REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

[EXCERCISING ITS ADMIRALTY JURISDICTION]

CASE NO: AC47/2010
RELATED TO CASE NO: AC108/09

In the matter between:

Name of Ship; "Alina II"

KUWIBA SHIPPING HONG KONG LIMITED (Respondent in Application to set aside arrest)	Applicant

and

PRIMA SHIPPING COMPANY LIMITED	First Respondent
THE BUNKERS ON BOARD THE MV "ALINA II" (Applicants in Application to set aside arrest)	Second Respondent

JUDGMENT: 28 JANUARY 2013

GAMBLE, J: INTRODUCTION

[1] Towards the end of October 2009 the MV *"Alina IF* (hereinafter "the vessel") docked at Saldanha Bay for the purposes of taking on a cargo of iron ore for onward shipment to China. When loading was completed on 31 October 2009 and the vessel was ready to set sail, it was discovered that she had a large gash in her hull and that water was leaking into her bottom tanks. This resulted in the vessel being unable to sail or to be towed into the bay and she was required to remain alongside the quay for a protracted period of time while the necessary repairs were effected.

[2] The Port of Saldanha evidently operates two adjacent quays which are dedicated to the export of iron ore from Sishen in the Northern Cape. One of those quays was rendered inoperative for several months as a consequence of the fact that the vessel could not be moved. This resulted in delays in the export of ore for a lengthy period of time and the knock-on effects of the calamity were of epic proportions. The resultant claims apparently run into many hundreds of millions of US Dollars.

[3] One of the parties severely affected by this maritime accident was the Applicant, Kumba Shipping Hong Kong Limited, a foreign registered company which had chartered the vessel from Prima Shipping Company Limited, the First Respondent in these proceedings. Kumba alleges that it has a maritime claim against Prima in excess of US$ 500 million for the losses suffered by it as a consequence of the damage to the ship and the inability of the vessel to complete its voyage.

THE ARREST AND SUBSEQUENT PROCEEDINGS

[4] On 22 December 2009 Kumba launched urgent ex *parte* admiralty proceedings in this Court against Prima for the arrest of the bunkers on board the vessel. The application, in terms of Section 5(3) of the Admiralty Jurisdiction Regulation Act ("AJRA"), was aimed at obtaining security for Kumba's claim that it intended to advance in London arbitration proceedings later. An arrest order was granted by Louw J on the same day.

[5] The vessel was released from arrest on 26 March 2010 pursuant to security put up by Prima. On 23 April 2010 Prima launched an application in terms of Section 5(2) of AJRA to set aside the arrest, and for return of the letter of undertaking. At the heart of this application was Prima's assertion that it was not the owner of the bunkers.

[6] The set-aside application was subsequently heard by Fourie J who delivered a detailed judgment on 26 July 2011. The learned Judge was unable to come to a final conclusion on the question of ownership of the bunkers on the papers and referred the matter to oral evidence.

[7] Oral evidence was heard by this Court on 13 and 14 March 2012 and further argument was advanced on 22 May 2012. The Court is indebted to Messrs D. Gordon SC and R Gordon for Kumba, and M Fitzgerald SC and P van Eeden, for Prima, for their heads of argument and submissions in this matter which have facilitated the preparation of this judgment.

[8] The relevant facts are set out in some detail in the judgment of Fourie J and will accordingly not be repeated herein. Suffice it to say that the question of ownership of the bunkers falls to be determined by considering the terms of the charterparty arrangement,

not between Kumba and Prima, but between Prima and Pompey. As Fourie J found, it is common cause that the contract for the carriage of goods concluded between Prima and Kumba was a voyage charterparty.

THE CHARTERPARTY

[9] In the founding affidavit in the arrest application, deposed to by Kumba's local attorney Mr. Andrew Pike of Durban, it is said that Kumba and Prima concluded a voyage charterparty on 21 September 2009. Pursuant thereto Kumba chartered the vessel from Prima for a single voyage between Saldanha Bay and a port in China yet to be designated. Mr. Pike alleged in para 8.5 of his affidavit that it was a material term of the charterparty that Prima would provide and pay for the bunkers on board the vessel.

[10] A copy of the charterparty is annexed to the founding affidavit. I shall revert to this document in due course but for present purposes I observe, firstly, that the type of charterparty does not appear *ex facie* the document, secondly, that there is no express term therein that Prima was liable to pay for the bunkers on board the vessel and, thirdly, that Prima is described therein as the *"disponent owner"'.*

[11] The founding affidavit in the set-aside application was deposed to by Prima's local attorney, Mr. Greiner of Cape Town. In that affidavit it was alleged that Pompey Shipping Corporation, a Liberian registered company, was the owner of the vessel which was managed by a Greek company called Polembros Shipping Limited. It was said, further, that on 21 September 2009 Pompey concluded a voyage charterparty with Prima and that Prima (as disponent owner) concluded a sub-voyage charterparty with Kumba.

[12] Mr. Greiner went on to say that the bunkers on board the vessel at the time she arrived in Saldanha Bay had been stemmed [1] in Singapore on 3 October 2009 by Polembros (as managers of the vessel) on behalf of Pompey and not Prima. Accordingly, it was contended that the bunkers were owned by Pompey and not Prima.

THE JUDGMENT OF FOURIE J

[13] Para 11 of his judgment Fourie J noted the following:

> *"[11] It will be apparent from the aforegoing that, in the course of this litigation, the focus of Kumba's attack has shifted. This shift has narrowed the dispute between the parties even more, i.e. to the question of whether or not the vessel was on a single voyage charter from Pompey Shipping to Prima, as alleged by respondents, or on a demise or time charter, as submitted by Kumba. "*

[14] The learned Judge dealt with the factual allegations in the competing affidavits and the annexures thereto in some detail. For reasons I shall mention later, the Court observed that Kumba maintained that the version put up by Prima was suspect and should be rejected out of hand as improbable, unbelievable and false. But, his Lordship also remarked, the evidence put up by Prima supported the inferences contended for by the Respondents. He believed that that version could not be described as fanciful or untenable and in fact had persuasive value.

[15] Fourie J was persuaded that referral of the disputed issue to oral evidence would be just and equitable in view of the peculiar circumstances, (which the Court called,

1 Maritime jargon for "placed on board the vessel"

"distinguishing features"). In para 21 of the judgment Fourie J listed those distinguishing features in some detail. It is not necessary to repeat such features in this judgment. Finally, the learned Judge considered that the production of relevant documentary evidence and the cross-examination of witnesses in regard thereto might disturb the overall probabilities of the case.

THE ORAL EVIDENCE

[16] Kumba adduced the evidence of Mr. Pike while Prima called Mr. David Gare, the in-house legal counsel of Polembros, and Mr. Antonios Stellas, the operations manager at Polembros, and a director of Pompey. The evidence of Mr. Pike did not advance the case for Kumba conclusively. Having stated in December 2009 in para 8 of the founding affidavit in the arrest application that Kumba had concluded a voyage charterparty with Prima, and having confirmed that in evidence, Mr. Pike was asked in chief by Mr. Gordon SC to explain to the Court his understanding of the term *"disponent owner1',* and why he had earlier contended that the charterrparty was a voyage charterparty. He testified as follows:

> *"M'Lord, I always understood that term to mean someone who is not in fact the owner of the vessel, but someone who has some of the rights of the owner of the vessel. The word disponent meaning that he can dispose of the commercial rights, if I can put it that way and benefit from the income of the vessel. So in the typical situation, M'Lord, that I've come across, a disponent owner would either be someone who has taken the vessel on a bareboat charter or someone who has taken a vessel on a time charter. So the disponent owner, in my*

understanding, and I've never seen different, is either a bareboat charterer or a time charterer. "

[17] Explaining his understanding of a voyage charter, Mr. Pike said:

> *"A voyage charterparty denotes that the person named in the voyage charter as the owner or the disponent owner, makes...space on the vessel available to the charterer, so that the charterer can place cargo on the vessel and the vessel will then carry that cargo from point A to point B, or in some cases to several different places. The charterer pays freight.. .but the disponent owner has the responsibility for operation of the vessel... "*

[18] Under cross-examination Mr. Pike was referred by Mr. Fitzgeral SC to para 10 of an affidavit made in March 2011 in an interlocutory application under Rules 35(12) and (14) in which he stated the following:

> *"The arrest of the bunkers was advanced on the basis that the bunkers were at all material times owned by and were the property of ...[Prima]...who had bareboat chartered the vessel from its owners Pompey Shipping. "*

[19] This allegation in March 2011 was made by Mr. Pike on the additional information then to hand, Kumba by then having been informed of the existence of Pompey and its alleged ownership of the vessel. There is no mention of Pompey Shipping in the founding affidavit. Rather, it was said by Mr. Pike, that while Prima was not the owner of the vessel, Prima -

> *"appears to be in some way associated with Polembros Shipping... and there is no way of investigating properly in the limited time available to determine whether other vessels managed by Polembros are associated with the vessel. "*

[20] When pressed by Mr. Fitzgerald SC to explain the first inconsistency, the witness admitted that the allegations were contradictory and said that para 10 of the later affidavit was wrong. Nevertheless, said Mr. Pike:

> *"I don't know if it was bareboat chartered, but, you know, it could only have been bareboat or time chartered and I'm not sure why I said bareboat chartered, M'Lord."*

[21] After some further debate with the witness Mr. Fitzgerald SC homed in on Mr. Pike's assertion that he had assumed ownership of the bunkers on the part of Prima since Prima had described itself as the disponent owner in the charterparty:

> *"Now you say a disponent owner means either a time charterer or a demise charterer...! don't know, M'Lord. it's probably a time charter, I just don't know.*
>
> *You bear the onus of proof. So you say the reference to a disponent owner means either a demise charter or a time charter, but you believe it's probably a time charter... Yes, but I don't know M'Lord. "*

[22] I should perhaps observe at this juncture that the categorization of the type of charterparty between Prima and Pompey is critical to Kumba's case, since the ownership of the bunkers, generally, would follow from, or be capable of being determined from, that categorization.

[23] Gys Hofmeyr[2] observes that ownership of the bunkers depends at least in part on the terms of the charterparty:

> *"Generally, in the absence of relevant provisions to the contrary in a demise charterparty, the demise charterer would, during the period of the charter, purchase and become the owner of the bunkers. In the case of a voyage charterparty on the other hand bunkers would generally be purchased and owned by the owner, demise charterer or time charterer. It is in relation to time charterparties that disputes have generally arisen...These disputes have, inter alia, involved the proper interpretation of the charterparties under consideration. So, for example, the South African cases have followed the decision in The Span Terza [3] that in the absence of contrary provisions in the charterparty,*
>
> *where the charterparty provides that the charterer shall provide and pay for the bunkers, such bunkers become the property of the charterers. Although the bunkers are in the possession of the owner (other than in the case of a charter by demise) they are received and held by the owner on behalf of the charterer.* "

[24] John Hare [4] discusses the difficulties inherent in a bunkers arrest and notes that often a claimant will not be privy to the contractual arrangement between the owner and the charterer. He then cites the customary permissible inferences that may be drawn by an arresting party from the type of charterparty in use:

> *"If the claim is against a demise charterer [5] of the vessel, the norm*

2 Gys Hofmeyr Admiralty Jurisdiction, Law and Practice in South Africa (2006) at p105 fn 53

3 [1984] 1 Lloyds Rep 119 (HL)

4 John Hare Shipping Law and Admiralty Jurisdiction in South Africa (2nd ed) at p98 et seq

5 The author points out in fn 206 at p99 that demise charters and bareboat charters are synonymous:

would be that the demise charterer supplies, pays for and owns all the bunkers consumed on board the vessel at all times. So widespread is this practice in shipping that the Court would be entitled to take judicial cognizance of it. At the other end of the charterparty heirarchy is the voyage charter - it is unusual for a voyage charterer to supply or pay for bunkers consumed during the voyage, and similarly this practice would be widespread enough to justify judicial notice. "

[25] Both Hofmeyr [6] and Hare [7] observe that difficulties have most often arisen in the past in relation to the ownership of bunkers in time charterparties. One of the problems in these forms of charterparties evidently arises from the fact that, upon delivery to the charterer, there is invariably a quantity of fuel on board the vessel and the terms of the charterparty (frequently the NYPE 1993 Form [8]) usually provides for the vessel to be redelivered with a specified tonnage of fuel at an agreed rate per ton.

[26] In Scrutton on Charterparties [9] the learned authors note that:

"Time charters usually provide that the charterer shall provide and pay for all bunker fuel, which is, so far as unconsumed, to be taken over by the owners on redelivery at an agreed price. It is a question of construction whether such bunkers remain the property of the charterer until consumed, and whether any remaining unconsumed

"The demise charterer takes a vessel 'bareboat' and supplies most or all of the crew and all of the supplies consumed. The time charterer hires the vessel for a certain period and may or may not become the owner of the bunkers. The voyage charterer hires all or part of the vessel from either the owner, the demise charterer or the time charterer for a particular voyage."

6 P105

7 P99

8 The New York Produce Exchange Charter Party Form. (Evidently the most common form of time charters according to Hare)

9 19th ed by Mocatta, Mustill and Boyd at p373

> *vest in the owner on the termination of the charter.. .During the currency of the charter the owner is the bailee of any bunkers that are the property of the charterer and has a duty to see that they are used to carry out the charterer's orders. "*

[27] In my view Mr. Pike's allegation in the founding affidavit of ownership of the bunkers vesting in Prima in light of the fact that the contract between it and Kumba was a voyage charterparty was entirely reasonable in the circumstances. He was not privy to the legal or factual basis upon which Prima had been designated *"disponent owner",* and he assumed that the customary import of the use of that term applied. Indeed, it was of little consequence whether Prima had taken the vessel on a time or demise charter, since either would ordinarily have obligated it to bunker the vessel.

[28] Any potential mistake on the part of Mr. Pike in the founding affidavit as to the correct factual and legal position was solely attributable to the description by Prima of itself as *"disponent owner1'* in the charterparty with Kumba. It was only when Mr. Greiner purported to reveal the true position (evidently on the instruction of Mr. Gare) that the voyage charter between Kumba en Prima was in fact a "*sub-voyage charter1',* that a potentially different construction fell to be placed on the term *"disponent owner1'.*

[29] In para 9 of the founding affidavit in the set-aside application (filed nearly a month after the vessel had sailed pursuant to the posting of security), Mr. Greiner stated the following:

> *"...The Second Respondent was thereafter arrested on 22 December 2009 whilst the vessel was alongside the iron ore berth at Saldanha Bay. The Second Respondent was arrested for the purpose of*

> *providing security to the Applicant for claims that the Applicant alleges to have against the First Respondent pursuant to a voyage charterparty entered into between the Applicant and the First Respondent on or about 21 September 2009 ("the sub-voyage charter") which claims the Applicant alleges it intends advancing in arbitration proceedings in London, United Kingdom, pursuant to clause 33 of that sub-voyage charterparty. The sub-voyage charterparty is annexed to the founding affidavit of Mr. Andrew John Pike ("Pike") as Annexure "AJP1".*

[30] Prima's case then was that although the charterparty looked remarkably like a voyage charterparty (and bore all the customary characteristics thereof), it was in fact a sub-voyage charterparty with the liability for bunkering the vessel, not on the ship owner as is the *"usual position"* under voyage charters, or on the disponent owner as the demise or time charterer, but on Pompey as the owner of the vessel and the counter-party to Prima in the alleged *"sub-voyage charter."*

[31] in suggesting a manner to resolve the conundrum ordinarily associated with cases of this sort, Hare [10] observes that:

> *"The performance obligations of the charterer and owner provide perhaps the best lead in that they will assist in determining the extent to which possession and control of the vessel has passed from the owner to the charterer. Performance by the parties also provides a lead in determining the nature of the charterparty agreement. "*

[32] Prima's case is therefore that as a sub-charterer from Pompey it was not its obligation to bunker the vessel but that this lay with Pompey pursuant to the sub- charterparty. Kumba, through Mr, Pike, suggests that Prima's description of itself as a *"disponent owner"* in the charterparty with Kumba leads to the reasonable conclusion that its use of the vessel (admittedly belonging to Pompey) is pursuant to either a demise or time charterparty concluded with Pompey.

DISPONENT OWNER

[33] Tetley [11] defines a disponent owner as:

> *"A person, such as a bareboat or time charterer*; *who, while not being the registered owner of* a *ship, nevertheless has the right to 'dispose of it' (i.e. to control its commercial operation), notably by sub-chartering it to a third party. Although lacking title to the vessel, the disponent owner may have many of the rights and responsibilities of the owner...The disponent owner may be an agent of the ship owner.. .he may also be the ship's manager. "*

[34] In my view this definition does not assist Prima as Mr. Fitzgerald SC seemed to suggest during the cross-examination of Mr. Pike. The reference to a *"sub-charier"* clearly contemplates the customary position under a demise or time charter, and does not make sense in respect of a voyage charter. Why would Pompey dispose of control of the vessel to Prima, and permit it to conclude a voyage charter, while retaining the obligation to bunker the vessel? Why would it take on that liability rather than passing it on to the disponent owner?

11 Glossary of Maritime Law Terms, 2nd ed 2004

[35] Hare [12] acknowledges the use of the phrase *"disponent owner1'* in the context of a demise charter:

> *"In the hierarchy of ownership and of operation of a vessel, with the registered legal owner being at the apex and with the vessel possibly been leased to a demise charterer by that owner, the next in line would be the time charterer. The time charterer contracts with the owner (or the demise charterer as "disponent owner"') for the exclusive use of the cargo carrying spaces on board a ship for a fixed time period. "*

[36] And, as the learned author points out [13], one of the more important consequences of a demise charterparty is that possession and control of the vessel is passed from the ship owner to the demise charterer, whereas under a time charter it is not normal for a time charter to transfer possession and control of the vessel to the charterers:

> *"The [time] charterers may well have a right to exclusive use of the cargo reaches of the vessel, but they cannot be said to have possession of her (or any part of her) in the same way as* a *demise charterer is given physical possession of the entire vessel, to the exclusion of the owner - especially under bareboat terms. The 'control' which the time charterers receive in pursuance of their charterparty is also limited to the working of cargo...The nautical control of the operation of the ship [under a time charter] remains with the owners. "*[14]

[37] As I have said, in the case of an outsider to the charterparty such as Mr. Pike, with his knowledge and experience in maritime law and in particular charperparties, it is not difficult to understand why he concluded that Prima probably operated the vessel under a demise charter (or possibly a time charter) with the owner: that was the most logical class of

12 P746
13 P741
14 **P746-7**

charterparty that one would expect a *“disponent owner1'* to operate under. Certainly, Mr. Pike said on a number of occasions in evidence that the so-called *“back-to-back”* voyage charter for which Prima now contends was a rarity to him, and would not explain the necessity to describe Prima as the *“disponent owner1’.*

[38] Mr. Pike observed in his evidence that the *“back-to-back1'* voyage charter did not appear to have any legal or factual basis until he received the affidavit of Gare in the set-aside application in which this form of charterparty was referred to for the first time. As Fourie J also observed in his judgment, the conclusion of that *“back-to- back”* voyage charter is therefore something which falls within the exclusive knowledge of Prima and Pompey, and 1 accordingly turn to assess the evidence of Mr. Gare to consider the veracity of this claim.

THE EVIDENCE OF MR. GARE

[39] Mr. David Gare told the Court that he was an admitted solicitor in England and Wales and had practiced as such with various leading firms in the field of maritime law until 1993. He then commenced employment with Polembros Shipping Limited. According to Mr. Gare, Polembros Shipping acts as ship managers of about twenty four vessels, including the Alina II. Pompey Shipping, which is the registered owner of the vessel, has a management contract with Polembros to this end and each of the vessels so managed is owned by a single-ship company.

[40] In cross-examination Mr. Gordon SC referred the witness to an English admiralty case [15] in which the Presiding Judge had analyzed the structure and operation of the Polembros Group. Accordingly, Mr. Gare confirmed that:

> *(1) "The Polembros Group of companies is a group of loosely- related family-owned companies which are ultimately owned by Mr. Spiros Polemis and his younger brother Mr. Adamandios Polemis, and the mother, the wife of Leonidas Polemis.*
>
> *(2) "Like many Greek family-owned shipping businesses, that of the Polemis family was not incorporated under a single structure, but in 1996 the principal management company was Polembros Shipping Limited";*
>
> *(3) "The principal assets are held in one-ship companies, managed by Polembros", and*
>
> *(4) "The payment of freights and disbursements in respect of these various one-ship companies were handled by Wintersea Maritime Limited. "*

[41] Mr. Gare also agreed, under cross-examination, with Mr. Gordon SC s conclusion that:

> *"This whole operation is under an umbrella structure, controlled by the Polemis boys. The whole lot, you're all interrelated, interchanged, controlled by the same person (sic)."*

[42] In relation to the record-keeping, control and administration of the Group, the following emerges from the cross-examination of Mr. Gare:

15 **J.P. Morgan** Chase **Bank and Others** v **Springwell Navigation, 2008 EWHC 1186 (27** May **2008)**

"...Because you were relatively informal, the whole Group was relatively informal, records were not kept and things were just run on a everybody-knows-what-everybody-else-is-doing basis, which is the same situation which I think you are trying to convey in your affidavit. Is that correct?...Certain areas where documentation is not needed, it's not recorded. Correct. "

[43] Earlier in his evidence-in-chief Mr. Gare explained the inner workings of the Group's business in relation to the reservation and booking of vessels of charterparties [16] when asked about the response to notices issues by Kumba under Rules 35(12) and (14):

"And the first of those [notices] requires all documents, including relevant correspondence and picture (sic-"fixture") documents relating to the subjects [17] between Pompey and Prima ?... Yes. M'Lord.

And were documents provided?...No documents were provided.

Why not?...They did not exist. The vessel was fixed internally and by the - our same in - house broker, whereby he ... (intervention)
Court: Sorry, when you say it was fixed internally. Is there one set of offices that - where all these transactions take place, or are there - is there one off ice... in Greece and one office in the United Kingdom ...? ... No, it's one - single office and one - single person, M'Lord.

Yes sorry, I interrupted you. You said the vessel was fixed internally.. And, as such no documentation would arise. "

[44] When asked by Mr. Fitzgerald SC about the availability of contemporaneous

16 **The admiralty term used was** *"fixed".*
17 **Another quaint admiralty term** loosely **used as a synonym for "contracts"**

documentation and/or exchanges between Prima and Pompey regarding the *"fixing"* of the vessel, Mr. Gare replied that no such documents existed *"as it's simply an internal arrangement'.*

[45] Turning to the actual bunkering of the vessel on 3 October 2009, Mr. Gare stated that he had no knowledge thereof, explaining that bunkers were customarily ordered by Mr. Stellas over the phone, and accordingly no documents arose. It appeared, further, that Polembros also controlled Wintersea, another Liberian registered entity whose sole function was the receipt, control and payment of monies for and on behalf of the Group.

[46] Towards the end of his evidence-in-chief, Mr. Gare referred the Court to a tax invoice issued by Equatorial Marine Fuel Management Services Pte Ltd of Singapore on 3 October 2009. This document reflected that the bunkers in question had been supplied to the vessel on that day and that it had been invoiced to:

> *"Polembros Shipping Limited Master*
> *and/or Owner*
> *and/or Charterer and/or Operator and/or Manager of*
> *MV Alina II*
> *c/o Mediterranean Bunker Services...*
> *Piraeus Greece. "*

[47] Mr. Gare also identified a document reflecting proof of payment for the bunkers in question by Wintersea. He confirmed that Mediterranean Bunker Services was a brokerage company in Greece with which Mr. Stellas had telephonically placed the order for the bunkers.

[48] All of the third party documentation to which I have referred so far regarding the supply of the bunkers is inconclusive as to ownership of the bunkers. All that it establishes is that Polembros was the party which ordered the bunkers from Equatorial through Mediterranean Bunkers.

[49] Mr. Gare was asked to deal with the alleged *"back-to-back"* voyage charterparty concluded between Pompey and Prima on 21 September 2009. He readily accepted that this was a document that had been created long after the arrest of the vessel and was only prepared when the South African lawyers representing the vessel asked for proof of the charterparty in February 2010. Up to then, said Mr. Gare, the *"back-to-back"* voyage charterparty was an oral one.

[50] Under cross-examination Mr. Gare admitted that he never told anyone (and in particular the Cape Town lawyers representing the vessel) that the document was a recent creation. He accepted that this omission was probably misleading.

[51] Of some significance is the fact that the voyage charterparty between Pompey and Prima was, at all material times, an oral agreement. Originating as it did from the offices of Polembros (where all of the affairs of the Polemis family's shipping empire were conducted), the written document was only produced when the lawyers for Kumba asked for documentary proof of the alleged contract of carriage.

[52] But, instead of truthfully stating that the contract between Pompey and Prima was concluded orally, Mr. Gare set about an elaborate *"cut and paste"* exercise (to use the word processing

expression favoured by counsel) in which he purported to create a document that was back-dated to 21 September 2009 - a date when the alleged oral charterparty was concluded. However, the voyage charterparty upon which Kumba relied in its founding papers (and which Prima claims is in fact a subcharter) was signed by Kumba on 9 December 2009 and by Prima on 20 November 2009, although the document does record that the date of the charterparty was 21 September 2009.

[53] While Mr. Gare testified that it is common practice for charterparty documents to be signed after the conclusion date (particularly where the material terms thereof have already been partially reduced to writing in other documents), the manner in which the alleged charterparty between Pompey and Prima was reduced to writing is suspicious, coming as it did some eleven weeks after the arrest of the vessel.

[54] That suspicion is based on, *inter alia,* the following factors:

54.1. It is common cause that until 18 February 2010, when Mr. Greiner first informed Mr. Pike of the alleged *"back-to-back"* voyage charterparty with Prima, that Prima had indicated that it was intending to put up security in respect of Kumba's arrest. Indeed, Mr. Pike's response to that letter does express some considerable amazement on the part of the arresting party;

54.2. In fact, just a week earlier, Mr. Greiner's associate, Ms. Viljoen, had indicated that Prima was considering putting up security;

54.3. Mr. Gare confirmed that he had effectively kept Prima's lawyers in the

dark as to the existence of the earlier voyage charter with Pompey;

54.4. The insurance cover over the vessel for the period 20 February 2009 to 20 February 2010 had features which suggest that it was contemplated by Pompey that the vessel would be used for time or bareboat charters, rather than voyage charters;

54.5. A reluctance on the part of Ms. Viljoen and Mr. Greiner to furnish documents requested by Kumba's lawyers, which documents would support the allegation that the Pompey/Prima charterparty was genuine.

[55] One must look very carefully then at the testimony of Mr. Gare in light of these anomalies, and, in particular, at the alleged basis advanced for the necessity for the conclusion of the Pompey/Prima charter. I consider Mr. Gare's evidence, firstly, in light of his demeanour in the witness box. I found him to be a smug witness who was most economical in the use of language. My overall impression was that, as a seasoned maritime lawyer, he was pointedly cautious with his answers, so much so that I have to agree with Mr. Gordon SC's complaint in argument that Mr. Gare was singularly lacking in candour.

[56] In addition to my disquiet with the witness's demeanour and lack of candour, there is the issue of his credibility. In advancing argument on behalf of Kumba, Mr. Gordon SC focused on the manner in which Mr. Gare dealt with the dating of the alleged Pompey/Prima charterparty. The witness's evidence on that aspect, it was argued, showed him to be dishonest and scheming.

[57] In the replying affidavit in the set-aside application Mr. Gare said that the charterparty was simply a replica of the Kumba/Prima charterparty, which was brought into existence when Prima's lawyers asked for a copy of that charterparty. It was dated 21 September 2009, said Mr. Gare,

> *"As that was the date on which agreement was reached, the arrangement between Prima and the owner [i.e. Pompey] being in place before that in respect of voyages emanating from South Africa."*

[58] In his evidence-in-chief before the Court, Mr. Gare said the following:

> *"And as this was on a (sic) straight 'back-to-back' terms, with the voyage charter between Prima and Kumba, I simply undertook what has been called a cut-and-paste approach with the obvious amendments. I then requested the relevant directors of the two companies involved to sign the charterparty, and as the charterparty is dated the 21st of Septebmer, that is the date that appeared on the charterparty...*
>
> *The charterparty came into existence on the 21st of September, but the charterparty itself was signed at a later date. "*

[59] Under cross-examination Mr. Gare agreed with Mr. Gordon SC's suggestion that in relation to Pompey and Prima:

> *"We don't have a written charterparty, we have an oral charterparty, and this is how we do things internally. That's the truth, isn't it?"*

[60] Mr. Gare also concurred that, when asked by Prima's lawyers to provide a copy of the charterparty, he was less than frank:

> *“So you never, in answer to the question, give us the charterparty. The truthful answer is, it’s an oral charter, it’s internal, we have no written record of it. Isn’t that the truthful answer?... That is the more correct answer. ”*

[61] And, as Mr. Gordon SC correctly submitted, the dating of the document on the signature page as *1121 September 2009",* thereby purporting to reflect the date of conclusion of the instrument, cannot be justified on the basis put forward *viz* that the charterparty was orally concluded on that date and later reduced to writing and then signed. If this was so, the actual date of signature would have been reflected if the parties were conducting themselves as honest businessmen. This is how the Kumba/Prima document was dated and signed.

[62] The Pompey/Prima charterparty, as a document that was sent out into the world as evidence of a written agreement having been concluded and signed on 21 September 2009 is nothing but a fraud. It is a fraud into which Prima’s local attorneys, no doubt unwittingly, were inveigled when they were instructed by Mr. Gare to put up the document as a genuine instrument in the founding affidavit in the set aside application.

[63] Mr. Gare was admittedly the author of that fraud and yet, when pressed in the witness box for an explanation, he did not own up to this dishonesty, preferring to describe the situation as *“unfortunate”.* I agree with the submission on behalf of Kumba that Mr. Gare, an experienced maritime lawyer, sacrificed frankness and honesty on the altar of expediency. For this reason his evidence is to be approached with the utmost caution.

THE DOUBLE TAXATION ARGUMENT

[64] In explaining the purpose of the "*back-to-back*" voyage charter between Pompey and Prima, Mr. Gare relied on an alleged double taxation agreement as constituting the *raison de etre* for what is admittedly a most unusual step. The argument appears to run as follows.

[65] There is a double taxation agreement between South Africa and Cyprus, the objective whereof is to entitle a party, liable to pay tax, to lawfully avoid the payment of income tax, in both jurisdictions on the same transaction. Ordinarily, Prima, as the recipient of the payment of freight in South Africa for its obligation to transport the cargo of iron ore to China would be liable to pay tax locally upon receipt of such freight.

[66] Mr. Gare, who confessed to having no knowledge of the relevant South African tax legislation, explained that, because Prima was a company registered in Cyprus with Greek directors, it would not be liable for the payment of income tax in Cyprus arising from the freight which it received in South Africa. Such tax exemption evidently accrued from the Cypriot tax regime.

[67] The purpose of a double taxation agreement is to entitle a party to avoid payment of income tax twice in two separate tax jurisdictions and is not designed to afford total tax exemption in either jurisdiction. [18]

18 Olivier and Honiball: International Tax: a South African perspective (4th ed) pp4-5

[68] The present case falls within the ambit of Article 23 of the *"Agreement between the Government of the Republic of South Africa and the Government of the Republic of Cyprus for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital"* concluded on 26 November 1997. That section provides as follows:

> ***"Elimination of double taxation***
>
> *Double taxation shall be eliminated as follows:*
>
> *(a) In Cyprus:*
>
> *(i) Subject to the provisions of Cyprus tax law regarding credit for foreign tax, there shall be allowed as a credit against Cyprus tax payable in respect of any item of income derived from South Africa or capital owned in South Africa the South African tax paid under the laws of South Africa and in accordance with this Agreement. The credit shall not, however, exceed that part of the Cyprus tax, as computed before the credit is given, which is appropriate to such items of income or capital;"*

[69] in the case of a Cypriot company such as Prima receiving income from freight due and payable in South Africa (and the documentation placed before the Court clearly reflects that the parties contemplated that Prima was liable for local income tax), it will receive a tax credit in South Africa for the amount of tax it is liable to pay in respect of such income in Cyprus. If, as Mr. Gare claims, Prima pays no tax in Cyprus by virtue of its Greek

directorate, there is no amount in respect of which it can be credited in that country.

[70] In such circumstances, Prima will be liable for income tax in South Africa under Section 33 of the Income Tax Act[19] which provides as follows:

> *33.* ***Assessment of owners or charterers of ships or aircraft who are not residents of the Republic.***
>
> *(1) Any person other than a resident who embarks passengers or loads livestock, mails or goods in the Republic as an owner or charterer of any ship or aircraft, shall be deemed to have derived therefrom (apart from any taxable income derived by him from other sources) a taxable income of 10 per cent of the amount payable to him or to any agent on his behalf, whether the amount be payable in or outside the Republic, in respect of passengers, livestock, mails and goods so embarked or loaded, but the provisions of this section shall not apply to any such person who renders accounts which satisfactorily disclose the taxable income derived by him from the embarking of passengers or the loading of livestock, mails and goods as aforesaid. ”*

[71] Given that the express purpose of the double taxation agreement between South Africa and Cyprus is to avoid fiscal evasion, Prima will be liable for income tax in South Africa on the freight received in respect of the Kumba voyage charterparty and it does not benefit under the double taxation agreement. Accordingly, the substratum of the double taxation argument falls away and does not assist Mr. Gare, nor Prima, nor Pompey, as providing a commercial or legal basis for the necessity to conclude the *"back-to-back"* voyage charterparty.

19 Act 58 of 1962

[72] In argument Mr. Gordon SC took a further point based on a 2006 ruling by the Australian Tax Commissioner. As I understand the argument, it was suggested that Section 33 of the South African Income Tax Act could never be interpreted, in the present circumstances, to have application to the contractual arrangement between Prima and Pompey (i.e. further up the *"chartering chain")* because at all materia! times the relevant charterparty to be considered for the purposes of determining such income tax would always be the charterparty between Prima and Kumba. In light of my finding above in relation to the non-applicability of the double taxation agreement, it is unnecessary to decide this point, as interesting as it is.

DISCUSSION

[73] In the circumstances, the reason offered by Mr. Gare for the necessity to conclude the *"back-to-back"* charterparty is misconceived and affords Prima no discernible reason for having had to conclude a sub-voyage charterparty with Kumba. Rather, the probabilities point strongly to the ex *post facto* creation of a document with the express purpose of procuring the release of the bunkers from arrest. This inference is based on the following common cause facts and inherent probabilities in the case:

72.1. the bunkers were arrested on 22 December 2009;

72.2. shortly after the arrest Ms. Viljoen informed a representative of Kumba that Prima intended to put up security to procure the release of the bunkers from arrest;

72.3. on 9 February 2010 and again on 11 February 2010 Prima’s

lawyers in Cape Town were still corresponding with Mr. Pike in regard to the provision of security;

72.4. for the first time, and on 18 February 2010 (8 weeks after the arrest), Prima alleged that the vessel was subject to a voyage charterparty concluded between it and Pompey;

72.5. in endeavouring to account for the eight week delay in providing Kumba with a copy of the alleged voyage charterparty, Mr. Greiner's explanation was that his and the Respondent's energies had been devoted to another application involving the parties to these proceedings;

72.6. the alleged true state of affairs, to the affect that the arrangements within Polembros are undocumented and *ad hoc,* and that the relevant alleged voyage charterparty was in fact at all material times only an oral agreement, was only revealed for the first time to the Court with the filing of the replying affidavit in the set-aside application - nearly one and a half years after the bunkers were arrested; and

72.7. if the allegation regarding the existence of an oral voyage charterparty was true, a party in the position of Kumba, when making pertinent enquiries as to the circumstances surrounding the production of such document, would have been told precisely that: that there was an oral voyage charterparty. However, the facts here demonstrate that technical objections were taken to the disclosure of the documentation.

> In short, when a simple explanation could have been proffered the failure to do so leads to an inference of dishonesty. Undoubtedly, the Respondents were playing for time while a document purporting to support their cause was being manufactured.

[74] In relying on the pre-existing oral voyage charterparty the Respondents have only the self-serving *ipse dixit* of Mr. Gare. There is no other contemporaneous documentation or independently established fact which corroborates this allegation. That allegation is, in any event, hearsay since it was not Mr. Gare who made the decision. According to him, an unnamed mystery individual with any number of suitable *"hats"* available to him in the Polembros office concluded that agreement with himself.

[75] But even if one were to pierce the corporate veil (and no argument in this regard was advanced by either party), and to accept that behind the various corporate shields was the Polemis family that effectively controlled the affairs of a substantial shipping fleet, it would be very difficult to believe that the fleet's affairs were so casually administered.

[76] Mr. Gare testified that Polembros Shipping managed each of the twenty four vessels that make up this fleet (and he boasted that there were a further eight vessels under construction). Each vessel was individually owned by a separate company and, as the facts here demonstrate, some sail under different flags. In such circumstances, it is not difficult to imagine that there is a complex web of insurance cover, extensive provisions for crewing the vessels, and on-going arrangements for fuelling the vessels and providing provisions for crew and, most importantly, the payment of taxes, levies and the like in a variety of jurisdictions across the globe.

[77] To suggest that a contract as important as a charterparty (the very life blood of such an enterprise) is concluded orally and is only reduced to writing when called for by lawyers in a distant jurisdiction, beggars belief. Were this a case involving a local long-line fishing vessel operating out of one of many of the small harbours that dot our coast-line, the argument may begin to make sense. But to suggest that the Polemis family went about business in a similar fashion borders on the farcical,

[78] In my view, then Mr. Gare's evidence of such an oral agreement falls to be rejected for a variety of reasons. Firstly, it is premised on a double taxation agreement that in truth affords Prima no advantage at all. Secondly, there is no plausible, independent documentation which lends support to this evidence. Thirdly, there is the improbability that so large a shipping company would operate thus. Finally, and in my view most significantly, there is the fact that Mr. Gare thought that it was acceptable to create a document after the event and then hold out that it was the real thing - both as to content and contemporaneity - to Prima's lawyers and then to the Court.

MR. STELLAS

[79] No doubt realizing that Mr. Gare's evidence might not carry the day, Mr. Fitzgerald SC relied heavily on the evidence of Mr. Stellas as the panacea to Prima's problems. For it was Mr. Stellas, so it was proclaimed, whose evidence was not challenged when he was eventually able to say that the bunkers were stemmed on behalf of Pompey.

[80] Mr. Stellas had earlier deposed to an affidavit in Greek, duly translated to English. He preferred to testify in English without the assistance of an interpreter. The evidence was that he had been employed by Polembros for about six years as its Operations Manager:

whether he was the aforementioned solitary functionary in a back-office who changed hats (as Mr. Gare put it) when making important decisions on behalf of the various corporate entities in the in the Group, is not clear, but he said that:

> *"My functions are to send the voyage orders to the vessels, arranging bunkers, appoint agents at loading, discharging ports, and supply water. And that's it. "*

[81] When shown the Prima/Pompey charterpary, Mr. Stellas identified his signature on behalf of Pompey. He said he signed because he was *"the director"* of Pompey, and he signed at the request of Mr. Gare. He said that Mr. Gare did not explain why it was necessary for him to sign the document, or for that matter, why his signature was appended after the designated date. Significantly, as a director of Pompey, Mr. Stellas did not testify about the conclusion of the oral charterparty when one would reasonably have expected him to do so.

[82] Mr. Stellas confirmed receipt by Polembros of a document from Mediterranean Bunkers dated 24 September 2009. The document, drawn for his attention, confirmed purchase of the bunkers in question. When asked in chief on whose behalf the bunkers were stemmed the witness said:

> *"On behalf of the owners, Pompey".*

[83] Mr. Fitzgerald SC then moved on to the issue of payment for the bunkers and here, so it seems, the witness drifted off course:

> *"And how was - was payment made in respect of those bunkers?..(No*

audible reply)

Were the bunkers that were supplied, were they paid for?... Yes

By whom?...By Polembros. Behalf of Pompey. ”

[84] No doubt realizing that the witness had lost his way, Mr. Fitzgerald SC deftly sought to salvage the situation by way of what was really a series of leading questions:

“By Polembros. Where does Wintersea fit into the situation?...Sorry, can you repeat, please?

Payment was made, you say, for the bunkers?...Yes.

Just explain by whom was payment made?...By Wintersea.

On whose behalf?...On behalf of Pompey. ”

[85] When asked by the Court whether he had initially said that payment had been made by Polembros on behalf of the owner, Mr. Stellas replied in the negative. Mr. Fitzgerald SC stepped in and pointed out that the issue had been *“cleared up".*

[86] It was anything but convincing that a witness who was required to testify on one limited issue botched his evidence-in-chief so badly. But, under cross- examination the witness was even less convincing. Mr. Gordon SC asked the witness a hypothetical question on the

assumption that Prima needed bunkers under a time charter. Mr. Stellas's reply to the question as to whether he *"would have done exactly the same as you did here"* was "*no, it is not correct'.* When Mr. Gordon SC took him through the hypothesis a second time, the witness, somewhat begrudgingly it seems, agreed that he would have done the same.

[87] Finally, when Mr. Gordon SC asked the witness where the documentation was reflecting that Wintersea had paid on behalf of Pompey, Mr. Stellas replied "*I don't know".* And when asked whether there should be such document citation in existence, the witness similarly replied *"I don't know".*

[88] Little wonder then that Mr. Gordon SC terminated his cross-examination on the spot. Not only was the witness at sea even while under the safe pilotage of Mr. Fitzgerald SC, but his evidence is at odds with that of Mr. Gare who testified that Wintersea was an entity under the control of Polembros whose sole function was the receipt and payment of monies on behalf of Polembros. He certainly did not claim that Wintersea paid on behalf of Pompey in the present case.

[89] In my view Mr. Stellas's evidence cannot be relied upon as an independent version of events. Rather, he was supposed to be singing from the same hymn-sheet as Mr. Gare but even then he struck several dischordant notes.

CONCLUSION

[90] I agree with the concluding submissions made in argument by Mr. Gordon SC that the evidence produced by the Respondents is so unconvincing, unreliable and improbable that any contention that Pompey was the true owner of the bunkers must be rejected as false. There being no other basis advanced for the possible ownership of the bunkers, and having

regard to the usual position discussed by Hare, *supra*, and Hofmeyr *supra,* and further while bearing in mind the customary use of the term *"disponent owner1',* the only reasonable inference to be drawn in the circumstances is that Prima had the vessel on a time or bareboat charter from Pompey, and as such was the owner of the bunkers,

[91] It follows that the application to set aside cannot succeed. Having considered the matter I am of the view, further, that all reserved costs in this matter should be costs in the cause.

ORDER

[92] **The following order is therefore made:**

1. The application to set aside the order for the arrest of the bunkers made by Louw J on 22 December 2009 in case no. AC 108/09 is dismissed.

2. The Respondents are to bear all of the costs in the application to set aside, including the costs of the application before Fourie J and the applications under Rules 30A, 35(12) and 35(14), such costs to include the costs consequent upon the employment of two counsel.

P. A. L. GAMBLE