Case No 725/1993

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE LONDON STEAM-SHIP OWNERS MUTUAL

INSURANCE ASSOCIATION LIMITED Appellant

and

WESTDEUTSCHE LANDESBANK GIROZENTRALE First Respondent

THE FUND CONSTITUTED BY THE PROCEEDS
OF THE SALE OF THE mv "PACIFIC TRADER" Second Respondent

STANDARD STEAMSHIP PROTECTION AND
INDEMNITY ASSOCIATION OF BERMUDA LIMITED Third Respondent

STANDARD STEAMSHIP OWNERS'
MUTUAL FREIGHT,DEADFREIGHT, DEMURRAGE
AND DEFENCE ASSOCIATION LIMITED Fourth Respondent

CORAM: CORBETT CJ, SMALBERGER, EKSTEEN, VAN DEN HEEVER et
OLIVIER, JJA

HEARD: 12 MAY 1995

DELIVERED: 24 AUGUST 1995

J U D G M E N T

EKSTEEN, JA

EKSTEEN. JA

On 1 August 1990, and at London, England, the Westdeutsche Landesbank Girozentrale ("the first respondent") concluded a written loan agreement with a Liberian company known as the Pacific Trader Corporation ("the Corporation") in terms of which it lent the Corporation US$3 000 000 in order to enable it to purchase the ship M V Pacific Trader (which I shall refer to simply as the "Pacific Trader"). The agreement provided that the borrower would repay the sum lent in fifteen equal consecutive quarterly instalments of U S $ 200 000 each, together with interest thereon. The first instalment was payable three months after the date on which the capital amount lent had been advanced. Subsequent instalments were payable three monthly intervals thereafter. The Pacific Trader was to serve as security for the loan. In pursuance of this agreement the Corporation, on 2 August 1990, executed a

Deed of Covenants and a Mortgage over the vessel in favour of first respondent.

Thereafter, during the period from August 1990 to November 1991 the Corporation duly paid the first five instalments. The sixth instalment which, it was alleged, was payable on 26 February 1992, was not paid on due date or at all. In terms of the agreement the aggregate of the loan, all interest accrued thereon, and all sums of whatsoever nature payable under the agreement and/or the Mortgage and Deed of Covenants, then became immediately due and payable.

The London Steam-Ship Owners Mutual Insurance Association Ltd ("the appellant") carries on business as a protection and indemnity club providing its members with mutual insurance in respect of any maritime claims arising out of such member's activities as a ship owner or operator. The appellant's relationship with its members is governed by a set of rules in terms of which a member "enters" a specific vessel in the club. The owner of the_

Pacific Trader was a member of the appellant, and had entered the ship in the club. In return the owner was obliged to pay subscriptions or premiums, known as "calls", to the appellant. From time to time - usually about twice a year - the appellant would review its financial position by comparing its funds available, with claims paid or to be paid, as well as making allowance for claims which may have arisen but which had not yet formally been claimed. In the light of this review it would, if it considered it necessary, make "supplementary calls" on its members. In the event of a vessel's entry being terminated, or of a vessel being withdrawn from the club, the appellant was entitled to levy what was known as a "release call" to cover any further claims which might arise in respect of an incident occurring during the period of the vessel's membership. Such release calls were, in terms of the rules, payable within 30 days after the member had received notification thereof.

Rule 24 provided that -

> "Applications for insurance may be made and accepted in respect of ships of which the beneficial ownership is separate on terms that the ships concerned shall be deemed (for these insurance purposes only) to form part of a specified Fleet whereby the Association shall deal with the entries of such ships in combination and not individually in consideration for which all Members within each such Fleet entry shall accept joint and several liability to pay all amounts due to the Association by way of Calls or otherwise in respect of all ships within that Fleet entry."

The entry of the Pacific Trader was made in terms of this rule. It was one of a number of ships owned by single ship owning companies, but managed and operated by a company known as Multifleet Marine Limited ("Multifleet"). Multifleet was also a member of the appellant's protection and indemnity club.

From the judgment a quo and the papers before us it would appear that in early May 1992 Multifleet cased to act as manager of the vessels in its fleet, and in fact ceased to trade. It was

subsequently liquidated. On 22 May 1992 the appellant approached the Durban and Coast Local Division and obtained an order in personam attaching the Pacific Trader ad fundandam jurisdictionem for the recovery of calls then due by the owner. On 25 May 1992 a rule nisi returnable on 9 June was granted by the same local division calling on all interested parties to show cause why there should not be an order that the Pacific Trader be sold in terms of section 9 of the Admiralty Jurisdiction Regulation Act, No 105 of 1983 ("the Act") and the proceeds of the sale be held in a fund as provided for in that section. The rule went on to provide for the payment, out of the proceeds of the sale, of various expenses incurred in the preservation of the ship, and in effecting the sale itself, and

> "in payment of claims by creditors as may be directed by the Court in accordance with the provisions of section 11 of Act 105 of 1983."

On 27 May 1992 the appellant, acting in terms of its rules, elected to terminate the entry of the Pacific Trader, as well as the other vessels comprising the Multifleet entry, and gave notice to the owners accordingly. It also demanded payment of release calls in respect of each of these ships. In terms of rule 24 the owner of the Pacific Trader became jointly and severally liable with the owners of all the other vessels for the payment of the unpaid calls, including the release calls, levied in respect of all the vessels in the fleet. In terms of appellants' rules these calls became due and payable on 26 June 1992.

In the meantime the rule nisi referred to above was confirmed on 9 June 1992, and on 16 July 1992 the ship was sold by judicial auction for the sum of U S $ 1 500 000. This amount was held, and continues to be held, by the Registrar of the Court as the fund referred to above. This fund ("the Fund") is the second respondent in the present appeal.

On 26 August 1992 the Court issued a further order appointing a referee to receive "any claim against the M V Pacific Trader and, after her sale, against the Fund constituted by the proceeds of her sale"; to consider such claims; and to report to the Court, i a, on the ranking of all such claims.

Among the claims proved against the Fund were those of the first respondent, the appellant, The Standard Steamship Protection and Indemnity Association of Bermuda Ltd (the third respondent) and the Standard Steamship Owners' Mutual Freight, Dead Freight, Demurrage and Defence Association Ltd (the fourth respondent). The referee, in his report, ranked all the proved claims according to the provisions of section 11 of the Act prior to its amendment by section 9 of Act 87 of 1992, which came into effect on 1 July 1992. The appellant, and third and fourth respondents objected to this ranking and maintained that the claims should have been ranked according to the section after it had been amended.

After settling claims in respect of a number of the ships in the fleet, appellant proved a claim for U S $ 774 006,39 against the Fund. This amount represented, not only the sum owing in respect of the Pacific Trader alone, but also the joint and several liability of the Corporation for unpaid calls in respect of all the vessels which had been included in the Multifleet entry. The Fund, as I have indicated, consisted of some US$1 500 000. If first respondent's claim of U S $ 2 000 000 were to rank ahead of appellant's claim, as the referee proposed, then there would be nothing left in the Fund for appellant to recover. If, however, section 11 of the Act were to be applied in its amended form, then, it is common cause, appellant's claim would rank ahead of that of the first respondent, and first respondent would only be able to take what was left in the Fund after the appellant's claim had been satisfied.

First respondent, therefore, brought an application before the Court a quo seeking an order declaring that section 11 of the Act,

before its amendment, was to be applied in determining the ranking of the claims against the Fund. The appellant and third and fourth respondents thereupon applied for and were granted leave to intervene. Both third and fourth respondents are also protection and indemnity insurers and both had submitted claims against the Fund in respect of calls and release calls. Their interests in the application brought by the first respondent are similar in practically all respects to those of the appellant. Their contention was that, since the sale of the Pacific Trader took place on 16 July 1992, and the Fund only came into existence after such sale, the amended section 11, which had come into force on 1 July 1992, should be applied to determine the ranking of claims.

After hearing argument the Court a quo upheld the appellant's contention that the ranking of claims fell to be determined by the section as amended, but that its preferently ranking claim should be limited to calls due in respect of the Pacific Trader only, and did

not include the joint and several liability of the Corporation for calls due by the other ships in the fleet. It is against this latter part of the order that the present appeal is brought. The third and fourth respondents have not appealed against the order. First respondent has however noted a cross-appeal against the first part of the Court's order.

From the papers before us it would appear that a number of subsidiary matters were placed in issue between the parties, but in his judgment the learned Judge a quo has recorded that the parties had agreed that the following issues should be decided viz -

> "(a) whether section 11 of the Admiralty Jurisdiction Act 105 of 1983 as amended by Act 87 of 1992 applies to the distribution of the respondent fund;
>
> (b) if the answer to (a) above is in the affirmative then do the provisions of section ll(4)(c)(viii) apply only to that portion of the claim of each intervening applicant arising within the period there referred to relating to calls levied in respect of the M V Pacific Trader or to all calls calls for which the owners of the M V Pacific Trader were

liable."

These were also the issues argued before us and I shall deal with them in that order despite the fact that this entails dealing with the cross-appeal before turning to this appeal. In fact it was common cause that if the cross-appeal were to be upheld, the appeal would become academic.

Since the provisions of section 11 of the Act, both as it read before and after its amendment, are of primary importance both in the appeal and in the cross-appeal, it may be convenient to reproduce the relevant parts of both versions at this stage. Prior to its amendment it read as follows:

> "11. (1) Claims with regard to a fund in a court in terms of this Act or security given in respect of property in connection with a maritime claim or the proceeds of property sold pursuant to an order or in the execution of a judgment of a court in terms of this Act shall be paid in the following order:
>
> (a) Claims in respect of costs and expenses incurred

to preserve the property or to procure its sale, and in respect of the distribution of the proceeds of the sale;

(2) claims to a preference based on possession, whether by way of a right of retention or otherwise;

(3) claims which arose within one year before the commencement of the proceedings, in respect of-

(i) wages and other sums due to or payable in respect of the master, officers and other members of the ship's complement, in connection with their employment of the ship;

(i) port, canal and other waterways deus and pilotage dues;

(iii) loss of life or personal injury, whether occurring on land or on water, directly connected with the employment of the ship;

(iv) loss of or damage to property, whether occurring on land or on water, resulting from delict and not capable of being based on contract, directly connected with the operation of the ship;

(v) the repair of a ship or the supply of goods

or the rendering of services to a ship for the employment or maintenance thereof; (vi) salvage, removal of wreck and contribution in respect of a general average act or sacrifice;

(4) claims in respect of mortgages, hypothecations, rights of retention of, and other charges on, the ship, effected in accordance with the law of the flag of the ship;

(5) claims in respect of any maritime lien not falling under any category mentioned in any of the preceding paragraphs;

(6) all other claims.

(2) The claims referred to in paragraphs (b) to (f) of subsection (1) shall rank after any claims referred to in paragraph (a) of that subsection in accordance with the following rules:

(7) A claim referred to in the said paragraph (b) shall rank before any claim accruing after it, other than a claim referred to in paragraph (c) (vi) of subsection (1);

(8) a claim referred to in paragraph (c)(vi) of that subsection, whether or not arising within the period of one year referred to in that subsection, shall take priority over any claim arising before that claim;

(9) otherwise claims referred to in any of the subparagraphs of the said paragraph (c) shall rank pari passu with claims mentioned in the same paragraph, irrespective of when such claims arose;

(10) claims referred to in paragraph (d) of subsection (1) shall rank according to the law of the flag of the ship;

(11) claims referred to in paragraph (e) of subsection (1) shall rank among themselves in their priority according to law;

(12) claims referred to in paragraph (f) of subsection (1) shall rank in the order of preference according to the law of insolvency;

(13) save as otherwise provided in this subsection, claims shall rank in the order set forth in subsection (1).

(14) .....

(15) .....

(16) .....

(0 .....

(7).....

(8) Where the fund arises by reason of an action in rem an associated ship, the ranking of claims set out in this section shall, notwithstanding the provisions of section 3(6), apply with regard to claims in respect of the associated ship,

and claims in respect of the ship concerned shall be paid thereafter in the order set out in this section."

Subsequent to the amendment by section 9 of Act

87 of 1992 the relevant parts of the section reads:

"11. (1) (a) If property mentioned in section 3 (5)(a) to (e) is sold in execution or constitutes a fund contemplated in section 3(11), the relevant maritime claims mentioned in subsection (2) shall be paid in the order prescribed by subsections (5) and (11). (b) Property other than property mentioned in

paragraph (a) may, in respect of a maritime claim, be sold in execution, and the proceeds thereof distributed, in the ordinary manner.

(2) The claims contemplated in subsection (l)(a)

are claims mentioned in subsection (4) and

confirmed by a judgment of a court in the Republic or proved in the ordinary manner.

(3) Any reference in this section to a ship shall,

where appropriate, include a reference to any other

property mentioned in section 3(5)(a) to (e).

(4) The claims mentioned in subsection (2) are the

following, namely -

(a) a claim in respect of costs and expenses incurred to preserve the property in

question or to procure its sale and in respect of the distribution of the proceeds of the sale;

(17) a claim to a preference based on possession of the property in question, whether by way of a right of retention or otherwise;

(18) a claim which arose not earlier than one year before the commencement of proceedings to enforce it or before the submission of proof thereof and which is a claim -

(i) contemplated in paragraph(s) of the definition of 'maritime claim';

(i) in respect of port, canal, other waterways or pilotage dues;

(iii) in respect of loss of life or personal injury, whether occurring on land or on water, directly resulting from employment of the ship;

(iv) in respect of loss of or damage to property, whether occurring on land or on water resulting from delict, and not giving rise to a cause of action based on contract, and directly resulting from the operation

of the ship; (v) in respect of the repair of the ship, or the supply of goods or the rendering of services to or in relation to a ship for the employment, maintenance, protection or preservation thereof; (vi) in respect of the salvage of the ship, removal of any wreck of a ship, and any contribution in respect of a general average act or sacrifice in connection with the ship; (vii) in respect of premiums owing under any policy of marine insurance with regard to a ship or the liability of any person arising from the operation thereof; or (viii) by any body of persons for contributions with regard to the protection and indemnity of its members against any liability mentioned in subparagraph (vii); (d) a claim in respect of any mortgage,

> hypothecation or right of retention of, and any other charge on, the ship, effected or valid in accordance with the law of the flag of a ship, and in respect of any lien

to which any person mentioned in paragraph (o) of the definition of "maritime claim" is entitled;

(19) a claim in respect of any maritime lien on the ship not mentioned in any of the preceding paragraphs;

(20) any other maritime claim.

(5) The claims mentioned in paragraphs (b) to (f) of subsection (4) shall rank after any claim referred to in paragraph (a) of that subsection, and in accordance with the following rules, namely -

(a) a claim referred to in the said paragraph

(b) shall, subject to paragraph (b) of this subsection, rank before any claim arising after it;

(21) a claim of the nature contemplated in paragraph (c)(vi) of that subsection, whether or not arising within the period of one year mentioned in the said paragraph, shall rank before any other claim;

(22) otherwise any claim mentioned in any of the subparagraphs of the said paragraph

(c) shall rank pari passu with any other claim mentioned in the same subparagraph, irrespective of when such claims arose;

(23) claims mentioned in paragraph (d) of subsection (4) shall, among themselves, rank according to the law of the flag of the ship;

(24) claims mentioned in paragraph (e) of subsection (4) shall among themselves, rank in their priority according to law;

(25) claims mentioned in paragraph (f) of subsection (4) shall rank in their order of preference according to the law of insolvency;

(26) save as otherwise provided in this subsection, claims shall rank in the order in which they are set forth in the said subsection (4).

(6).....

(7) .....

(27).....

(28).....

(29).....

(11) In the case of claims against a fund which consists of the proceeds of the sale of, or any security or undertaking given in respect of, a ship (hereinafter referred to as the ship giving rise to the fund) which is an associated ship in relation to the ship in respect of which the claims arise, the following rules shall apply,

namely -

(30) all claims which fall under paragraphs (b) to (e) of subsection (4) and which arose in respect of a ship in relation to which the ship giving rise to the fund is such an associated ship as is contemplated in section 3(7)(a)(i), shall rank immediately after claims which fall under the said paragraphs and which arose directly in respect of the ship giving rise to the fund concerned and after any claims which fall under paragraph (f) of subsection (4) and which arose from, or are related directly to, the operation of (including the carriage of goods in) the ship giving rise to the fund concerned;

(31) all claims which fall under the said paragraphs (b) to (e) and which arose in respect of a ship in relation to which the ship giving rise to the fund is such an associated ship as in contemplated in section 3(7)(a)(i) or (iii) shall rank immediately after any claims mentioned in paragraph (a) of this subsection or, if there are no such claims, immediately after the claims which fall under the said paragraphs and which arose directly in respect of the ship giving rise to the fund concerned; and

(32) the provisions of subsections (5) and (9) shall

apply with regard to any claim mentioned in paragraph (a) or (b)."

From a comparison of the two versions it may be seen that if the ranking of the claims were to depend on the section prior to its amendment then first respondent's claim would fall under section ll(l)(d), and would rank ahead of appellant's claim which would fall under section ll(l)(f). If, on the other hand, the section as amended were to apply the appellant's claim would come under subsection (4)(c)(viii) whereas first respondent's claim would come under subsection (4)(d). Appellant's claim would therefore have priority over first respondent's claim. So much was common cause between the parties.

In the Court a quo the matter was approached by considering whether the amended section should be given retrospective effect or not. In the argument before us, however, the issue of retrospectivity was hardly referred to at all. As I understand the

argument, Mr Shaw, on behalf of the first respondent, contended that because the order of Court authorizing the sale of the ship was made before the amendment of the section came into effect on 1 July 1992, the unamended section governed the distribution of the proceeds, despite the fact that the sale itself took place only on 16 July 1992. It was only in cases where the order authorizing the sale, and the sale itself, had taken place after 1 July 1992 that the section as amended would apply. Mr Wallis, for the appellant, conceded that had the order and the sale both taken place before 1 1 July he would not be able to contend that the amended section should apply. The touchstone in the present case, he submitted, was not the date of the order but the date of the sale.

In developing his argument Mr Shaw submitted that the amended section ll(l)(a) referred back to sections 3(5)(a) to (e) and to section 3(11) all of which were new sections. These sections, as well as the amended section 9, had an effect different

from the previous as yet unamended sections. In view of the express references in section 1 l(l)(a) to the provisions which were introduced by the amendment, and the reference in section 3(11) to a sale in terms of an order made in terms of section 9, he submitted, section ll(l)(a) must be read as referring to orders authorizing a sale, made after the commencement of the amendments. To give it any other interpretation would give rise to inequitable results. In support of this latter submission he referred to the decisions of this Court in the matters of Euromarine International of Mauren v The Ship Berg and Others 1986 (2) SA 700 (A) and National Iranian Tanker Company v MV Pericles GC 1995 (1) SA 475 (A). Both these cases dealt pertinently with the question of whether the legislative enactments under consideration there, operated with retrospective effect or not, and in both instances the Court held that the provisions should not be so interpreted. It seems to me as though the issue of the retrospectivity of the amendments to the Act

in the present case was relied on more strongly in the Court a quo than before us, as this seems to underlie much of the reasoning of the learned Judge in the judgment appealed against. In this Court, as I have indicated, the issue was hardly referred to at all. In fact it was common cause that the matter was to be determined by ascertaining the intention of the Legislature as it appears from the wording of the statute seen in its general context (Adampol (Pty)Ltd v Administrator. Transvaal 1989 (3) SA 800 (A) at 803 I -804 B; Swanepoel v Johannesburg City Council: President Insurance Co Ltd v Kruger 1994 (3) SA 789 (A) at 794 AD.) What we are concerned with is not the retrospectivity or otherwise of the amended sections, but simply whether they apply in the circumstances of the present case. This, as I have said, must be decided by looking at the language used seen in the general context of the Act as a whole.

As I have indicated section 11 of the Act deals with the

ranking of claims. The amended section provides that:

> "If property mentioned in section 3(5)(a) to (e) is sold in execution; or constitutes a fund contemplated in section 3(11)

which is the case in the present matter - then

> "the relevant maritime claims mentioned in subsection 2)" i e the claims enumerated in

subsection (4)

> "shall be paid in the order prescribed in subsections (5) and (11)."

Subsection (11) deals with claims in respect of which an "associated

ship" is involved, and therefore does not affect the present enquiry.

Subsection (5) deals with the ranking of the various claims set out

in subsection (4). It is not necessary to refer to all the various

rankings; suffice it to say that the only provision relevant to the

facts of this case is (5)(g) which provides that

> "(g) save as otherwise provided in this subsection claims shall rank in the order in which they are set forth in

the said subsection (4)."

From these provisions it seems to me that before one can consider in what order claims should be paid out of a fund (as in the present case) that fund must already be in existence. It is only after the fund has come into existence and claims against it have been proved that the consideration of the ranking of those claims will arise. In the present case it is common cause that the Fund only came into existence after the sale of the Pacific Trader on 16 July 1992.

In R v Grainger 1958 (2) SA 443 (A) this Court was considered a conviction of contravening section 131 (3) of Act 31 of 1917 as amended by section 20(b) of Act 46 of 1935 and section 26 of Act 29 of 1955. These statutory provisions had the effect of penalising the making of contradictory statements under separate oaths unless the swearer believed each statement to be true when he made it. The amendment introduced by Act 29 of 1953 had the

effect of facilitating proof of the offence. The appellant in that matter had made one statement under oath before this latter amendment had come into force and a second sworn statement after the amendment had taken effect. The Court held that the matter was to be considered in the light of the Act as amended, and confirmed the conviction. Steyn JA in his judgment referred to Bartolus ad D 1.1.9 n 47 and to Wesel. Ad Novelles Constitutiones art 22 n 29 where Wesel was said at 448 H - 449 A to have contended -

> "dat die reel teen retrospektiwiteit slaan op handelinge wat klaar voor die Wet verrig is en waardeur iemand onmiddellik daarop 'n reg verkry het, en stel hierteenoor 'n actus pendens wat nog nie voltrek is nie en wat in die algemeen beheers word deur die nuwe verordening waaronder dit die aanvulling kry waaruit dan eers die reg ontstaan."

The learned Judge of Appeal then referred to the decision of Natal Bank v Deputy-Sheriff of Pretoria 1904 T S 620 where the

Court held that a Deputy-Sheriff who had executed a writ before a Government Notice had brought in a new tariff of fees, but where the writ was subsequently withdrawn after the new tariff had been brought in, was entitled to charge the fees provided for in the new tariff. Steyn JA then proceeded (at p 449 D - F) to say:

> "Uit die voorgaande blyk, meen ek, dat 'n actus pendens deur 'n nuwe Wet beheers word, as die verdere feit of feite wat nodig is alvorens die tersaaklike reg of verpligting uit die handeling of kompleks van handelings ontstaan, na die inwerkingtreding van die nuwe Wet tot stand kom. In die onderhawige geval het ons ook te doen met was as 'n actus pendens beskou kan word, in die sin dat by die inwerkingtreding van genoemde sub-artikel een van die vereiste handelings reeds verrig was, maar sonder die regsgevolg wat eers uit die tweede handeling, in sy verhouding tot die eerste, sou ontstaan."

(cf also Adampol (Pty) Ltd v Administrator. Transvaal (supra) at p 806 H - 807 B and 818 F - 819 B.)

Although, therefore, in the present case, the order of Court authorizing the sale was an essential prerequisite to the sale taking

place, it did not have the effect of vesting any rights to the proceeds of the sale in the first respondent. How much, if anything, he would receive, would depend on the fund itself coming into existence and on the amount of all the other claims, with precedence over his own, which might be proved against the fund. The fund itself only came into existence after the amended provisions had come into force, and the subsequent vesting of the first respondent's claim as the result of the ranking of the claim by the referee appointed by the Court, can be seen as an actus pendens which would therefore be governed by the Act as amended. Only then can he be regarded as having a vested right to so much of the proceeds, after payment of other preferred claims, as may be available to satisfy his claim.

It follows, in my view, that it would be anomalous in the present case to hold that a fund, which only came into existence after the amended Act had taken effect, should be administered in

terms of the Act prior to its amendment. In fact certain claims against the fund, such as harbour dues, may themselves only have come into existence after the amendments had taken effect. To suggest that such claims should be administered under the pre-existing Act merely because the order of Court authorizing the sale of the vessel had been made prior to the amendments, simply serves to emphasize the anomaly.

The mere face that the rule nisi issued on 25 May 1992 and confirmed on 9 June 1992 provided for the proceeds of the sale of the Pacific Trader to be applied to the payment of creditors "in accordance with the provisions of Section 11 of Act 105 of 1983" cannot affect the conclusion to which I have come. If in law the Act as amended applies, then an order of Court cannot alter that position, nor in fact do I think that the Court making that order had any such intention. The order must, in my view, be taken to refer to section 11 of the Act as it may read at the time when it is to be

applied to the ranking of the creditors' claims; i e to the law as it then may be.

The argument that, because the new section 11 referred to other new sections, such as sections 3(5)(a) to (e), 3(11) and 9, it would only apply to orders made after 1 July, and that the old section 11 must apply to all orders made before that date, seems to me to be somewhat tenuous. Section 3(5)(a)-(e) merely refers to the categories of property which may be arrested to found an action in rem, and sections 3(11) and 9 both deal with the constitution of a fund consisting i a of the proceeds of the property sold by order of the Court. The old section 9 also provided for the constitution of such a fund. Section 11, however, - both as amended and as unamended - deals with the ranking of claims made against the Fund and, as I have indicated above, only finds application once a fund has come into existence. The fact that the new sections 3(5)(a) - (e), 3(11) and 9 may conceivably affect forms of property

other than those affected by the Act prior to its amendment, and therefore the composition of the Fund, cannot, in my view, have any effect on the interpretation to be given to section 11 in its reference to the ranking of claims.

In my view therefore the learned Judge a quo was right in holding that the Act as amended must be applied to the ranking of claims, and that the appellant's claim should rank above that of the first respondent. The cross-appeal, therefore, cannot succeed. I turn now to consider the appeal itself. I turn now to consider the appeal itself.

On an acceptance of the application of the Act as amended, it is common cause that appellant's claim is one which falls under section ll(4)(c)(viii). The matter to be decided is whether the priority accorded by that subsection applies only to that portion of the claim which the appellant and the third and fourth respondents have for calls levied in respect of the Pacific Trader itself or

whether it includes that portion which reflects the joint and several liability of the owner of the Pacific Trader in respect of the other ships in the fleet. The Court a quo held that it applied only to claims in respect of the Pacific Trader itself.

> Section ll(4)(c)(viii) accords priority to a claim -
>
> "by any body of persons for contributions with regard to the protection and indemnity of its members against any liability mentioned in sub-paragraph (vii)"

id est

> "(vii) in respect of premiums owing under any policy of marine insurance with regard to a ship or the liability of any person arising from the operation thereof ...

Mr Wallis submitted that the word "thereof at the end of the above-quoted subparagraph referred back to "a ship" and that the liability referred to in (vii) must therefore be "the liability of any person arising from the operation" of a ship. The subparagraph uses the words "a ship" and not "the ship" as it does in other

subparagraphs, and therefore, he submitted, it applies to claims in respect of calls due in respect of any ship, and not merely in respect of the vessel, the sale of which gave rise to the Fund.

This choice of words - which also appeared in section 11 prior to its amendment - has been considered in previous decisions of our Courts. In Gulf Oil Trading and Others v The Fund Comprising the Proceeds of the Sale of the M V Emerald Transporter: Irving Trust Co v Gulf Oil Trading Co and Others: Gulf Oil Trading Co and Others v The Fund Comprising the Proceeds of the Sale of the M V Jade Transporter 1985 (4) SA 133 (N) three separate cases had been set down together for argument before a Full Bench exercising its Admiralty jurisdiction under the Act. First there was an appeal concerning the quantum and ranking of certain claims against the fund comprising the proceeds of the sale of the M V Emerald Transporter. Then there was an application in terms of section 11(4) of the Act for a declaratory

order to settle the ranking of certain claims against the fund comprising the proceeds of the sale of the M V Emerald Transporter. Then there was an application in terms of section 11(4) of the Act for a declaratory order to settle the ranking of certain claims against the Fund comprising the proceeds of the sale of the M V Steel Transporter; and finally there was a similar application relative to the quantum and ranking of certain claims against the Fund comprising the proceeds of the sale of the M V Jade Transporter. All three ships were owned by a group of companies known as the Eddie Steamship Group which in turn was controlled by Mr W H Eddie Hsu of Taiwan. Included in the group were Outer Ocean Navigation Corporation Ltd which owned, inter alia. M V Emerald Transporter, Far Eastern Navigation Corporation Ltd, which owned inter alia M V Jade Transporter and Eddie Steamship Ltd, which owned, inter alia M V Steel Transporter. Each of the three ships was therefore an associated

ship in relation to the other two, and to the other ships belonging to the group. Each of the ships had been arrested in actions in rem. and sold in terms of orders of Court issued under section 9 of the Act. The claimants against the various funds had claims, e g for the supply of bunkers and lubricating oil supplied directly to each of the three ships concerned, but also had similar claims against other ships owned by the Eddie Steamship Group - i e against associated ships. The issue before the Court, then, concerned the ranking of these claims. It was contended that claims in respect of the supply of bunkers and lubricating oil, even where such supply was to an associated ship, enjoyed priority over the claim of a mortgage of the particular ship which had been sold. This contention was based on the provisions of section 11 of the Act which provided that claims in respect of

> "the repair of a ship or the supply of goods or the ranking of services to a ship for the employment or maintenance thereof (sec 11(1)(c)(v))

ranked before the claims of a mortgage (sec ll(l)(d)).

Counsel pointed to the use of the words "the ship" in subparagraphs (i), (iii) and (iv) of section 11(l)(c), and contrasted it with the use of the words "a ship" in paragraph (v). "A ship", he submitted, therefore meant "any ship" and the price of bunkers and lubricating oil supplied to an associated ship, therefore was therefore a claim in respect of "the supply of goods ... to a ship" within the meaning of section 11(1)(c)(v).

Rejecting this argument, Howard J , remarked at 141 E-G :

> "I agree that according to its ordinary meaning 'a ship', comprehends 'any ship' but I cannot accept that the Legislature used the indefinite article deliberately to signify that subpara (v) is intended to embrace associated ship claims as well as direct claims. A change of expression does not always and inevitably denote a change of intention, even when the choice of words has been deliberate (see R v Shole 1960 (4) SA 781 (A) at 787 B.)"

The learned Judge then went on to refer to the nature of a maritime

lien such as those referred to in section ll(l)(c). They encumbered the ship against or in respect of which the claim lay and did not secure claims against or in respect of other ships. At p 142 C-F he remarked:

> "It is quite clear that sec ll(l)(c) was designed to deal with claims secured by maritime liens over the ship whose proceeds comprise the fund. Such claims can only be direct claims and it would be completely incongruous to include associated ship claims among them.
>
> I see no reason why the associated ship claims of the necessaries man should be singled out for preference over all associated ship claims and included in para (c) of sec 11(1) to rank for payment before the direct claims referred to in paras (d), (e) and (f). Their presence in sec ll(l)(c) would not only be incongruous for the reasons indicated above, it would also upset the order set forth for the ranking of claims and could not be reconciled with the provisions of sec 11(8). In short, Mr Shaw's construction of sec ll(l)(c)(v) leads to results which the Legislature manifestly did not intend. The considerations militating against that construction are so cogent that I am driven to the conclusion that the use of the indefinite article in subpara (v) was due to a legislative mistake, and that in order to give effect to the Legislature's

intention 'a ship' has to be construed as 'the ship'."

In an appeal against that judgment in the matter between

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1987 (2) SA 583 (A) this reasoning of Howard J and the conclusion

to which he came in this regard was fully endorsed by this Court.

Corbett JA contended himself with remarking (at p 599 C-D that -

> "The Court a quo ... held that the associated ship claims of the necessaries man fell into the second queue. I agree, with respect, with this conclusion and the reasoning of the Court a quo in support of it and do not find it necessary to elaborate thereon."

Then, in 1992, sec 11 was re-drafted in a form differing very considerably from its predecessor, and enacted by the amending Act 87 of 1992. Despite the clear and explicit language of both of the judgments I have referred to one finds, mirabile dictu. that the draftsman, in his rendering of subpara (v) in the amended version,

merely succeeds in making the previous confusion worse confounded. He has altered the first reference to "a ship" to "the ship" but left the second reference as it was, so that now that subparagraph reads:

> "(v) in respect of the repair of the ship, or the supply of goods or the rendering of services to or in relation to a ship for the employment, maintenance, protection or preservation thereof."

On a literal reading of the provision, we find that the draftsman accords priority to claims in respect of the supply of goods or the rendering of services to any ship, whereas he limits the priority of claims for the repair of a ship to the repair of the particular ship the sale of which gave rise to the fund. This is so incongruous that I cannot conceive of it ever having been the intention of the Legislature. The legislative mistake to which Howard J referred supra has thus been perpetuated - in part at least. The suggestion that the Legislature retained the expression "a ship" in respect of

services on the assumption that the Courts had already interpreted

it as meaning "the ship" is clearly untenable.

Further examples of the draftsman's confusing ineptness are

reflected in other parts of the section, such as subsection (3) - does

"any reference ... to a ship" exclude references to "the ship"?

Again in subsection 4(d) priority is accorded to

> "a claim in respect of any mortgage ... of ... the ship, effected or valid in accordance with the law of the flag of a ship ... "

This, on the face of it, seems to make no sense, and Mr Wallis was driven to concede that his deliberate change of language was clearly wrong. It seems to me that the draftsman had no regard for the distinction between the definite and the indefinite article, and that, in the interpretation of this section, no reliable inference of a specific intention can be drawn from the use of the one as opposed to the other.

In the present appeal we are, of course, not dealing with

claims in respect of associated ships, but with the joint and several liability of the owner of the Pacific Trader with owners of other ships for debts in respect of such other ships. Nevertheless, if one has regard to the general scheme of the Act - and more particularly to the provisions of section 11 - it seems to me that the Legislature sought to accord priority to claims against the ship the sale of which gave rise to the fund. Dealing with the interpretation of section 11(8) prior to its amendment, Corbett JA in the Jade Transporter (supra) at p 598 F remarked :

> "It is clear to me that when s 11(8) speaks of a claim 'in respect of a particular ship, it means a claim which arose in respect of that ship."

After its amendment the Act retained this general scheme. This appears for example in sec 11(11)(a) and (b) where priority is accorded to

> "claims ... which arose directly in respect of the ship giving rise to the fund concerned ... "

and to

> "claims ... which arise from, or are related directly to , the operation of ... the ship giving rise to the fund concerned".

Section 11(4)(c) must, in my view, be interpreted in the same

light, and due allowance must be made for the careless and

indiscriminate use of the definite and indefinite articles.

Accordingly the use of the words "a ship" in sec ll(4)(c)(vii) must

be seen as a legislative mistake, and must be read as "the ship".

If therefore one construes section 11 (4)(c)(vii) to refer to

> "premiums owing under any policy of marine insurance with regard to the ship or the liability of any person arising from the operation thereof

there can be no room for the argument that it includes liability arising from the operation of any ship other than the one giving rise to the fund. Such a construction, moreover, not only serves to make sense of the provisions of the sub-paragraph, but is also

consistent with the general scheme of the Act. It follows therefore that the appeal itself must also be dismissed.

The Court a quo ordered that the costs of all the parties there concerned should come out of the Fund as this seemed to be most equitable solution. Mr Shaw in his heads of argument, has submitted that the effect of this order is that the burden of all the costs falls on first respondent, and that that order should therefore be varied so that each party be ordered to pay its own costs or , at worst, that only a portion of the appellant's costs come out of the Fund. No argument was addressed to us on this issue at the hearing of the appeal, and I see no valid reason to differ from the learned Judge a quo in the conclusion to which he came.

In the result the appeal is dismissed with costs, and the cross-appeal is also dismissed with costs.

J P G EKSTEEN, JA

CORBETT, CJ……)

SMALBERGER, JA…)

CONCUR

VAN DEN HEEVER, JA)

OLIVIER,…… JA)