THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 339/08

NAME OF SHIP: mv 'CAPE COURAGE'

In the matter between:

BULKSHIP UNION SA APPELLANT

and

QANNAS SHIPPING COMPANY LTD FIRST RESPONDENT

DRY BULK MARITIME LTD SECOND RESPONDENT

Neutral citation: *Bulkship Union SA v Qannas Shipping Co Ltd & Another* (339/08) [2009] ZASCA 74 (1 June 2009)

Coram: FARLAM, MAYA JJA, HURT, LEACH et GRIESEL AJJA

Heard: 5 MAY 2009

Delivered: 1 JUNE 2009

Summary: Shipping ï Admiralty Jurisdiction Regulation Act

105 of 1983, s 3(7) - interpretation of phrase 'when the maritime claim arose'.

ORDER

On appeal from: High Court Durban and Coast Local Division **(**Balton J sitting as court of first instance).

The following order is made:

1. The appeal is allowed with costs including those occasioned by the employment of two counsel.

2. The order made by the court *a quo* is set aside and replaced with an order in the following terms:

'1. Subject to paragraph 2 below, the application is dismissed with costs including those occasioned by the employment of two counsel.

2. The order of arrest granted on 15 June 2006 is amended by adding the following at the end of paragraph 1:

"save for the claim brought by the applicant in respect of an alleged breach of clause 5(a) of the Memorandum of Agreement".'

JUDGMENT

FARLAM JA (Maya JA, Hurt, Leach et Griesel AJJA concurring)

[1] This is an appeal against a judgment delivered and an order granted by Balton J sitting in the Durban High Court, on 4 March 2008, in which the deemed arrest of the the MV 'Cape Courage' was set aside. The judgment of the court *a quo* has been reported: see *MV 'Cape Courage': Bulkship Union SA v Qannas Shipping*

Company Ltd v Bulkship Union SA SCOSA C 124(D). The vessel had been arrested on 15 June 2006 in terms of s 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983, as amended (which I shall call in what follows 'the Act'), for the purpose of providing security for claims brought by the appellant, Bulkship Union SA, against the second respondent, Dry Bulk Maritime Limited, in arbitration proceedings in London. The claims which are the subject of the arbitration are in respect of alleged breaches of a memorandum of agreement for the sale and purchase of another vessel, MV 'Pearl of Fujairah', and for misrepresentations relating to the condition of that vessel.

[2] The MV 'Cape Courage' was arrested as an 'associated ship' pursuant to s 3(6) and (7) of the Act on the basis that the second respondent owned the MV 'Pearl of Fujairah' when the appellant's claims arose, and the same person or persons controlled the second respondent at the time when the claims arose and the first respondent, Qannas Shipping Company Limited, (the owner of the MV 'Cape Courage') at the time of the arrest. Security was established by the provision of a guarantee and the MV 'Cape Courage' was released but she remains deemed to be under arrest in terms of s 3(10) of the Act.

[3] On 23 August 2006 the first and second respondents brought an application for an order setting aside the deemed arrest and the return of the guarantee, alternatively for the reduction of the amount of the security, and in addition an order that the appellant provide them with counter-security in the arbitration. The alternative claim for a reduction in the quantum of security and the claim for counter-security were thereafter resolved between the parties and it is unnecessary to make further reference to them. The only issue in the appeal is therefore whether the court *a quo* correctly set aside the deemed arrest of MV 'Cape Courage'.

[4] As the original application for the arrest of the vessel was brought *ex parte* the appellant was obliged in the application before Balton J to justify the arrest. It accordingly had to show: (a) that the MV 'Cape Courage' is susceptible to arrest *in rem* in respect of its claim; and (b) that it has a *prima facie* case in respect thereof. In respect of the first issue the appellant had to establish its case on a balance of probabilities while on the second issue it had only to establish that there was evidence which, if accepted, would establish a cause of action.

[5] Before I set out the issues which have to be considered in this appeal it is desirable to set out sections 3(4), (6) and 3(7) and s 5(3)(a) of the Act, as far as they are material.

Section 3(4), (6) and (7) provide:

'(4) Without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action a maritime claim may be enforced by an action *in rem*–

. . .

(b) if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.

(6) . . . [A]n action *in rem* . . . may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.

(7) For the purposes of ss (6), an associated ship means a ship, other than the ship in respect of which the maritime claim arose ï

. . .

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

Section 5(3)(a) of the Act is in the following terms:

'(a) A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which 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, if the person seeking the arrest has a claim enforceable by an action *in personam* against the owner of the property concerned or an action *in rem* against such property or which would be so enforceable but for any such arbitration or proceedings.'

[6] In the present case the MV 'Pearl of Fujairah' was owned by the second respondent prior to her transfer in terms of the contract of sale between the second respondent and the appellant, which it is common cause took place when the vessel was delivered to the appellant at Lianyungang Roads, China, at 7.05 pm, local time on 20 October 2005. It is not disputed, at least for the purpose of these proceedings, that the first and second respondents were controlled at the relevant times by the same person or persons. What is in dispute, however, is whether it can be said that the MV 'Pearl of Fujairah' was owned by the second respondent when the appellant's claims 'arose' and whether one of the appellant's claims, viz that based on an alleged breach of clause 5(a) of the memorandum of agreement between the appellant and the first respondent, was established *prima facie.*

[7] Counsel for the appellant stated that if this court were satisfied that all the claims arose at a time when the MV 'Pearl of Fujairah' was still owned by the second respondent they would not persist in their contention that a *prima facie* case had been made out in respect of the alleged breach of clause 5(a) of the memorandum of agreement.

[8] The other alleged breaches of the memorandum of agreement, which the respondents concede were established *prima facie,* related to clause 11 of the memorandum (which

provided that the vessel should be delivered and taken over in substantially the same condition as when inspected, fair wear and tear excepted), clause 18 (which provided that the vessel should be delivered 'with her present BV class maintained, free of outstanding recommendations and average damage affecting her present class at the time of delivery') and a term implied by s 14 of the English Sale of Goods Act 1979 (as amended) (that the vessel was of satisfactory quality or fit for the purpose for which it was sold).

[9] The claims based on alleged misrepresentations made by the second respondent relating to the true condition of the vessel were to the effect (a) that the second respondent provided the appellant at the pre-purchase survey with incorrect Ultra Thickness measurement readings (which showed the extent to which the steel work had rusted away) and incorrect technical data relating to the vessel's operating speeds; (b) that the second respondent incorrectly advised the appellant's agent at the time of the pre-purchase survey that the vessel was in 'normal operating condition'; and (c) that the second respondent incorrectly represented to the appellant when the notice of readiness for delivery was given on 18 October 2005 that the vessel was as of that date in every respect physically ready for delivery in accordance with the terms of the memorandum of agreement.

[10] Before the vessel was delivered to it the appellant paid the second respondent the purchase price of the vessel US $14 990 000. On doing so it became entitled to delivery of the vessel and, as I have said, it received delivery of the vessel at 7.05 pm local

time on 20 October 2005, when ownership in the vessel passed to it. It accordingly received a right *in personam* against the first respondent (what we would call a *ius in personam ad rem acquirendam)* on payment of the purchase price, and this was followed by the real right of ownership, when delivery took place.

[11] The learned judge in the court *a quo* held that the appellant's claims against the second respondent did not arise until the appellant had suffered damage in consequence of the breaches of the contract between the parties and the misrepresentations alleged. She came to this conclusion because she held that the words 'when the maritime claim arose' in s 3(7)(a) mean when all the juristic facts necessary for the claim to exist have occurred, 'even though the claim might not yet be enforceable because, for example, a suspensive condition has not been fulfilled.' She also held that the appellant did not suffer any damage until it became owner of the vessel on delivery. It followed in her view that none of the appellant's claims arose when the second respondent owned MV 'Pearl of Fujairah', with the result that, as the appellant had failed to establish the necessary association between the two vessels, the deemed arrest had to be set aside.

[12] Counsel were agreed that the first issue to be decided related to the interpretation of the expression 'the time when the maritime claim arose' in s 3(7)(a) of the Act and that that question is to be determined under South African law.

[13] The second issue debated at the bar related to when a cause of action accrues for the purposes of what is called limitation

of actions under the Limitation Act, 1980, in England (what we would call prescription). Both the appellant and the respondents filed opinions by English barristers on this point, stating their views (which were sometimes in agreement and sometimes not) as to when the appellant's various claims accrued under English law, which it was common cause was the proper law of the contract between the parties and of the arbitration. Both barristers assumed that the appellant's causes of action based on the alleged misrepresentations would also be governed by English law (whether that assumption was correct is a matter on which I express no opinion).

[14] Counsel for the appellant contended that the reference in s 3(7)(a) of the Act to the time 'when the maritime claim arose' with regard to 'the ship concerned' is a reference to the time when the wrong giving rise to the maritime claim occurred or was committed and that it did not refer to the existence of a complete cause of action. In particular, they submitted that in the context of a claim based on a breach of contract a maritime claim arises at the time of the breach, whether or not damage has as yet been suffered. As far as claims in delict (or tort) are concerned, they submitted that the maritime claim arises at the time the delict was committed, even if actual damage was only suffered thereafter. In the circumstances, their argument continued, where the breach takes the form of the delivery of a defective ship under a contract of sale the maritime claim arises when the seller performs its obligation to deliver the ship and 'the performance of that obligation precedes ï and is completed prior to ï the passing of ownership in the vessel sold from the seller to the buyer.'

[15] As regards the claims based on alleged misrepresentations by the seller they submitted that, to the extent that it is held that such claims arise only when the buyer acts to its prejudice, the payment of a deposit or the purchase price is sufficient prejudice, it not being necessary that the buyer also receive ownership of the defective ship. In support of their submissions on the meaning of the phrase 'when the maritime claim arose' they relied heavily on the decision of this court in *MV* 'Heavy Metal': *Belfry Marine Ltd v Palm Base Maritime SDN BHD* 1999(3) SA 1083 (SCA). They also relied on an unreported judgment delivered in the Cape Town High Court by Foxcroft J, *MV* 'Meng Hai': *Multi Spirit SA v MV* 'Meng Hai' *and Cosco Bulk Carrier Company Ltd,* delivered on 10 September 2004.

[16] Counsel for the respondents submitted that the phrase 'the time when the . . . claim arose' refers, 'at the earliest, to the time when the claim came into existence and that in South African law, the law to be applied in regard to this issue, the claims under discussion cannot have arisen until at least some part of the damages claimed had been suffered, which in each case did not occur until delivery of the vessel had been accepted by the buyer.'

[17] Counsel on both sides sought to rely on the decision of this court in MV 'Forum Victory": *Den Norske Bank ASA v Hans K Madsen* CV 2001 (3) SA 529 (SCA) in which the expression 'a claim which arose', which appears in s 11(4)(c) of the Act, was held (para [14] at 525G-H and para [17] at 536I) to mean the 'claim came into existence'. It must be pointed out, however, that Scott

JA said (para [11] at 534G-J):

'The expression "when the maritime claim arose in s 3(7) is perhaps no less ambiguous than the expression "claim which arose" in s 11(4)(c). In these circumstances there would seem little to be gained by interpreting the one, in its different contextual setting, in order to serve as an aid to the interpretation of the other.'

[18] As far as the decision of this court in the *'Heavy Metal'* is concerned, counsel for the respondents pointed out that the judgment does not deal with the question as to whether the damages claim in that case could only have arisen when the damages were suffered. He pointed out that counsel for the appellant in that case did not argue the point. In the circumstances counsel for the present respondents submitted that the 'Heavy Metal' is not authority for the proposition relied on by the appellant in this case. I agree with this contention. I was one of the judges in the 'Heavy Metal' and the passage relied on by the appellant's counsel comes from the judgment I delivered, which on this point at least was concurred in by the other members of the court. As counsel for the present respondent submits, the point was not argued in the case nor considered in the judgment. If it had been argued it would have been discussed in the judgment. It follows that the point will have to be considered on the basis that it is *res nova* in this court.

[19] The unreported decision of Foxcroft J in *MV* 'Meng Hai', on which counsel for the appellant relies, affords a useful starting point. The case also concerned a claim for damages suffered as a result of the delivery of a defective ship and the arrest of a ship which was allegedly an associated ship. The owner of the ship also argued, as here, that the association between the two vessels

had not been established because the applicant's claim only arose after it became the owner of the defective ship. Foxcroft J rejected this contention, relying largely on the *Heavy Metal,* which he held decided the point. At pp 14-15 of his judgment, however, he said this:

When one looks at all the dictionary definitions of the word 'arise' one is struck by the idea of origin. The Shorter Oxford English Dictionary gives under the third meaning of the verb, 'to spring up, come above ground, into existence'. The transferred use is given as 'to take its rise, originate'. The second meaning under this third heading is 'to be born, come into the world of action'. Insofar as one can ever have regard to dictionary meanings, the idea of origin in these meanings of the word 'arise' is paramount.'

[20] It is important to note that the phrase 'when the maritime claim arose' was taken over by our legislature from article 3(1) of the International Convention Relating to the Arrest of Sea-going Ships, signed in Brussels in 1952. (In what follows I shall refer to this convention as the 'Arrest Convention'.)

[21] The convention permitted a claimant to 'arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship'. The article embodied a compromise arrived at between the representatives of the countries represented at the convention. The nature of the compromise appears from a passage in the judgment of Lord Denning MR in *The* Banco: *Owners of the Motor Vessel* Monte Ulia *v Owners of the ships* Banco *and Others* [1971] P 137 (CA) at 151F-H ([1971] 1 All ER 524 at 532a-c), which is quoted in the 'Heavy Metal' case at 1098A-C and which reads as follows:

'In 1952 there was an international convention held at Brussels. . . . It was held because of the different rules of law of different countries about the arrest of sea-going ships. Some countries, like England, did not permit the arrest of any ship except the offending ship herself: whereas many continental countries permitted the arrest, not only of the offending ship, but also of any other ship belonging to the same owner. In the result a middle way was found. It

was agreed that *one* ship might be arrested, but only *one.* It might *either* be the offending ship herself *or* any other ship belonging to the same owner: but not more. This was an advantage to plaintiffs in England because it often happened previously that, after a collision, the offending ship sank or did not come to these shores. So there was nothing to arrest. Under the Convention the plaintiff could arrest any other ship belonging to the same owner whenever it happened to come to England.'

[22] In England a ship which may be arrested despite the fact that it is not 'the offending ship' is called a 'sister ship'. Our Act, of course, goes further than the Arrest Convention and the English Act which followed it by widening the net and providing for a statutory piercing of the veil to combat the practice frequently adopted by ship owners of seeking to evade the sister ship provision by setting up a series of one-ship companies. On the point presently at issue, however, the requirement that the owner or ultimate controller of the ship sought to be arrested, ie, with us the associated ship, must have been the owner or controller of the offending ship 'when the maritime claim arose' is similarly worded. Counsel did not refer us to authority on the meaning of the phrase in question in article 3 of the Arrest Convention or in legislation elsewhere in the world in which it has been adopted by countries not parties to the Convention, such as Australia which uses a similar formulation in s 19 of its Admiralty Act 1988 (Cth), nor was I able to find any. I note also that no cases on the point are cited in the leading textbook on the 1952 and 1999 Arrest Conventions, *Berlingieri on Arrest of Ships,* 3 ed, by Professor Francesco Berlingieri.

[23] In my view it is significant that in cases other than those involving maritime liens, where other considerations apply, for a maritime claim to be enforced by an action *in rem* the owner of the property to be arrested must be liable to the claimant in an action

in personam in respect of the cause of action concerned. When one realises that the owner or controller of the 'offending ship' has to be personally liable on the claim, it becomes clear that it is really inappropriate to speak of the 'offending ship': it is really the 'offending owner' (or controller) who should be looked at because property owned or controlled by it, in the form of another ship, becomes liable to be arrested when the associated ship provision is utilised. It accordingly makes sense, when a claim has 'originated' and enough factors are present to indicate that the owner or controller of the ship concerned at that time (or those for whose actions or omissions it is liable) has 'offended', that another ship owned or controlled by that person when the claim is enforced may be arrested in respect of the claim. Damage resulting from the offending actions or omissions by the owner or controller (or for which it is liable) may not yet have been suffered but if it is clear that it will in due course be suffered, I think that it is not stretching language to say that the claim has 'arisen'. Although the point did not form the subject of the decision in the case it is interesting to note that Gaudron, Gummow and Kirby JJ, in their judgment in *Laemthong International Lines Co Ltd v BPS Shipping Limited* (1997) 190 CLR 181 (H C of A) used the expression 'when the cause of action . . . arose' in speaking of a date when a breach occurred but before the damages in question were suffered. The case concerned a voyage charter party for the carriage of a cargo of bagged rice from Bangkok to Nouakchott in Mauritania. The agreement was breached on 8 July 1995 at Bangkok when the charterers failed to ensure proper fumigation of the cargo, leading to the infestation of the cargo by a species of beetle. As a result of this the vessel was arrested in Mauritania and the owners

subsequently claimed $1 833 285 as damages from the charterers in consequence of the arrest, which included interest and the cost of obtaining the release of the vessel and also certain demurrage and dead freight charges alleged to be due under the charterparty. These damages would all appear to have been suffered after the failure to fumigate. Yet Gaudron, Gummow and Kirby JJ said (at 200): '(o)n 8 July 1995, when the cause of action of the respondent against the appellant arose on the respondent's general maritime claim concerning the *Nyanza* . . .'

[24] In the circumstances I am satisfied that the appellant's submissions regarding the meaning of the phrase 'when the maritime claim arose' in s 3(7)(a) are correct and that it was also correctly submitted that the claims under clauses 11 and 18 of the memorandum of agreement and s 14 of the English Sale of Goods Act 1979 as well as the claims in tort based on alleged misrepresentations all arose when the first respondent was still the owner of the MV 'Pearl of Fujairah'.

[25] It is accordingly unnecessary to deal with the respondent's contentions regarding a possible breach of clause 5(a) of the memorandum of agreement.

[26] Save for a slight alteration of the order of arrest in regard to the claim under clause 5(a), the appeal in my view must be allowed with costs including those occasioned by the employment of two counsel.

[27] The following order is made:

1. The appeal is allowed with costs including those occasioned by the employment of two counsel.

2. The order made by the court *a quo* is set aside and replaced with an order in the following terms:

'1. Subject to paragraph 2 below, the application is dismissed with costs including those occasioned by the employment of two counsel.

2. The order of arrest granted on 15 June 2006 is amended by adding the following at the end of paragraph 1:

"save for the claim brought by the applicant in respect of an alleged breach of clause 5(a) of the Memorandum of Agreement".'

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IG FARLAM

JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	D A GORDON SC S R MULLINS SC
	Instructed by Garlicke & Bousfield Inc Durban Webbers Bloemfontein
FOR RESPONDENT:	A M STEWART SC
	Instructed by Shepstone & Wylie Durban Matsepe Inc Bloemfontein