



## Tebtale Marine Inc v MS Mare Traveller Schiffahrts GmbH & Co KG

### Introduction

South Africa is probably the best known and most favourable ship arrest jurisdiction.

Arrests there are governed by the *Admiralty Jurisdiction Regulation Act 105 1983*, which permits associated ship arrests (s3 (6)), effectively allowing an arresting party to pierce the corporate veil, a very useful facility when dealing with SPVs. It must be established though that the associated ship was "*owned, at the time when the action is commenced, by the [registered owner] of the ship concerned at the time when the maritime claim arose...*" (s3(7)(a)(i), and emphasis added).

If the registered owner of the ship that is the subject of the maritime claim holds more than a fifty percent shareholding in the registered owner of the associated ship, it is then possible to bring an *in rem* action against the latter. It is very common to issue a warrant of arrest (a 'protective writ' or summons) in South Africa, even though there is no present indication that the associated vessel will call there, as that protects the time limitation position and is necessary for an arrest should she do so. Associated ship arrest is common and long established in South Africa. It is what most overseas parties look for, and is probably the principal selling point of its maritime jurisdiction.

However, what is the position where ownership of the associated vessel validly transfers to a third party after issuing the protective writ but before an arrest in South Africa can be made? Does this defeat the right of an action *in rem*?

As a matter of English law (and as for other Commonwealth jurisdictions), the answer is no – the relevant ownership is that when the proceedings are issued. Therefore, as long as ownership can be established at that time, the transfer of ownership will not defeat the right of action *in rem* (*The Monica S*).

This issue recently came before the High Court of South Africa (Western Cape Division, Cape Town), and the court there has departed from the English law position.

### Background

The matter concerned an application by Tebtale Marine Inc to set aside a protective writ in respect of the MV 'MOUNT MERU'.

In early 2016, the respondent MS Mare Traveller Schiffahrts GmbH & Co KG had issued that writ in readiness for the arrest of 70+ vessels purportedly owned by Hanjin Shipping ("**Hanjin**"). This including the MV 'MOUNT MERU'. The underlying claim arose in respect of the MV 'MARE TRAVELLER', a vessel under whose charter to Hanjin hire was unpaid.

At the time of issue the MV 'MOUNT MERU' was an associated ship, as she was under the ultimate control of Hanjin, but before any attempt to arrest in South Africa she was sold to Tebtale.

### Core issue

The question was this: for an associated ship arrest under *s3(7)(a)(i)*, is it a requirement that the person liable *in personam* is the owner of the property at the time of the *arrest*, or at the time of *issue* of the proceedings?

### Applicant's argument

Under *s3(7)(a)(i)* the "*time when the action is commenced*" is the moment when "*any process by which action is instituted*" – i.e. the arrest of the vessel (*s1(2)(a)(i)*) – so that is the relevant time..

Whereas *s3(4)* requires the owner of the property to be personally liable for the claim, if he is not the owner at the time of arrest *s3(4)(b)* - "*if the owner of the property to be arrested would be liable to the claimant in an action in personam in respect of the cause of action concerned*" - has not been complied with.

In the case of an associated ship arrest, to make one person pay for the debts of another with whom he has no commercial relationship would amount to an "*arbitrary deprivation of property*", contrary to *s25* of the Constitution.

### Respondent's argument

Under *s3(7)(a)(i)* the relevant time of ownership is when the action is commenced. In terms of an *in rem* action, this is the issue of process (*s1(2)(a)(iii)*), so that is the relevant time.

This is the historical and widely accepted position, both under English law - *the Monica S* - and in many Commonwealth jurisdictions.

### Decision

The judge first observed that the transfer of ownership in the MV 'MOUNT MERU' was not done to perpetrate a fraud on a creditor and appeared to be a valid, *bona fide* sale.

In view of *s3(4)(b)* the judge found it inconceivable that greater rights would be given against the associated ship than against the ship in respect of which the claim arose. Accordingly, and reading *s3(7)(a)(i)* in light of *s3(4)(b)*, he agreed with the applicant that, on an interpretation of South African statute (and dismissing any reliance on the English law position), the relevant time of ownership was the time of the arrest.

However, that the judge said he reached his decision with hesitation, asking in particular whether *s1(2)(a)(iii)* (which is limited to an action *in rem*) is the subsection that covers all cases of an action *in rem*, or whether an action *in rem* could also fall under *s1(2)(a)(i)*, which is not *strictly* limited to an action *in personam*.

All these matters might be resolved on appeal, but for now South African law is that *s1(2)(a)(i)* can apply to determine the commencement of an action *in rem* for the purpose of *s3(7)(a)(i)*.

## Conclusion

The decision arose out of its own particular facts, the judge plainly entertained reservations, and on any appeal the respondent may yet regain its right of action *in rem* against the MV 'MOUNT MERU' for the claim against Hanjin.

Appeal proceedings have been started, but the current situation will certainly tarnish South Africa's reputation as a favourable arrest jurisdiction, especially as regards associated ships.

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