Ltd., 460 F.3d 434, 438 (2d Cir. 2006).

law bar to the attachment."[2] Once the plaintiff has met the burden and the defendant's property has been restrained by maritime attachment order, "Rule E(4)(f) provides defendant with an opportunity to appear before the Court to contest the attachment."[3] However, even if plaintiff has satisfied the four filing and service requirements, the court "still may vacate the attachment if: (1) the defendant is present in a convenient adjacent jurisdiction; (2) the defendant is present in the district where the plaintiff is located; or (3) the plaintiff has already obtained sufficient security for a judgment."[4]

In its motion to vacate, Bosse made two arguments: (1) that the majority of the restrained funds belong to other parties and must be released; and (2) there was no prompt notice by Chiquita or GWF regarding the attachments. Bosse argued first that most of the restrained funds belong to other shipowners whose vessels are managed by Holy House who was acting as an agent without any personal interest in the transactions, and therefore Chiquita/GWF had not met its *prima facie* burden. Holding that Chiquita/GWF had in fact met this burden, the court relied heavily on the fact that the funds were held in an account under the name Holy House, the fact that the Second Circuit had held that "property" should be construed broadly, and that under Rule B, it is also possible for more than one party to have an interest in the same property. The Court dismissed Holy House's argument regarding agency and ownership because of the named accounts.

Secondly, Bosse argued that Chiquita/GWF did not give proper notice under Local Admiralty Rule B(2). Because of the lack of proper notice, Bosse argued that a vacatur of the attachment was appropriate. The court, relying on *Rolls Royce Industrial Power v. M/V FRATZIS*, held that this action was not severe enough to warrant a vacatur.[5] Chiquita/GWF provided a copy of the emails that were sent to Holy House and defense counsel, which were sent one day after the confirmation from the banks. The notice was proper under Local Admiralty Rule B.2 because the rule clearly provides for notification via electronic means . . . which the Court reads to include electronic mail notification and the notification was considered prompt. Because Chiquita/GWF proved that it had a *prima facie* case and that it met its required burden, Bosse's motion to vacate was denied.

GWF first moved to dismiss Bosse's complaint under Supplementary Admiralty Rule E(4)(f). The court rejected this motion because E(4)(f) does not provide for dismissal. The court noted that GWF should have used Federal Rule of Civil Procedure 12. In fact, the Court notified GWF's counsel of this fact at the September 25 hearing and counsel informed the court that it would not pursue the motion to dismiss.

Second, GWF moved to vacate the August 14th attachment. The parties had detailed discussions on the merits of the Bosse action during the September 25 hearings but according to the court this was unnecessary. The motion to vacate was "decided based on whether a *prima facie* claim was shown and whether the technical requirements for attachment were met."[6]

The Court held that the first two guidelines of *Aqua Soli* suggest that vacatur was appropriate in this case. First, GWF was subject to suit in the Southern District of New York, evidenced by the fact that both it and Bosse were parties to the Chiquita action. Additionally, Bosse had no jurisdictional issues for the same rationale. Because of this, Bosse's actions were not in accordance with the purposes of maritime attachments and GWF's motion to vacate was granted.

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[2] Id.
[3] Id.
[4] Id.
[5] Rolls Royce Industrial Power (India) v. M/V FRATZIS M, 1996 A.M.C. 393, 397 (S.D.N.Y. 1995)
[6] See Aqua Stoli at 438.