

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)
(Exercising its Admiralty Jurisdiction)**

CASE No. **AC 26/2009**

NAME OF SHIP: MV *VOGERUNNER*

In the matter between:

TMT BULK CO LTD

Applicant

and

BUNKERS LADEN ABOARD

THE MV *VOGERUNNER*

First Respondent

TRANSFELD ER CAPE LTD

Second Respondent

BILLION GAIN ENTERPRISE CO (HK) LTD

Intervening Party

JUDGMENT

delivered on 28 OCTOBER 2009

BINNS-WARD J:

1] For reasons that will become apparent, the issues in this case have become reduced to the question of which of the parties

should be liable for the costs. However, in order to make that determination it has been necessary to consider the arguments that were advanced on the merits.

2] The subjects that that were addressed in argument in that regard were twofold.

3] The first concerned the ownership of the fuel on board the MV *Vogerunner* at the time the bunkers were arrested while the vessel was at berth at Saldanha Bay on 3 April 2009. The arrest occurred pursuant to an order obtained *ex parte* by the applicant, TMT Bulk Co Ltd (to which I shall refer as 'TMT'). The basis for the arrest was to afford TMT security for a claim it had instituted against the second respondent, Transfeld ER Cape Ltd (to which I shall refer as 'Transfeld'), in arbitration proceedings in London for damages in the amount of US\$4 692 380,00, plus interest and costs. The damages had allegedly been sustained as a consequence of a breach by Transfeld of a contract of afreightment concluded between TMT and Transfeld in January 2007. The arrest was ordered on the basis of an acceptance of the allegation in TMT's founding papers that Transfeld was the owner of the bunkers. The main issue argued before me was whether or not all or part of the fuel on board indeed belonged to

Transfeld, or was in fact the property of the intervening party, Billion Gain Enterprise Co (HK) Limited (to which I shall refer hereafter as 'BG').

4] The second question was whether BG had made out a proper case in terms of s 5(2)(c) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act') that TMT's arrest of the bunkers should be made subject to a condition that TMT be required to furnish security for a claim that BG indicated it intended to institute before this court (presumably in terms of s 5(4) of the Act) against TMT for damages arising from the arrest of the bunkers allegedly having been sought by TMT without reasonable and probable cause. By reason of the arrangements subsequently made for the hearing of both matters together, the second question would fall away as a practical issue if the first question were determined against TMT.

5] It would appear from correspondence put in by TMT on the day before this matter was heard on 21 October 2009 that the arbitral dispute between TMT and Transfeld was settled on 4 June 2009 on the basis that neither party would be liable to make any payment to the other. Contingent on the implementation of the settlement, TMT indicated its willingness to agree to release from

the alternative security provided by BG by way of a deposit of funds into an escrow account all but US\$25 000. TMT contends that the balance of US\$25 000 should be retained in the escrow account as security for TMT's costs in opposing BG's application before this court to set aside the arrest and the application for counter-security.

6] Mr *Stewart SC*, who appeared for BG together with Ms *Vaughan*, submitted that the compromise of the dispute on the basis described in the correspondence necessarily entitled BG to the release of the security provided by it. He submitted that there was no basis for the security to be retained pending implementation of the settlement. The security had not been given in respect of any further dispute that might arise in respect of the implementation of the settlement agreement. Mr *Stewart* further contended that TMT was not entitled on any basis to retain US\$25 000 as security for its costs in the applications for release and counter-security, as the arrest had not been ordered to establish security in that respect. Counsel also pointed out that there was nothing on the papers to indicate that the terms of the establishment of the escrow account might have widened the basis

upon which the security was provided. In my view all of these contentions are well-founded.

7] BG's resultant entitlement to the release of its security is the incident that renders the issues in the arrest application and the counter- security application moot, save for costs.

8] It is appropriate to begin with a summary of the relevant facts.

9] TMT obtained the order in terms of section 5(3) of the Act authorising the arrest of the bunkers laden on board the *Vogerunner* for the purpose aforementioned during the late afternoon of Friday, 3 April 2009. As mentioned, the order was executed later the same day.

10] On Tuesday, 7 April 2009, BG launched an urgent application for an order setting aside TMT's arrest of the bunkers. This happened after TMT had refused, during exchanges between the parties legal representatives on Monday, 6 April 2009, to accept the validity of BG's claim that it was the owner of the bunkers. The application by BG for leave to intervene and to set the arrest aside was set down for hearing as a matter of urgency

on Thursday, 9 April 2009; as permitted in terms of paragraph 5 of the order granted *ex parte* on 3 April.

11] On 8 April 2009 BG lodged a supplementary affidavit to found its aforementioned application in terms of section 5(2) of the Act for counter-security. The amount of the counter-security sought was US\$688 345,92.

12] On 9 April 2009 acceptable alternative security for TMT's claim was established by means of a deposit of funds into an escrow account, and the bunkers were released from arrest. The vessel, which upon the arrest of its bunkers had been ordered by the harbour master to move off its berth and stand at anchor, was thereafter able once again to take up its berth and to load its cargo.

13] Counsel were agreed that TMT, as the arresting party, bore the onus of justifying the arrest by proving on a balance of probabilities that the bunkers on board the *Vogerunner* were owned by Transfield at the time that the arrest was effected (cf. *Cargo Laden & Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 832 I and 834G-H). They were also agreed that any disputes of fact fell to be determined in

accordance with *Plascon Evans* principles.¹ This has the result that, in the absence of any basis to reject them as obviously untenable, I am able to accept the validity and probity of the factual averments made by the deponents to the affidavits filed on behalf of BG on the ownership dispute and can accept the supporting documentation annexed thereto at face value.

14] It was either common cause, or apparent from the documentation produced by BG, that the *Vogerunner* was owned by a German company, H Vogemann GmbH. At the time of the arrest of the bunkers the vessel was on a five year time charter to Transfield. In terms of a time charter, dated 23 February 2009, concluded on the standard NYPE 93 time charter form, BG had sub-chartered the *Vogerunner* from Transfield. The vessel was delivered to BG at Qingdao, China on 2 March 2009. At the time of the vessel's delivery she had on board 895,30 MT of intermediate fuel oil (IFO). The vessel thereafter sailed to Singapore in order to take on bunkers. On her arrival at Singapore the vessel had 506 MT of IFO on board.

¹ Whereas TMT initially had sought a reference of disputed facts to oral evidence, if necessary; this course was not persisted in at the hearing; advisedly so in my view.

15] In Singapore, in the course of a ballast voyage from China to Saldanha Bay, where she was destined to collect a cargo of iron ore, a further 2939,539 MT of bunkers was put on board. In terms of the relevant fuel supply contract between BG and Combo Sharp Trading Limited, BG would obtain ownership of the fuel supplied when payment therefor was effected to Combo Sharp, which appears to have happened on 14 April 2009. The evident intention was that Combo Sharp would retain ownership of the fuel it supplied until payment for it had been received.

16] It is convenient at this stage to mention that clause 2 of the charterparty between Transfeld (as disponent owner) and BG (as charterer) provided, '*whilst on hire the Charterers shall provide and pay for all the fuel except as otherwise agreed....*'. That provision in the standard contract forms has been authoritatively construed to denote that the charterer is the owner of the fuel provided and paid for by it during the currency of the contract. (See *Ex parte Terminus Compania Naviera SA & Grinrod Marine (Pty) Ltd: In re The Areti L* 1986 (2) SA 446 (C) at 449J- 450 I, with reference to the decisions in *The Saint Anna* [1980] 1 Lloyd's Rep 180 (Q.B. Adm) and *The Span Terza* [1984] 1 Lloyd's Rep 119 (HL). See also *Ultisol Transport Contractors Ltd v Bouygues Offshore* 1996

(1) SA 487 (C) at 493F-494F and cf. *The MV Prosperous: Cobam NV v Aegean Petroleum (UK) Ltd and Another* 1996 (2) SA 155 (A)). Clause 2 is therefore inconsistent with any intention that Transfeld would become owner of the bunkers stemmed at Singapore upon their being laden on the vessel.

17] One looks in vain for any indication in the charterparty that the parties intended that any fuel provided and paid for by BG in terms of clause 2 should be merged with any other bunkers on board that might – on TMT’s construction of the contract - have been owned by Transfeld so as to bring about joint and undivided ownership in the resulted mixture. The potential consequences, in the context of the arrest, of any merger of Transfeld’s property with that BG by *confusio* therefore do not arise for consideration. The effect of clause 2 means, however, that there is no room to doubt that BG did hold a proprietary interest in the bunkers that were arrested, even if –on TMT’s case - not an exclusive one. It is not necessary, however, to grapple with the practicalities of just which part of the bunkers was justifiably attachable at the instance of TMT unless the question of who owned the bunkers on board on delivery in terms of the charterparty is answered favourably to

TMT's contentions. I therefore turn to deal with the ownership of the bunkers on board when the vessel came on hire.

18] BG contends that its purchase of the bunkers on board the vessel at the time of the delivery of the vessel was evidenced in the terms of the sub-charterparty (cf. *Shoreline Universal Ltd BVI v America's Bulk Transport Ltd and others (The Titan)* [2007] 3 All SA 183 (D) at 187f). BG relied in this regard on the provisions of specially framed clause 33(d) of the rider clauses in the contract, which provided:

'Bunker quantities on delivery to be about IFO² 900mt and about MDO³ 150mt. Bunker prices USD225/pmt for IFO and USD400/pmt for MDO. Same quantities and same prices both ends.'

Clause 33(d) falls to be read with clause 37, which in turn provided insofar as relevant:

'Charterers shall pay the first hire and value of bunkers on delivery within three (3) banking days upon delivery, subsequently hire is payable every 15 (fifteen) days in advance thereafter.

.....

Charterers have the right to deduct from Charter hire during the period of the Charter any off time hire..... Charterers have the right to withhold from last hire payment estimated value of bunkers on board at

² Intermediate fuel oil.

³ Medium diesel oil.

redelivery, however final hire payment to be arranged as promptly as possible.'

19] It was argued on behalf of TMT that Clause 33(d) read in the context of the charterparty did not constitute a contract for the sale of the bunkers. In the heads of argument submitted by TMT's counsel, significance was attached in this regard to the fact that clause 3 of the standard form charterparty provisions had been deleted in the concluded contract. Clause 3 of the NYPE Time Charter Form provides:

'That the Charterers, at the port of delivery, and the Owners, at the port of redelivery, shall take over and pay for all fuel remaining on board the vessel at the current price in the respective ports, the vessel to be delivered with not less than ... tons and not more than ...tons and to be re-delivered with not less than... tons and not more than ...tons.'

Equivalent wording to clause 3 has previously been held to evidence a contract of sale from owners to charterers of the bunkers already on board at the commencement of the hire period, and thereafter a further contract of sale by the charterers to the owner at the conclusion of the hire period (*Universal Group Limited t/a Island View Shipping Co v The Fund created by the sale of the MV Maharani* 1990 (2) SA 480 (N) at 487D-E and 489I).

20] In TMT's heads of argument it was suggested, with reliance on the approach adopted by Berman AJ (as he then was) in *Frosso Shipping Corp v Richmond Maritime Corp (Ideomar SA Intervening)* ('*The Maria K*') 1985 (2) SA 476 (C) at 483 I- 484D, that the deletion of the standard form clause 3 pointed towards there having been no intention by Transfeld and BG to conclude a contract of sale for the bunkers already on board the vessel when entering into the charterparty on the agreed terms. However, in the face of the reference in the heads of argument put in by BG to the principle enunciated in *Pritchard Properties (Pty) Ltd v Koulis* 1986 (2) SA 1 (A) – a judgment delivered nearly two years after that in *The Maria K* - to the effect that deleted words in a deed of agreement do not form part of the agreement and therefore do not fall to be had regard to in its construction (cf. also *A & J Inglis v John Buttery & Co* (1877 - 1878) 3 Appeal Cases 552 at 571), TMT's counsel did not pursue that contention in oral argument.⁴

21] The correct approach to the construction of clause 33(d) of the time charterparty concluded between Transfeld and BG is to

⁴ I should mention that it is not apparent to me that the principle in *Koulis* is applicable when the contract, construed without any reference to what the parties decided to delete, is ambiguous. I incline to the view that where the contract is ambiguous, the deletion of wording appearing in the signed deed is a matter to which regard may, in an appropriate case, properly be had on *Delmas Milling* principles, being part of the relevant factual matrix. See *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454F - 455C. Compare also *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) at para. [39].

consider its wording with regard to the ordinary meaning of the language used, read in context. The exercise falls to be undertaken consistently with the 'golden rule' of interpretation described in the oft-cited passage in *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E- 768E. The proper construction of the clause is determinative of the dispute between TMT and BG as to whether its provisions record a contract of sale.

22] It is trite that the *essentialia* of a contract of sale require agreement between the seller and the purchaser on the identity of the thing to be sold and purchased (the *merx*) and the price at which it is to be made available, coupled with an undertaking by the seller of the legal obligation to put the *merx* at the disposal of the purchaser so that the latter can take it into possession (i.e. an undertaking by the seller to 'deliver' it).

23] If regard is had to the aforementioned provisions of clauses 33(d) and 37 of the additional clauses introduced by the parties into their otherwise standard form contract, the identity of the thing in issue is clearly identified: it is the bunker quantities on board at the commencement and the termination of the hire, respectively. A price per unit measure (metric tons) for the IFO and MDO is stipulated, which it is clear the charterers must pay to the owners

in respect of the bunkers on board when the vessel comes on hire and the owners must pay to the charterers upon redelivery. There is also, in my view, a sufficiently clear indication of an undertaking by the owners to effect delivery (in the sense of that word in the context of the contract of sale) at the commencement of the hire period. The undertaking is to make the vessel available with a stipulated quantity (albeit expressed in terms which allowed a reasonable degree of latitude to the seller) of the IFO and MDO on board.

24] All the essential elements of a contract of sale were therefore present. In the context of the presence of those characteristics, the parties' use of the term 'price' tends to confirm their apparent common intention that the respective transactions concerning the bunkers on board at the beginning and the end of the charter were to be contracts of sale. This impression is further strengthened by the incidence of clause 33(d) in a contract containing the provision in clause 2, discussed above.⁵ The price to be paid by TMT as the disponent owner on redelivery is plainly directed at the acquisition by it of the bunkers purchased by and in the ownership of BG, as the charterer, in terms of clause 2, during the hire period. What

⁵ See para. [15], above.

character of transaction could achieve that evident objective other than a contract of purchase and sale? There is no basis in the language to suggest that the parties wished to distinguish the nature of the transaction intended in terms of clause 33(d) to occur at the end of the charter from that which was to occur at its commencement; other than as to which of the parties was to be seller and which purchaser in the respective transactions.

25] Mr *Wragge SC*, who (together with Mr *Howie*) appeared for TMT, sought to contend against the correctness of the conclusion reached by me in the preceding paragraph on the basis of the absence of any use in clause 33(d) of the expression 'take over and accept'. In this regard, again with particular reliance on Berman AJ's judgment in *The Maria K*, counsel emphasised the legal character of a time charterparty. In this connection Mr *Wragge* stressed that the contract does not give the charterer physical possession and control of the vessel and, in essence, affords the charterer only the facility to use the cargo space on agreed terms for the provision of a carrier service to be rendered by the shipowner using its ship and crew. There is no 'delivery' in the true sense of the word (as applied in the context of a sale) of

the ship to the charterer.⁶ He submitted that in that context, in the absence of clear provision in the charterparty to the contrary, the bunkers on board the vessel - no matter who pays for them - remain at all time in the possession and under the control of the owner of the vessel. Mr *Wragge* submitted that the elements of clauses 52 and 50 in the charterparty in issue in *The Maria K*, which provided insofar as relevant:

'Vessel will be delivered with about 750 metric tons of fuel oil on board. Charterers paying 180 US\$ per metric ton of fuel oil. Vessel to be re-delivered with about the same quantity as she was delivered. Owners paying charterers, as per clause 50, same price. Charterers to pay on delivery for 200 tons of fuel oil and the balance until total quantity of bunkers is delivered, to be paid to the owners at latest sailing from the last loading port of the first voyage.' (clause 52)

and

'If during the currency of this charterparty any proven expenditure is incurred by charterers on behalf of the owners, which is normally for owners' account, the charterers shall have the right to recoup themselves in respect of such expenditure by way of deduction from any hire which may become due and payable under this charterparty. Charterers are entitled to deduct from the ultimate and penultimate, if necessary, hire payment, the amount of bunkers on re-delivery, as well as the estimated outlays for owners' disbursements. If any over-

⁶ Cf. the passage from McKinnon LJ's judgment in *Re Arbitration Between Sea And Land Securities Ltd and William Dickinson & Co Ltd; The Alresford* [1942] 1 All ER 503 (CA), quoted in *The Maria K* at 479H-480C and see the explanation of the meaning of the terms 'delivery' and 'redelivery' in a time charter in *The Prosperous*, supra at 161E-F.

deduction is made by charterers, then charterers to remit same to the owners within maximum five days after the time of re-delivery' (clause 50).

were equally evident in the clauses in contention in the current case and there was no basis to distinguish the matter for the purposes of construction from the finding in *The Maria K* (at 484 A-D).

26] TMT's counsel's argument is sustainable only if Berman AJ was correct in his approach to the construction of the relevant clauses in the charterparty in issue in *The Maria K*.

27] At the passage in *The Maria K* just cited Berman AJ held:

'Merely providing that the charterer was to pay for the fuel oil to be consumed on the voyage, indicates that the parties contemplated no more than what SHEEN J [in *The Saint Anna* [1980] 1 Lloyd's Rep 181 (QB)] called a financial transaction (and not a purchase) under which the charterer paid for the fuel oil. Mr *Kuschke's* contention that, on a proper construction of clause 52, there was a sale of the fuel oil to the charterer must fail when that clause is seen in its proper context as part of the time charterparty, where the vessel remains at all times in the possession, control and management of the owner, which - through its employees - is contractually bound to do no more than carry the charterer's goods during a specified period of time from one port to another by putting the vessel at the charterer's disposal; the reciprocal obligations of the charterer being, insofar as payment is concerned, to pay for having the vessel put at its disposal and to pay for the fuel

consumed, it being entitled to be reimbursed at the end of the voyage, in terms of clause 50, in respect of fuel oil still in the tanks. I hold therefore that no sale of fuel oil to the charterer took place.’

Mr *Wragge* further submitted that the employment of the word ‘value’ rather than ‘price’ in clause 37 of the contract at issue in the current case was a further indicator against the existence of an agreement of sale of the bunkers on board to the charterer at the time of delivery.

28] It has already been mentioned that the learned judge’s view of the significance of the deletion of the standard clause 3 fundamentally influenced his construction of clauses 50 and 52 of the charterparty he was called upon to interpret. As rightly contended by Mr *Stewart*, the subsequent judgment of the Appellate Division in *Koulis* confirms that the approach by Berman AJ to the task of construing the contract in issue was materially misdirected in principle. As soon as Mr *Wragge* conceded (as he was bound to do) the applicability of the *Koulis* principle, his reliance on *The Maria K* was fatally undermined.

29] There is no significance in the absence from clause 33(d) of the expression ‘take over and accept’. The parties to the contract in issue in the current case chose to express themselves

differently to the standard clause, but the concept denoted by that expression was nonetheless clearly recorded in the language which they did employ.

30] It also seems to me, with respect, that Berman AJ was wrong in apparently - in the context of an *a priori* approach informed by the learned judge's understanding of the legal character of a time charterparty - considering the bunkers to be an integral part of the ship: In *The Eurostar*⁷ [1993] 1 Lloyd's Law Rep 106 (Q.B. Adm), Sheen J commented, in the context of determining the ambit of the mortgage of a ship – and more particularly whether it included the ship's bunkers, '*The word "ship" does not in its ordinary meaning include fuel. It is common practice for the fuel to be the property of charterers.*' Construing the language of clause 33(d) as I have done results in the acknowledgment of an intention by the parties to regulate proprietorship of the bunkers in accordance with such common practice, and not, as Berman AJ's constructional approach to the clauses in *The Maria K* implied, in a position at odds with the normal essence of a time charter. I should not be misunderstood hereby to be suggesting that a different *a priori* approach to the construction of a time charterparty to that taken by

⁷ *Den Norske Bank A/S and Irish Intercontinental Bank Ltd v Owners of the Ships "Eurosun" and "Eurostar" and Euro Marine Carriers B.V. (The "Eurosun" and "Eurostar")*

Berman AJ is appropriate. On the contrary, the nature of a typical time charterparty, being ‘a complex commercial bargain between owner and charterer’,⁸ is such that any interpretation of such a contract should be approached with due appreciation of the ability of the parties to regulate the detail of their contractual relationship in a multitude of different and individualistic ways while nevertheless remaining true to the recognisable typical features of a time charterparty.

31] The use of the word ‘value’ rather than ‘price’ in clause 37 of the agreement furthermore does not detract from the construction of clause 33(d) as providing for two agreements of sale. I agree with the submission by Mr *Stewart* that, read in context, the word ‘value’ connotes the result of the calculation of the amount of the monetary consideration to be paid, determined with reference to the precise quantity of the fuel delivered under the respective sales provided for in clause 33(d). Interpreted in that way there is no conflict between the terminology in clause 33 and that in clause 37. In terms of Mr *Wragge*’s construction on the other hand, the word ‘price’ in clause 33(d) would fall to be negated by the word ‘value’ in clause 37. There is in my view no warrant for preferring

⁸ Per Lord Bingham of Cornhill in *Whistler International Limited v. Kawasaki Kisen Kaisha Limited* [2001] 1 All ER 403 (HL).

the sense of the one word above the other in construing the contract.

32] I am fortified in my conclusion, arrived at on a purely linguistic approach, that BG's contention as to the proper meaning and effect of the contract is the correct one by regard to the commercial sense of its import so construed - particularly if contrasted with the effect if TMT's contention were accepted. Implicit in the argument advanced on the applicant's behalf is that TMT would have it that the parties intended that the implementation of the contract would bring about a situation during the charter, after bunkers were stemmed in Singapore, that both parties would enjoy some form of joint or partial ownership of the bunkers on board. No sensible reason for such an objective is evident. Quite the opposite, every good reason exists why the parties should wish to avoid such a result.⁹ Both parties would thereby unnecessarily expose themselves to the risk of the attachment of their property at the instance of the creditors of the other; and such risk would continue even after their contractual relationship under the charterparty had ended. The arrest of

⁹ Cf. *The Maharani* supra, at 489H.

bunkers is a not infrequent litigious event;¹⁰ and it seems to me unlikely therefore that the contracting parties would have been unaware of the potentially adverse incidences of any agreement with the effect contended for by TMT. It would render a distinctly unbusinesslike result to construe the contract as TMT would seek.

33] The mere conclusion of a contract of sale does not result in the transfer of ownership to the purchaser. In order for that to happen there must be delivery accompanied by the intention to pass ownership (see *Lendlease Finance (Pty) Ltd v Corporacion De Merçadeo Agricola and Others* 1976 (4) SA 464 (A) at 489H-490A). Although delivery was put in issue in the written argument, Mr *Wragge* - while expressly refraining from making any admission – nevertheless, advisedly in my view, did not contest Mr *Stewart's* submission that on the facts it was clear, if South African law is applied¹¹, that delivery had occurred by *constitutum possessorium*.¹² Equally, insofar as English law might apply - by reason of the incidence of rider clause 65(a) of the charterparty, in

¹⁰ See e.g. J. Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Juta & Co, 1999, at §2-2.5.2

¹¹ There was no indication in the evidence that the *lex situs* was inconsistent with South African law and accordingly it is presumed to be the same. Cf. e.g. *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 692D-E; *MV Heavy Metal; Belfry Marine Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) at para. [65].

¹² See *Mankowitz v Loewenthal* 1982 (3) SA 758 (A) 766B-G and cf. *Universal Group Ltd t/a Island View Shipping Co v The Fund created by the sale of the MV Maharani, Ex MV Claire A Tsavlis (The Maharani)* 1990 (2) SA 480 (N), especially at 491H-494B.

terms of which the parties agreed that the contract would be governed by and construed in accordance with English law¹³ - delivery of a personal chattel is not required under that law to pass ownership.¹⁴ Under English law ownership passes in accordance with the expressed intention of the parties as evidenced by the terms of their contract. That the parties had the requisite intention is implicit in my findings, above, about the proper construction of clauses 33(d) and 37 of the charterparty.

34] It follows that, to the extent necessary, BG is entitled to an order setting aside the order authorising the arrest of the bunkers.

35] The application by BG for the provision by TMT of counter-security was contingent on the failure of its application to have the arrest order set aside. In terms of orders granted on 9 and 14 April 2009, respectively, directions were given that resulted in the two applications being setdown for hearing together on 6 May 2009. Costs were stood over for later determination. On 6 May 2009 both applications were postponed for hearing together on 13 August 2009, and the costs occasioned by the postponement were stood over for later determination. On 13 August 2009,

¹³ See *Marcard Stein & Co v Port Marine Contractors (Pty) Ltd and Others (The Gulf Trader)* 1995 (3) SA 663 (A) at 671H-J read with *Ultisol Transport Contractors Ltd v Bouygues Offshore* 1996 (1) SA 487 (C) at 492H -493C.

¹⁴ See *Ultisol Transport Contractors Ltd* supra, at 493G-H; *The Gulf Trader* supra, at 667D.

apparently because an early allocation notice required in terms of Consolidated Practice Note 43 had not been filed, the applications were further postponed to 21 October 2009; the costs of that postponement also being stood over for later determination. At the hearing before me on 21 October 2009, counsel were agreed, subject obviously to the exercise by the court of its discretion, that the costs stood over in terms of the orders just described should be costs in the cause.


36] In the circumstances I do not consider it necessary, or appropriate to give consideration to the merits of the application for counter-security. The need to do so fell away once the practical outcome of the matters was determined by the directions given in the orders made earlier that the applications be heard together. In that context a consideration of the application for counter-security would be relevant only in the event of the application for the setting aside of the arrest order not being upheld. That contingency has in the event not eventuated. I do not propose therefore to make any order at all in respect of the application for counter-security.

37] The following orders will issue:

- a The order authorising the arrest of the bunkers laden aboard the *MV Vogerunner* for the purposes of providing security to the applicant in terms of s 5(3) of the Admiralty Jurisdiction Regulation Act No. 105 of 1983 ('the Act') is hereby, to the extent that remains necessary, set aside.
- b The applicant is ordered to pay the intervening party's costs of suit in the application for leave to intervene and for the setting aside of the aforementioned order granted in terms of s 5(3) of the Act on the scale as between party and party; such costs to include –
 - (i) the costs of two counsel;
 - (ii) the costs reserved for later determination in terms of the orders made on 9 April 2009; 6 May 2009 and 13 August 2009; and

(iii) the full costs of appearances at the hearing on 21 October 2009.

c No order is made in the application by the intervening party in terms of s 5(2) of the Act for the provision of counter-security; and there shall be no order as to costs in respect of the costs stood over for later determination in terms of the order made on 14 April 2009.



A.G. BINNS-WARD
Judge of the High Court