Lib. 76/89

LL Case No 534/1987

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THE CARGO LADEN AND LATELY LADEN ON BOARD THE VESSEL "THALASSINI AVGI" Appellants

and

THE MV "DIMITRIS" Respondent

CORAM: CORBETT CJ, BOTHA, HEFER, KUMLEBEN et F.H. GROSSKOPF JJA

HEARD: 5 MAY 1989

DELIVERED: 1 JUNE 1989

JUDGMENT

BOTHA JA:-

The issues in this appeal relate to the application, in unusual circumstances, of the novel procedure for the arrest of a ship which was introduced into our maritime law by the provisions of section 5 (3) (a) of the Admiralty Jurisdiction Regulation Act No 105 of 1983 ("the Act").

The appeal is directed against an order dismissing,with costs, an application brought on notice of motion by the appellants against the respondent in the South Eastern Cape Local Division. ZIETSMAN J, who made the order in the Court a quo, granted leave to the appellants to appeal against it to this Court.

In order to understand the nature of the application in the Court a quo and the relief sought therein, and to describe the identities of the parties involved in the litigation, it is necessary to outline the events which gave rise to the application.

Towards the end of 1985 the ship Thalassini Avgi took on a load of general cargo in various ports

in the Far East, including Singapore, Yokohama, Kobe and Hong Kong, for carriage to various ports in the Middle East, including Aden, in the People's Democratic Republic of Yemen ("South Yemen" or "Yemen"). The owner of the MV Thalassini Avgi was Astromando Compania Naviera S A ("Astromando"), a corporation which is domiciled in Panama, and which has a recorded address in Athens, Greece. The vessel was registered in Greece and most of her crew were Greeks. The voyage of the Thalassini Avgi took place pursuant to a time charterparty entered into between Astromando and Nippon Yusen Kaisha ("NYK"), a Japanese corporation based in Tokyo. As the charterer of the vessel, NYK issued bills of lading, in the standard form used by it, in respect of the various consignments of goods taken on board the ship including goods destined for consignees who were in South Yemen.

The Thalassini Avgi arrived at Aden, her last port of discharge, on 2 February 1986. On 4 February

1986 a fire broke out on board the vessel. It destroyed or damaged much of the cargo still on board. The ship herself was also extensively damaged (apparently she was later taken to a "scrapping port", after she had been sold by auction by the Yemeni authorities). The Yemeni consignees, being the holders of the bills of lading and owners of the cargo which was destroyed or damaged, suffered losses which they claim total U.S. dollars 1 037 407,00 in value. They were all insured against such losses with the South Yemen Insurance and Reinsurance Company, a corporation registered in accordance with the laws of South Yemen ("the Yemen Insurance Company").

The scene now shifts to the harbour of Port Elizabeth; the time, April 1986. In port, there was the ship Dimitris, taking on a cargo of steel for carriage to the United States. The owner of the MV Dimitris is a Panamanian based corporation, Compania de Navegacion Aeolus S A. On 21 April 1986 an

application was made to the South Eastern Cape Local Division for an order for the arrest of the Dimitris, under section 5 (3) (a) of the Act, read with sections 3 (6) and (7). It needs to be said at once that this application, to which I shall refer as "the first application", is not in a direct sense at stake in this appeal, although, as will appear in due course, it plays an important role in the consideration of the appeal. The application which led to the order which is now under appeal, came later; I shall refer to it as "the second application".

In the first application the applicants were stated in the founding affidavit to be the Yemeni consignees to whom I have referred above. They were cited in the papers (quaintly, it seems to me) as "THE CARGO LADEN AND LATELY LADEN ON BOARD THE VESSEL 'THALASSINI AVGI'". They were also the applicants in the second application, cited in the same fashion. I shall refer to them as "the appellants". The

respondent in the first application, as in the second, was the MV Dimitris. I shall, however, refer to the vessel by name, and to her owner (as mentioned above, Compania de Navegacion Aeolus S A) as "the respondent".

The founding affidavit in the first application was deposed to by Mr John Edward Hare, a member of a firm of attorneys in Cape Town representing the appellants on instructions from Messrs Clyde & Company, a firm of solicitors of Guildford, in the United Kingdom. It will be convenient at this stage to refer to some of the averments contained in Mr Hare's affidavit. He mentions that the appellants are the holders of bills of lading and owners of the cargo on board the Thalassini Avgi which was destroyed or damaged in the fire, as referred to earlier, and annexes a schedule listing their names and the values of their claims for damages. For reasons which need not be explained, the exact number of the claimants cannot be determined from the list, but it would appear

that they number between 50 and 60. Mr Hare states that they bring a "collective" application through common marine assurance cover held by the Yemen Insurance Company, which has a legal liability to indemnify them to the extent of their respective losses, and upon so doing, will become subrogated to the rights of each individual assured. Messrs Clyde & Co act also as solicitors for the Yemen Insurance Company. Mr Hare states further that the Dimitris is an associated ship of the Thalassini Avgi, and in support of this he refers to allegations concerning the persons in control of Astromando and the respondent, which are set forth in an affidavit made by him in a contemporaneous application by NYK for the arrest of the Dimitris. It is not necessary to canvass those allegations, since it was common cause in this appeal that the Dimitris was indeed an associated ship of the Thalassini Avgi, in accordance with the provisions of sections 3 (6) and (7) of the Act. Nor is it necessary to give further

attention to the NYK application for the arrest of the Dimitris, for the course that that application took and its eventual outcome do not affect the issues in this appeal. Finally, in Mr Hare's affidavit the following is said:

> "..... it is unlikely that any cargo claims (other than the request for security herein) will be brought to this jurisdiction for trial, ..."
>
> "Without the security of the arrest of the 'Dimitris' as an associated ship of the 'Thalassini Avgi' therefore Applicants will have little chance of satisfaction of any judgment obtained in actions commenced either in Japan (the country of jurisdiction in the Bill of Lading contracts) or in South Yemen where the Applicants are domiciled."

It is to be noted, with a view to what is to follow later in this judgment, that the appellants contemplated the commencement of proceedings either in Japan or in South Yemen.

The first application, which was brought ex parte, resulted in an order of the Court being issued on 21 April 1986. I quote the relevant parts of it:

"2. That the M.V. 'DIMITRIS' at present lying alongside in Port Elizabeth harbour be arrested by the Deputy Sheriff for the district of Port Elizabeth (in his capacity as Admiralty Marshall) in an action in rem to be instituted by Applicants (as Plaintiff) against Respondent (as Defendant) in the above Honourable Court in which action Applicants will claim against Respondent as a maritime claim as defined by Section 1 (1) (ii) (i) read with Section 1 (1) (ii) (y) of Act 105 of 1983:

2.1 the amounts indicated against their individual names and Bills of Lading shown on Schedule X hereto, being damages suffered by each claimant arising out of the loss of or damage to cargo shipped on board the 'THALASSINI AVGI' for carriage to and discharge at the port of Aden during February 1986, which amounts aggregate U.S.D. 1 187 407;

2.2 interest a tempore morae on each claim;

and/or, in the event of any of the above claims being brought for adjudication before any competent Court elsewhere than in the Republic of South Africa,

2.3 the provision of security as a maritime claim in terms of

Section 1 (1) (ii) (y) and/or in terms of Section 5 (3) (a) of Act 105 of 1983 with regard to or arising out of the aforesaid claims which amount in aggregate to U.S.D. 1 187 407;

and in any event, in respect of each claim,

2.4 costs of suit; and

2.5 alternative relief.

3. That the said vessel be released from arrest on security being furnished to the Applicants to the satisfaction of the Registrar for any judgment, including interest and costs, which may be given in the said action in rem and on Respondent selecting a domicilium citandi et executandi within the area of jurisdiction of this Honourable Court.

7. That the Respondent is given leave to apply for this Order to be discharged on 48 hours notice to the Applicants care of their attorneys.

9. That the costs of this Application be costs in the cause in the said action in rem."

The order was duly served in accordance with the directions for service contained in it (which I

have omitted from the quotation above). A few days later the Dimitris, the shipment of her cargo having been completed, was ready to sail. For the respondent it was a matter of urgency that she should do so as soon as possible. This appears from an affidavit deposed to on 27 April 1986 by Mr Marthinus Theunis Steyn, a member of a Cape Town firm of attorneys acting for the respondent. This affidavit was made in contemplation of an application being made to the Court on behalf of the respondent for an order releasing the Dimitris from arrest. In the event, no such application was in fact brought before the Court. The parties, through their attorneys, reached an agreement allowing for the release of the vessel from arrest, thus rendering it unnecessary to obtain an order of the Court.

From Mr Steyn's affidavit the following appears. The respondent entered into negotiations with the appellants, the parties acting through their

respective legal representatives, regarding the provision of security to the appellants in order to obtain the release of the Dimitris from arrest. Agreement was reached on the quantum of the security, and also as to the form in which it would be provided. With regard to the latter, it was agreed that a letter of undertaking would be furnished by what is called the "P & I Club". However, a dispute arose as to whether the P & I Club letter of undertaking to be procured by the respondent would apply in respect of any judgment obtained in a court other than the South Eastern Cape Local Division or the Tokyo District Court, and more particularly, whether it should apply to any judgment granted by a court in South Yemen. This dispute could not be resolved by negotiation: the appellants insisted that the security should cover any judgment granted in any proceedings instituted by them in South Yemen, while the respondent was not prepared to include a reference in the letter of undertaking to a judgment

of a Yemeni court. The reasons for the respondent's attitude, as stated by Mr Steyn in his affidavit, were, in the main, and in brief, as follows: the NYK standard form of bill of lading contained an exclusive jurisdiction clause (clause 3), in terms of which "any action against the carrier thereunder shall be brought before the Tokyo District Court in Japan"; the NYK standard form of bill of lading furthermore contained a demise clause (clause 4), the effect of which was that the carrier of the cargo was Astromando, and not NYK; accordingly, the Tokyo District Court was the proper forum for the adjudication of all claims between the appellants and Astromando, since it was the contractually agreed forum; the Yemeni Court was not the proper court to determine any action between the parties; and the respondent had no confidence in the courts of South Yemen, since it feared that it might not be afforded a fair hearing in such courts. Mr Steyn said in his affidavit that, since it was not

possible at that stage, in view of the urgency of the matter, to obtain a timeous decision of the Court (the South Eastern Cape Local Division) as to whether the security in the form of a letter of undertaking should apply in respect of a judgment of a Yemeni court, the respondent would seek an order determining the terms of the letter of undertaking in such manner as to leave open the question in dispute without causing prejudice to either party. In this regard he referred to a letter of undertaking which would reserve the right for the appellants to apply to the Court at a later stage, but before any action was instituted, to determine whether the security provided in the letter of undertaking would stand as security in any court other than, or in addition to, the Tokyo District Court or the South Eastern Cape Local Division. On that basis, Mr Steyn submitted, there would be no prejudice to any of the rights of the appellants, and the respondent would be able to have its vessel released from arrest,

so as to enable her to proceed with her voyage.

Thereafter an agreement was reached between the parties, on the basis of the proposal put forward in Mr Steyn's affidavit. On 29 April 1986 The West England Shipowners Mutual Protection and Indemnity Association (Luxembourg) - the "P & I Club" - issued a letter of undertaking, addressed to the appellants (referred to as the owners of the cargo in question), the material part of which reads as follows:

> "In consideration of and upon condition that you consent to the release from arrest of the vessel 'Dimitris' and refrain from arresting and/or taking action resulting in the arrest of the 'Dimitris', the 'Thalassini Avgi' and/or any other vessel or property in the same ownership, associated ownership or management for the purpose of founding jurisdiction and/or obtaining security in respect of the above claims against Astromando Compania Naviera S A ('Astromando') the owners of the 'Thalassini Avgi' concerning the cargo referred to above, we hereby undertake to pay to Clyde and Co on your behalf on demand such sums as may be adjudged by the Tokyo District Court or by the Supreme Court of South Africa (South Eastern Cape Local Division) or by the judgment of such other Court as the Supreme Court of South

> Africa in its South Eastern Cape Local Division or any Court of Appeal therefrom and in the exercise of its discretion in terms of Section 5 (3) of Act No. 195 of 1983 or otherwise in terms of the said Act may on your application, brought prior to the institution of proceedings in such other Court, direct that this undertaking should cover ....."

Upon receipt of this letter of undertaking, the appellants, through their attorneys, consented to the release of the Dimitris from arrest. The release was effected, we were informed from the Bar, by means of an informal authorisation issued by the Registrar of the Court (presumably pursuant to paragraph 3 of the order of the Court, quoted above). The Dimitris departed on her voyage to the United States.

So ended the first application.

The second application was launched some months later, in October 1986. In it, the appellants sought an order in the following terms:

> "1. It is directed that the undertaking furnished by the West of England Shipowners Mutual Protection & Indemnity

Association (Luxembourg) dated 29 April 1986, being annexure 'JEH3' to the Affidavit of JOHN EDWARD HARE filed in support of the Notice of Motion herein, shall cover any judgment, either in delict or in contract, in respect of the claims for which the said undertaking was furnished, granted by any Court of competent jurisdiction in the People's Democratic Republic of Yemen.

2. Respondent is ordered to pay the costs of this application."

It is this order that the Court a quo declined to grant, resulting in the dismissal of the second application.

From the above survey it will be seen that, fundamentally, the sole isue for decision in the second application was whether or not the appellants were entitled to be furnished with security in respect of any judgment that might be given in their favour in legal proceedings which they contemplated instituting in South Yemen. If they were found to be so entitled, there were no problems relating to either the quantum of the security or the form of it. However, in the

papers filed in the second application a number of other matters were raised and extensively canvassed on both sides. These became issues which, it was contended, had a bearing on the main issue I have mentioned, and which consequently called for consideration and decision in order to resolve the main issue. These matters were dealt with, on the appellants' side, in the founding affidavit of Mr Hare, in affidavits of two foreign law experts, the one a lawyer from Yemen and the other a lawyer from Japan, and in an affidavit of a partner in the firm of Clyde & Co; and on the respondent's side, in the answering affidavit of Mr Peter Rees Smith, a partner in a London firm of solicitors, acting on behalf of the respondent and Astromando, and in affidavits of yet two further foreign law experts, again a lawyer from Yemen and a lawyer from Japan. I shall, in due course, examine the various matters raised, in greater or in lesser detail, but for the moment it will be convenient to indicate, in the

broadest terms, what they relate to. The appellants contend that they have claims against Astromando, in contract, or in delict, or both; that such claims are enforceable in the appropriate court of South Yemen, which has jurisdiction to hear them; that such court will in fact exercise its jurisdition to adjudicate upon the claims; and that the Yemeni court is a more appropriate and convenient forum than either a South African or a Japanese court. All these contentions are controverted by the respondent. For its part, the respondent contends further that the appellants are bound by the exclusive jurisdiction clause in respect of the Tokyo District Court, as stipulated for in clause 3 of the NYK standard form of bill of lading; and that, in any event, Astromando will not be able to obtain a fair hearing in any court of South Yemen.

Before these contentions are examined more closely, it will be expedient, I consider, first to pass some general observations upon the application of

section 5 (3) (a) of the Act in practice. At the outset of this judgment mention was made of the novelty in our law of the provisions of the section - c f Kataqum Wholesale Commodities Co Ltd v The MV Paz 1984 (3) SA 261 (N) at 263 B-E and Euromarine International of Mauren v The Ship Berg and Others 1986 (2) SA 700 (A) at 711 D-I. The Act, however, contains no directions as to the procedure to be followed in practice, when an application is made to a court to exercise the power conferred upon it by the section, nor as to the approach to be adopted by the court when considering such an application. It is desirable, therefore, to indicate, in broad terms, the views held by this Court in regard to the procedure to be followed and the approach to be adopted under the section, in the context of facts such as those of the present case.

Section 5 (3) reads as follows:

"5 (3) (a) A court may in the exercise of its admiralty jurisdiction order the arrest of any property if -

(i) the person seeking the arrest has a claim enforceable by an action in rem against the property concerned or which would be so enforceable but for an arbitration or proceedings contemplated in subparagraph (ii);

(ii) the claim is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding either in the Republic or elsewhere and whether or not it is subject to the law of the Republic.

(b) Unless the court orders otherwise any property so arrested shall be deemed to be property arrested in an action in terms of this Act.

(c) A court may order that any security for or the proceeds of any such property shall be held as security for any such claim or pending the outcome of the arbitration or proceedings."

It is clear, in our view, that subparagraphs (i) and (ii) of section 5 (3) (a) should be read conjunctively, as if they had been conjoined by the addition of the word "and" between them (c f the

Euromarine case supra at 708 E). The intention of the Legislature was to make it possible for a claimant to apply to a court for, inter alia (confining myself to what is relevant in the context of the present case), an order for the arrest of a ship with the object of obtaining security in respect of a claim which is the subject of proceedings contemplated in a foreign court (subparagraph (ii)). A prerequisite for the grant of such an order is that the claimant must have a claim enforceable by an action in rem (subparagraph (i)). In terms of subparagraph (i) the action in rem must be against the ship which it is sought to arrest, but when the subparagraph is read together with the provisions of section 3 (6) of the Act, it is clear that an order of arrest is also available against an associated ship of

the ship against which the relevant maritime claim arose, as defined in section 3 (7). Although the existence of a claim in rem is a prerequisite for the exercise of a court's power to order an arrest in terms of section 5 (3) (a), the claimant will, in practice, more often than not have no need nor any wish to prosecute such action in the court in which the application is being made; ex hypothesi, his sights will be set on a foreign court. (Hence the common reference to the procedure under the section as a "security arrest".) It will be recalled that in this case, in the first application, Mr Hare said in his founding affidavit that it was unlikely that the appellants' claims would be brought to trial in the Court to which the application was addressed. Such a possibility is indeed remote. That being so, it may be queried whether any useful purpose was served by what appears to have been the dominant part of the order issued by the Court on 21 April 1986, viz that

part of the order which is contained in the main section of paragraph 2 of it, as quoted earlier. However, since nothing turns on this aspect of the order, I shall say no more about it.

But what is of considerable practical significance is that part of the order of 21 April 1986 which appears between the end of paragraph 2.2 and the beginning of paragraph 2.3 of it. For convenience, I quote:

> "and/or, in the event of any of the above claims being brought for adjudication before any competent Court elsewhere than in the Republic of South Africa, ..."

Then follows paragraph 2.3, containing the vital claim for the provision of security, which was really what the first application was about. What strikes one immediately is that in the words I have just quoted there is no mention of any specific foreign court in which the contemplated proceedings might be brought. There is no more than a general reference to "any

competent Court elsewhere". In our view this part of the order is too vague and uncertain to be acceptable, and an order ought not to be granted in such wide terms. There is no way in which the parties can know how the order is to be applied, and it opens the door to future disputes which could be extremely awkward to resolve. If security were to be furnished on the basis of such an order, and the claimant were to institute an action in a court of his choice somewhere in the world, it would be possible for the defendant in such action to raise the contention that the chosen court was not a "competent court" as envisaged in the order, and that the security furnished accordingly did not apply to it. Such a situation would create a virtual impasse, which should obviously be avoided. We consider, therefore, that, as a matter of practice, a court making an order under section 5 (3) (a) should specify and nominate the foreign court to which the order applies. Where an order is sought for security

to be provided in respect of proceedings contemplated in a foreign court, it is important to observe that the question as to the forum to which the security is to relate, is one that should be settled in the initial application for such an order (other questions, as to the quantum or the form of the security and so forth, can be dealt with later). And, of course, where more than one foreign forum come into play, the order must nominate all those to which the security is to be applicable. From the requirement of practice in regard to the form of the order that I have been discussing, a further requirement of practice follows. It is that it is incumbent on the applicant for such an order to deal in his application, initially, with the question of the court or courts in which he contemplates bringing proceedings, and to nominate the forum or the forums to which he seeks the court to relate the security claimed, in order to enable the court properly to exercise its power in that regard.

In the present case we consider that this requirement was adequately complied with. In the excerpt quoted earlier from the founding affidavit of Mr Hare in the first application, it was made clear that the appellants contemplated commencing an action in Japan or in South Yemen. Accordingly the Court hearing the application could, and should, have nominated the courts of those countries in its order, instead of merely referring to "any competent Court elsewhere".

A claimant applying for an order in terms of section 5 (3) (a) should be required, in addition to nominating the forum of his choice, to show prima facie that his claim is enforceable in that forum. This requirement is closely allied to the requirement that the claimant must satisfy the court that he has a prima facie case on the merits against the person against whom he wishes to institute proceedings. In The MV Paz case supra, which was concerned with a security arrest in respect of proceedings pending in a foreign

court, FRIEDMAN J said at 268 A that

> "..... an applicant should make averments that will satisfy the Court prima facie that he has reasonable prospects of success in the main proceedings.",

while DIDCOTT J at 269 G required circumstances to be shown which would enable the Court

> "..... to come to a conclusion about the applicant's prima facie prospects of success in the main proceedings."

With respect, it seems to us that in these remarks the test in regard to showing a prima facie case is pitched too high. In the analogous case of an attachment of property ad fundandam jurisdictionem an applicant need show no more than that there is evidence which, if accepted, will establish a cause of action. In the case of Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd 1953 (3) SA 529 (W), STEYN J, after examining a number of common law authorities and earlier decisions, said the following (at 533 C-E):

> "The authorities and considerations to which I have referred seem to justify the

> conclusion that the requirement of a prima facie cause of action, in relation to an attachment to found jurisdiction, is satisfied where there is evidence which, if accepted, will show a cause of action. The mere fact that such evidence is contradicted would not disentitle the applicant to the remedy. Even where the probabilities are against him, the requirement would still be satisfied. It is only where it is quite clear that he has no action, or cannot succeed, that an attachment should be refused or discharged on the ground here in question."

This approach is well established in cases of attachment of property to found jurisdiction (see e g Butler v Banimar Shipping Co SA 1978 (4) SA 753 (SECLD) at 757 C-G and the cases cited there). In our judgment, it is the proper approach to be applied to applications for the arrest of a ship in terms of section 5 (3) (a) of the Act, and we hold accordingly. This approach applies also to the question of the 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 emphasize that an application under section 5 (3) (a) is not an appropriate vehicle for obtaining 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 respondent in the application.

An applicant for an order in terms of section 5 (3) (a) must satisfy the court that he needs security in respect of his claim. This requirement was fully discussed in the case of The MV Paz supra, by FRIEDMAN J at 268 B-C and by DIDCOTT J at 269 I - 270 B. In that case, the main proceedings had already been commenced and were pending in Hong Kong, and in view of the circumstances of that case particular aspects of the need to obtain security in a South African court required to be emphasized (see e g per FRIEDMAN J at 268 C-E). The need for such emphasis does not arise in the present case, where the main proceedings are yet in - contemplation. Subject to that observation, however, we are, with respect, in general agreement with what was said in The MV Paz on this score. By way of summary it may perhaps be said that

an applicant must satisfy the court, in the words of DIDCOTT J, "that his need for security is both genuine and reasonable", a criterion which would embrace the further refinements mentioned in the judgments, such as that the applicant must explain why he needs security, that it must appear that he is not bent on merely harassing the other side, and so forth.

It may be convenient now to summarize what has been said above. A claimant applying for an

order for the arrest of a ship in terms of section 5 (3) (a), for the purpose of obtaining security in respect of a claim which is the subject of contemplated proceedings to be instituted in a foreign forum, is required to satisfy the court (a) that he has a claim enforceable by an action in rem against the ship in question or against a ship of which the ship in question is an associated ship; (b) that he has a prima facie case in respect of such a claim, which is prima facie enforceable in the nominated forum or forums of his choice, in the sense explained above; and (c) that he has a genuine and reasonable need for security in respect of the claim.

If an applicant satisfies the requirements enumerated above, he is, in our judgment, entitled to an order in terms of the section, unless the respondent shipowner places countervailing material before the

court by which it is proved that there is sound reason for not granting the order. Failing that, we do not consider that the court has a discretion to decline to exercise its power in favour of the applicant; the postulate of an unfettered discretion would, in our view, run counter to the intention of the Legislature. On this footing the apparent differences of approach reflected in the judgments in The MV Paz case supra do not, with respect, call for further comment.

It follows, then, that when once the criteria mentioned above are met, the respondent shipowner who would oppose the granting of an order must raise, and discharge the onus of proving, some countervailing factor of sufficient weight to persuade the court not to grant the order. (The question as to when and how that can be done in practice will be considered presently.) An example of such a ground of opposition has been mentioned earlier, viz where it is proved that the foreign court, despite having jurisdiction to

adjudicate upon the claim, will nevertheless decline to do so for some particular reason. Another example that may be conveniently mentioned now, is where it is proved by the shipowner that the defendant in the contemplated proceedings will not receive a fair hearing. In this regard the onus of proof is a heavy one. In England it is well settled that a litigant who asserts that he may not obtain justice in a foreign jurisdiction is required to prove and establish his assertion objectively by means of positive and cogent evidence (see The "El Amria" (1981) 2 Lloyd's Rep 119 (CA) at 126; The Abidin Daver (1984) 1 All ER 470 (HL) at 475 h-j and 476 b-j; and The "Spiliada" (1987) 1 Lloyd's Rep 1 (HL) at 11 i f - 12, the paragraph numbered (6)). We consider that our courts will apply the same approach.

In practice an order in terms of section 5 (3) (a) will usually be obtained ex parte. It is necessary to comment now on some aspects of the

procedure which is to be followed thereafter. The ship is placed under arrest and her owner will want to procure her release from the arrest. This is usually achieved by the owner furnishing security for the claim, in lieu of the ship. If the parties agree on the quantum and the form of security, there are no further problems to be resolved. Failing agreement, the order of the court may, and usually does, provide for the release of the ship from arrest upon security being furnished to the satisfaction of the Registrar. In the present case, however, the ambit of paragraph 3 of the order which was issued on the first application, as quoted earlier, is not clear; it seems to be related only to the main part of the order (paragraphs 2, 2.1 and 2.2). But nothing turns on this and it can be left aside. The shipowner is entitled, in any event, to apply to the court for an order for the release of the ship against the furnishing of satisfactory security. It is not in doubt that the court has

the power to order the furnishing of security in exchange for the release of the ship from arrest (see section 5 (3) (c) and section 5 (2) (b) and (c)). In such an application the court will be concerned with the question whether the security tendered is proper and adequate.

There is, however, another way in which the owner of the ship can obtain her release from arrest. He can apply to the court for an order setting aside the order of arrest itself. In the present case, the order of the Court issued on 21 May 1986, on the first application, in paragraph 7 expressly reserved the right for the respondent to apply for the order to be discharged, on 48 hours' notice to the appellants. The appending of such a condition to the order of arrest is authorised by the provisions of section 5 (2)

(c) of the Act. In our view the incorporation of such a condition in an order made under section 5 (3) (a) is a salutary practice. Even in the absence of such a condition, however, the shipowner would be entitled to apply for the setting aside of the order of arrest, and, although the Act does not expressly empower the court to set aside such an order, there can be no doubt that in fact it has the power to do so, in accordance with the common law principles relating to the setting aside of attachment orders obtained ex parte. The incidence of the onus in such a situation is of importance in this case. In the Bradbury Gretorex case supra, it was pointed out by STEYN J at 531 A-D that an applicant cannot by obtaining ex parte an order in his favour secure a more advantageous position than he would have been in if the other party had had an opportunity of putting counter-allegations before the court; consequently, if the other party applies for the setting aside of the order, the original applicant

retains the onus of satisfying the court that he was entitled to it. That approach was applied, correctly in our view, in the context of applications for setting aside the arrest of a ship procured in terms of section 3 (4) and (5) of the Act, in Transgroup Shipping SA (Pty) Ltd v Owners of MV Kyoju Maru 1984 (4) SA 210 (D) at 214 I and Transol Bunker BV v MV Andrico Unity and Others 1987 (3) SA 794 (C) at 799 D, and it must apply equally to an order for arrest obtained ex parte in terms of section 5 (3) (a). In the last-mentioned case, Transol Bunker BV supra, MARAIS J held (at 799 H) that in an application for the setting aside of an order of arrest the party who obtained the order may advance any ground to justify the arrest irrespective of whether or not he relied upon it initially in obtaining the order. We agree with this finding and, generally speaking, with the reasoning of the learned Judge in support of it (see at 799 A - 800 D), and we would apply the finding to orders obtained under

section 5 (3) (a). One further observation should be made in regard to an application by the shipowner for setting aside such an order. While the party who obtained the order bears the same onus of justifying the granting of it as would have applied had the original application been opposed after notice to the shipowner, the latter, by the same token, remains burdened with the onus of proving any countervailing circumstances which he could have raised and proved in answer to the original application. Thus, while the claimant must still show that he has a prima facie cause of action, prima facie enforceable in the foreign court of his choice, in the sense explained earlier, the shipowner, if he alleges that the foreign court would as a matter of fact decline to exercise its jurisdiction to adjudicate upon the matter, or that the foreign court would not afford him a just and fair hearing, is still required to discharge the onus of proof in that regard.

Applying what has been said above to the circumstances of the present case, we are of the view that the proper course of events would have been as follows. The order of the Court of 21 April 1986 would have nominated the courts of Japan and South Yemen as the forums to which the order was related. The respondent, not wishing to submit to litigation against Astromando in Yemen, would have applied to the Court for the setting aside of its order pro tanto, by excising from it any reference to the court of Yemen. In its application the respondent would have relied on its specific objections against the Yemeni court entertaining the main proceedings. But it could also have based its application more broadly, by placing in issue those matters in respect of which the appellants bore the onus, and it could have done so even if it were content to abide by the furnishing of security relating to a Japanese court or a South African court, thus using any alleged defect in the appellants'

original application merely as a spring-board for achieving its real object, which was to avoid the provision of security in respect of proceedings in a Yemeni court, as appears from Mr Steyn's affidavit of 27 April 1986, referred to earlier. The appellants would then have opposed the application, seeking to justify their entitlement to an arrest order on any grounds they wished to advance, and to meet the respondent's objections to the Yemeni court. And the respondent would have had the right to reply. If this procedure had been followed, all the relevant evidential material would have been collated in a satisfactory fashion, the incidence of the onus in relation to the various averments and counter-averments would have been clear, and the court hearing the application would on that footing have decided the central issue as to whether or not the reference to the Yemeni court was to remain in the order. To have brought the issue before the court in this, the proper

manner, could no doubt have caused a delay, detrimental to the urgency of obtaining the release of the ship from the arrest, but that presents no insuperable problem. In practice there ought not to be any difficulty in arranging provisional or interim security to be furnished, pending the determination of an application of the nature described above, in such a way as to allow the release of the ship, without prejudice to the rights of either party, and leaving it to them thereafter to pursue to a conclusion an application along the lines indicated above.

That concludes my survey of what this Court considers, broadly, to be the proper procedure to be followed, and the proper approach to be adopted, in regard to applications under section 5 (3) (a) in circumstances like those of the present case.

I revert now to what actually happened in this case, as outlined earlier. Since the order of the Court of 21 April 1986 did not nominate Tokyo or

Aden as the place "elsewhere", where the appellants' claims could be "brought for adjudication", the parties were faced with a peculiar problem when they could not agree on whether the security to be provided in order to obtain the release of the Dimitris from arrest, was to apply in respect of a judgment of a court in South Yemen or not. They resolved the problem, sensibly enough, by leaving open that question in the P & I Club letter of undertaking of 29 April 1986. In so doing, however, they created an unusual and artificial situation, in which it was left to the appellants to approach the Court for a direction in regard to the applicability of the letter of undertaking to proceedings in Yemen. At first sight, this arrangement may seem to suggest that the appellants assumed a different kind of onus, or a more burdensome one, in regard to satisfying the Court that the security should relate also to proceedings in Yemen, than that which would have applied in the context of the first application as

such, or in the context of an application by the respondent for an order setting aside or qualifying the order of arrest of 21 April 1986. It is quite clear, however, that that could not have been the intention of the parties, and that the arrangement in fact had no such effect. Mr Steyn's affidavit of 27 April 1986, referred to earlier, makes it plain that the parties entered into the arrangement without prejudice to any rights of the appellants. In consequence, the appellants were in no worse a position after they had agreed to the release of the Dimitris on the basis of the letter of undertaking than they would have been in had they simply refused to accept the letter of undertaking and to consent to the release of the ship. The respondent would then have been compelled to apply to the Court for relief, and the incidence of the onus in respect of the various matters that could have been raised in such application would have been no different from that explained earlier. This is the setting in

which the second application falls to be considered.

It is convenient at this stage to refer to the basis upon which the Court a quo decided the second application. The ratio decidendi appears from the following excerpts from the judgment of ZIETSMAN J:

> "The applicants could have refused to release the ship unless security was supplied in the amount and subject to the conditions that would satisfy them. If they felt that the South Yemen Court was the only appropriate forum for their proposed action against the respondent [Astromando] they could have refused to release the ship unless the respondent agreed to make the security it offered available to satisfy a judgment of the South Yemen Court. When the respondent refused to agree to this condition the applicants released the ship on the understanding that they could then apply to this Court for the terms of the security undertaking to be extended to include a judgment of the South Yemen Court. They now ask that this be done, and in my opinion an onus rests upon them to justify the granting of the order they seek.
>
> If the applicants had succeeded in persuading me that it will be impossible or impracticable for them to bring their action in this Court, or in the Tokyo District Court, I might have been disposed to grant their application. However, they have failed to

persuade me that this is the case ....."

> "The Tokyo District Court or this Court are Courts available to the applicants and they have the security required to satisfy any judgment they may succeed in obtaining in their favour. They have not persuaded me of the need to extend the security to apply also to a judgment of the South Yemen Court."

In my view, with respect, the learned Judge erred. The reasoning that the appellants had attracted an onus by virtue of the terms of the letter of undertaking to which they agreed, ignores entirely that they did so in order to accommodate the respondent in connection with the release of the ship, and without prejudicing any of their rights. The appellants' acceptance of the letter of undertaking in return for the release of the ship was simply part of an arrangement devised to defer the determination of the issue between the parties, and the appellants could not be disadvantageously affected because of it. To say that the appellants were asking for the security to be "extended" may be right, but only in a linguistic sense

and only because of the fortuitous circumstance that the parties had arrived at the arrangement reflected in the letter of undertaking. The learned Judge, however, wrongly dealt with the extension of the security in a conceptual sense, as importing, by way of principle, the requirement that the appellants had to prove the necessity for it. This approach loses sight of the fact that the extent of the security, in relation to the courts to which it would apply, had not yet been settled, either by an order of the Court or by agreement between the parties. It is not the case that the appellants had elected to seek security in respect of two courts only, that they had obtained such security, and that they thereafter changed their minds and were seeking fresh or additional security in respect of yet a third court. Accordingly there was no warrant for the learned Judge's reasoning that there were two courts available to the appellants, in respect of which they held security, and that they had failed

to show that it would be impossible or impracticable for them to bring their action in those two courts and that there was a need to extend the security. In my judgment, with respect to the learned Judge, these considerations were wholly irrelevant to the decision of the second application. Consequently the Court a quo's dismissal of it on those grounds cannot be sustained.

It follows, therefore, that the second application must now be considered afresh. Brief reference has been made earlier in this judgment to the various affidavits filed in the second application, and to the various matters canvassed therein as being relevant to a decision on the issue between the parties. In the discussion of these matters which is to follow, I shall give effect to the general observations about procedure and approach that have been set out above, and I shall do so by dealing with the second application as if the order of the Court of

21 April 1986 had contained a nomination of the Yemeni court as a court to which the order was applicable, and as if the respondent had applied for the setting aside of it pro tanto. There is no unfairness to the respondent in approaching the case on this basis, for, as has been shown, such an approach is, in effect, tantamount to postulating that notice of the first application had been given to the respondent, that the respondent had had an opportunity of opposing it and of placing the grounds of its opposition before the Court, and that the appellants had replied in the ordinary course - all of this, hypothetically, before any order of arrest had been issued. In this way, proper perspective and effect can be given to the relevant considerations concerning the onus resting on the appellants and the respondent respectively, as discussed earlier. In my view, such an approach is the practical and also the fairest way of doing justice between the parties.

The appellants aver that they have claims against Astromando in contract and in delict. The respondent contends that the appellants have failed to prove the existence of their alleged claims on either basis.

Adverting first to the claims in contract, it is clear from Mr Hare's founding affidavit in the first application that he was asserting a prima facie case on the part of the appellants against Astromando, based on the latter's breach of contract, which consisted of its failure to deliver the cargo due to the appellants in terms of the respective bills of lading. In the answering affidavit of Mr Rees Smith there is a bare denial that Astromando had committed a breach of contract and that it is liable to the appellants in contract. Mr Rees Smith refers to an affidavit of Mr Hiroshi Kimura, a practising attorney from Tokyo who specializes in maritime law. Mr Kimura does not deny that Astromando is liable to the appellants in

contract; on the contrary, it is implicit in his affidavit that Astromando is so liable, in principle, according to the terms of the NYK bills of lading and in conformity with Japanese law. The respondent's object in relying on Mr Kimura's affidavit was to meet an averment in Mr Hare's founding affidavit in the second application, namely that Astromando was also liable to the appellants in delict. That averment, in turn, was made in order to counter Mr Steyn's reliance, in his affidavit of 27 April 1986, on the exclusive jurisdiction provision contained in clause 3 of the NYK bills of lading. Clause 3 reads as follows:

> "The contract evidenced by or contained in this Bill of Lading shall be governed and construed by Japanese law except as may be otherwise provided for herein, and any action against the carrier thereunder shall be brought before the Tokyo District Court in Japan."

The entire thrust of Mr Kimura's expert evidence in his affidavit was to show that under Japanese law clause 3 enures to the benefit of the shipowner, even where an

action is brought against him in delict. In the course of his lengthy exposition of the legal position in Japan Mr Kimura dealt inter alia with the effect of clause 4 (2), the so-called "demise clause", and clause 6, the so-called "Himalaya clause", of the NYK bills of lading. It is not necessary to trace Mr Kimura's reasoning. The conclusion stated by him is that both NYK, as the charterer, and Astromando, as the owner, of the Thalassini Avgi, qualified as "the carrier" in terms of clause 3, and that, accordingly, Astromando could invoke the provisions of that clause if it were sued in a court other than the Tokyo District Court, whether the action was founded in contract under the bill of lading or in delict. Consequently there is nothing in Mr Kimura's affidavit serving to controvert the effect of Mr Hare's affidavit as showing that the appellants have a prima facie cause of action for breach of contract against Astromando.

Counsel for the respondent rightly conceded

as much during the course of his argument in this Court, but he then went on to submit that the appellants had abandoned their claims in contract. This submission was based on the fact that Mr Hare in his founding affidavit in the second application sought to put forward claims by the appellants founded in delict, and on the contents of an affidavit made by Mr Seijiro Ninomiya, another practising lawyer from Tokyo who specializes in maritime law. This affidavit was filed in reply to that of Mr Kimura. In it, Mr Ninomiya expounds his expert views on the Japanese law and expresses his disagreement with the opinions held by Mr Kimura. He states his conclusion as follows:

> "(1) In this case, in my opinion, NYK is a contractual carrier, and not the owner.
>
> (2) Irrespective of the conclusion who is the carrier, the cargo interests may file a suit [against] both the owner and time charterer based on tort, and in the tort claim, any clauses in the bill of lading are not applicable because any clauses in the bill of

> lading stipulate terms and conditions of a contract and have nothing to do with tort."

In my opinion, counsel's argument that the appellants had abandoned their claims in contract is without substance. The purpose of putting in Mr Ninomiya's affidavit was obviously to show that, contrary to Mr Kimura's opinion, there was an expert opinion available for the appellants to rely on, showing that at least in respect of a claim based on delict, Astromando would not be entitled to invoke the exclusive jurisdiction clause in its favour (clause 3). The mere fact that the appellants' witness expressed the view that NYK was the contractual carrier under the bills of lading, and not Astromando, with the implied corollary that Astromando was not liable to the appellants in contract, cannot justifiably be construed as an abandonment by the appellants of their reliance on claims in contract against Astromando. That is far too tenuous a basis for a case of waiver to be made

out. In any event, what Mr Hare said in his founding affidavit in the second application is wholly inconsistent with any suggestion that the appellants' claims in contract were being jettisoned. He said, inter alia:

> "For purposes of this application I respectfully submit that it suffices for Applicants to contend that they have a right to sue Astromando (and in this forum the Respondent as an associated ship) based on an alleged breach of the contract evidenced by the said Bills of Lading (to which, Respondent accepts Astromando was a party) and/or on the delictual (tortious) acts of Astromando through its servants for which it is vicariously liable."
>
> "Furthermore, and in any event, Applicants respectfully submit that, in addition to claims based upon breach of contract, claims also lie against Astromando in delict ....."

I turn to the appellants' claims in delict. These are based on information that members, or a member, of the crew of the Thalassini Avgi deliberately started the fire aboard the vessel. The evidence on which the appellants rely for alleging that they have a

prima facie case in this regard, is admittedly of a hearsay nature. It is contended for the appellants that the evidence is nonetheless admissible in terms of section 6 (3) of the Act, and that in terms of section 6 (4) it should be accorded sufficient weight to justify a finding that the appellants have shown a prima facie cause of action in delict. For the respondent it is contended that the evidence in question should not be admitted. In the court a quo ZIETSMAN J in fact ruled that it was inadmissible. This ruling was supported on behalf of respondent, while on behalf of the appellants it was argued that the learned Judge had erred in not receiving the evidence.

The evidence in question is contained in the founding affidavit of Mr Hare in the second application. Before I quote the relevant passage, some background facts must be mentioned. After the fire, an official board of enquiry was appointed to

investigate the matter. It consisted of a Yemeni judge, as chairman, and three other members. The board invited two fire experts to act as advisers to it, Mr Bound and Dr Mitcheson. The former, who was retained as an expert by the Yemen Insurance Company, accepted the board's appointment, but the latter, who was acting as expert adviser for Astromando, declined to do so. Astromando had a legal adviser acting on its behalf in Aden, Mr Mohamed Shafi Abdul Karim, a practising lawyer of long standing. When the board commenced its proceedings, Mr Karim, representing Astromando, objected to its holding an enquiry, on technical grounds relating to its jurisdiction to do so. The board heard argument and then overruled the objection. Mr Rees Smith alleges in his answering affidavit that Mr Karim took no further part in the proceedings before the board. This is disputed in an affidavit made by another advocate practising in Aden, Mrs Raquya AQ Humeidan. She states that Mr Karim was

present during the enquiry, that he had appointed an advocate, Mr Wagih A Lugman, to represent six crew members of the Thalassini Avgi who were to be called as witnesses, that Mr Lugman examined and cross-examined these and other witnesses, that Mr Karim was guiding him in doing so, and that Mr Karim paid Mr Lugman's fee on behalf of the crew members. The board heard the evidence of the master of the vessel and five other crew members, and of the assistant port officer and the harbour master of Aden. At the time when the papers in the second application were filed, the board had drawn up its report on its findings, but the report had not yet been formally released or published.

Mr Hare, in his founding affidavit in the second application, dealing with the appellants' claims in delict, refers to his founding affidavit in the first application and to the affidavit of Mr Lawrence Henley, which had been filed in the NYK application for the arrest of the Dimitris, mentioned earlier in this

judgment. On the basis of the affidavit of Mr Henley and of information obtained by the representatives of NYK, Mr Hare had said in his first affidavit that it appeared that a series of fires had broken out simultaneously in four different places on board the Thalassini Avgi. With these introductory references, Mr Hare's affidavit in the second application then proceeds as follows (this is the hearsay evidence in question):

> "Further, I am instructed that the South Yemeni authorities have conducted an Enquiry into the circumstances surrounding the fires which broke out on board the 'THALASSINI AVGI' at Aden. I am informed by Messrs. Clyde & Co that the Report of the Enquiry has been finalised but has not yet been formally released. However Messrs. Clyde & Co have been informally advised that the Enquiry has concluded that the fires were started deliberately and in all probability by a member of the crew of the 'THALASSINI AVGI'. I respectfully submit that, based on these unofficial findings and the facts set out in my Affidavit and the affidavit of Messrs. Henley, and in the annexures to Mr Henley's Affidavit, an action based on delict is at least prima facie available to Applicants as a means of proceeding to recover their

claims."

Mr Rees Smith, in his answering affidavit, responded to the above-quoted passage in Mr Hare's affidavit as follows:

> "I deny the correctness of the alleged informal advice furnished to Messrs Clyde & Co by an undisclosed person or persons, and, in turn, conveyed to Mr Hare. I respectfully submit that the allegation constitutes hearsay evidence at its worst. Accordingly, I do not deal with this evidence and at the hearing of this matter application will be made to strike out:- ....."

and then the alleged offending parts of the passage are set out. With reference to Mr Rees Smith's response, two further matters may conveniently be noted at once. The first is that, in another part of his answering affidavit, Mr Rees Smith stated the following:

> "I am informed by Mr Karim that the findings of the Second Inquiry [which is the one referred to above] were pronounced on 25th August 1986 and that although he has sighted a copy of the findings briefly, it will be some time before these findings and other proceedings before the Second Inquiry are formally published ....."

The second is that Mr Karim made an affidavit for the respondent, dated 25 January 1987, which was filed in the second application as part of the respondent's answer to the appellants' application: in it, Mr Karim does not mention a word of the proceedings and evidence before the board of enquiry, nor of the board's findings which he had "sighted".

Subsections (3) and (4) of section 6 of the Act provide as follows:

> "(3) A court may in the exercise of its admiralty jurisdiction receive as evidence statements which would otherwise be inadmissible as being in the nature of hearsay evidence, subject to such directions and conditions as the court thinks fit.
>
> (4) The weight to be attached to evidence contemplated in subsection (3) shall be in the discretion of the court."

In the Court a quo, ZIETSMAN J in his judgment dealt with the objection to the evidence as follows:

"Hearsay evidence may be admitted in

> applications of this kind (see section 6 (3) of the Admiralty Jurisdiction Regulation Act, No 105 of 1983) but I agree with Mr Scott that the type of double hearsay evidence, evident in the above quotation from Mr Hare's affidavit, where the original source of the alleged communication is not even disclosed, cannot be admitted."

In my view, with respect, the learned Judge erred in his approach to the question he had to decide. As I understand the passage in his judgment that I have quoted, his approach was that he had no power to allow the evidence in question when once the two features of it mentioned by him were present, viz that it constituted "double hearsay" and that the original source of the communication was not disclosed. On this approach the learned Judge fettered the exercise of his discretion under the section in a manner which is not warranted by the terms of it, and thus effectively precluded himself from actually exercising his discretion. It may be that the learned Judge meant to convey that the two features of the evidence

mentioned by him constituted the grounds upon which he exercised his discretion in deciding not to admit the evidence... But even if that were his approach, it seems to me, with respect, that he misdirected himself by isolating those two features and by confining his decision to a consideration of them, to the exclusion of a consideration of other circumstances which were relevant to the exercise of his discretion and which operated in favour of allowing the evidence, as will be shown below. In my judgment, therefore, the learned Judge failed to apply his mind properly to the exercise of the discretion conferred by section 6 (3), and this Court is obliged to consider the matter afresh.

Counsel for the respondent, arguing in support of the conclusion arrived at by the Court a quo on this point, relied on the well-known prerequisites applied in general practice for allowing hearsay evidence in urgent interlocutory applications - see e g Southern Pride Foods (Pty) Ltd v Mohidien 1982 (3) SA

1068 (C) and the earlier cases cited in the judgment in that case. (The recent legislation concerning the admissibility of hearsay evidence, contained in section 3 (1) (c) of Act 45 of 1988, is irrelevant for present purposes.) Counsel argued that those pre-requisites should be applied in the context of section 6 (3) of the Act, with the single exception that the operation of section 6 (3) is not confined to inter-locutory matters. Thus, counsel argued, hearsay evidence should only be received under section 6 (3) if it is shown, inter alia (I do not propose to enumerate all of the prerequisites), that the matter is one of urgency, and if the source of the information is disclosed. Counsel referred us to an unreported judgment of NEL J in the Cape Provincial Division, in the case of Elsden Shipping Lines (Holdings) Ltd v Atlantic Fisheries & Shipping Co Ltd (21.3.1986), which contains remarks tending to support counsel's argument. I do not, however, agree with the argument, nor, with

respect, with the remarks in the unreported judgment which tend to support it. In my opinion it is quite clear that the Legislature intended, by enacting section 6 (3), to sanction a departure, in admiralty cases, from the general practice of the courts in other cases, in regard to receiving hearsay statements in evidence. The object of the Legislature is placed beyond doubt by the use of the expression "which would otherwise be inadmissible". Counsel's attempt to cut down the effect of that expression by confining its operation to cases which are not of an interlocutory nature rests on pure speculation as to the Legislature's intention and is wholly unwarranted. Although the prerequisites in other cases, to which counsel referred, such as urgency and the disclosure of the source of the information, are matters which will no doubt be taken into consideration in the exercise of the discretion conferred by section 6 (3), I can perceive no justification for thinking that the

Legislature contemplated compliance with such pre-requisites as a condition requiring fulfilment before the exercise of the discretion can come into play.

Counsel for the appellants, on the other hand, contended that section 6 (3) should be construed as if the word "may" meant "shall", with the result that the courts in admiralty cases are obliged to admit hearsay statements in evidence. I do not agree with this argument either. The obvious and simple answer to it is that there is no justification for departing from the plain meaning of the language used by the Legislature.

The Legislature has given no indication of how a court should approach the exercise of its discretion under section 6 (3), if regard is had to that subsection by itself. It seems to me, however, that subsection (3) must be read together with subsection (4), and that the latter subsection provides the clue as to the general approach to be adopted in

applying subsection (3). In terms of subsection (4) the weight to be attached to hearsay statements, if allowed under subsection (3), is itself left for assessment in the discretion of the court. Subsection (4) is, I consider, of overriding importance in the scheme of the procedure envisaged in the combined provisions of the two subsections. Accordingly, in my view, the general approach to be adopted in the application of section 6 (3) should be lenient rather than strict; the court should, speaking generally, incline to letting hearsay statements go in and to assess the weight to be attached to them under section 6 (4) when considering the case in its totality; and a decision to exclude such statements should normally be taken only when there is some cogent reason for doing so.

Reverting to the facts of this case, the most important feature of the hearsay statement in Mr Hare's affidavit is that its origin is a finding of an

official board of enquiry, contained in a written report compiled by it. The report was not yet officially available, and it is not due to any fault of the appellants that the report itself was not produced in evidence. It appears that it was unlikely that the report would have become available within a reasonable period of time. Although it was not shown that the second application was one of "urgency" in the usual sense, it could not reasonably have been expected of the appellants to await the official release of the report before they launched the second application. The real source of Mr Hare's information was the report itself. The identity of the person who conveyed the contents of the board's finding to Messrs Clyde & Co, and the identity of the person who received the communication and in turn passed it on to Mr Hare, do not appear to me to be of any moment in the particular circumstances of this case. It can hardly make any difference whether they were Mr A and Mr B, or Mr X and

Mr Y. I do not find anything disturbing in the "double hearsay", nor in the failure to supply the names of the communicants. Moreover, what is of decisive significance is that the respondent's own legal representative and witness, Mr Karim, had first-hand knowledge, not only of the evidence that was given before the board, but also of the board's finding itself. The respondent was accordingly in at least an equally good (and probably better) position, as compared to the appellants, to gain access to the information contained in Mr Hare's statement. In all these circumstances, my conclusion is that the Court a quo should have allowed the hearsay statement in evidence.

As to the weight to be attached to the statement, counsel for the appellants pointed to various factors tending to support the correctness of Mr Hare's information. He mentioned the information previously obtained, that the fire had broken out

simultaneously in different places on board the vessel, and the fact that Astromando's fire expert, who had investigated the circumstances of the fire, was not made available to advise the board of enquiry, which, it was contended, justified an adverse inference against Astromando. In my view, two further features of the case, relied on by counsel for the appellants, are of decisive importance. The first is Mr Rees Smith's response to the statement, and the second, Mr Karim's silence about it. As to the former, I find it very difficult to understand Mr Rees Smith's bald denial (in itself also hearsay) of the statement in Mr Hare's affidavit. On the probabilities, Mr Rees Smith must have been advised by Astromando's legal representative, Mr Karim, about the tenor of the evidence heard by the board, and specifically also about what he (Mr Karim) had seen of the board's report. His omission to deal in his affidavit with the information that he must have received from Mr

Karim, leaves one with the impression that he was shielding behind the hearsay nature of Mr Hare's statement, using it as a technicality in order to avoid having to deal with the substance of the allegation. After all, if he had information at his disposal, showing that Mr Hare's information was wrong, why did he not say so? In my judgment, an adverse inference is justified that Mr Rees Smith was in no position to refute the substance of Mr Hare's information. As to Mr Karim, his failure to deal in his affidavit with the statement in question is quite mystifying, particularly in view of the absence of any explanation proffered by or on behalf of the respondent as to why Mr Karim was not instructed to advert to the matter. In all these circumstances, my conclusion is that the hearsay statement in Mr Hare's affidavit carries sufficient weight to justify a finding that the appellants have shown a prima facie cause of action in delict against Astromando.

Having found that the appellants have proved a prima facie case against Astromando, both in contract and in delict, I turn to the next question, viz whether they have shown prima facie that their claims are enforceable in the courts of South Yemen. I dealt earlier with the affidavits of Mr Kimura and Mr Ninomiya, concerning the position under Japanese law. It is now necessary to refer to the opinions expressed by the two experts on Yemeni Law, Mrs Humeidan and Mr Karim. Part of the opinion originally expressed by Mrs Humeidan, in a first affidavit made by her, was accepted by Mr Karim, with some alterations. I quote the altered version put forward by Mr Karim:

> "In cases in respect of claims for marine cargo damage it is within the discretion of the PDR Yemen Courts that claims can be brought against shipowners and/or charterers in tort as well as for breach of the Contract of Carriage. The PDR Yemen Courts have jurisdiction to adjudicate upon cargo damage claims against a shipowner arising out of tortious or deliberate acts committed within the territory of the PDR Yemen even if the cargo was carried under a Bill of Lading

> containing a demise clause and an exclusive jurisdiction clause specifying a jurisdiction other than the PDR Yemen."

In a second affidavit, Mrs Humeidan said the following:

> "The PDRY Courts will assume jurisdiction in cases where a Plaintiff is a Yemeni National or the cause of action arises within the terriority of the PDRY. The fact that there may be a contractual agreement between the Plaintiff and the Defendant to refer disputes to jurisdictions other than PDRY will not prevent or dissuade the PDRY Courts from maintaining jurisdiction and hearing the case."

In reply to this statement, Mr Karim said in his affidavit that he agreed with the first sentence of it, but not with the second. In regard to the latter, he stated:

> "A contractual agreement regarding jurisdiction can be enforced by way of an application for a stay of proceedings commenced in PDR Yemen in favour of proceedings in the contractual jurisdiction. The Court will, in its discretion grant or refuse the stay."

As far as the last two passages quoted are concerned, when they are read against the background of the first-quoted passage, it is not entirely clear that the

deponents were referring to claims both in delict and in contract, or only to the former. On balance, the wording of the last two passages appears to be wide and generalized enough to include both types of claims. It is not necessary, however, to express a firm opinion on this question. Nor is it necessary to address the differences of opinion reflected in the statements of Mrs Humeidan and Mr Karim, or in those of Mr Kimura and Mr Ninomiya, as quoted earlier. They raise issues which the court hearing the main case will be called upon to decide. As explained earlier in this judgment, proceedings under section 5 (3) (a) of the Act are not appropriate for obtaining pronouncements of the court on issues of this kind. Adopting the approach set out earlier, it is sufficient to say that, in my view, two conclusions emerge with clarity from a conspectus of the expert evidence as a whole. First, the appellants have discharged the onus of showing that the courts of South Yemen have jurisdiction to

adjudicate upon their claims, and that their claims are prima facie enforceable in those courts. Second, the respondent has not discharged the onus of proving that those courts will clearly, or even probably, decline to exercise their jurisdiction in favour of the appellants, whether on the ground of the exclusive jurisdiction clause (clause 3) of the bills of lading, or on any other ground. In the result, on the score of the enforceability of the appellants' contemplated action in South Yemen, there is no reason for denying the appellants the relief claimed in the second application.

As to the convenience or the appropriateness of a court in Yemen as the forum for hearing the main proceedings, my conclusion is the same as that just stated above. There is no need to enter into details. The main point raised on behalf of the respondent was that the Greek crew members of the Thalassini Avgi would not be prepared to go to Aden to testify in the

case, because the master of the vessel and five crew members had been prohibited by court order from leaving Yemen until the conclusion of the hearing of evidence by the board of enquiry. I do not consider that there is any force in this point. On the evidence contained in the affidavits filed by the appellants concerning the fair way in which the crew had been treated by the Yemeni authorities, I see no reason why they should be reluctant to go there again. In any event, should they refuse to return to Aden, there was no suggestion that their evidence could not be taken on commission.

As to the appellants' need for security, it has not been contended by the respondent that they did not genuinely and reasonably require security, in general. The respondent's unwillingness to furnish security in respect of a judgment of a Yemeni court has no bearing on the matter of security as such; it is confined to the respondent's reluctance to litigate in Yemen. That is a matter that must be assessed on its

own merits, irrespective of the appellants' need for security.

That leads me to the last issue that calls for consideration: the respondent's fear that Astromando will not receive a fair hearing in any court of South Yemen. From the respondent's point of view, there is no doubt that this is, and always was, the fundamental and crucial issue in the case. It had already been foreshadowed in Mr Steyn's affidavit of 27 April 1986, and it played the most conspicuous part in Mr Rees Smith's answering affidavit in the second application. However, the respondent's expressed fear that justice will not be done in South Yemen, and the grounds advanced in support of it in Mr Rees Smith's affidavit, evoked a very strong and detailed response from the appellants, particularly in the form of a forceful affidavit made by Mrs Humeidan. In view of this turn of events, this issue, despite its vital importance to the respondent, need not be canvassed in

any great detail. I shall merely outline the main opposing contentions advanced in the affidavits.

The allegations contained in the affidavit of Mr Rees Smith may be summarized as follows. The government of South Yemen is Marxist in nature. In January and February 1986 severe rivalries in the regime led to an outbreak of fierce fighting and the temporary evacuation of the foreign community. While the laws of Yemen are equal to the best in force in any other country, when it comes to the application of those laws to any particular case, the courts take into consideration a factor known as "public interest" and give too much weight to it; because of this, parties involved in litigation against a public sector corporation of Yemen are usually advised to settle the dispute rather than to proceed to court. In order to protect the interest of the public sector, the courts are inclined to disregard even the best defences available on the other side. The Yemen Insurance

Company, through which the appellants are acting collectively, is a public sector company which is owned and controlled by the State. The standard of the judiciary is not high; the appointment of judges tend to be political appointments. An example is the recent appointment of the Chief Justice of the Aden Governorate, which was felt by most lawyers to have been inappropriate, since he has little or no common law experience.

Mr Rees Smith said in his affidavit that he had intended to annex an affidavit or affidavits from one or more of the people who furnished him with the information summarized above, but that he could not do so because the disclosure of the identities of the people concerned would place their personal safety in jeopardy. He offered to appear personally in the Court a quo and to disclose his sources of information in confidence. In the event, nothing came of this offer.

In the affidavit of Mrs Humeidan each and every allegation of substance made by Mr Rees Smith is dealt with and explicitly denied. I see no point in tabulating her denials. Instead, I mention only some of the salient features of her evidence. As to the alleged inclination of the courts to favour the "public interest" and public sector companies, she says:

> "These assertions are not true at all because the judges in the P.D.R. Yemen are independent and apply the applicable laws fairly. The only factors they take into consideration and to which they give weight when hearing any suit are the legal evidence submitted by the parties and the fair application of the applicable law."

With regard to the Yemen Insurance Company, she says that while it is a public sector company owned by the State, it nevertheless acts as an independent company, and she points out that the reinsurers are foreign companies in the United Kingdom, and that in shipping cases their interest and risk are predominant, i e 70 percent. She asserts that the standard of the

judiciary in South Yemen is considered to be among the best in the Middle East. With regard to the criticism of the appointment of the Chief Justice, she says that the judge concerned was appointed as Chief Justice of the Republic's Supreme Court, and not of the Aden Governorate Court. She explains his qualifications and disputes that his appointment was considered to be inappropriate, except on the basis of a personal opinion held by a certain practising lawyer. She is obviously referring to Mr Karim. And she has some interesting observations to make about Mr Karim, in relation to Mr Rees Smith's allegation that parties involved in litigation with public sector companies are usually advised to settle their cases. She avers that she has personal knowledge of the manner in which Mr Karim conducts his practice and that she can accordingly confirm that Mr Karim is the source of Mr Rees Smith's information. In summary, she says of Mr Karim: he handles most of the cases connected with

shipping; he believes in settling such cases; he strictly maintains this policy, not because of the elements of public interest, but because, as many times openly declared by him, he seeks to avoid costs and lengthy litigation; he also avoids litigation, because he is neither familiar with the applicable civil law nor the procedure, which is in the Arabic language, in which he is weak; consequently he gives his clients the impression that the Yemeni courts may rule in favour of the public corporation (which mostly represents the claimants); he emphasizes the public interest factor as a means of persuading his clients that it would be in their favour to settle their disputes amicably.

The above survey of the evidence speaks for itself. The conclusion from it is inescapable: the respondent has failed to discharge the onus of proving objectively that Astromando is in danger of not receiving a fair trial, or that justice is not likely to

be done, in the courts of South Yemen.

In the final result, the appellants have discharged the onus in regard to the matters which they were required to prove, and the respondent has failed to discharge the onus in respect of matters concerning which the burden of proof rested on it. Consequently the Court a quo should have decided the second application in favour of the appellants.

The order of the Court is as follows:

1. The appeal is allowed, with costs, including the costs of two counsel.
2. The order of the Court a quo is set aside and there is substituted for it an order as follows:

"(a) It is directed that the undertaking furnished by the West of England Shipowners Mutual Protection and Indemnity Association (Luxembourg) dated 29 April 1986, being annexure

JEH 3 to the affidavit of John Edward Hare filed in support of the notice of motion, shall cover any judgment, either in delict or in contract, in respect of the claims for which the said undertaking was furnished, granted by any Court of competent jurisdiction in the People's Democratic Republic of Yemen.

(b) The respondent is ordered to pay the costs of the application."

A.S. BOTHA JA

CORBETT CJ

HEFER JA

KUMLEBEN JA

F.H. GROSSKOPF JA

CONCUR