REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(KWAZULU-NATAL DIVISION, DURBAN)

(Exercising its Admiralty Jurisdiction)

CASE NO. A253/2009

NAME OF SHIP: MV 'BAVARIAN TRADER'

In the matter between:

PANCOAST TRADING SA **APPLICANT**

and

ORIENT SHIPPING ROTTERDAM BV **FIRST RESPONDENT**

MV 'BAVARIAN TRADER' **SECOND RESPONDENT**

JUDGMENT

Delivered on 16 February 2010

WALLIS J

[1] The crisp and novel question in this case is whether a ship can be arrested as an associated ship in terms of s 3(7)(a) of the Admiralty Jurisdiction Regulation Act

105 of 1983 ('the AJRA') where it is also the ship in respect of which the maritime claim arose ('the ship concerned'). The question arises in the following circumstances.

[2] On 17 July 2009 the first respondent, Orient Shipping Rotterdam BV ("Orient Shipping"), chartered the mv 'Bavarian Trader' to the applicant, Pancoast Trading SA ('Pancoast'). The fixture recap was embodied in an e-mail message sent to Orient Shipping by brokers acting on behalf of Pancoast and fell to be read together with an earlier charterparty between the same parties in respect of another vessel. Orient Shipping are described for the purposes of the charter of the mv 'Bavarian Trader' as the disponent owner of that vessel.

[3] Pancoast gave instructions to the master of the mv 'Bavarian Trader' to load a cargo for discharge at *inter alia* Dar es Salaam, Tanzania but the master refused to do so, apparently in reliance on the trading exclusions in clause 55 of the charterparty that provide that there would be:

'No sailing through the Gulf of Aden and Somalia waters and/or any other areas with threats of piracy.'

Pancoast elected to treat this refusal as a repudiation of the charterparty and re-delivered the mv 'Bavarian Trader' eighteen days before the expiry of the charter and at Bandar Imam Khomeini in Iran as opposed to the stipulated redelivery port of Durban. In those circumstances a dispute arose between Orient Shipping and Pancoast with Orient Shipping claiming unpaid hire, lost hire, the cost of bunkers consumed in sailing the vessel to Durban and the costs of a bunker call at Fujairah. This dispute has been referred to arbitration in London in accordance with clause

17 of the charterparty.

[4] On 16 December 2009 Orient Shipping caused the mv 'Mariner II' to be arrested in terms of section 5(3) of the AJRA for the purpose of providing security for its claim in that arbitration. Pancoast responded by paying, without prejudice or any admission as to its liability and reserving its rights to reclaim this sum, an amount of US$559 553.24 being the full amount of the claim in the arbitration. In the result it has a counterclaim for the repayment of that sum in the arbitration.

[5] Pancoast was unsecured in respect of its claim for repayment. On 18 December 2009, it obtained an order from this court for the arrest in terms of s 5(3) of the AJRA of the mv 'Bavarian Trader', which was at that time berthed in Richards Bay harbour. For reasons that I will explain it was not arrested on the basis that it is the ship concerned but on the basis that it is an associated ship in respect of that vessel. The arrest was obtained as a matter of urgency, without notice to and in the absence of Orient Shipping. Accordingly Orient Shipping was entitled in terms of r 6(12)(c) of the Uniform Rules of Court to set the matter down for reconsideration of that order. Such reconsideration is distinct from an application to set aside the arrest and Orient Shipping reserves its right to bring such proceedings in the future if it does not succeed in having the original order set aside on reconsideration by this court.

[6] Although the point was not mentioned in the heads of argument delivered on behalf of the parties I raised at the outset whether the claim by Pancoast is a

maritime claim. Mr Mullins SC, who appeared for Pancoast, submitted that the claim is one for repayment of amounts paid, effectively under duress, in terms of a charterparty. The result of such payments is, so he submitted, that Pancoast has overpaid what is due under the charterparty in respect of the mv 'Bavarian Trader' and accordingly the claim to recover this amount is a claim "arising out of or relating to" a charterparty in terms of paragraph (j) of the definition of a maritime claim in s 1(1) of AJRA. He pointed out that this paragraph includes a claim "whether such claim arises out if any agreement or otherwise". This seems to me to be correct and I understood Mr Harpur SC, who appeared for Orient Shipping, to accept this. I turn then to consider the basis for the arrest.

[7] As the nature of the claim demonstrates the ship in respect of which Pancoast's claim arises is the mv 'Bavarian Trader'. The claim is not one giving rise to a maritime lien. Accordingly in order to arrest the mv 'Bavarian Trader' itself it would be necessary that its owner be liable to Pancoast in an action *in personam* in respect of this particular cause of action[1]. However, Pancoast's claim does not lie against the registered owner of the vessel, All Around Maritime Co. SA a Panamanian company. Instead it lies against Orient Shipping, which is described as the disponent owner of the MV 'Bavarian Trader'. As Pancoast does not suggest that it has any claim against the ship-owning company the mv 'Bavarian Trader' is not susceptible to arrest under s 3(4)(b) of AJRA. It is in those circumstances that Pancoast seeks to arrest it as an associated ship.

[8] The argument on behalf of Pancoast commences with the proposition that as

1 S3(4)(b) of AJRA

Orient Shipping describes itself as the disponent owner of the mv 'Bavarian Trader' it is probable that the vessel is the subject of a charterparty between its registered owner and Orient Shipping. Assuming that to be correct Orient Shipping is, in terms of s 3(7)(c) of AJRA, deemed to be the owner of the mv 'Bavarian Trader' in respect of the maritime claim for which it, and not the owner, is alleged to be liable. This deemed ownership operates for the purposes of s 3(6), that is for the purpose of identifying, and obtaining the arrest of, an associated ship as a way of commencing an action *in rem* in respect of the maritime claim.

[9] In terms of s 3(7)(a)(iii) of the AJRA a ship is an associated ship where it is owned by a company which is controlled by a person who owned the ship concerned or controlled the company owning the ship concerned when the maritime claim arose. The evidence relied on by Pancoast is directed at showing that Orient Shipping controls the company that owns the mv 'Bavarian Trader', namely All Around Maritime Co. SA. Accepting for present purposes that this is correct (although Orient Shipping reserves its position in that regard) the argument for Pancoast is thus that the mv 'Bavarian Trader' is an associated ship in respect of itself. On the one hand it is the ship concerned and Orient Shipping is deemed to have been its owner in relation to this claim. On the other it is a ship owned by a company controlled by Orient Shipping. In those circumstances Pancoast submits that the party standing behind the mv 'Bavarian Trader' both as the ship concerned and as an associated ship is Orient Shipping and this satisfies the requirements for association.

[10] Orient Shipping's riposte to this argument is straightforward. It draws attention to the language of s 3(6) which provides that an action *in rem* may be brought by the arrest of an associated ship '*instead of* the ship concerned'. That language they submit indicates that an associated ship must be a different vessel from the ship concerned. They contend that the matter is then put beyond doubt by the opening words of s 3(7)(a) which read:-

'For the purpose of subsection (6) an associated ship means a ship, *other than the ship concerned* …'

These two provisions are, so it was submitted, clear and unambiguous and demonstrate that the associated ship cannot be the same vessel as the ship concerned.

[11] Mr Mullins met this argument by submitting that it would be absurd to exclude the arrest of a vessel that met the statutory requirements for an associated ship merely on the grounds that it happened also to be the ship concerned in circumstances where it could not be arrested as such. He submitted that the purpose of the associated ship provisions is to enable a maritime claim to be enforced against any vessel in the same ownership as the ship concerned or any vessel the owner of which is controlled by the person who owned the ship concerned or controlled its owner. He pointed out that the purpose of the deeming provision in s 3(7)(c) is to enable a claimant having a claim against the charterer of a vessel to seek out a ship owned by that charterer or owned by a company controlled by the charterer and arrest it as an associated ship. He submitted that it is not the identity of the ship concerned ("the offending ship") that is relevant but

the identity of the '"offending owner" (or controller)'[2] and Orient Shipping is the offending owner in relation to the mv 'Bavarian Trader' both when viewed as the ship concerned and when viewed as an associated ship. He said that the legislature did not intend to say that there must be two separate vessels. When asked how the words in the preamble to s 3(7)(a) should be understood he submitted that they should be read as if they had been worded "usually, but not always, a ship other than the ship concerned" or "which may be a ship other than the ship concerned".

[12] The basis upon which a court approaches questions of statutory interpretation was dealt with in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*[3] and for present purposes it is unnecessary for me to rehearse the principles referred to there. The court must look at both the language used and the surrounding context. I find it relatively unhelpful in that regard to speak of the intention of the legislature because I very much doubt whether the members of Parliament, as then constituted, had in mind the present situation when the AJRA was enacted in 1983 or when it was amended in 1992. It is after all special legislation in a field of our law where few practising lawyers have much knowledge or experience and where a judge as great as Innes CJ said that he expressed views with diffidence because 'the subject is so special'.[4] It is unlikely therefore that the parliamentarians considered an issue that has taken more than 25 years to surface since the enactment of the AJRA.[5] I agree with what Didcott J

2 *Bulk Ship Union SA v Qannas Shipping Company Limited* : *The mv "Cape Courage"* 2010 (1) SA 53 (SCA) para. [23].
3 2008 (5) SA 1 (SCA) paras. [16] to [19].
4 Crooks & Co v Agricultural Co-Operative Union Ltd 1922 AD 423 at 427
5 None of the textbooks on Admiralty Law in South Africa suggest that it is possible for the same ship to be both the ship concerned and an associated ship in respect of itself.

said, in his interview with the Judicial Services Commission prior to his appointment as a judge of the Constitutional Court, in regard to the ascertainment of the intention of Parliament:-

"Now that is of course an oversimplification. I have always thought that the intention of Parliament is simply legal shorthand for a more sophisticated concept because one knows perfectly well that a large number of people sitting in Parliament might never have applied their minds to a problem at all or had any thoughts on that particular aspect because it had not yet arisen and was not in their minds."

The task of interpretation is not to seek out such an ephemeral intention but to construe the words that have been used in the legislation in question.[6]

[13] Starting then with the words that appear in sections 3(6) and 3(7)(a) they cannot, on their face and in accordance with ordinary principles of grammar and syntax, bear any meaning other than that they are referring to two separate ships, one of which is described as the ship in respect of which the maritime claim arose (more commonly referred to as the ship concerned) and the other of which is the associated ship. Looking at the individual subparagraphs of s 3(7)(a) it is plain that each is referring to two different vessels. There is simply no contemplation in the language of the statute that the ship concerned may also be the ship concerned. Indeed, this is recognised by Mr. Mullins, with his suggestions as to the manner in which these words should be construed. Fundamentally they involve a rewriting of s 3(7)(a) but that is not ordinarily the function of the interpreter in the absence of clear absurdity.

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6 Edwin Cameron; 'Legal Chauvinism, executive-mindedness and justice – L C Steyn's impact on South African law' (1982) 99 *SALJ* 38 at 59-60.

[14] The contention on behalf of Pancoast amounts to this. Because Orient Shipping is personally liable to it in respect of its claim it should be open to Pancoast to arrest any vessel owned by Orient Shipping or owned by a company controlled by Orient Shipping. The papers suggest that there are indeed vessels owned by other companies controlled by Orient Shipping and it is not disputed that such vessels would be susceptible to arrest as associated ships. Mr. Mullins submits that it is an absurdity in those circumstances to say that the mv 'Bavarian Trader' cannot be arrested as an associated ship merely because in the peculiar circumstances of the present case it is also the ship concerned. He also places some store that upon the fact that this situation occurs only because of the internal arrangements between Orient Shipping and All Around Shipping and suggests that if this is permitted to prevent the arrest of the ship concerned that will stultify the legislation and enable parties to escape from the intended liability by internal contractual devices.

[15] There is force in that submission. It is illustrated by the following facts drawn from the papers. These suggest that Orient Shipping operates a fleet of eight ships, the registered owners of which are, if one takes All Around Maritime Co. SA as typical, one-ship companies registered in Panama. If that is correct and Orient Shipping is liable *in personam* to Pancoast in respect of the present claim then the seven ships in that fleet, other than the mv 'Bavarian Trader', would be liable to be arrested as associated ships on a straightforward application of the provisions of ss 3(6) and 3(7) of the AJRA. The only reason why the mv 'Bavarian Trader' is not susceptible to arrest is because of the internal arrangements within the group that

result in Orient Shipping and not All Around Maritime Co. SA being liable *in personam* in respect of Pancoast's claim. That is said to be an absurdity that could not have been contemplated by the legislature had it addressed its collective mind to the problem.

[16] Orient Shipping counters this argument by saying that the postulated situation, whilst odd and possibly anomalous, is not an absurdity justifying a departure from the language used in the AJRA. Mr. Harpur points out that if Pancoast is wrong in saying that the reference to Orient Shipping as disponent owner of the mv 'Bavarian Trader' means that it is the charterer of that vessel, the deeming provision in s 3(7)(c) would not be available to Pancoast and the structure upon which the claim to association has been erected would collapse. That too, he freely concedes is possibly anomalous if the overall purpose of the legislation was simply to achieve a situation where any ship owned by the person liable *in personam* for a maritime claim or owned by a company controlled by that person is to be liable to arrest as an associated ship, but that is a consequence of the language chosen by the legislature. Had the aim been to achieve a purpose so broadly stated the entire structure of these provisions would have been different. In other words, so he submitted, the fact that anomalies may arise in certain rather unusual factual situations does not mean that the actual language used in these provisions can be disregarded.

[17] The AJRA was the product of an investigation and report by the South African Law Commission. In that report[7] the following is said in paragraph 7.3

7 South African Law Commission, Project 32, Report on the review of the law of admiralty

about the institution of an associated ship:-

"In view of the retention of the action *in rem* it is necessary … to set out the circumstances in which an action *in rem* may be brought. Provision has also been made for the bringing of an action *in rem* against an "associated ship". The International Convention with regard to the Arrest of Sea-going Ships[8] … makes provision for the arrest to found an action *in rem* of a sister ship, that is to say, a ship in the same ownership as the guilty ship. The provisions of the Bill are an extension of this notion based on the fact that since the conclusion of the Convention its provisions have been defeated by the proliferation of "one ship companies", that is to say, companies owning only one ship and therefore avoiding the Convention. The extension is, it is thought, a logical extension of the Convention, but the broad notions upon which the Convention is founded have been preserved."

[18] It is highly debatable whether the suggested link between the proliferation of one ship companies and the Arrest Convention is correct, as the flagging out of vessels in one ship companies registered in flag of convenience states was a trend that was underway before the conclusion of the Convention and accelerated thereafter for sound business reasons.[9] The Arrest Convention was the product of a protracted period of negotiation and drafting of agreement on a convention for the arrest of ships that harmonised the English system involving the arrest *in rem* of the ship concerned and the Continental system of arresting all property in the ownership of the debtor.[10] This resulted in the compromise embodied in the sister ship arrest provisions of the Convention. It is probable that it is purely coincidental that this occurred at a time when there were dramatic changes underway in historic

8 The Arrest Convention of 1952.

9 N P Ready in R Coles, *Ship Registration Law and Practice* (4th ed., 2002) 18-19; B A Boczek *Flags of Convenience* (1962) at 9 - 25. The reasons for the shift towards registering vessels in one ship companies under flags of convenience were dealt with in testimony before the United States House of Representatives in 1957 by the Maritime Administrator and none of those reasons refer to the impact of the Arrest Convention. Boczek p30.

10 The process is described by Professor F Berlingieri in *Arrest of Ships (*4th ed 2006), 5-7.

patterns of ship ownership and registration that had the effect of rendering sister ship arrests relatively unusual. There is little foundation for the notion that the two are linked. Be that as it may, however, the significant aspect of the Law Commission's report is that it is plain from its language that the proposed introduction of a jurisdiction to commence proceedings *in rem* by way of the arrest of an associated ship manifestly contemplated that the associated ship would be a different ship from the ship concerned. That had been the case with sister ship arrests under the Arrest Convention and there is nothing in the Law Commission report to suggest any contemplation of the possibility that the associated ship might, in certain circumstances, also be the ship concerned.

[19] In summary therefore the position is as follows. The language of ss 3(6) and 3(7)(a) clearly indicates that the ship concerned and the associated ship will be different vessels. It is not suggested that there is any ambiguity in that language. It is freely conceded that in order to arrive at a conclusion favourable to Pancoast words need to be read into s 3(7)(a) to nullify the force of the language actually used. The argument based on language supports Orient Shipping's position. Turning to context the background to the introduction of the associated ship jurisdiction is to be found in the Law Commission's report.[11] It was seen, whether rightly or wrongly, as an extension of the sister ship arrest provisions of the Arrest Convention. A ship arrested as a sister ship could not be the ship in respect of which the maritime claim had arisen because sister ship arrests were only available under the Convention in circumstances where both vessels were owned by the

11 Reference to the Report is permissible in terms of the principles in *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A). at 562.

person liable *in personam* in respect of the maritime claim. Hence if the ship concerned was arrested it would be arrested because of its owner's personal liability and not because it was a sister ship in relation to itself. There is nothing in the Commission's report to suggest that the associated ship would be different in this regard. Lastly the report itself makes it clear that the purpose of introducing the associated ship arrest is to enable claimants to arrest vessels in addition to the ship concerned. The underlying assumption at the outset was that the ship concerned would itself be susceptible to arrest and if it was not then ordinarily there would be no question of the arrest of an associated ship.

[20] It should also be borne in mind that when the AJRA was originally enacted the scope of the presumption in s 3(7)(c) was far narrower than it is at present. It was then confined to charterers or sub-charterers by demise. Whilst it makes no difference for the purpose of Pancoast's argument whether Orient Shipping has chartered the vessel from All Around Maritime Co. SA on a time or voyage charter basis or whether it is a demise charterer of the vessel this is nonetheless relevant to the general contention that the underlying purpose of the legislation is to enable claimants to arrest any vessel owned or controlled by the person against whom the maritime claim lies. In other words it is relevant to the submission that the court should have regard not to the identity of the "offending ship" buy to the identity of the "offending owner". Certainly when the AJRA was passed that could not be said to be the case and there is no reason to think that the broadening of the deeming provision in 1992 had the effect, by way of a by-wind as it were, of altering the effect of the language to the preamble to s 3(7). Whatever relevance the reference

to an "offending owner" may have had in the context of the judgment in *The Cape Courage* the fact remains that the structure of these provisions is directed at the arrest of ships for the purpose of commencing an action *in rem* not simply attributing liability *in personam* to the person who controls the ship owing company.

[21] Against those considerations must be set the situation that Mr Mullins described as absurd. I think that Mr. Harpur is correct in saying that it is rather more an anomaly than an absurdity. Other similar anomalies can be imagined. For example one can take the situation where an individual X controls five ship-owning companies registered in Cyprus each owning a single vessel. If a claim arises in respect of one of those ships, for which its owner is liable *in personam*, then that ship could be arrested in terms of s 3(4)(b) and the other ships in the fleet could be arrested as associated ships. If, after the claim arises and for perfectly sound business reasons, X decides to re-flag the ships in Malta and transfers the ships to new companies registered in that jurisdiction, the existing associated ships would continue to be associated ships, but the ship in respect of which the maritime claim arose would no longer be susceptible to arrest in terms of s 3(4)(b). Mr Mullins urges that this is likewise absurd and that such a ship should be capable of being arrested as an associated ship in respect of itself. In my view, however, these are anomalies that arise from exceptional factual circumstances rather than absurdities inherent in the statutory scheme. I am accordingly unpersuaded that these considerations, when seen in the light of the overall context described above justify a departure from the statutory requirement that the associated ship be a ship

other than the ship concerned.

[22] In the result I am satisfied that Pancoast was not entitled to arrest the mv 'Bavarian Trader' in terms of s 5(3) of the AJRA and the order for its arrest should be discharged. I accordingly grant the following order:-

a) The order granted by this Court on 18 December 2009 under Case No. A253/2009 for the arrest of the mv 'Bavarian Trader' in terms of s5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 is discharged.

b) The security provided by the First Respondent for the release of the mv 'Bavarian Trader' from arrest is to be returned within seven days of the date of this order.

c) Pancoast Trading SA is to pay the costs of this application.

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M.J.D. WALLIS

DATE OF HEARING	22 January 2010
DATE OF JUDGMENT	16 February, 2010
APPLICANT'S COUNSEL	MR S R MULLINS SC
APPLICANT'S ATTORNEY	SHEPSTONE & WYLIE
RESPONDENTS' COUNSEL	MR G D HARPUR SC
RESPONDENTS' ATTORNEY	BOWMAN GILFILLAN ATTORNEYS Locally represented by: VAN VELDEN PIKE & PARTNERS