



The purpose of the arrest was to obtain security to meet the applicant's claim against the respective respondents in pending arbitration proceedings which were to take place in London.

- [3] The ship was released from arrest after the first respondent put up security in an amount of some US\$747 000. The first respondent thereafter launched application proceedings in the Court *a quo* in which it sought a reduction in the amount of security it had put up. It also in turn sought counter-security from the applicant in an amount of US\$932 349,41 together with additional amounts for interest and costs. The security sought was to cover claims which the first respondent had against the applicant and which also would be the subject matter of the same arbitration proceedings in London.

- [4] The application was argued before Naidoo AJ on 31<sup>st</sup> July 2006 when judgment was reserved. The learned judge delivered judgment on 23<sup>rd</sup> March 2007 in which she dismissed the first respondent's application for a reduction in the security which

had been furnished to the applicant. In respect of the application for counter-security by the first respondent she ordered that the applicant put up an amount of US\$802 565,32 and Canadian \$60 000,00 together with interest thereon calculated at 6,5% for two and a half years compounded at three-monthly intervals and costs in the amount of US\$60 000,00 in respect of the arbitration and US\$7 500,00 in respect of the application. The learned judge ordered that the costs of the application be costs in the arbitration with the reservation that if the arbitrator does not make an order for costs the matter can be dealt with by the Court *a quo*.

[5] With the leave of the Court *a quo* the applicant appeals against the said order directing it to put up counter-security, there being no cross-appeal by the first respondent against the order dismissing the claim for the reduction of security.

[6] It is a well-established principle that an applicant for security bears the onus of proof.

Hence in this case the respondent would need to establish its entitlement to security and is obliged to make out a *prima facie* case therefor. In the leading case of **Cargo Laden on Board the mv Thalassini AVGI v the mv Dimitris** 1989 (3) 820 AD at 831, Botha JA referred to the requirement that a *prima facie* case be made out in applications for attachment *ad fundandam jurisdictionem*. He cited with approval the dicta of Steyn J in **Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd** 1953 (3) SA 529 (W) : -

"The authorities and considerations to which I have referred seem to justify the conclusion that the requirement of a *prima facie* cause of action, in relation to an attachment to found jurisdiction, is satisfied where there is evidence which, if accepted, will show a cause of action. The mere fact that such evidence is contradicted would not disentitle the applicant to the remedy. Even where the probabilities are against him, the requirement would still be satisfied. It is only where it is quite clear that he has no action, or cannot succeed, that an attachment should be refused or discharged on the ground here in question."

[7] Botha JA went on to say in relation to the abovementioned *dicta* : -

"In our judgment, it is the proper approach to be applied to applications for the arrest of a ship in terms of s 5(3)(a) of the Act, and we hold accordingly."

[8] While it may be suggested that the abovementioned test requires an applicant for security to comply with a comparatively low threshold of proof, the Supreme Court of Appeal in a subsequent case has sounded a note of caution in regard to proof of a *prima facie* case. In ***Hülse-Reutter and Others v Gödde*** 2001 (4) SA 1336 (SCA) at 1343, paragraph [12], Scott JA said the following :-

"[12] The requirement of a *prima facie* case in relation to attachments to found or confirm jurisdictions has over the years been said to be satisfied if an applicant shows that there is evidence which, if accepted, will establish a cause of action and that the mere fact that such evidence is contradicted will not disentitle the applicant to relief - not even if the probabilities are against him; it is only where it is quite clear that

the applicant has no action, or cannot succeed, that an attachment should be refused. This formulation of the test by Steyn J in *Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd* 1953 (3) SA 529 (W) at 533C - D has been applied both by this Court and the Provincial Divisions. (See, for example, *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 831F - 832B; *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) G at 936E - H.). One of the considerations justifying what has been described as generally speaking a low-level test (*MT Tigr: Owners of the MT Tigr and Another v Transnet Ltd t/a Portnet (Bouygues Offshore SA and Another Intervening)* 1998 (3) SA 861 (SCA) at 868I) is that the primary object of an attachment is to establish jurisdiction; once that is done the cause of action will in due course have to be established in accordance with the ordinary standard of proof in subsequent proceedings. (See the *Bradbury Gretorex* case *supra* at 531H - 532A.). No doubt for this reason Nestadt JA, in the

*Weissglass* case *supra* at 938H, warned that a court 'must be careful not to enter into the merits of the case or at this stage to attempt to adjudicate on credibility, probabilities or the prospects of success'.

- [13] Nonetheless, the remedy is of an exceptional nature and may have far-reaching consequences for the owner of the property attached. It has accordingly been stressed that the remedy is one that should be applied with care and caution. (See *Thermo Radiant Oven Sales (Pty) Ltd v J Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 302C - D; *Simon NO v Air Operations of Europe AB and Others* A 1999 (1) SA 217 (SCA) at 228E - F.).
- .....

- [14] What is clear is that the 'evidence' on which an applicant relies, save in exceptional cases, must consist of allegations of fact as opposed to mere assertions. It is only when the assertion amounts to an inference which may reasonably be drawn from the facts alleged that it can have any relevance."

(My emphasis)

[9] The first respondent's claims for security were formulated under four heads : -

- 9.1 Costs of Hold Cleaning;
- 9.2 Claim re Painting of Holds;
- 9.3 Damages for Lost Sale;
- 9.4 Balance of Charter Hire.

[10] It is convenient to turn to item 9.4 at the outset. Counsel for the first respondent conceded that he had difficulties in supporting this claim. It appears that the statement of claim originally advanced in the sum of US\$69 783,87 was incorrect and was reduced to US\$8 199,77. However that amount does not relate solely to "charter hire" but includes other miscellaneous items unconnected with charter hire. In my view this was correctly conceded by the first respondent's counsel and nothing more need be said about it.

[11] I turn now to consider the remaining claims.

[12] Costs of Hold Cleaning and Claim re Painting of Holds

The first respondent claimed the amount of Canadian \$60 000,00 which is alleged to be the cost of cleaning the holds of the ship. This occurred during the period 17<sup>th</sup> and 18<sup>th</sup> April 2004. The ship had carried a cargo of 21 022 metric tonnes of green petcoke from Seattle to Port Alfred. The details of the first respondent's claim are set out in the submissions submitted by Hewett & Company, marine claim adjustors, in support of the arbitration. In summary the first respondent's case was as follows. After the cargo had been discharged the applicant appointed contractors to clean the holds. This commenced on 15<sup>th</sup> April 2004 and continued to 16<sup>th</sup> April 2004. Officials of the department of agriculture inspected the holds for the purpose of conveying a cargo of wheat. They rejected them as being unsuitable due to the presence of "rust and paint scale".

[13] Further cleaning was undertaken using the same contractors as before but this time they were commissioned by the first respondent. On 18<sup>th</sup>

April the holds passed the inspection and the vessel sailed at 19H45 that day. The cost of cleaning was Canadian \$60 000,00. This amount was paid by the first respondent on 23<sup>rd</sup> April 2004.

[14] The first respondent makes the case that the applicant is liable in terms of clause 50 of the charterparty agreement. The relevant provisions read as follows : -

"In lieu of hold cleaning to be for Charterers account. Charterers to pay USD3000 lumpsum, except petcoke where Charterers to pay USD4000 lumpsum. Intermediate hold cleaning during period charter to be always for Charterers time/risk/expenses as USD550 per hold Master/crew to assist such operation however Charterers to remain ultimately responsible for vessel's conditions resulting from previous cargoes. If vessel fails to pass hold inspection due to previous cargoes, vessel (to remain on hire and all expenses related thereto to burden Charterers entirely. Holds cleaning to include remove/keeping on board and disposal at allowed waters of all dunnage and lashing materials."

[15] The first respondent averred that the previous cargo of green petcoke was in its words "a particularly oily and dirty cargo" and a period of one day to clean the holds was a wholly inadequate period of time.

[16] It was also the first respondent's case that when the holds were cleaned at the applicant's instance this operation was carried out defectively and resulted in the paint coating on the holds being damaged and necessitating repainting. This cost amounted to US\$104 345,77 and forms the subject matter of the claim referred to above.

[17] The applicant in reply to the respondent's allegations on this part of the case relies on the submissions made by marine law solicitor Barry Young ("TR2"). The applicant denies that it is liable to the first respondent for the aforesaid costs. It alleges that the cleaning operation was carried out by a firm called Urgence Marine from 15<sup>th</sup> April 16H30 to 20H15 on 16<sup>th</sup> April. This firm had been used by the applicant on four previous occasions when petcoke was carried.

These operations had always been successful. It was never charged with the duty of descaling or scraping rust or peeling paint from the holds. The operation in question was done in the presence of and under the supervision of the ship's captain and the head owner's superintendent. These persons made no complaints in regard to the cleaning operation. The applicant denied that its contractors had used any chemicals to clean the holds; only water had been used.

[18] The applicant contends that clause 55 of the charterparty is applicable. This reads as follows : -

"If at any time during the charter the vessel is ordered to load grain or any other commodity and is rejected by USDA and/or NCB inspectors (in Canada understood "port Warden") or any other authorized inspector, because of rust and/or rust scales, vessel to be placed off-hire until Owners effect at their expense the necessary work to obtain final passes. In this event Owners to clean immediately upon rejection of the vessel and with utmost despatch."

[19] Attorney Mundell on behalf of the first respondent in reply said that no problem had been experienced with the ship's holds during a period of four and a half years that the charterparty was in operation. He made the point once again that petcoke is a dirty chemical which requires proper cleaning whether by use of chemicals or water. In Mundell's view the inference was irresistible that it was the cleaning process that caused the problem. He said that if water was used it must have been at such a high pressure that it damaged the paint coating. This was a risk that the applicant agreed to bear in terms of clause 50 of the charterparty and he relied on the words in clause 50 : -

"Intermediate hold cleaning during period charter to be always for Charterers time/**risk**/expense"

(Deponent's emphasis).

[20] In my opinion Mr Mundell derived this theory from what was stated by Hewett & Co in annexure "TR4" as follows : -

"So, it is beyond doubt that the ship failed because of paint scale. Rust scale was only an

after-thought. The preliminary report of the Club Surveyor, Capt. J. Y. McCarthy confirms this (document "E" attached).

In our submission, the only inference that the Tribunal can safely draw is that the high-pressure (booster pumps) water washing probably lifted paint scale (and probably a minor amount of adherent rust scale), such that the ship failed inspection. This is fully supported by the matters referred to in paragraph 22 and 23 below in relation to the Defence to Counterclaim."

[21] Naidoo AJ in the Court *a quo* reasoned as follows in relation to the first respondent's claim for counter-security under the abovementioned heads:-

"The Applicant does not dispute that the cleaning and repairs in (a) and (b) respectively were undertaken and paid for by the First Respondent. Its contention is that First Respondent has failed to show a nexus between conduct on its (the Applicant's) part and the expenses so incurred, so that such damages suffered by the First Respondent cannot be claimed from the Applicant. **There is evidence of such costs having been incurred and I**

accept that this discloses a cause of action.

....."

[22] Counsel for the applicant submits that the learned judge erred. On the other hand counsel for the first respondent defended the decision albeit that he approached the matter quite differently.

[23] It was undisputed that when the ship offloaded the cargo of petcoke the holds were cleaned at the instance of the applicant by Urgence Marine. This operation was performed over a space of some 24 hours. The probabilities are that the ship was being prepared to load its fresh cargo which in this instance happened to be wheat.

[24] There appears to be no dispute on the affidavits that the ship's high-pressure water hoses were used to perform the cleaning operation. Likewise there is no dispute that the authorities rejected the holds and plainly on the documentation that was due to paint and rust scale. It is also common cause that Urgence Marine were commissioned by the first respondent to bring the holds into a

state where they complied with the requirements of the authorities. This was done.

[25] In my opinion it is essential to determine whether there is any relationship between the cleaning of the holds at the instance of the applicant and the condition described as paint and rust scales when the holds were inspected the authorities. There is yet a further question and that is whether there is a relationship between the condition of the holds as a result of the carrying of various items of cargo during the currency of the charterparty and the said condition.

[26] In order to answer the above questions posed one must construe clause 50 of the charterparty. No doubt the arbitrators will be called upon to do this in due course. At this stage it seems to me that as part of the exercise to decide whether a *prima facie* case has been made out it would not be inappropriate for me to express a *prima facie* view as to the proper meaning to be attributed to clause 50. "Intermediate" means, according to the **Shorter Oxford Dictionary**, "coming or

occurring between two things." In the context of clause 50 I think it means at the end of a voyage and the discharge of the current cargo preparatory to the taking on board of another cargo, the costs of hold cleaning to be at the charterer's expense. If anything goes wrong and damage is caused to a third party, the charterer bears the risk. If there is any delay in the performance of the operation that too is at the risk of the charterer. Although the ship owners' personnel in the form of the master and crew assist in the cleaning operation, the charterer nonetheless remains responsible for the vessel's **conditions** resulting from previous cargoes. The clause goes on to stipulate that if the vessel fails the hold inspection due to previous cargoes, the charterer is to bear the expenses arising therefrom.

[27] I find it significant that the clause refers to "conditions" in the plural. That seems to refer to a state of affairs where one is likely to find the vessel's hold in varying conditions after

each voyage and depending on what type of cargo it carried.

[28] Clause 55 on the other hand deals with the situation where the vessel is rejected by the authorities because of rust and/or rust scales. The clause clearly provides that in this event the owners of the vessel are to clean it with "utmost dispatch".

[29] The first respondent's claim on this part of the case rests on a twofold hypothesis. In the first instance the first respondent seeks to link the cleaning operation after the discharge of the petcoke cargo with the subsequent rejection by the authorities due to the presence of paint and rust scale. Secondly and apparently in the alternative, the first respondent asserts that the presence of rust scale resulted from the previous cargoes that had been carried during the currency of the charterparty. That responsibility must be laid at the door of the applicant.

[30] It seems to me that in testing these hypotheses we ought not to be persuaded to draw inferences from mere speculative theories but rather to do so from the objective facts in the case. If that exercise is performed we find the following:-

30.1 The cleaning of the holds took place over a period of some 26 hours. In this operation only plain water was used through the ship's fire main and booster pumps. No chemicals were used.

(See email from one Stephen Chouinard of Urgence Marine, page 95).

30.2 Holds numbers 1, 2, 4 and 5 were rejected by the Canadian Port Authority. The notation on the relevant document (page 96) reads as follows :-

"Holds #1-2-4-5 have to be scraped in order to remove paint scale for the .... (illegible) and on the walls. (and rust scale)."

30.3 Once again Urgence Marine performed the work which was :-

"Holds 1-2-4-5 had to be scrapped (*sic*) in order to remove paint scale .... Also concluded with head owner's agreement provided scrapping and removal of rust, rust scales and loose paint (again only plain water was used and high pressure units and manlifts)."

30.4 Captain J. Y. McCarthy, a marine surveyor and *prima facie* an expert witness, inspected the ship and recorded his findings in a letter dated 18<sup>th</sup> April 2004. If Captain McCarthy is called to testify before the arbitrators he no doubt will adhere to the version which is set out in his said letter. And it is therefore appropriate to quote that in full :-

"Further to your request, I have inspected four (4) of the vessel's five (5) cargo hold (no. 3 cargo hold not indented to be used to carry cargo on the upcoming voyage).

During my inspection, I was assisted by Mr Dionissios Katevatis representing the Operators, Corner Shipping Co. Ltd. of Piraeus, Greece.

Following is an account of my findings :

Removal of scales by high pressure water jet in progress and nearing completion in nos 4 and 5 cargo holds at time of inspection.

In no. 4 hold I noted that 3 x 45 gallon drums were filled with paint and rust scales in a proportion of approximately 20% rust scales and 80% paint scales with a certain quantity found all over tank top (apparently sufficient to fill at least 1½ to 2 more 45 gallon drums for a total of approximately 5½ to 6 x 45 gallon drums in this cargo hold.

At time of inspecting no.5 cargo hold (1700 on April 17<sup>th</sup>) removal of scales was also nearing completion. A pile of rust and paint scales in a proportion of approximately 20% rust and 80% paint scales was contained on a large piece of canvas on the tank top with enough scales to fill more than one x 45 gallon drums; and the undersigned learned from the cleaning shore labours that 4 x 45 gallon drums had already been removed from this cargo hold.

In section of nos. 1 and 2 cargo holds revealed that these holds had been completely washed but removal of scales had not started as yet and it was found from visual inspection at tank top level that bulkheads, shell and hopper plating,

and frames were very heavily rusty; mod'ly/heavily corroded all over with rust and paint scales on heavily pitted steel frames and plating. Based on observation, the quantity easily removable by high pressure water jet should be approximately equivalent to the quantity removed from nos. 4 and 5 holds (5 x 45 gallon drums (5 x 45 gallon drums of 20% rust and 80% paint scales).

#### Conclusion

Based on my observation, the general condition of all four (4) cargo hold showed very heavy pitting all over with heavy rust and moderate/heavy corrosion resulting from normal wear and tear extending over a long period of time (vessel has been in service for approximately 23 years); and no apparent sign of rapid oxidation was noted at time of inspection in Port Alfred."

30.5 Urgence Marine had been used on four earlier occasions to clean the holds after a cargo of petcoke had been discharged. That appears in the contentions of the solicitor Barry Young at page 61 and which statement was not challenged.

30.6 The ship's captain was present when the holds were cleaned and apparently no complaint was made in regard to this operation.

30.7 The inspection by the authorities did not reveal the presence of any residues from the petcoke cargo but rather as pointed out above the unacceptable presence of paint scales. If such residues were indeed present that would have been a very cogent factor in rejecting the holds for the purposes of conveying wheat.

[31] The cumulative effect of the abovementioned facts do not in my view support an inference even *prima facie* that the cleaning of the holds by Urgence Marine caused the subsequent rejection. The theory put forward that the cleaning was inadequate is based on pure speculation and goes against the direct evidence of Urgence Marine which no doubt will be put before the arbitrators. Furthermore Messrs Hewett and Mundell's theory that the high-pressure hoses used by Urgence Marine caused the paint scale problem likewise

falls to be rejected as pure speculation. Initially this theory was not put forward in the statement of claim. In addition according to the surveyor's report the presence of paint scale is as a result of fair wear and tear. There is nothing to suggest nor was it suggested at the time that the petcoke cargo caused the paint scale problem. It is of some significance to note that there is no evidence that petcoke is a corrosive substance or that it could have caused the paint scale condition to manifest itself.

[32] The final theory put forward by counsel for the first respondent was one based on clause 50 (*supra*) of the charterparty. Counsel submitted that in terms of this clause the ultimate responsibility for the condition of the ship is that of the charterer. If one has regard to the fact that during the period of the charter the ship carried various cargoes including petcoke, the inevitable consequence would have been a deterioration in the condition of the holds

resulting in the state of affairs that manifested itself on the 16<sup>th</sup> April 2004.

[33] I am unable to agree with this. It seems to me that this too is based on pure speculation. The overwhelming probability is that the applicant complied with its obligations to effect intermediate cleaning within the meaning of clause 50. Such cleaning dealt with the respective **conditions** of the holds from time to time. There is no suggestion of any damage caused by the various cargoes it carried. The surveyor's report is consistent with the paint and rust scale having been caused by fair wear and tear and it appears to negative the inference that the first respondent seeks to draw.

[34] My *prima facie* view is that when the holds were rejected as aforesaid the matter fell foursquare within the meaning of clause 55 and it was the first respondent who had to bear the costs of the second cleaning operation. In my opinion the learned judge in the Court *a quo* erred in simply relying upon the fact that an expense was

incurred. She ought to have considered whether there were any facts which established *prima facie* that the applicant was liable therefor. She ought indeed to have found that the first respondent had not made out a *prima facie* case.

[35] I turn now to the claim for damages based on an alleged lost sale of the ship. The relevant background which emerges from the first respondent's founding affidavit is the following.

[36] During March 2005 the first respondent decided to sell the ship. A sale of the ship was contemplated by the parties as appears from clause 60 of the charterparty which reads as follows : -

"Owners have the right to sell the vessel during the currency of this Charter Party subject to Charterer's approval which not to be unreasonably withheld."

[37] In April 2005 the first respondent avers that a final agreement was reached between it and China Yantai Shipping Company Limited for the sale of the ship in an amount US\$6 790 000. In support of this the first respondent puts up an email the body of which reads as follows : -

"joseph/costis

copy to the sellers

sylvia

ref telcon, pleased to confirm sale at usd 6,790,000

cash less 2 pct yr side + 1 pct ours.

owise as agreed

end

reverting with recap tomorrow.

rgds

costis tsalpatouros"

[38] The first respondent communicated with the applicant on 6<sup>th</sup> April 2005 as follows : -

"RE:SYLVIA - CP EXTENDED DD FEB 2-2004

FURTHER PREVIOUS MSGS RE POSSIBILITY OF SUBJECT VESSEL BE SOLD TO A PROSPECTIVE BUYER AND SINCE OWNERS HAVE A CHINESE BUYER, CHARTERERS ARE KINDLY REQUESTED TO NOTE AND REPLY THE FOLLOWING:

- 1 -WHETHER WILL BE COMFORTABLE FOR THE CHARTERERS TO ACCEPT DELIVERY OF THE VSL TO NEW OWNERS/BUYERS DURING MAY WITH CANCELIN DATE THE 15<sup>TH</sup> TO JUNE 2005.
- 2 -BUYERS/NEW OWNERS TO CONTINUE THE BALANCE TIME CHARTER PERIOD AT THE SAME TERMS AND CONDITIONS OF THE ORIGINAL C/P INCLUDING ITS LAST ADDENDUM/EXTEENSIONS AND PRESENT HIRE.

- 3 -SUBJECT NEW OWNERS/MANAGEMERS APPROVAL FROM  
CHARTERERS.AWAITING SELLERS FULL BACKGROUND.
- 4 -DELIVERY PLACE OF THE VESSEL TO BUYERS/NEW  
OWNERS.
- 5 -RELEVANT AGREEMENT TO BE COVERED BY A NOVATION  
AGREEMENT DULY SIGNED BY ALL PARTIES  
(OWNERS/CHARTERERS/BUYERS-NEW OWNERS) CONCERNED.
- 6 -SUB FURTHER DETAILS/EXPLANATIONS MIGHT BE NEEDED  
BY BOTH SIDES.

OWNERS WANT TO THANK CHARTERERS IN ADVANCE FOR THEIR  
PROPMPPT REPLY."

[39] A reply was received on 11<sup>th</sup> April 2005. The  
applicant recorded the following : -

"THANKS OWNERS LAST. CHRS NEED FOLLOWING TO  
CONSIDER THE ISSUE FURTHER:

1. FULL STYLE, IDENTITY AND BACKGROUND OF  
BUYERS/THEIR MANAGERS. CHRS ALSO NEED  
CONFIRMATION THAT VESSEL'S FLAG, CLASS AND  
INSURANCE COVER WILL REMAIN THE SAME.
2. NOVATION TERMS - PLS SEND THIS ON. IT ALSO  
NEEDS TO BE SPELT OUT CLEARLY EARLIEST TIME FOR  
REDELIVERY OF THE VSL FROM CHARTER - SO THERE  
ARE NO ARGUMENTS WITH NEW OWNERS. ON ACCOUNTING  
- WHAT ARE OWNERS PROPOSALS ON THAT? HOW WILL  
THE BUNKERS BE DEALT WITH.

3. CHRS NEED TO BE SURE THAT THERE WILL BE NO LOSS OF TIME/EXTRA EXPENSE TO CHRS THROUGH THE CHANGE IN OWNERSHIP.

4. CLAIMS: CHRS HAVE A LARGE CLAIM FOR INCIDENT AT PORT ALFRED IN APRIL 2004. FURHERMORE, THERE ARE VARIOUS UNDERPERFORMANCE CLAIMS. THESE CLAIMS MUST BE SETTLED OR SECURITY PROVIDED BEFORE CHANGE OF OWNERSHIP.

CHRS AWAIT OWRS VIEWS ON ALL ABV BEFOE CHRS MAKE THEIR DECISION."

[40] There was a further exchange of communications between the parties. It is clear that the applicant did not give its consent as requested. The first respondent avers that on 5<sup>th</sup> May 2005 the prospective purchaser cancelled the sale. The following day an offer for US\$6.1 million was made and the allegation is that that was accepted.

[41] The first respondent's case is that at that time there was a falling market and it was obliged to accept the lower amount of US\$6.1 million resulting in a loss of some US\$690 000. Hence the claim for damages.

[42] In regard to this claim Naidoo AJ in the Court a quo reasoned as follows : -

"The disputes relating to each leg of the First Respondent's claim are all matters or evidence before the Arbitration Tribunal whose task it is to make rulings on the merits of the First Respondent and Applicant. I align myself with the statement of Botha JA in the '*Thalassini*' supra when he said at 832 C that 'It is necessary to emphasise that an application under s 5(3)(a) is not an appropriate vehicle for obtaining rulings or decisions on issues that would have to adjudicated upon by the foreign Court hearing the main proceedings.'"

[43] In my view this was an incorrect application of the principles laid down in the "*Thalassini*" case. The applicant for security is required to establish a *prima facie* case. If it turns out that the particular cause of action in respect of which an applicant requires security will not succeed in the foreign tribunal because, for example, it is bad in law, then clearly in my view a *prima facie* case will not be

established. It is wrong to reason as the Court *a quo did*, that rulings on matters of law must be left for decision by the foreign tribunal without this Court applying its mind to the issues and arriving at a decision albeit at a *prima facie* level.

[44] The instant case provides a good example of the principle that I have attempted to set forth. In the first place the applicant submits as a matter of law and on the assumption that the facts set forth by the first respondent are correct, that the claim is bad in English law. Secondly and in the alternative, the applicant contends that on the facts the first respondent has not made out a *prima facie* case.

[45] The applicant relies on two fundamental principles. Firstly it asserts that at common law, and this is borne out by the terms of clause 60, the owner of a vessel always has the right during a currency of a time charter to sell that vessel. Secondly

it relies on the interpretation given to clauses of this nature in English law

[46] The clause in question states in terms that such right is afforded to the first respondent subject to the applicant's approval which is not to be unreasonably withheld. On a proper construction of the clause there is no doubt in my mind that the phrase commencing with "subject to" and the provision that such approval shall not be unreasonably withheld are in the nature, in the first instance, a qualification, and in the second, a proviso. Thus the proviso that approval shall not be unreasonably withheld does not create a contractual obligation or as it is put in English law, it does not constitute a covenant. The principle is embedded in English law that a proviso of this nature does not entitle a party to sue for damages if such party believes that consent has been unreasonably withheld. If as in the present case the

matter concerns a sale subject to approval and that approval is said to have been unreasonably withheld then the first respondent was entitled to proceed to sell the ship. It would then be for the applicant to bring court proceedings in order to demonstrate that its withholding of the approval was not unreasonable. In *Treloar v Bigge* 1874 LR Exch 151 at 154, Kelly CB said that clauses of this nature do not

"constitute a covenant on which the lessee can sue, but are words, the only effect of which is to qualify the generality of the phrase into which they are introduced. The plaintiff covenants that he will not assign the lease or the premises demised 'without the consent in writing of the said T E Bigge' (the defendant) 'first had and obtained', and if the words stopped there the tenant's covenant would be absolute, but they are qualified by the words 'such consent not being arbitrarily withheld'. Now the rule of law, no doubt, is that any words in a deed which impose an obligation upon

another amount to a covenant by him; but the words must be so used to show an intention that there should be an agreement between covenantor and covenantee to do or not to do a particular thing. I cannot find any such intention here. The words, taken grammatically, do not seem to me to amount to an undertaking by the lessor, but are a part of the same sentence as that containing the lessee's covenant, and qualify its generality. They prevent that covenant operating in any case of arbitrary refusal on the part of the lessor, that is, in any case where, without fair, solid, and substantial cause, and without reason given, the lessor refuses his assent."

[47] *Thomas v Curnow* 1913 WLD 168 is a useful illustrative case. The clause in that case bears a strong resemblance to the one in the present. It reads as follows : -

"That the lessees have the right of sub-letting the said premises at any time during the continuance of the said lease subject to the consent in writing of the lessor or his legal representative, but such consent shall not be unreasonably withheld."

[48] Bristowe J at page 170 said : -

"I think that the Clause is a grant to the lessee of a right to sub-let subject to the qualification that the consent of the lessor must be obtained, which is again qualified by the provision that such consent shall not be unreasonably withheld. The Clause may, in fact, be read in this way : 'The lessee shall have a right to sub-let without the consent of the lessor in the event of such consent being unreasonably withheld.' If this is the true view, it seems to me there is nothing to specifically perform. .... The proper course for the applicant to take, if the landlord withholds his consent, is to cede the lease in spite of his refusal and then the question of whether the refusal was reasonable or not can be raised in an action of ejectment or some similar proceedings."

[49] Mr Hewett, the first respondent's expert witness, states in his affidavit that he is unable to find any authority on this aspect in a charterparty setting. He appears to suggest that it is reasonably possible that an arbitration tribunal will hold that the clause in question constitutes a contractual covenant in the form of an undertaking. With respect I must confess that I

have great difficulty with this view. I fail to see how one can distinguish the words used in the clause from the numerous cases in English law commencing with *Treloar v Bigge* as well as the cases decided in South Africa. It is true these cases dealt with contractual matters such as lease contracts. I fail however to discern that there is any difference in the way one would approach the interpretation of such a clause simply because it happens to be in an Admiralty context.

[50] In my view the claim for damages is bad in law and the Court *a quo* ought to have dismissed the claim for counter-security under that head. In case I am wrong in this conclusion I turn now to deal with the facts of the matter.

[51] The assumption is that the applicant breached a contractual obligation in that its refusal to give approval to the sale was unreasonable. That conduct resulted in the sale falling through and a second sale being concluded for a lesser price. The first respondent's cause of action consists of two elements. Firstly, the breach aspect which as

I have said, involves the unreasonable refusal to approve the sale and secondly, proof of the quantum of the claim. This latter element presupposes proof of the first sale and naturally, proof of the second sale for a lesser amount. In the present proceedings *prima facie* proof is required of the above elements.

[52] It seems to me that insofar as a charterer is concerned the sale of the chartered vessel during the currency of the time charter may have important if not far-reaching consequences for the charterer. For example, the owner's identity and background might have had a bearing on where the ship could ply its trade. If, for example, the new owner of the ship would be blacklisted in certain countries that may adversely affect the charterer. Hence in my view the information which the charterer requested in its email of 11<sup>th</sup> April 2005 was not unreasonable. Counsel for the first respondent submits however that the stipulation which is set forth in paragraph 4 of that email is grossly unreasonable and indicates that the applicant was

attempting to hold the first respondent to ransom by insisting that its claims be settled. Against the background that the claims in question were in existence and subject to arbitration, it is not in my view unreasonable that the applicant feared that transfer of ownership of the first respondent's only asset, and hence the only security for its claim, would prejudice it. Applicant's stipulation in paragraph 4 of the said email was not in my view an unreasonable demand.

[53] By 26<sup>th</sup> April 2005 it appears that the first respondent had not dealt with the concerns which initially were raised by the applicant. In its email dated 26<sup>th</sup> April 2005 the applicant records:-

"2. WE STILL NEED URGENT REPLY FROM THE BUYERS ON A NUMBER OF POINTS - WHICH ARE STILL OUTSTANDING. PLEASE CAN OWNERS EXPEDITE.

.....

4. CHARTERERS ARE NOT REQUIRED TO GIVE ANY REASON AT ALL FOR WITHHOLDING APPROVAL. FOR THE RECORD, CHARTERERS HAVE NOT DECLINED APPROVAL - THEY NEED BOTH BUYERS AND OWNERS REPLIES ON A NUMBER OF VERY IMPORTANT POINTS."

[54] On 5<sup>th</sup> May 2005 the broker who was acting on behalf of the purchaser of the vessel recorded in an email the following : -

"..... BUYERS HAVE NOW DECIDED TO TEMPORIZE THIS DEAL.

REGRET OUTCOME BUT DEFINITELY NOT BUYERS' FAULT."

[55] The first respondent in its founding affidavit at paragraph 39 makes the following averments : -

"I submit that it is apparent from the above that the applicant held the misguided view that it could withhold its approval without good reason. It initially endeavoured to manipulate the situation and force the first respondent into settling the disputed claim. Once that failed, it simply declined to approve the sale because it was inconvenient to do so. I submit that this is grossly unreasonable and clearly contrary to the provisions of the charterparty which requires that the applicant's approval should not be unreasonably withheld."

[56] I do not agree with this statement. It runs contrary to what the applicant recorded in the email quoted above. The first respondent has adduced no evidence at all to demonstrate that it

attempted in any way to allay the legitimate concerns of the applicant.

[57] My conclusion on this part of the case is that the first respondent did not make out a *prima facie* case on the issue of the alleged unreasonable failure to approve. The evidence which emerges from the exchange of email communications seems to point in the opposite direction.

[58] In regard to the issue of quantum, here in my view the first respondent faces certain difficulties. These difficulties were highlighted in the answering affidavit of Mr Reddy at paragraphs 98, 99, 100 and 101. Firstly there is no evidence of a second sale. A counter offer was made but we do not know whether it was accepted. Despite being invited to put up the sale agreement, the first respondent has failed to do so. It would seem to me that proper proof of a sale is an essential building block in a claim for damages of this nature. Further doubts are cast on the matter when one notes that the first respondent was still the owner of the ship when it was

arrested in September 2005. Finally Mr Reddy makes the cogent point in my view that the email SRM18 strongly suggests that it was the same purchaser who entered into the second sale; see SRM18 where reference is made in the body of the email to "RE SYLVIA/CHINA YANTAI".

[59] For all the above reasons I am satisfied that both on the law and on the facts the first respondent did not establish a *prima facie* case in support of its claim for counter-security.

[60] To sum up then, the appeal must succeed with costs and the order of the Court *a quo* must be set aside. The following order is substituted therefor :-

1. The application for counter-security is dismissed.
2. The first respondent is directed to pay the applicant's costs such costs to include the qualifying fees (if any) of the expert witness Mr Young.

LEVINSOHN DJP : It is so ordered

DATE OF JUDGMENT : 1 APRIL 2008

DATE OF HEARING : 6 FEBRUARY 2008

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