NOT REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT – DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO.: A148/2005

Name of Ship: **MV "IRAN DASTGHAYB"**

In the matter between :

TERRA-MARINE SA	**PLAINTIFF/RESPONDENT**
and	
MV "IRAN DASTGHAYB"	**DEFENDANT/1st APPLICANT**
ISLAMIC REPUBLIC OF IRAN SHIPPING LINES	**SECOND APPLICANT**
ECO SHIPPING COMPANY (PJS)	**INTERVENING APPLICANT**

J U D G M E N T
DELIVERED ON : 29 OCTOBER 2009

PATEL J

[1] This is an application brought by the applicants for the following relief :

1.1. The Respondent's action *in rem* against the mv "IRAN DASTGHAYB" under case number A148/2005 is stayed in terms of section 7 (1) (b) of the Admiralty Jurisdiction Regulation Act No. 105 of 1983, pending the determination

of the Respondent's claims in the arbitration proceedings in London.

1.2. The said order for the stay of the *in rem* action in paragraph 1 hereof is made subject to the Second Applicant providing security to the Respondent for any final and un-appealable arbitration award in the arbitration proceedings (and also in the *in rem* proceedings should the stay of the action be lifted), such security being restricted to the claims identified in paragraph 59 of the founding affidavit of Reddy at pages 43 – 45 of the record as arising after 13 December 2000 and limited to the capital sum of US$830 420.43 in respect of :

1.2.1. Unpaid management fees in the sum of US$632 100.00;

1.2.2. Steel work and repairs in respect of the mv 'ECO Elham' in the sum of US$11 000.98;

1.2.3. Steel work and repairs in respect of the mv 'ECO Ekram' in the sum of US$156 044.45;

1.2.4. P & I Insurance reimbursement in relation to the mv 'ECO Ekram' in the sum of US$15 315.00;

1.2.5. Bunkers at Karachi US$15 960.00,

together with US$99 650.45 in respect of security for interest and the sum of US$25 000.00 in respect of legal costs.

1.3. Upon the provision of such limited substitute security, the security previously provided by the second applicant shall be cancelled and the respondent is directed to return all and any letters of undertaking furnished in that regard to the applicants' attorneys for cancellation.

1.4. The respondent is ordered to pay the second applicant's costs, such costs to include the qualifying fees of the expert witness Dr. Iraj Babaei.

The First Applicant is the mv "IRAN DASTGHAYB". The Second Applicant is ISLAMIC REPUBLIC OF IRAN SHIPPING LINES. The Intervening Applicant is ECO SHIPPING

COMPANY (PJS). The respondent is TERRA-MARINE SA, a company duly registered and incorporated with limited liability in accordance with the laws of Switzerland.

[2] The respondent as plaintiff commenced action proceedings *in rem* in terms of Section 3 (5) (a) read with Section 3 (4) (b) of the Admiralty Jurisdiction Regulations Act 105 of 1983 ("the Act") against the first applicant and 91 other vessels by issue of the summons on 23 December 2005 under case number A148/2005, it being alleged that all 92 vessels were associated ships against which it alleged claims against ESC were enforceable. Out of convenience, I shall refer to the parties as follows:

2.1. Terra-Marine S.A., the plaintiff in the action and the respondent in this application, as "the plaintiff";

2.2. The mv IRAN DASTGHAYB, the defendant in the action and the first applicant in this application, as "the defendant" or "the defendant vessel";

2.3. ISLAMIC REPUBLIC OF IRAN SHIPPING LINES, the owner of the defendant and the second applicant in this application, as "IRISL";

2.4. ECO SHIPPING COMPANY, the intended intervening applicant in this application, as "ESC"; and

2.5. The defendant and IRISL together as "the applicants".

[3] The warrant of arrest was issued on 6 March 2006 and the defendant vessel was arrested. The vessel was subsequently released from arrest against the provisions of security in the form of a letter of undertaking in terms of Section 3 (10) (9) (i) of the Act with the result that there continues to be a deemed arrest of the vessel. It is common cause that the letter of undertaking was subsequently substituted by agreement with a different letter of undertaking. The arrest of the defendant vessel was effected on the basis that the plaintiff is owed various sums of money by the ESC being those amounts payable to the plaintiff on balance of account between those parties cited in the summons under a ship management agreement between them in respect of the management by the plaintiff of the vessel's ECO Ekram and ECO

Elham. The plaintiff pursues those claims against the defendant vessel. In argument before this court Mr Mullins who appears for the applicant conceded that IRISL ships are associated ships with regards to claims arising after 13 December 2000.

[4] During the latter part of 2003, some two years prior to the commencement of the *in rem* proceedings in South Africa, the plaintiff had commenced arbitration proceedings against ESC in London pursuant to a clause in the ship management agreement between the plaintiff and ESC which was in the following terms:

> "In case of any controversy arising out of the interpretation or enforcement hereof, it should at the first place be settled through mutual negotiation. If the parties fail to reach an agreement in this way, then the matter shall be submitted for arbitration in London to be adjudged under the provisions of English laws."

[5] The relief sought in this application changed at the hearing of the application and is different from the one set out in the notice of motion. There was no challenge to the arrest of the vessel on any basis other than that the arrest should be set-aside if the counter-security that was sought was not furnished alternatively that the

security should be reduced if the counter-security was not furnished. Further it appears from the papers that the applicants did not seek an order that the court decline to exercise jurisdiction and dismiss the action pursuant to s7 (1) (a) of the Act.

[6] Be that as it may the applicants no longer require that the plaintiff be ordered to provide counter security to ESC for the latter's counterclaim in the arbitration. It might also be mentioned and this much is common cause that there was no application to set the arrest aside and accordingly and as submitted by Mr Stewart who appears for the plaintiff, analogies with such applications are accordingly inappropriate. It is because counter security is no longer sought that ESC, which is in liquidation, decided not to be a party in these proceedings. If there were any other reasons the same are not apparent from the papers.

[7] The essential relief sought by the applicants is that the *in rem* application instituted by the plaintiff pending the finalization of the arbitration in London be stayed. The amended relief sought by the applicants has no proper basis in its founding papers but in my view if I am with the plaintiff that IRISL cannot rely on the arbitration clause in the ship management contract between the

plaintiff and ESC, then in that event that is dispositive of the matter and I need not accede to Mr Mullins, who appears for the applicants, request that I consider all the other issues raised by him in the argument albeit they do not strictly find genesis in the applicants founding papers.

[8] There is a dispute as to whether the applicants have properly made out a case in their founding papers that this court is not a convenient forum in which the *in rem* action must be adjudicated. Section 7 (1) (a) constitutes the statutory recognition of the *forum non conveniens* doctrine by which a defendant can ask a court to decline to exercise jurisdiction on the basis that it is more appropriate that the proceedings be adjudicated upon in another forum. The defendant bears the onus in this regard. I am in agreement with Mr Stewart that aside from the obvious point that the proceedings between the plaintiff and the defendant vessel are not the same proceedings as might be pursued in the arbitration, and therefore the *forum non conveniens* doctrine cannot possibly apply, reliance on s 7(1)(a) only in reply constitutes the introduction of a new cause of action with different considerations therefore requiring different evidence. The prejudice to the plaintiff

of allowing that at this stage is palpable. I therefore will decide this application in the manner in which I have done.

[9] I further agree with Mr Stewart that the challenge to certain of the components of the claim being maritime claims and to their enforceability *in rem* raises the need for the plaintiff to adduce new and further evidence. The plaintiff cannot be expected to do that in yet further affidavits, in particular when the prayer for relief which it has been called upon to meet has not been amended. I therefore do not advert to this aspect in my judgment.

[10] I deal therefore with the question whether IRISL can rely on the arbitration clause in the ship management contract between the plaintiff and ESC. The plaintiff's case is that IRISL, as owner of the defendant vessel is not a party to the arbitration clause and cannot enforce that clause against the plaintiff. On a literal interpretation of the arbitration clause adverted to above, it is obvious that IRISL is not a party to that agreement. Is there any other legal basis? Both Mr Mullins and Mr Stewart argued that on the facts as set out in these papers, there is no direct authority and sought to bolster their respective arguments by referring me to analogous cases.

[11] I might in passing mention that the applicants have sought a stay of the action instituted by the plaintiff by motion proceedings and to have certain issues which would otherwise be determined at the trial to be determined in these application proceeding. Although nothing is irregular about this, the plaintiff is only expected to justify the arrest to the extent that the arrest is challenged in their founding papers in motion proceedings. The procedure adopted by the applicants in seeking to determine certain of the issues between the parties in application proceedings carries with it the risk to the applicants in the event that those issues cannot be determined in these proceedings because of disputes of facts then the applicants must lose on those issues which will then have to be determined at the trial in due course.

[12] I turn now to consider whether the applicants can rely on the arbitration clause. The plaintiff's case is that IRISL, as owner of the defendant vessel, is not a party to the arbitration clause and cannot rely on that clause against the plaintiff. If IRISL cannot rely on the arbitration clause then in my view that is dispositive this entire application.

[13] As pointed out earlier, the plaintiff's case is that IRISL, as owner of the defendant vessel, is not a party to the arbitration clause as against the plaintiff. In the absence of any direct authority on this point, Counsel for plaintiff referred the Court to ***Freightmarine Shipping Ltd vs S Wainstein & Co (Pty) Ltd and others*** 1984 (2) SA 425 (D). In casu, Freightmarine applied to stay proceedings against it in reliance on an exclusive arbitration clause in the bill of lading. The court refused the application for a stay on the grounds the Freightmarine was not a party to the bill of lading and therefore could not force those parties to arbitrate. Although the facts in the Freightmarine case are not on all fours with facts in this case it is perhaps necessary to consider briefly the facts in Freightmarine case. S Wainstein & Co brought an action against Freightmarine and Robertson for damage to cargo. The carrier under the bill of lading was Robertson or Safmarine, the owner and charterer, and Freightmarine was sued as 'agent' of the carrier in terms of s311 (4) of the Merchant Shipping Act 57 of 1951. That section has since been repealed by the Carriage of Goods by Sea Act 1 of 1986. It provided that a ship's agent of a foreign ship in a South African port would in certain circumstances be liable for claims against the ship or the owner or the charterer of the ship. It was on this basis of statutory liability that Freightmarine was sued in the

action in respect of the carrier's debt, a situation akin to the statutory liability of an associated ship defendant.

[14] In my view there is no basis upon which the plaintiff could commence arbitration proceedings against IRISL and therefore there is no basis on which IRISL can ask for a stay of the proceedings in this forum. Of course, every defence to the underlying claims against ESC must be available to the defendant in an associated ship action, reliance on the arbitration clause is not a defence to the claim, it is merely a procedural remedy personal to the original debtor. ESC is not before this court in this application hence in my view IRISL cannot rely on the arbitration clause for a stay of the action in this court.

[15] Counsel for IRISL relies on the ***mv Achilleus vs Thai United Insurance Co. Ltd and others*** 1992 91) SA 324 (N) as being a case in which an exclusive jurisdiction clause between the plaintiff and the principal debtor was successfully relied on in achieving a stay of the proceedings against the associated ship. However a study of this case reveals that it is probable that the carrier that issued the bills of lading in which the exclusive jurisdiction clause was recorded was not the owner of the associated ship arrested in

Durban. Further from the judgment it is quite possible that the carrier which was personally bound by the exclusive jurisdiction clause was also the owner of the associated ship. It was perhaps for this reason that the point pertinent to this matter was not argued in the mv Achilleus. In my view the point was not settled in the mv Achilleus in favour of IRISL.

[16] This point being decisive, I do no need to consider the other points raised by IRISL. I am not persuaded that IRISL will suffer any more prejudice if the matter was disposed off in this court than it would if the matter were to be decided in London.

[17] The application is therefore dismissed with costs.

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PATEL J

DATE OF HEARING :	**TUESDAY, 24 FEBRUARY 2009**
DATE OF JUDGMENT :	**THURSDAY, 29 OCTOBER 2009**
COUNSEL FOR PLAINTIFF/RESPONDENT:	**A M STEWART SC**
INSTRUCTED BY :	**COX YEATS** **12TH FLOOR** **VICTORIA MARINE** **71 VICTORIA EMBANKMENT** **DURBAN** **(REF.: Andrew Clark/ps/09 T717 001)**
COUNSEL FOR APPLICANTS:	**S MULLINS SC**
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