IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. A71/2009

In the matter between:

BROBULK LIMITED	APPLICANT
and	
GREGOS SHIPPING LIMITED	FIRST RESPONDENT
M V "GREGOS"	SECOND RESPONDENT
SEAROUTE MARITIME LIMITED	INTERVENING PARTY

JUDGMENT Delivered on 28 January 2010

SWAIN J

[1] Searoute Maritime Limited (the intervening party whose intervention in these proceedings was not opposed) together with the respondents, applies to set aside the arrest of the ship mv "Gregos" (second respondent) owned by Gregos Shipping Limited (first respondent) which arrest was ordered by this Court, at the behest of Brobulk (applicant).

[2] The arrest is challenged by the intervening party and the respondents, only on the basis that the applicant has failed to establish that it has a *prima facie* claim against the intervening party, as is required by Section 5 (3) of the Admiralty Jurisdiction Regulation Act No. 105 of 1983 (the Act).

[3] The submission of Mr. Stewart, S.C., who appeared for the intervening party, was that the applicant did not have a presently enforceable claim against the intervening party, as it is a "cargo claim" as contemplated by Clause 3 of the Inter-Club New York Produce Exchange Agreement 1996 (the Inter-Club Agreement), which it is common cause is applicable to the present dispute.

[4] It is also common cause that if the claim is such a "cargo claim" as contemplated by the Inter-Club Agreement, then the applicant has no presently enforceable claim and the arrest must therefore be set aside.

[5] In order to place the claim advanced by the applicant, in its proper context, it is necessary to briefly set out the salient facts which gave rise to the claim.

[5.1] On 16 March 2006 the applicant chartered mv "Ariel" (the Vessel) from the intervening party.

[5.2] On 09 June 2006 the applicant in turn time-chartered the Vessel to Seafreight PLC on similar terms.

[5.3] Seafreight PLC in turn sub-time chartered the Vessel to Ahmadi Aluminium Corporation (AAC).

[5.4] AAC loaded a cargo of alumina in bulk for carriage to Bandar Abbas, covered by a Bill of Lading, issued by the intervening party, as owner of the Vessel.

[5.5] The Vessel suffered a major engine breakdown on 28 June 2006, as a result of which the Master entered into a Lloyds open form with a salvor.

[5.6] A salvage award was made in 2007, in terms of which AAC's proportion of the salvage remuneration was US$4,151,326.11 inclusive of interest and costs.

[5.7] AAC have claimed against Seafreight PLC,as set out in their points of claim dated 09 June 2009, which claim was adumbrated in March 2007.

[5.8] Solicitors representing Seafreight PLC, wrote to the applicant informing the applicant of AAC's claim and suggesting that

the applicant should take over the defence, which offer was declined.

[5.9] Arbitration proceedings were commenced by the nomination of arbitrators and Seafreight PLC has delivered its points of claim in the arbitration.

[5.10] The second respondent, was arrested by order of this Court on 01 April 2009 in terms of Section 5 (3) of the Act, for the purpose of providing security for the applicant's claim for an indemnity in respect of an alleged liability of the applicant for the sum of US$4,161,362.41 plus interest and costs amounting to US$5,076,823.11, being the subject of the pending arbitration proceedings, in which the applicant had a claim enforceable *in rem* against the second respondent.

[5.11] The second respondent is an associated ship with the Vessel in terms of Section 3 (7) (a) (iii) of the Act, because the second respondent was owned, at the time the application was commenced, by a company which is controlled by a person who owned the Vessel, or controlled the company which owned the Vessel, when the maritime claim arose.

[5.12] On 07 April 2009 security was provided by the first respondent the owner of the second respondent, to the applicant in

the form of a letter of undertaking, which resulted in the second respondent being released from arrest on the same day.

[6] The applicant's claim to an indemnity against the intervening party is therefore founded on the applicant's alleged liability to Seafreight PLC, who sub-time chartered the Vessel from the applicant. Seafreight PLC in turn have an alleged liability to AAC who sub-voyage chartered the Vessel from Seafreight PLC. The liability of AAC arises from the salvage award, referred to above.

[7] The primary submission of Mr. D. J. Shaw, Q.C., who appeared for the applicant, was that the issue of whether the claim for an indemnity advanced by the applicant fell within the parameters of the Inter-Club Agreement, was manifestly a matter to be considered by the arbitrators in the pending arbitration. He submitted that all that was required of the applicant, was to show that its claim was one which *prima facie* exists and is *prima facie* enforceable before the arbitration tribunal, relying upon the decisions in

Cargo Laden on Board the MV Thalassini Avgi v MV Dimitris 1989 (3) SA 820 (AD) at 832 C – E

and

Bocimar NV v Kotor Overseas Shipping Limited 1994 (2) SA 563 (AD) at 580 H – 581 B

[8] In the case of the Thalassini Avgi, Botha J A had the following to say:

"This approach applies also to the question of enforceability of the claimant's claim in the chosen forum. If it is shown *prima facie* that the foreign court nominated by the applicant has jurisdiction to hear the case, that would normally be the end of the enquiry into this aspect of the matter. It is necessary to emphasise that an application under Section 5 (3) (a) is not an appropriate vehicle for returning rulings or decisions on issues that would have to be adjudicated upon by the foreign court hearing the main proceedings. Not infrequently, questions may arise as to whether or not the chosen foreign court would grant a stay of proceedings on the ground of a contractual clause conferring exclusive jurisdiction on some other tribunal, or on the ground that such foreign court is a *forum non conveniens*, and so forth. A court hearing an application under Section 5 (3) (a) ought not to involve itself with questions of this kind unless it is made to appear quite clearly that the chosen foreign court, despite having jurisdiction, will in fact not exercise it in favour of the claimant. In such a case an order under Section 5 (3) (a) will not be granted since it would be futile. But the onus of proving such a state of affairs will rest squarely on the respondents in the application."

[9] Referring to this passage, Mr. Stewart, S.C. submitted that it is made clear that there are really two types of issue that this Court will not decide. The one is factual disputes where all that is required is a *prima facie* case. The other was issues relating to the exercise of the other tribunal's discretion. He submitted that the issue before

this Court, was neither of these and it was therefore appropriate to decide the points in issue.

[10] Mr. Shaw, Q.C., submitted that there was no basis for drawing a distinction between matters which give rise to the exercise of a discretion, and those which call for the exercise of a decision with regard to factual disputes. Referring to the following dictum in the case of Bocimar at page 580 H – 581 B

"It seems to me that the correct starting-point in this enquiry as to onus is the general principle that in a civil case an applicant (or plaintiff) is generally required to establish the ingredients of his cause of action upon a balance of probabilities. One of the ingredients of a case for the arrest of property under Section 5 (3) of the Act is a genuine and reasonable need for the security to be provided by the arrest. It is, therefore, logical that the applicant for the arrest should be required to establish this need on a balance of probabilities. It is true that in the Thalassini case this Court laid down a less stringent standard of proof, *viz* a *prima facie* case (in the above defined sense), with reference to the establishment of the applicant's claim and its enforceability in the nominated forum, but this was because of the consideration that these were issues which would have to be adjudicated upon in the forum hearing the main action. This rendered an application under Section 5 (3) an inappropriate vehicle for obtaining rulings or decisions upon such issues. In my view, there is no good reason to extend this principle of a *prima facie* case to matters relating exclusively to whether the applicant has made out a good cause of action for arrest under Section 5 (3), a matter which would not arise for decision in the main action."

he submitted that there are matters lying outside the purview of the main action, which are relevant to the arrest of property under Section 5 (3) of the Act, such as whether there is a genuine need for security or not, and matters which are relevant and have to be decided in the action, which are not appropriate for decision in terms of Section 5 (3) of the Act, and in respect of which a question of a *prima facie* case only relates.

[11] I agree with the submission of Mr. Shaw, Q.C. The relevant consideration is whether the issue in question has "reference to the establishment of the applicant's claim and its enforceability in the nominated forum" and "would have to be adjudicated upon in the forum hearing the main action". That such adjudication may involve the exercise of a discretion by the other tribunal, cannot be a decisive consideration. Whether the applicant is only obliged to establish a *prima facie* case, which is *prima facie* enforceable before the arbitration tribunal, on the issue of whether the claim of the applicant is a "cargo claim" as contemplated by the Inter-Club Agreement, requires the consideration of a further argument advanced by Mr. Stewart, S.C.

[12] Mr. Stewart, S.C., submitted that this issue should be decided by this Court on the ground that it was a matter of law and not a question of fact. Consequently, so the argument went, the issue of whether the applicant has established a *prima facie* case is

irrelevant, as this test applies to issues of fact and discretion, and not with regard to issues of law. He submitted this Court was therefore called upon to decide the legal issue at stake.

[13] The starting point for the argument of Mr. Stewart, S.C. was Section 6 (1) of the Act which provides as follows:

" '**6. Law to be applied and rules of evidence**

(1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall-

(a) with regard to any matter in respect of which a court of Admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied.

(b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.' "

[14] Referring to the decision in

Transsol Bunker BV v mv Andrico Unity & others; Grecian- Mar SRL

v

mv Andrico Unity & Others

1989 (4) SA 325 (A)

Mr. Stewart, S.C. submitted that in order to determine whether English law or Roman Dutch law is to be applied, the "matter" must be identified and it must then be determined whether the pre-1983 South African Court of Admiralty, established under the Colonial Courts of Admiralty Act of 1890 had jurisdiction over that "matter". He submitted in his heads of argument that in the present case the "matter" at issue is the claim asserted by the applicant against the intervening party, which is a claim for an indemnity under a time-charter party, in respect of the applicant's potential liability to a sub-time charterer (Seafreight PLC) in respect of the cargo interests (i.e. AAC's) liability to pay salvage. He relied upon Section 6 of the Admiralty Court Act of 1840, which provides that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage, in support of his contention.

[15] In argument however, Mr. Stewart, S.C. conceded that the claim was not a salvage claim, but was a claim for breach of the Gencon voyage charter party contract between Seafreight PLC and AAC, as submitted by Mr. Shaw, Q.C.

[16] Mr. Stewart, S.C. also relied upon Section 6 of the Admiralty Court Act of 1861 which provides as follows:

"6. As to claims for damage to cargo imported

The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: Provided always, that if any such cause the plaintiff do not recover twenty pounds, he shall not be entitled to any costs, charges or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court."

in support of his submission that the pre-1983 South African Court of Admiralty had jurisdiction. Mr. Shaw, Q.C. however pointed out that the Section did not apply because the goods in question were not carried into any port of the former colony of Natal, nor the Republic of South Africa, nor England nor Wales. Mr. Stewart, S.C., whilst conceding that the wording of the Section was open to such an interpretation, submitted that the wording was somewhat complex. In my view, the interpretation placed upon the Section by Mr. Shaw, Q.C. is correct.

[17] Mr. Stewart, S.C. then referred to Professor Hares' book

Shipping Law & Admiralty Jurisdiction in South Africa
1st Edition 1999, Pg 21

in which, by reference to Wiswall, he identifies as amongst old heads of jurisdiction, contracts "made upon the sea for maritime consideration" and "contracts made abroad incident to a matter originating at sea"

Wiswall – The Development of Admiralty Jurisdiction and Practice since 1800, 1972 at 8 – 11

and submitted that this was a claim under a contract made abroad, incident to a matter originating at sea. Assuming that such a ground of jurisdiction exists, it seems that the contract in question would be the Gencon voyage charter party between Seafreight PLC and AAC, the breach of which Mr. Stewart, S.C. conceded, formed the basis for the claim. However, I have grave doubts whether it may be said that this contract was made "incident" to the matter in question i.e. the breakdown of the ship and the financial consequences that flowed from it.

[18] I therefore do not agree with the submission of Mr. Stewart, S.C. that this Court applies English law under Section 6 (1) of the Act and in doing so applies the law of the Republic and not foreign

law and the issues of English law are therefore questions of law, and not questions of fact.

[19] In terms of Section 6 (1) of the Act, this Court is therefore to apply Roman Dutch law, to decide the issue of whether the claim of the applicant falls within the terms of the Inter-Club Agreement.

[20] The Inter-Club Agreement provides, in Clause 9, that it is "subject to English law and jurisdiction". Accordingly, in terms of Roman Dutch law, English law applies. Mr. Shaw, Q.C., however submits that what is of crucial importance is that the determination of what the English law is, is a question of fact. In this context English law is a foreign law, which this Court would normally determine by taking judicial notice of the English law, but nevertheless the issue remains a question of fact in which the applicant is only required to establish a *prima facie* case. I agree with this submission.

[21] What has been placed before me without objection by any of the parties, are two opinions each by Mr. Timothy Young, Q.C. and Mr. Andrew Baker, Q.C., in which they reach contrary conclusions as to whether the claim by the applicant against the intervening party, is a "cargo claim" as defined in the Inter-Club Agreement. I am unable to conclude that the view of Mr. Baker, Q.C., tendered in

support of the applicant's claim, that the claim is not such a "cargo-claim", is manifestly wrong. Having decided that the dispute is one of fact, it suffices if the applicant establishes a *prima facie* case on this issue, which in my view, it has succeeded in doing. In this regard, Mr. Stewart, S.C. fairly conceded that if I found that the issue of what the English law was, was a question of fact, the applicant had made out a *prima facie* case and the intervening party must fail. In any event, and if the issue was a question of law, I would decline to decide it, on the ground that it will have to be adjudicated upon by the arbitrators in the pending arbitration.

[22] I was informed by Mr. Shaw, Q.C. that it was agreed between Counsel that the successful party should in addition be awarded the costs incurred in obtaining the opinion of Mr. Young, Q.C. or Mr. Baker, Q.C. as the case may be.

The order I make is the following:

A. Searoute Maritime Limited is granted leave to intervene in these proceedings.

B. The application by the intervening party and the respondents, that the deemed arrest of the second respondent be set aside, and that the

letter of undertaking attached to the notice of motion marked “A” be returned to the respondent’s attorneys, is dismissed.

C. The intervening party and the respondents are ordered to pay the applicant’s costs, such costs to include the costs incurred by the applicant in obtaining the opinions of Mr. Andrew Baker, Q.C., jointly and severally, the one paying the other to be absolved.

____

SWAIN J

Appearances: /

Appearances:

For the Applicant	**:**	Mr. D. J. Shaw, Q.C.
Instructed by	**:**	Shepstone & Wylie Durban
For the Respondents and Intervening Party	**:**	Mr. A. Stewart, S.C.
Instructed by	**:**	Garlicke & Bousfield Inc. Durban
Date of Hearing	**:**	12 November 2009
Date of Filing of Judgment	**:**	28 January 2010