Case No 107/97

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the appeal between:

TRADAX OCEAN TRANSPORTATION SA Appellant

and

mv "SILVERGATE" PROPERLY DESCRIBED AS
mv "ASTYANAX" First Respondent

ASTYANAX COMPAÑIA NAVIERA SA Second Respondent

GARDENIA MARITIME INC Third Respondent

Coram : Nienaber, Marais, Plewman, Streicher JJA *et* Farlam AJA

Heard: 1 March 1999

Delivered : 24 May 1999

Maritime law - whether a certain Greek decision should be enforced in South Africa - whether the vessel arrested was the property of second respondent and therefore liable for execution in South Africa in satisfaction of the judgment - whether issue of ownership of the vessel was *res judicata* as a consequence of a decision in US District Court for the Central District of California - whether terms of the letter of undertaking furnished on behalf of third respondent to appellant to secure release of vessel from attachment in USA precluded appellant from bringing proceedings in court *a quo.*

J U D G M E N T

FARLAM AJA

FARLAM AJA:

[1] This is an appeal, with the leave of the court *a quo*, from a judgment of Booysen J, sitting in the Durban and Coast Local Division of what was then termed the Supreme Court of South Africa, exercising its admiralty jurisdiction in terms of the Admiralty Jurisdiction Regulation Act 5 of 1983.

[2] In the court *a quo* the appellant, Tradax Ocean Transportation SA, a company incorporated under the company laws of Panama, claimed judgment against the first respondent , a motor vessel flying the Panamanian flag and thereupon registered in the Panamanian registry as the "Silvergate", for payment of US $500 959,95 "together with legal interest thereon in accordance with Greek law from 4 October 1990 to date of payment and legal costs as adjudged in [certain] Greek proceedings amounting in the sum of Greek Drachmae 3 170 000". In addition the appellant asked for an order that it be granted leave to execute the judgment sought against security which the third respondent had provided in order to obtain the release of the first respondent and that its costs of suit be paid by the first and third respondents jointly and severally.

[3] The second respondent, which does not oppose the appeal and against which no relief was sought in the court below, is Astyanax Compañia Naviera SA, a company registered under the company laws of Panama, which carried on business as

a shipowner at Piraeus, Greece. It belongs to a group of companies known as the "Stef Stravelakis Group of Companies".

[4] The third respondent is Gardenia Maritime Inc, a company registered under the company laws of Liberia. It is registered in the Panamanian registry as the owner of the first respondent.

[5] In what follows I shall call the appellant "Tradax", the first respondent "the vessel", the second respondent "Astyanax SA" and the third respondent "Gardenia".

[6] As appears from the terms of relief sought, the proceedings in the Durban and Coast Local Division had been preceded by certain proceedings in the courts of Greece. In addition there had been proceedings, followed by a judicial sale, in the Netherlands, and in the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit.

Prior to the institution of these various legal proceedings arbitration proceedings instituted by Tradax took place in London in respect of claims arising from a charter party relating to the vessel.

Before the issues which arose for decision in the court *a quo* and in this court are stated it is necessary to set out in detail the circumstances which gave rise to

the litigation between the parties in the court *a quo*.

[7] On 7 July 1983 Tradax, as charterer, concluded a voyage charter party in respect of the vessel with a contracting party described in the charter party as "Panagiotis Stravelakis SA Piraeus as disponent owners of [the vessel]". It is now common cause between the parties that no such entity as Panagiotis Stravelakis SA has ever existed . At the time when the voyage charter party was concluded and for some five years thereafter this fact was not known to Tradax.

[8] An individual named Panagiotis Stravelakis is according to the evidence an employee of the Stef Stravelakis group and a relative of Stefanos Stravelakis, who is, amongst other things, the president of Astyanax SA and the main, if not the only, shareholder in the companies in the group.

[9] In terms of the voyage charter party between Tradax and "Panagiotis Stravelakis SA" a cargo of grain was to be transported from Bahia Blanca in the Argentine to three ports in Japan.

[10] A dispute arose during the voyage between Tradax and the owner's representatives, who demanded payment of US $218 895,83 as demurrage and threatened to interrupt the discharge of the cargo in Japan and to exercise a lien over it if this sum was not paid.

[11] On 22 November 1983 Tradax agreed to pay under protest the sum

demanded as demurrage on receipt of the owner's fleet guarantee to repay this amount "if by written agreement signed by both owners and charterers or by final arbitration award". The sum in question was thereafter paid by Tradax to S Stravelakis SA of Piraeus Greece against the owner's fleet guarantee, in which Stefanos Stravelakis, on behalf of eight companies in the Stef Stravelakis group, bound the companies "as surety and co-principal debtor to and in favour of [Tradax] by way of security for the true and proper discharge of [Astyanax SA] registered owners of Astyanax (hereinafter to be referred as the principal debtor) of whatever the principal debtor may be found to be indebted to [Tradax] by virtue of a valid London arbitration award ... in respect of the principal amount interest and costs if legal proceedings in London relating to the claim against the principal debtor for overpayment of demurrage to the principal debtor pursuant to Charter Party of 7.7. 1983 of MV Astyanax..."

[12] Subsequently in August 1985 arbitration proceedings commenced in London between Tradax and "Panagiotis Stravelakis SA" in respect of Tradax's claim for repayment of the demurrage it had paid under protest and for despatch it said was due to it under the charter party.

[13] The arbitration proceedings were resisted by the respondent in the arbitration whose representatives did not inform either Tradax or the arbitrators that their client, "Panagiotis Stravelakis SA", did not exist.

[14] On 30 May 1986 the arbitrators made an interim final arbitration award in terms of which they ordered the respondent in the arbitration to pay to Tradax US $14 981,25 in respect of discharging port despatch and £250 in respect of costs. Subsequently, on 15 December 1987, they made a final arbitration award in which they ordered the respondent in the arbitration to pay Tradax US $267 498 (being US $210 140 in respect of the loading port demurrage which Tradax had paid under protest as previously described and a further US $57 358 in respect of despatch) with interest thereon from 23 November to the date of the award, plus interest on the previous award from 1 January 1984 to 30 May 1984, as well as certain amounts in respect of costs.

[15] On 5 July 1988 the arbitrators made a third award, described as a final award of costs, in which they ordered the respondent in the arbitration to pay Tradax £12 208,20 in respect of earlier costs and a further amount of £385 in respect of the costs award itself.

[16] It is common cause between the parties that the US dollar equivalent of the total of the three awards with interest thereon as at 10 April 1989 amounted to US $500 959,99.

[17] On 15 June 1986, that is to say just over two weeks after the first award was made, the vessel was arrested in the Netherlands pursuant to an order of the

President of the Rotterdam District Court, at the instance of the Chase Manhattan Bank, which was the mortgagee of the vessel.

[18] On 25 June 1986 the District Court at Rotterdam ordered Astyanax SA to pay US $139 487 734,05 to the Chase Manhattan Bank and on 1 August 1986 at a judicial sale in execution held at the instance of the bank the vessel was sold to Carla Maritime Inc for Dfls 5 170 000, an amount less than the judgment debt.

[19] On 12 August 1986 Carla Maritime Inc sold the vessel by private treaty to Silver Trident Shipping Co Ltd, which caused the vessel, on 13 August 1986, to be provisionally registered in the Maltese registry as the “Silver Trident”.

[20] On 9 July 1987 the Silver Trident Shipping Co Ltd sold the vessel by private treaty to Gardenia, which caused her to be deleted from the Maltese registry on 4 August 1987 and permanently registered as the “Silvergate” in the Panamian registry on 20 November 1987.

[21] It will be recalled that the arbitrators made their second award in favour of Tradax and against “Panagiotis Stravelakis SA” on 15 December 1987. On 27 April 1988 Tradax sought an order before the Single Member First Instance Court of Piraeus against “Panagiotis Stravelakis SA” enforcing the two arbitration awards that had been given at that stage.

[22] These proceedings were not defended and on 28 June 1988 the court

gave judgment in Tradax's favour and declared the two awards executory in Greece.

[23] As has already been said, the arbitrators' third award was given in London against "Panagiotis Stravelakis SA" on 5 July 1988. After the judgment of 28 June 1988 was served at the offices of the Stef Stravelakis group Tradax's attorney, Emmanuel John Stephanakis, contacted the attorney who acted for the group sometime in September 1988 and asked why the enforcement proceedings had not been defended and why the judgment had not been satisfied. The reply he received was: "How should I defend a party which does not exist?" This was the first intimation that Tradax received to the effect that "Panagiotis Stravelakis SA" did not exist. When asked why the owner's fleet guarantee provided to Tradax when it paid under protest the demurrage claimed under the charter party gave the name of Astyanax SA as the principal debtor, the attorney explained that as the vessel was usually traded in the name of Astyanax SA, the registered owner of the vessel, and as the charter party had not been to hand when the guarantee was drafted, it had been assumed that the owner under the charter party was Astyanax SA. No coherent reason appears to have been furnished as to why the arbitration had been defended in the name of a non-existent company.

[24] Tradax then launched proceedings in Greece against all the companies which had given the guarantee. It also instituted proceedings against Stefanos

Stravelakis and Panagiotis Stravelakis on the basis that they were liable in delict to Tradax for the damages sustained by it because they had, so it was alleged, instructed their New York brokers to insert a non-existent company into the charter party and they had instructed their London solicitors to defend the arbitration on behalf of a non-existent company.

[25] On 10 April 1989 a letter was written to Tradax on behalf of Astyanax SA which I quote as it reads:

> "Dear Sirs,
> 'M/V ASTYANAX - C/P dd 07.07.1983'
> We refer to the above matter and wish to make clear to you the following:
>
> 1. We confirm, as registered owners of the above mentioned vessel, that have, a long ago, recognized and accepted that we owe to you the sums awarded by the issued in accordance with the terms of said C/P of 7-7-1983 arbitration awards, namely the Interim Final Award dated 30-5-1986, the Final Award dated 15-12-1987 and the Final Award of Costs dated 5-7-1988 of the London Arbitrators Mr. M. W. Hamser, Mr. A. J. Kazantzis and Mr. B.A. Harris, plus their costs and the statutory payable interest, which as we understand are presently amounting to the sum of U.S. Dollars $500.959,99.
>
> 2. However, you must appreciate that the above vessel is no longer in our hands and because of that we find it very difficult to meet with the payment of the above indisputed sums, nevertheless we confirm that shall make our best to rectify the position, in view of the fact that our group of companies is still very much interested to maintain good business relations with your goodselves."

The letter was signed by Stefanos Stravelakis in his capacity as president of Astyanax SA.

[26] The statement that Astyanax SA found it "very difficult to meet with the payment of the above indisputed sums" appears to have been something of an understatement because Astyanax SA, which was a "single ship company" whose vessel had been sold in execution in Rotterdam over two and a half years earlier, was clearly without any assets whatever.

[27] On 31 December 1990 the Multi Member First Instance Court of Piraeus in Decision no 2367/1990 ordered Astyanax SA to pay Tradax US $500 959,99, plus legal interest thereon from the date of service of the action, being 4 October 1990, and legal costs in the sum of 3 170 000 Greek Drachmae. It is clear from the judgment that its order against Astyanax (which did not defend the action) was based on the letter of 10 April 1989.

[28] In its judgment the Multi Member First Instance Court also dealt with a claim Tradax brought against Gardenia, *viz* for an order declaring that Astyanax SA was still the owner of the vessel.

[29] The court refused to uphold this claim on the ground that it had no jurisdiction to grant such an order as against Gardenia. Although the vessel was, as I have said, registered in the name of Gardenia in the Panamanian registry on 20 November 1987 it was not deleted from the Greek register until 4 March 1993.

(Before that date, on 13 November 1992, the vessel was arrested at

Durban by order of Booysen J at the instance of Tradax. She was subsequently released after Gardenia provided security.)

[30] On 17 August 1990, before Tradax obtained its judgment in Greece against Astyanax SA in the amount of US $500 959,99, it caused the vessel to be arrested at Long Beach, California, in the United States, pursuant to a writ of attachment issued by the United States District Court for the Central District of California. On 21 August 1990 the vessel was released after Gardenia's Californian attorneys furnished Tradax on 21 August 1990 with a letter of undertaking in the following terms:

> "In consideration of your releasing the M/V SILVERGATE (ex M/V ASTYANAX) (hereinafter 'the Vessel'), from attachment in the action entitled 'Tradax Ocean Transportation S.A. vs Astyanax Compania Naviera S.A.', Case No. 90-4419 RB (GHkx) filed in the United States District Court for the Central District of California, and in further consideration your agreeing not to re-attach or arrest the Vessel or any other property of Gardenia Maritime, Inc. for the claims which you have asserted in the aforesaid action, we agree to satisfy any judgment which ultimately, after appeal, if any, may be rendered in the said action against Astyanax Compania Naviera S.A. and which shall be deemed in said action enforceable against the Vessel as property or as an asset of Astyanax Compania Naviera S.A. or against any property interest which Astyanax Compania Naviera S.A. has in the Vessel, insofar as such judgment does not exceed the sum of Six Hundred Thousand U.S. Dollars ($600,000), inclusive of interest, and costs and any other expenses.
>
> We also agree that upon written demand by you, we will cause to be filed a bond in a form acceptable to the said court in the amount and subject to the same terms and conditions set forth hereinabove. (If such bond is posted, we, the undersigned Association, shall have no further obligation under this letter).

> This letter of undertaking is issued without prejudice to any right or defense presently or hereafter available to the Vessel or Gardenia Maritime, Inc., including without limitation, any defenses that the aforesaid attachment is wrongful, and that the Vessel is not property of Astyanax Compania Naviera, S.A."

[31] A preliminary attempt by Gardenia to obtain the release of the vessel and the return of its security having failed and an attempt by Tradax to obtain an order staying the proceedings until a judgment was obtained in Greece, which would have made each of the issues in the action pending in the US District Court *res judicata,* also having failed, the US District Court on 9 May 1991 ordered that the matter proceed to trial.

[32] Thereafter on 11 September 1991 Spencer Letts J, a judge of the US District Court for the Central District of California, granted an application brought by Gardenia for summary judgment in its favour "on the ground that the [vessel] cannot be attached ... because it is not property of defendant [Astyanax SA]". The court ordered that the attachment be vacated and that the security posted by it or on its behalf be exonerated and released.

[33] He had earlier, when the case was being orally argued before him, indicated that he proposed denying Gardenia's motion for summary judgment but added that he would reconsider the matter and that if he changed his mind he would give the parties the chance to reargue the case. He subsequently did change his mind

and he offered to permit reargument of the matter. This offer was not taken up by Tradax.

[34] On 19 September 1991 the Piraeus Court of Appeal, in Decision 1153/91, upheld Tradax's appeal against that part of the judgment of the Multi Member First Instance Court of Piraeus in which Tradax's claim as against Gardenia for an order declaring that Astyanax SA was still the owner of the vessel was rejected.

[35] Tradax appealed against the order granted by Letts J on 11 September 1991 to the United States Court of Appeal for the Ninth Circuit. Pending this appeal, it sought a stay of the execution of the judgment of Letts J. This application was refused on 26 September 1991 but on the next day two judges of the US Court of Appeals for the Ninth Circuit denied as unnecessary Tradax's emergency motion for a stay of the district court's judgment pending appeal. The Court of Appeals held that the motion was unnecessary because it had jurisdiction to determine whether the district court exonerated the letter of undertaking "improperly, fraudulently or accidentally".

[36] While these events were taking place in California the parties were also involved in further legal proceedings in Greece.

[37] Decision 2367/1990 of the Multi Member First Instance Court of Piraeus and Decision 1153/91 of the Piraeus Court of Appeal were both given in the

absence of Gardenia. In January 1992 Gardenia, as it was permitted to do in Greek law, brought what was described as an Appeal in Default in which it requested the Piraeus Court of Appeal to reconsider its Decision 1153/91.

[38] On 16 July 1992 the Piraeus Court of Appeal gave its judgment, Decision 1108/92, in the reconsidered appeal. It held that by Greek law the vessel continued to belong to Astyanax SA because the adjudication decree of the Rotterdam District Court confirming the judicial sale of the vessel to Carla Maritime Inc had not been registered in the Piraeus Ship Registry. The Court of Appeal proceeded, however, to deal with a further contention advanced by Gardenia, *viz* that Tradax's attempt to execute its judgment against Astyanax SA against the vessel would amount to an abuse of right which is prohibited by section 281 of the Greek Civil Code, which reads as follows:

> "The exercise of a right shall be prohibited if such exercise obviously exceeds the limits imposed by good faith or morality or by the social or economic purpose of the right."

It held that if the facts alleged by Gardenia were true the section would apply but that as they were denied by Tradax its definite decision on the point would be deferred until the facts alleged by Gardenia were proved. It accordingly "extinguished" its decision 1153/91 (with exceptions now not relevant) and ordered that evidence on the facts in issue should be heard by the junior judge of the First

Instance Court of Piraeus and "in case of impediment before the directly senior judge and so on."

[39] Tradax's appeal on the merits against the judgment of Letts J, which was set down for hearing on 5 April 1993, was never heard. This was because Tradax, as has already been said, caused the vessel to be arrested on 13 November 1992 at Durban and applied, *inter alia*, for the enforcement in South Africa of certain judgments of the Piraeus Multi Member Court of Appeal and for a declarator as to the ownership of the vessel, which application having been sent to trial resulted in the judgment presently under appeal.

[40] On 27 November 1992, in an affidavit filed on behalf of the vessel and Gardenia, Gardenia's Durban attorney, Anthony John Louis Norton, referred to the proceedings pending in California and stated that the jurisdiction of the California court, to which Tradax had submitted for the resolution of its claim, was in the circumstances a more appropriate jurisdiction than that of the Durban court for the determination of the claim and he accordingly prayed on behalf of his clients for the arrest of the vessel to be set aside.

[41] Tradax responded to this submission by filing an affidavit deposed to by Emmanuel John Stephanakis, who, it will be remembered, was its Greek attorney, in which the following was said (I quote the affidavit as it reads):

> "Whilst it is correct that the appeals were pending the Applicant [Tradax] tendered to Third Respondent [Gardenia] by open correspondence that in the event of this Honourable Court maintaining the arrest and referring the matters in dispute to trial it would cause the pending appeal to be abandoned and withdrawn and the letter of undertaking (which in any event has been vacated by the Californian Court) to be returned to the Third Respondent's attorneys in the USA. Since making such tender the Applicant has decided there is no purpose in maintaining the Appeal and has issued instructions to its US lawyers to take the necessary formal steps to abandon that Appeal. I verily believe that by the date of the hearing of this matter in South Africa these formalities will have been completed and the Appeal will no longer be pending.
> ....
> As indicated above the Applicant has abandoned the Appeal including any argument with regard to the reinstatement of the letter of undertaking."

[42] On 30 March 1993 Gardenia's Californian attorneys launched an emergency motion in the US Court of Appeals for the Ninth Circuit for the immediate dismissal of the appeal on the ground of mootness. In support of this motion Gardenia relied on the allegation that Tradax had in the Durban proceedings "undertaken and agreed to dismiss the appeal".

[43] Tradax opposed this motion, denying that it had undertaken or agreed to dismiss its appeal.

[44] On 2 April 1993 the US Court of Appeals for the Ninth Circuit gave its judgment in the motion to dismiss the appeal. It rejected Gardenia's contention that the appeal was moot but nevertheless dismissed it, under rule 42 (b) of the Federal Rules of Appellate Procedure, on the ground that "Tradax's representations to the

South African Court, under oath, and Gardenia's motion to this court expressing willingness to dismiss constitute a voluntary stipulated dismissal". The reasons given by the Court of Appeals are set out fully in paragraph [66] below.

[45] In the court *a quo* Tradax led the evidence of three witnesses, *viz,* Emmanuel John Stephanakis, its Greek attorney, Professor Konstantinos Kerameus, a Greek law professor, who testified as an expert on Greek law, and Professor Rudolph Eric Japikse, a Dutch professor, who testified as an expert on Dutch law.

[46] Gardenia led the evidence of three witnesses, Constantinos Tasiopoulos, its Greek attorney, who testified as an expert on Greek law, Wilhelmus Verhoeven, who had acted as Chase Manhattan's attorney in regard to the judicial sale of the vessel in Rotterdam and who testified as an expert on Dutch law, and Alan Nakazawa, its American attorney, who testified as an expert on American Law.

[47] In the court *a quo* the following issues were argued by the parties:

(a) whether Decision 2367/90 which Tradax had obtained against Astyanax SA in Greece should be enforced in South Africa;

(b) whether at the time of the arrest in South Africa the vessel, notwithstanding her sale in execution in Rotterdam and delivery pursuant thereto, remained the property of Astyanax SA and therefore liable for execution in satisfaction of the judgment;

(c) whether the issue of the ownership of the vessel was *res judicata* as a consequence of the decision of Letts J in the US District Court for the Central District of California;

(d) whether the terms of the letter of undertaking furnished on behalf of

Gardenia to Tradax to secure the release of the vessel from attachment in the Californian proceedings precluded Tradax from pursuing the proceedings in the court *a quo*; and

(e) whether there was a non-disclosure of the Californian proceedings in the *ex parte* application brought before the court *a quo* for the arrest of the vessel and, as a consequence thereof, whether the proceedings should have been dismissed.

[48] The learned judge in the court *a quo* found in the favour of Gardenia on issues (a), (b), and (d). In regard to issue (e) he found that, had the existence of the proceedings in California, the findings of Letts J and the letter of undertaking been brought to his attention before he initially granted the arrest, he would not have made an order on the application. He made no finding on issue (c).

[49] When the matter was argued in this court submissions were advanced in respect of the issues listed above. In addition two further issues were debated, *viz*:

(f) whether appellant's claim falls within the definition of a "maritime claim" in section 1 of the Admiralty Jurisdiction Regulation Act 5 of 1983; and

(g) whether the doctrine expressed in the maxim *pretium succedit in locum rei sub hasta* is part of the law of the Netherlands and, if it does, whether the appellant's claims in this case were transferred to the price paid by Carla Maritime Inc after the judicial sale, with the result that, even if Astyanax SA was still the owner of the vessel when it was arrested in Durban, Tradax's claim could not be enforced by means of an action *in rem* brought against the vessel.

[50] When issue (b) was debated in this court counsel also dealt with the

question, which was not dealt with in the court *a quo*, whether a reference to the *lex situs* of the vessel to determine the legal effect of the judicial sale, in this case the law of the Netherlands, was a reference to the internal law of the Netherlands or to the law of the Netherlands including its rules of private international law, which in turn, according to Professor Japikse, refer to the law of Greece.

[51] In view of the fact that I have come to the conclusion that both issues (c) and (d) have to be decided in favour of Gardenia it is unnecessary in my opinion to say anything further regarding the other issues which were debated in this case.

[52] I commence with issue (c).

In its plea Gardenia raised the defence that the issue of ownership of the vessel was *res judicata* by reason of the order for summary judgment granted by Letts J in the U S District Court for the Central District of California on 11 September 1991.

[53] Counsel were agreed that in terms of our common law for the defence of *res judicata* to succeed it had to be established that:

(a) the judgment relied on was a final or definitive decision;
(b) it emanated from a competent court;
(c) the judgment was between the same persons; and
(d) the cause of action was the same.

Counsel were further agreed that these rules are equally applicable where the judgment relied on was given by a foreign court.

[54] In my view this summary of the legal position in relation to the doctrine of *res judicata* can be accepted provided that the phrase "the cause of action" in (d) above is understood as referring not the cause of action in the strict sense but to "the same matter in issue" : see Voet 44.2.4; *Boshoff v Union Government* 1932 TPD 345 and *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A).

[55] Counsel for Tradax did not contend that the U S District Court for the Central District of California was not a competent court for the purposes of the application of the rules relating to *res judicata* nor that the same matter was not in issue. The parties were obviously the same. They contended, however, that the decision given by Letts J was not a final and definitive decision because Tradax did not, so it was argued, have a full and fair opportunity to litigate the dispute in California because the Court of Appeals for the Ninth Circuit denied it a review of the decision on the merits.

[56] They also contended that the Californian proceedings offended, so they argued, our principles of natural justice, in particular the principle of *audi alteram partem*, and should accordingly on that ground also not be given effect to. In support of this submission they contended that there was a lack of a fair hearing, referring in this regard to what was described as "the manner in which Judge Letts arrived at his decision and the manner in which the appeal was dismissed".

[57] Counsel for Tradax also argued that faced with conflicting foreign decisions on the question of ownership of the vessel, *viz* the American decision and judgments of the Greek courts, which they submitted were "prior and clearly final and binding", the court *a quo* should have preferred to follow the decisions of the Greek courts. As appears from paragraph [32] and [34] above the decision of Letts J was given on 11 September 1991 and the first relevant Greek decision dealing with the ownership of the vessel was given eight days later on 19 September 1991.

[58] In their submissions on this point counsel for Gardenia referred to section 1 F of the Protection of Business Act 99 of 1978, which reads as follows:

> "It shall be a defence to any action brought in any court in the Republic if it is proved to the satisfaction of such court that the cause of action founding the action so brought was the subject of a judgment given by a court in a foreign country, if-
>
> (a) in terms of the laws of the foreign country the court which gave such judgment was competent to give that judgment;
> (b) in terms of such laws such judgment is final and conclusive; and
> (c) the parties to the proceedings in which such judgment was given, or their successors in title, are the same as the parties to the proceedings in the Republic".

[59] Counsel for Gardenia contended that Parliament has spelt out in the section when a foreign judgment will constitute *res judicata* and that provided the foreign judgment relied on complies with the provisions of the section (which they submitted was the case here) the court has no discretion to consider the issues raised

by Tradax in regard to the manner in which the dispute was dealt with by Letts J and the Court of Appeals for the Ninth Circuit.

[60] It is by no means clear to me that Parliament, in enacting section 1 F, intended to codify the law relating to *res judicata* when a foreign judgment is involved. It may well be (I state the possibility without deciding the point) that section 1 F only applies to such foreign judgments as are referred to in section 1 (1) (a) read with section 1 (3) of the Act, *viz* judgments delivered or given in connection with civil proceedings arising from an act or transaction "connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material". Because I am of the view, on other grounds, that the defence of *res judicata* must succeed it is not necessary for me to say anything further on the question as to whether section 1 F of Act 99 of 1978 applies in this case.

[61] Counsel for Gardenia contended further that the summary judgment was clearly a final and definitive decision. They relied on the testimony of Mr Nakazawa, who referred in his evidence to an authoritative American treatise, *Moore's Federal Practice,* where the following appears in the commentary on Rule 56, the rule dealing with the American federal doctrine of summary judgment:

> "A determination of a summary judgment under Rule 56 is a final adjudication of the merits of the claim presented; if granted in favor of a claimant it affirmatively adjudicates the merits of the claim and if in favor of the defendant the judgment is in bar and not in abatement ... Matter in bar is that which is sufficient

to prevent a meritorious recovery on a claim."

[62] Mr Nakazawa also referred to *Ruple v City of Vermillion, South Dakota*, 714 F 2d 860 (1983), a decision of the United State Court of Appeals for the Eighth Circuit, in which it was held that for the purposes of *res judicata* a judgment entered on a motion to dismiss or for summary judgment is just as binding as a judgment entered after a trial of the facts.

[63] Tradax's counsel, in support of their submission that final and preclusive effect ought not to be given to Letts J's judgment, relied on a concession made by Mr Nakazawa that in deciding whether preclusive effect should be given to a judgment an American Court will have regard, as an element of the enquiry, to the question as to whether there was a full and fair opportunity to litigate the claim. They referred also to a statement made by the Supreme Court of the United States, in *Montana v U S*, 1979, 99 S Ct 970 at 979 in note 11, which reads as follows:

> "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."

[64] Tradax's counsel also cited in support of their argument on this part of the case a statement by Mr Nakazawa that in deciding whether preclusive effect is to be given to a prior judgment a U S Court will look at the adequacy of the hearing and

the opportunity for review of the decision by way of an appeal to a higher court. They submitted that Tradax did not have a full and fair opportunity to litigate the dispute in California

> "... because the Court of Appeals denied a review of the decision not on its merits or on the ground of mootness but simply because the dispute was to be litigated at a trial in South Africa and in the circumstances it felt that Tradax should be held to the undertakings given on its behalf in South Africa by Stephanakis. In doing so on the face of it the provisions of Rule 42 (b) - on which it relied - were given a strained and unconvincing meaning."

[65] Rule 42 (b) of the Federal Rules of Appellate Procedure is in the following terms:

> "If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court".

[66] The judgment given by the Court of Appeals when Tradax's appeal was dismissed reads as follows:

> "Appellee Gardenia Maritime, Inc. has moved this Court for an order dismissing the appeal as moot, on the basis of representations made by counsel for Appellant Tradax Ocean Transportation, S. A. in a sworn deposition before the Durban and Coast Local Division of the Supreme Court of South Africa (the 'South African Court') in proceedings involving the same parties to this action. This appeal is not moot, however, in that this Court retains jurisdiction of the controversy and may grant effective relief. See *Republic National Bank of Miami v. United States*, 113 S. Ct. 554 (1992); *Elliott v M/V Lois B.*, 980 F.2d 1001, 1004-05 (5th Cir. 1993).

> Nevertheless, a court of appeals may, in the exercise of its plenary power, dismiss an appeal as frivolous or as not taken in good faith. *Pacific Westbound Conf. v. United States*, 332 F. 2d 49, 51 n.5 (9th Cir. 1964); *Cohen v Curtis Publishing Co.*, 333 F.2d 974, 978 - 79 (8th Cir. 1964), *cert. denied*, 380 U. S. 921 (1964). Moreover, on motion of an appellant we may dismiss an appeal 'upon such terms as may be ... fixed by the court.' Fed. R. App. P. 42 (b). This circuit has approved dismissal of an action without a formal agreement signed by both parties, where there was an unqualified oral stipulation of dismissal made in open court. See *Eitel v. McCool*, 782 F. 2d 1470, 1473 (9th Cir. 1986). We see no reason why the same conduct may not support dismissal of an appeal in this case. Tradax's argument that there is no settlement agreement between Gardenia and Tradax is irrelevant to whether Tradax's counsel's sworn representation to the South African Court should bind it.
>
> Tradax's counsel represented to the South African Court that Tradax had 'decided there is no purpose in maintaining the Appeal and has issued instructions to its US lawyers to take the necessary formal steps to abandon that Appeal.' Stephanakis Affidavit at 70 ¶ 229. Counsel did not mention that extracting a settlement of Gardenia's counterclaims was a part of the 'necessary formal steps.' Counsel represented it as a done deal: Tradax 'has abandoned the Appeal.' *Id.* ¶ 230. This appears to be an expression of unqualified intent to dismiss. Furthermore, Tradax denied that it has submitted to the jurisdiction of the United States District Court or that the United States courts are an appropriate forum. *Id.* at 80 ¶ 261.
>
> This presents an even stronger case for finding a mutual stipulation to dismiss than *Eitel*, since Tradax's statement of intent to dismiss appears in a written document signed under oath. Gardenia, obviously, has a mutual intent to dismiss. We find Tradax's representations to the South African Court, under oath, and Gardenia's motion to this Court expressing willingness to dismiss constitute a voluntary stipulated dismissal under F.R.A.P. 42 (b). Accordingly, the appeal is DISMISSED."

[67] I do not agree with Tradax's counsel's submission that Tradax did not have a full and fair opportunity to litigate the dispute in California because the Court

of Appeals denied a review of the decision. As appears from the judgment of the Court of Appeals the appeal was dismissed because Tradax's representative had said under oath in the court *a quo* that Tradax had abandoned the appeal and Gardenia, as the court said, had "a mutual intent to dismiss". In the circumstances, the Court of Appeals was entitled, in the exercise of its plenary power to dismiss the appeal "as frivolous or as not taken in good faith" to make the order it did. There was nothing inherently unfair or unjust in what the court did. (Whether a South African court would have reached the same conclusion in the same manner is irrelevant.)

[68] Nor can Tradax justifiably complain about the procedure followed by Letts J. It is clear that both parties were afforded a full hearing at the summary judgment application and were in fact offered the opportunity of delivering further argument after the judge had informed the parties that he had decided to grant Gardenia's motion for summary judgment. Tradax after receiving this invitation decided not to reargue the matter.

[69] The quotation from the decision of the United States Supreme Court in *Montana v U S, supra,* upon which Tradax's counsel relied is taken from a footnote from which it appears that the court relied expressly on the formulation appearing in Restatement (Second) of Judgments, Tentative Draft No 4, 1977, § 68 1 (c), the comment to which says that preclusion should only be denied upon "a compelling

showing of unfairness".

[70] I do not think that it can be said in this case that there was a compelling showing of unfairness such that the preclusive effect of Letts J's judgment should be denied. Tradax appealed to the Appeals Court and at the same time it rearrested the vessel in Durban. In my view it clearly had to choose in which forum to proceed. In the Durban proceedings it expressly stated that it was in the process of abandoning the appeal in California. By doing so it compromised its US appeal. This led to the appeal being dismissed and that, in turn, rendered the summary judgment on the issue of ownership final.

[71] Although all the parties were keen to litigate in South Africa, by not protecting its own position *vis-à-vis* Gardenia, Tradax exposed itself to a plea of *exceptio rei judicatae*. It could have protected itself by obtaining an acknowledgement from Gardenia that a *res judicata* plea would not be advanced, failing which it should have pursued the US appeal proceedings to finality. I do not think that its failure to protect its position deprives Letts J's decision of preclusive effect.

[72] In my view the contention advanced by Tradax's counsel that the Greek decisions on the ownership of the vessel should be preferred to the American decision must also be rejected. In my view the only relevant Greek decision, where both Tradax

and Gardenia were before the court, is that given by the Piraeus Court of Appeal in Decision 1153/91, on 19 September 1991, eight days after the decision of Letts J on which Gardenia relies. That decision was, however, (as stated in paragraph [38] above) "extinguished" pending a decision on Gardenia's abuse of right contention after evidence had been heard by a judge of the First Instance Court of Piraeus. I do not think that any effect can be given in this country to Decision 1153/91 while it remains "extinguished" as a result of Decision 1108/92.

[73] This renders it unnecessary for me to deal with a contention advanced by Gardenia's counsel to the effect that logic dictates that Letts J's judgment, which was the earlier judgment, should in any event be preferred to Decision 1153/91 (cf Spencer Bower, Turner and Handley, *Res Judicata*, 3rd ed, paragraph 372 and *Showlag v Mansour & Others* [1995] 1 AC 431 (PC)).

[74] I am accordingly satisfied that issue (c) has to be decided in favour of Gardenia.

[75] I am also of the view that issue (d) was correctly decided in the court *a quo* in favour of Gardenia.

[76] As the letter of undertaking was given in California in order to secure the release of the vessel there, its interpretation is governed by its proper law, which in this case is the law which would be applied in a federal court sitting in California.

Counsel did not refer us to any American legal decisions on the point nor have we been able by our own efforts to discover any directly in point. It is not suggested, however, that the approach which a federal court sitting in California would adopt differs in any way from the approach which a South African court would adopt in construing the terms of the letter had it been given to secure the release of the vessel from a South African arrest.

[77] The terms of the letter of undertaking have been set out in paragraph [30] above. The key portion reads as follows:

> "[1] In consideration of your (i e Tradax's) releasing [the vessel] from attachment in the action ... Case No 90-4419 RB (GHkx) ... and [2] in further consideration your agreeing not to re-attach or arrest the Vessel ... for the claims which you have asserted in the aforesaid action, [3] we agree to satisfy any judgment which ultimately, after appeal, if any, may be rendered in the said action ..."

[78] Counsel for Tradax contended that on a proper reading of the letter of undertaking it relates only to claims made in the Californian proceedings and cannot be construed as an undertaking never to re-attach or arrest the vessel.

[79] In my opinion this interpretation of the letter of undertaking is plainly incorrect.

In terms of the letter of undertaking Gardenia promised:

to provide a guarantee for a sum in excess of the amount of the claim.

And Tradax promised:

(i) To release the vessel immediately

(ii) To restrict its claim to $600 000

(iii) Not to re-arrest the vessel.

[80] If Tradax's action in California had been taken to its conclusion, and succeeded, the guarantor would have paid Tradax in terms of the letter of undertaking. If, on the other hand, the action failed the guarantor would have been released. (As it happens the action was not pursued to finality and therefore the guarantor was held to be released from its undertaking.)

[81] Interdependence or reciprocity existed between (i) Gardenia's promise to provide and maintain the security, pending the successful outcome of the current proceedings, and (ii) Tradax's promise, inter alia, not to re-arrest the vessel; it did not exist between (i) the promise to provide the security, whatever the outcome of the proceedings, even if they failed, and (ii) the promise not to re-arrest the vessel. The letter is not in terms limited to re-attachments or arrests in California and no basis exists for such an implied restriction of its express terms. It was given to effect the release of the vessel from arrest in California. The parties would not have contemplated further arrests or attachments in California for the reason, as was submitted by counsel for Gardenia, that, security having been given for Tradax's

claim, such further arrest or attachment in California would have been very remote indeed. Gardenia would, however, have been concerned about arrests in other jurisdictions and the undertaking not to attach or arrest is to be read in the light of that concern. It is therefore clear in my view that the effect of the giving of the letter of undertaking in this case was, in the words of Willmer J in *The Hartlepool* (1950) 84 Lloyd's List Law Reports 145 (PDA) at 146, that

> "the ship's release [was] purchased and she is free from further arrest in any country in respect of the same claim".

(See also *The Soya Margareta* [1960] 2 All ER 756 (PDA) at 761 G - H, where the *dictum* of Willmer J was cited with approval.)

[82] This appears also to be the effect of the case law on the point in the United States: see Gilmore and Black, *The Law of Admiralty*, 2nd ed, p 799, citing *The New England (J K Welding Co Inc v Gotham Marine Corp*) 47 F 2d 332 at 335; *American Jurisprudence* 2d, vol 2 *"Admiralty"* § 233 and *Overstreet v Water Vessel Norkong*, 706 F 2d 641 (5th Cir) at 643 fn 2 : "Once a vessel is released from arrest by a bond, the vessel itself can no longer be held to answer for the claims the bond is designed to meet. The bond is the claimant's sole source of recovery". (It seems that the position is the same where, as here, a letter of undertaking is given instead of a bond: see *Continental Grain Company v Federal Barge Lines Inc* 268 F 2d 240 (5th

Cir) at 243.)

[83] Counsel for Tradax also contended that if, for example, the insurer had gone into liquidation after judgment had been given in favour of Tradax it could hardly be contended that an attachment of the vessel was impermissible for the purposes of execution.

The fact that cases may arise where the guarantor goes into liquidation or is sequestrated after the release of the vessel does not compel one to a conclusion different from that stated above. Either the liquidation or sequestration of the guarantor and his or its consequent inability to honour the guarantee will entitle the party accepting the guarantee to resile from his or its promise not to arrest the vessel again in respect of the claim (*cf Westminster Bank Ltd and Ano v West of England Steamship Owners' Protection and Indemnity Association Ltd and Ano* (1933) 46 Ll L Rep 101) or, possibly, the view will be taken that as the insolvency of those giving the letter of undertaking was something which the person who arrested the vessel could have foreseen, it was a risk that was taken and the vessel is still immune from re-arrest in respect of the original claim: *cf US v Ames* 99 US 35 (1878), to which Gilmore and Black refer, *op cit* p 800 fn 466.

[84] Whatever the position may be where the grantor of the letter of undertaking goes into liquidation or is sequestrated, nothing of that kind happened

here. There is no reason to believe that the undertaking would not have been honoured if Tradax had obtained judgment in its favour in Case 90-4419 RB (GH kx).

[85] Finally, counsel for Tradax argued that at the time of the arrest in South Africa Gardenia's American attorneys were contending that the security in question had been rendered void by the decision of the District Court and were demanding that the letter of undertaking be returned. Tradax's counsel contended further that for Gardenia to rely on the letter of undertaking to resist the arrest of the vessel in South Africa while at the same time contending that the security was no longer operative amounted to approbating and reprobating.

[86] In my view this contention cannot be accepted. It is not correct to say that Gardenia's attorneys were contending that the letter of undertaking was void. What they were contending was that the security undertaking contained in the letter had lapsed by reason of Letts J's judgment exonerating the security. In truth what had happened was that the insurance company's obligation to satisfy any judgment given in the action which was enforceable against the vessel fell away (subject to a possible reversal on appeal) when the judge ruled that the vessel belonged after the judicial sale not to Astyanax SA but to Gardenia for the reasons stated earlier. But for the reasons stated earlier it did not and cannot follow that Tradax's counter promise (not to re-arrest the vessel) also fell away.

[87] It may be going too far to say that, as contended by counsel for Gardenia, on a proper interpretation of the letter the parties intended that the undertaking not to re-attach or arrest should remain effective even although the security was no longer in place whatever the reason for that might be. What seems quite clear, however, is that it could never have been intended that the undertaking would fall away as a consequence of the fact that the security was no longer operative by reason of a final and binding judicial decision negating the existence of the very basis upon which the claim for, and the provision of, security rested. If Tradax lost the case in America, it could not simply re-attach or arrest in another jurisdiction and continue litigating there or elsewhere. That could not have been the basis on which the letter of undertaking was issued.

[88] In the circumstances I am satisfied that the appeal must fail. The following order is made: The appeal is dismissed with costs, including those occasioned by the employment of two counsel.

I G FARLAM
ACTING JUDGE OF APPEAL

NIENABER JA)
MARAIS JA)
PLEWMAN JA) - Concur
STREICHER JA)