IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION

(Exercising its Admiralty Jurisdiction) CASE NO:**A78/2007**

NAME OF SHIP: MV "**ASIAN HOPE**"

In the matter between:

ASIAN HOPE SHIPPING LIMITED **APPLICANT**

and

OCEAN TRADE S.A. **RESPONDENT**

JUDGMENT

KRUGER J:

[1] Pursuant to an order of this Court granted on the 20th July 2007, the MV "Asian Hope" was arrested at the instance of the Respondent. The Respondent, as Plaintiff, commenced an action "*in rem*" against the MV "Asian Hope" as an arrested ship in relation to certain other vessels by the issue of an "*in rem*" summons. On the 22nd July 2007 the MV "Asian Hope" was arrested in Richards Bay Harbour.

[2] The Applicant now seeks to have the arrest set aside.

[3] There are two issues to be decided:

a) Whether the Respondent, as the Applicant for the arrest,

has established a *prima facie* case in respect of its claims and

b) Whether the Respondent has shown, on a balance of probabilities, that the MV "Asian Hope" is an associated ship and therefore susceptible to arrest *in rem* in respect of the Respondent's claims.

PRIMA FACIE CASE

[4] In **Hulse-Reutter and others v Godde 2001(4) SA 1336**, Scott JA held at 1343 E-F:

> "The requirement of a *prima facie* case in relation to attachments to found or confirm jurisdictions has over the years been said to be satisfied if an applicant shows that there is evidence which, if accepted, will establish a cause of action and that the mere fact that such evidence is contradicted will not disentitle the applicant to relief – not even if the probabilities are against him; it is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused."

[5] In assessing the evidence presented to warrant an arrest Scott JA held:

> "What is clear is that the "evidence" on which an applicant relies, save in exceptional cases, must consist of allegations of fact as opposed to mere assertions. It is only when the assertion amounts to an inference which may reasonably be drawn from the facts alleged that it can have any relevance. …. The enquiry in civil cases is, of course, whether the inference sought to be drawn from the facts proved is one which by balancing probabilities is the one which seems to be the more natural or acceptable from several conceivable ones. ….

> If the position were otherwise the requirement of a *prima* facie case would be rendered all but nugatory." (At 1344 C-E)

[6] In casu, the facts relied upon by the Respondent and what is common cause are that:

a) There were business dealings between the Respondent, Ocean Trade SA, and a Japanese company known as Inter Pacific Lines ("IPL").

b) IPL was in financial difficulties and as a result fell into arrears with the payments of Bareboat Charter Hire to the Ocean Trade owners.

c) During 2001 there were extensive negotiations between the Respondent, IPL and Keymax Maritime Co. Limited ("Keymax") who managed the charter vessels.

d) Various agreements were drafted and exchanged between the parties in an attempt to reach consensus.

[7] The Respondent's claim is based upon an allegation that an agreement with Keymax was reached and signed by both Ocean Trade and Keymax whereby Ocean Trade, as compensation for its loses, would receive purchase options in respect of six (6) vessels, viz, MV's Ocean Daisy, Ocean Sampaguita, Ocean Ellie, Ocean Phoenix, Ocean Harmony and Southern Odessey. ("the option ships"). This agreement became known as the "Keymax agreement".

[8] The Applicants deny that the Keymax agreement was signed and consequently came into existence.

[9] In substantiation of its allegations, Mr Wallis SC, on behalf of the Respondent, has referred to correspondences exchanged between Mr Charalambous Ziogas and Mr George Economou - representing Ocean Trade and their Japanese counterparts. These are discussed briefly hereafter.

[10] On the 17th December 2001, Dr Ziogas (who was the chief negotiator on behalf of Ocean Trade) sent an e-mail to Mr Economou wherein he stated that he was "satisfied with progress made". This of course related to the IPL and Keymax agreements of which he was tasked to oversee its conclusion.

[11] On the 27th December 2001, Dr Ziogas sent a further e-mail to Mr Economou which stated as follows:

> "For your file please find what I sent to our Japanese friends …. with the attachments of the final agreements which are much improved." (my emphasis)

[12] In the original message to the "Japanese friends", Messrs Kayahara and Iwai, Dr Ziogas expressed the hope "that the attached agreement will be signed today".

[13] It is indeed common cause that the IPL agreement was duly signed.

[14] On the 31st December 2001, a fax was forwarded by Keymax to Ocean Trade, for the attention of Dr Ziogas, enclosing the Keymax agreement duly signed by its President, Mr Kayahara.

On the 31st December 2001, after receiving the telefax mentioned above, Dr Ziogas forwarded an e-mail to Mr S Iwai, of Keymax in which the following is stated:

> "Dear Mr S Iwai
> Thank you very much for the signed agreement by Kayahara-san which was well received today and your kind e-mail.
> I faxed back signed both agreements to your office.
> I am looking forward working with you and Tony implemented (sic) these agreements." (my emphasis)

[15] This is the high-water mark of the Respondent's case in discharging the onus of a *prima facie* case. The Respondents contend that subsequent to the signing of the Keymax agreement, as edvidenced above, Dr Ziogas, in breach of his fiduciary obligations, alternatively fraudulently, procured that the options on four of the six option ships were granted in favour of the four companies owned or controlled by him. These companies being Daisy Shipping Limited, Ellie Shipping Limited, Harmony Shipping Limited and Ocean Phoenix

Shipping Limited which acquired the options in the MV's Ocean Daisy, Ocean Ellie, Ocean Harmony and the Ocean Phoenix respectively. It being the Respondent's contention that the aforesaid companies by virtue of their ownership or control by Dr Ziogas, are tainted by the conduct of Dr Ziogas, in taking delivery and ownership of the option ships in fraud of the Respondent's prior rights under the Keymax agreement.

[16] The Respondents further contended that the conduct of Dr Ziogas, after the 31st December 2001 lends credence to the fact that the Keymax agreement was signed.

[17] It is common cause that during October 2001 Dr Ziogas and Mr Economou agreed on a parting of the ways. They agreed on reciprocal options whereby each would be entitled to buy out the other's share in and to Ocean Trade. The options were to be exercised by July 2002. In an attempt to secure funding to enable him to buy out Mr Economou, Dr Ziogas informed prospective investors that Ocean Trade SA owned three "modern Vessels to be expanded to nine in total when option on six more vessels …… are exercised." (Annexure GE1, page 18). I agree with the submission that unless Dr Ziogas was deliberately attempting to mislead prospective investors, he could not have made these representations unless the Keymax agreement had been signed.

[18] On the 12th June 2002, in an e-mail addressed to a Mr Fordyce, Dr Ziogas stated:

> "For your information I never gave Cardiff signed copy of the Keymax/IPL agreement but I told him that we have a gentleman's agreement ….."

[19] I agree with the submission by Mr Wallis SC that if the "signed copy" referred to in the said e-mail did not exist, it would not have been available to be given. Accordingly, a signed copy must have existed in order for Dr Ziogas not to have given same.

[20] The Applicant on the other hand, has contended that Dr Ziogas did not sign the Keymax agreement and that the Keymax agreement has always remained unsigned. In substantiation of this, the Applicant's have referred to the affidavits of Mr Kayahara in a previous application in which he had alleged that the Keymax agreement was not signed. Mr Iwai in these proceedings has also confirmed that despite a diligent search, the said agreement could not be located. Accordingly it has been submitted, the Respondent's entire claim is based on speculation and circumstantial evidence. Mr Gauntlett SC for the Applicant has further submitted that as the Respondent's claim is not based on fact it falls to be

dismissed.

[21] I do not agree. The Respondent's claim is indeed based on factual occurrences as already outlined in this judgment. In any event I am of the opinion that should it be found that the Respondent's claims are based on mere assertions, these assertions amount to the inference that the Keymax agreement was indeed signed.

[22] Mr Gauntlett SC has also submitted that the Respondent's allegations of a breach of a fiduciary duty and of fraud, as a basis for the attachments, are ill founded in law. Given that Dr Ziogas was not a partner but merely an employee mandated to procure deals, as alleged by Mr Economou, a fiduciary duty does not arise. He has further submitted that the relationship between Dr Ziogas and Mr Economou also did not constitute an agency in terms of South African Law.

[23] Whilst there may be merit in these submissions, at this level of the enquiry I am mindful of the judgment of Nestadt JA in the case of **Weissglass NO v Savonnerie Establishment 1992(3) SA 928 (A)**, as cited with approval by Scott JA in **Hulse-Reutter** (supra) at page 1343 (I) where it is cautioned that a Court "must be careful not to enter into the merits of the case or at this stage to attempt to adjudicate on

credibility, probabilities or the prospects of success".

[24] I am accordingly satisfied that the Respondent has successfully discharged the onus of establishing a *prima facie* case.

ASSOCIATION

[25] I turn now to consider whether the "Asian Hope" is an associated ship of the four option ships.

[26] Sections 3(6) and (7) make provision or allowance for the arrest of an associated ship instead of the ship in respect of which the claim arose.

[27] Section 3(6) provides:

> "Subject to the provisions of sub section (9) an action *in rem*, other than such an action in respect of a maritime claim contemplated in paragraph (d) of the definition of "maritime claim", may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose."

[28] Section 3(7) provides:

> "7(a) For the purposes of sub-section (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose –
> i) owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose; or
> ii) owned, at the time when the action is

commenced, by a person who controlled the company which owns the ship concerned when the maritime claim arose; or

iii) owned, at the time when the action is commenced by a company which is controlled by a person who owned the ship concerned or controlled the company which owned the ship concerned when the maritime claim arose.

....."

[29] The Respondent bears the onus of justifying the arrest by showing or proving the association on a balance of probabilities – **Bocimar NV v Kotor Overseas Shipping Limited 1994(2) SA 563 (A) at 583 F**.

[30] It is common cause that the claim arose against the four "option ships". It is also common cause that the four companies, referred to earlier in this judgment, which owned the four option ships, were wholly owned subsidiaries of East West Maritime Investments Limited (hereinafter referred to as EWMI) – a company controlled directly or indirectly by Dr Ziogas.

[31] The Respondent contends that at the time the action *in rem* commenced, EWMI was the sole shareholder in and controlled Asian Hope Shipping Limited, the owner of the MV "Asian Hope". This contention has been refuted by the Applicant who has alleged a transfer of shares and accordingly, ownership, prior to the arrest. It is the events which resulted in this

change of ownership that are to be considered.

[32] The Applicant has conceded that prior to 9 July 2007 the said four companies which owned the option ships as well as the Applicant, were wholly owned subsidiaries of EWMI. It is common cause that on 3rd July 2007 the Respondent launched proceedings in London, Hong Kong and Singapore against the option ships. It is also common cause, or at least not disputed, that a letter or e-mail was addressed to Dr Ziogas, on behalf of Ocean Trade SA, dated 5th July 2007, stating, *inter alia*, the following:

> "The purpose of this letter is to put you on notice in respect of claims that Ocean Trade have in relation to the ownership of the MV Ocean Daisy, MV Ocean Harmony, MV Ocean Phoenix and MV Ocean Ellie.
> .....
> Our clients hold documents that prove beyond any doubt that you acted fraudulently and in breach of your fiduciary obligations, and that you transferred the purchase options (and hence the ownership of the vessels) away from Ocean Trade to companies that you own/control.
>
> As a result of the serious and fraudulent breaches of fiduciary obligations committed by you, it is Ocean Trade's position that the four vessels belong to them.
>
> .....
> To that end, Ocean Trade are now taking various measures including:
> i) .....
> ii) .....
> iii) Arresting the vessels.
> iv) Taking other appropriate measures to obtain security for their claims.
> v) .....
>
> Before taking the above measures, we are instructed to

> give you a period of 48 hours (until 15h00 Athens time on Saturday 7th July 2007) to negotiate a solution acceptable to our client. If an acceptable agreement has not been reached within that period, our clients will implement the measures set out above.
> If you want to avoid a very nasty dispute that will involve very serious allegations being levelled against you personally (allegations that can be easily proved with the documents that we are holding), you have a limited window of opportunity to act. If you do not seize that opportunity, our instructions are to proceed against you, your companies and the vessels with maximum vigour."

[33] The Applicant contends that it was as a result of this letter and alleged threatening telephonic conversations that:

a) legal advice was sought.

b) an urgent meeting of the shareholders of EWMI was held on the 9th July 2007 and

c) it was resolved, *inter alia*, to transfer the shares in Asian Hope Shipping Limited to Markham Enterprises SA.

[34] This transfer was effected on 10th July 2007. The Respondent has questioned the veracity of the sequence of events alleging that there is sufficient evidence as contained in the affidavits to conclude that the meeting of the 9th July 2007 did not in fact take place.

[35] Mr Wallis SC has submitted that had the meeting taken place as alleged, Dr Ziogas, at the commencement of these

proceedings, would have immediately disclosed that the meeting had taken place and what transpired as a result thereof. He also would have specifically denied being in control of the Applicant when the arrest was effected.

[36] Mr Wallis SC further referred, at length, to the proceedings instituted in Greece by Dr Ziogas, against Mr Economou, where he (Dr Ziogas) once again failed to disclose that the MV "Asian Hope" was no longer an associated or sister ship of the four option ships. He has accordingly submitted that the only inference to be drawn is that Dr Ziogas's attorneys were not so instructed because a meeting of the 9th July 2007 simply did not take place.

[37] A closer scrutiny however reveals that in his founding affidavit, Dr Ziogas did in fact challenge the basis of the claim of association. After having been furnished with the necessary details in the answering affidavit by Mr Economou, Dr Ziogas immediately denied being the beneficial owner or controller of the Applicant at the time the action commenced. This course of action, in my opinion, can hardly be criticised as being "odd" or "suspicious" which would lead to the conclusion that it was part of a contrived sequence of events to disprove association.

[38] As regards the proceedings instituted in Greece, Ms Mary (Rosemary) Ronteri, Dr Ziogas' attorney has confirmed that she prepared the necessary application papers based on documents in her possession. These documents related to the structure and shareholding of EWMI and its subsidiaries prior to the 9th and 10th July 2007. There is nothing to gainsay this other than an allegation or an inference to be drawn that Ms Ronteri too is part of the whole scheme conjured up by Dr Ziogas to deceive the Court in this matter.

[39] Finally, Mr Wallis SC also referred, at length, to the documents annexed to the affidavit by Ms Ekaterini Christellou in support of her claim that the meeting of the 9th July 2007 took place and that the shares in the Applicant were transferred to Markham Enterprises SA as a result thereof. He has submitted that the said documents were manufactured for the sole purpose of avoiding arrest. In this regard he urged the Court to compare the signatures of Mr Georgiadis on three different documents alleging that they were all identical and were either mechanically or photostatically produced. In this regard it is noted that according to Ms Christellou, the documents were electronically forwarded to Mr Georgiadis and returned to her via the same means. There is accordingly nothing sinister in the fact that the signatures appeared to be

the same had they been signed electronically as the affidavit of Ms Christellou implies.

[40] Mr Wallis SC also submitted that the conduct of Ms Christellou, in claiming ownership of the said vessel at such a late stage of the proceedings, and her reason therefore is not credible. I do not agree. Her explanation *inter alia* that she accepted Dr Ziogas's assurances that he would resolve the matter coupled with the difficulty she was experiencing with her pregnancy at the time, can hardly be said to be lacking credibility or credulity.

[41] The events leading to the meeting of the 9th July 2007, as set out in the affidavits of Dr Ziogas and Ms Christellou, need to be further considered. After having been informed of the writs issued in Hong Kong, Singapore and London, legal advice was sought from a "marine specialist lawyer", a Mr John Nicholas Krywkowski. Mr Krywkowski, having in excess of 25 years experience, and being familiar with South African "associated ship" arrests, delayed his departure to Italy in order to advise his clients of the dangers of associated ship arrests. As a result thereof the meeting of 9th July 2007 was held and the resolution adopted to divest EWMI of the vessels associated with the four option ships. The relevant minutes of the

meeting as well as a copy of the share certificate confirming that Markham Enterprises SA is now the sole shareholder of Asian Hope Shipping Limited and thus the owner of the MV "Asian Hope" has been produced. There is, in my opinion, nothing sinister or suspicious in this sequence of events. The shareholders were entitled to arrange their affairs to avoid the consequences of the South African statutory provisions. Had the EMWI shareholders – Dr Ziogas, Mr Georgiadis and Ms Christellou not been informed of the Respondent's and Mr Economou's intentions as outlined earlier in this judgment, one may be inclined to conclude that the sudden production of company minutes and a share certificate is indeed suspicious and a fabrication. However, as outlined earlier in this judgment the Respondent and Mr Economou indirectly brought about the restructuring of ownership of the various companies – sadly, to the Respondent's own detriment.

[42] To find otherwise, would, in my opinion necessitate a finding that Dr Ziogas, Mr Georgiadis, Ms Ekaterini Christellou, Ms Mary Ronteri and Mr john Krywkowski all deceitfully colluded in creating a sequence of events designed specifically to deceive this Court. In this regard it is noted that Ms Ronteri, Ms Christellou and Mr Krywkowski are all prominent members of the legal profession.

[43] I am accordingly not satisfied that on a balance of probabilities, the Respondent has discharged the onus of proving association.

[44] Mr Wallis has argued that if the Court should come to this conclusion, it should not uphold the application and set aside the arrest but should direct oral evidence to be heard alternatively the matter should be referred to trial. In this regard he relied on the case of **Kadirga 5 (1)**

J A Chapman and Company Limited v Kadirga Denizcilik ve Picaret a.s. SCOSA C12 (N), wherein the Court referred the matter for the hearing of oral evidence in order to determine whether the ship arrested was indeed an associated ship. It is however noted in that case that claims of association were only met by a bare denial.

[45] In the **Leros Strength**

Rosa v MV Progress
MV Progress v Stone Engineering Limited SCOSA C 20 (D), Levinsohn J (as he then was) referred the matter to oral evidence to determine whether the arrested ship was indeed an associated ship. The learned Judge found that there was circumstantial evidence which showed a link between the two ships and further found that there was an absence of any statement of who the controlling shareholders of the ship owning company were. As a result it was deemed necessary for oral evidence to be heard in order to clarify the issues.

[46] In casu, there is direct evidence in the form of a shareholding certificate which proves that the shares in Asian Hope Shipping Limited were transferred to Markham Enterprises SA.

[47] I am of the opinion that it is precisely this fact which distinguishes the case at hand from those cases relied upon by Mr Wallis. I am also not persuaded that any oral evidence will tip the scales in favour of the Respondent. I am accordingly not prepared to exercise my discretion and order that oral evidence be given.

COSTS

[48] I turn now to briefly deal with the question of costs. I do not intend departing from the general rule that the successful

party be awarded the costs of the action. Mr Gauntlett SC has however urged the Court to grant an award of costs which would include the costs of attorneys engaged in London and Greece. I could not find any authority to justify such an award for costs. Mr Gauntlett did not refer me to any authorities either.

[49] Rule 70(1)(a) of the Uniform Rules of Court provides that:

> "The taxing master shall be competent to tax any bill of costs for services actually rendered by an attorney in his capacity as such in connection with litigious work ....."

In terms of Rule 70(8):

> "Where, in the opinion of the taxing master, more than one attorney has necessarily been engaged in the performance of any of the services covered by the tariff, each such attorney shall be entitled to be remunerated on the basis set out in the tariff for the work necessarily done by him."

[50] An attorney is defined in Rule 1 as:

> "attorney shall mean an attorney admitted, enrolled and entitled to practice as such in the division concerned."

[51] It is clear that the Greek and London attorneys are not attorneys of "this division" and the claim for their costs must accordingly fail.

CONCLUSION

[52] In conclusion, it is hereby ordered that:

1. the action instituted under Case No. A78/2007 is hereby struck out and the arrest of the MV “Asian Hope” set aside.
2. The sheriff of the district Lower Umfolozi is hereby directed and authorised to release the “Asian Hope” upon receipt of this order sent to her by telefax. The said sheriff is simultaneously to deliver any and all documents belonging to the vessel in her possession to the Master forthwith. The sheriff shall remove all security personnel on board the vessel immediately, at the cost of the Respondent.
3. the Respondent is directed to pay the applicant’s costs, which costs shall include the costs consequent upon the employment of two senior and one junior counsel.

14 November 2007

CAV on: 25 October 2007

Judgment delivered on:	14 November 2007
Counsel for Applicant:	D Gordon SC J J Gauntlett SC S Wallace
Instructed by:	Cox Yeats
Counsel for Respondent:	M J D Wallis SC
Instructed by:	Shepstone Wylie