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IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: AC181/2006

DATE: 30 APRIL 2008

In the matter between:

MT "FOTIY KRYLOV" Applicant

and

THE OWNERS OF THE "RUBY DELIVERER" Respondent

J U D G M E N T

(Application for Leave to Appeal)

DAVIS, J:

[1] This is an application for leave to appeal to the Supreme Court of Appeal against a judgment of this Court of 12 February 2008.

[2] I do not propose to examine the background nor the essential reasoning which is contained in the principal judgment. However, there is one issue that I wish to raise before analysing the arguments of Mr Stewart.

[3] This case is governed by section 6(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 which

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provides that English law as at 1983 applies to maritime *liens,* which is the subject of this particular dispute. In itself this provision raises a host of difficulties in assessing an application for leave to appeal. The law which governs this English law is determined by English Courts. As Mr Wragge, who appeared on behalf of the respondent (in this matter) correctly noted, in a number of relevant instances the English Courts have set out the law which applies in a case such as the present.

[4] The test that I have to adopt is whether there is a reasonable prospect that, in this case, the Supreme Court of Appeal may either read the relevant English law differently to the way I have adopted, or indeed, give it a different content. Debates about a foreign system makes the exercise of leave to appeal even more problematic than is ordinarily the case.

[5] Mr Stewart, who appeared on behalf of the applicant (in this application), submitted that the Court had erred in respect of its rejection of his reliance upon two essential cases, being the Longford and the Burns. In both the Longford 6 Asp.Mar.Law.Cas 371 (1889) and the Burns 10 Asp.Mar.Law.Cas 424 (1907) the statutory time bar in protecting the owners of defendant vessels was held not

to apply to maritime *lien* claims asserted *in rem* against the vessels on the basis that an action *in rem* is different from an action *in personam* and only indirectly affects the owner of the defendant vessel. In short, defences *in personam* were held not to avail the owners of the arrested vessel. According to Mr Stewart, therefore, it should follow that a charterer by definition would be an even weaker position.

[6] Turning to critical facts in these two cases, in the Longford it was held that a statutory proviso that no action shall be brought in which the Dublin Steam Packet Company would be liable for any damage to a ship unless one month's notice in writing was given to the company, did not apply to an admiralty claim *in rem*. This claim concerned a claim for collision damage which had given rise to a maritime *lien*. In the Court *a quo*, Butt, J considered that it was not in form a claim against the company, nor in substance could it be a claim against the company because the remedy against the company was not co-extensive with the remedy against the owners.

[7] This decision was upheld by the Court of Appeal on a rather more narrow basis that, before the passing of the Judicature Act there were only causes in the Admiralty

Court and not actions. The statute referred only to actions in the UK courts of law and the Admiralty Court had not been such a court at the time the statute was enacted.

[8] This decision was considered by the Court of Appeal in the Burns where the Court had to consider whether a claim *in rem* against a ship owned by the London County Council was a claim against the Council which, by statute, had a limitation period of six months. Again, this was a claim for damages arising out of a collision between the two ships which had given rise to a maritime claim. Collins, MR referred to the decision in the Longford as follows:

> "It seems to me that that case in substance decides that there is a real, and not a mere technical distinction between an action *in rem* personam and an action *in rem*". (at 427)

In similiar fashion, Fletcher Moulton, LJ said:

> "The very able argument of counsel for the appellants rests upon the contention that the process of the arrest of a vessel...is merely a method of enforcing an appearance in an action *in rem*. In other words, that an action *in rem* in no way differs in its nature from an action *in personam*

save that there is attached to it a means of arrest of the vessel of compelling the appearance of defendant. I am therefore of the opinion that the supplemental proposition of the argument of the counsel for the appellant fails and that the action *in rem* is an action against the ship itself. It is an action in which the owners may take part, if they think proper, in defence of their property but whether or not they will do so is a matter for them to decide and if they do not decide to make themselves party to the suit in order to defend their property, no personal liability can be established against them in that action. It is perfectly true that the action indirectly affects them. So it would if it were an action against a person whom they had indemnified... I do not think that we are entitled to suppose that there has been a change in the nature of the action *in rem* merely because the modern language of the writ by which it commences is unsuitable for what I think the authorities established to be its real manner". (at 428)

[9] Mr Wragge contended that this Court had been correct to reject the application of both the Longford and the Burns and rather to apply the approach which had been adopted

in the Tasmania 1886 (6) Asp.LR 305 in which the Court did not deal with the statutory provision, as had been the case in the Longford and Burns but whether a provision in a contract, as was the case in the present dispute, was sufficient to represent an adequate defence. That case (the Tasmania) is direct authority for the proposition that, if there is a provision in a contract pursuant to which the demise charterer of the chartered ship is relieved of responsibility for the damage, then, in those circumstances, no damage *lien* accrues. As Hofmeyr: Admiralty Jurisdiction (2006) at 154 writes:

> "The fact that a ship was the instrument of the damage is not sufficient to give rise to a *lien. T*here must have been a breach of duty by those in control of the ship so that the ship in their hands becomes the instrument of the damage...The breach of duty must, however, be a breach which renders the owner of the offending ship (at the time when the cause of action arises) liable, either directly or vicariously".

[10] If therefore, the personal liability of the *res* owner is a condition precedent to the accrual of a damage *lien* (Hofmeyr at 154) and if the charterers in whom the control of the ship has been vested by the owners are

treated *pro hac vice* as owners, then a contractual provision excluding owners' liability means that it is difficult to see how the condition has been met insofar as the charterers are concerned.

[11] Mr Stewart referred me to Halsbury's Laws of England Admiralty Vol. 1(1) 2001 in which the following appears:

> "The foundation of a claim *in rem* is the *lien* resulting from the personal liability of the owner of the *res*. Therefore a claim *in rem* cannot be brought to recover damages for injury caused to a ship by the malicious act of the master of the defendant ship or for damage done at the time when the ship was in the control of third parties by reason of compulsory requisition.
>
> On the other hand, in several cases ships allowed by their owners to be in the possession and control of charterers have been successfully proceeded against to enforce *liens* which arose whilst the ship was in control of such third parties".

[12] That passage affords, in my view, authority for the proposition of Hofmeyr, namely that if there is a contractual provision which excludes the owner's liability then somebody who steps into the shoes of the owner

and is treated for the purposes of liability as the owner, should have the same benefit of the contractual provision as do the owners.

[13] In my view, on this ground I cannot see how applying the law as it was put to me by counsel and as I have analysed it in the judgment, could give rise to a conclusion different to this Court.

[14] Turning then to the application on the Himalaya clause. Mr Stewart submitted that as Blue Bottle had not contracted directly with Tsvaliris, that is to say in performing under the Tow Hire agreement, Tsvaliris was not performing an obligation of Arusha's to Blue Bottle under the Towcon and was therefore not a servant, agent or sub-contractor of Arusha performing services under the Towcon. According to Mr Stewart what occurred was that Arusha had contracted with Tsvaliris for the services of the Nikolay Chiker but Arusha did not do so in order to perform some obligation that it had to Blue Bottle and Tsvaliris was according not a subcontractor of Arusha at all and certainly did not fall within the meaning of clause 19 of the Towcon.

[15] Mr Wragge contended that when Arusha contracted with Tsvaliris it did so in order that Tsvaliris would render

services that (a) had contracted to perform for Blue Bottle. Hence, Tsvaliris, as a subcontractor, was entitled to the protection of the Himalaya clause. In my view, clause 80 of the Towcon made it clear that Blue Bottle and Arusha intended, by the terms of the contract, to protect their subcontractors such as Tsvaliris. The clause also expressly provided that Blue Bottle contract as agent or trustee of and for the benefit of subcontractors such as Tsvaliris. With regard to the necessary authority, the ratification of Tsvaliris of the contract was sufficient. This ratification occurred when the Nikolai Chiker was made available to render the service in terms of the Tow Hire contract, alternatively at a later stage. Accordingly, analysed in terms of the evidence placed before this Court, it is difficult to see how Tsvaliris was not entitled to the protection of the Himalaya clause.

[16] For these reasons the application for leave to appeal is DISMISSED, WITH COSTS.

DAVIS, J

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