



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

(Exercising its Admiralty Jurisdiction)

Reportable

Case No. A 80/2014

Name of Ship: **MV “TARIK III”**

In the matter between:

CREDIT EUROPE BANK N.V

APPLICANT

and

**THE FUND COMPRISING THE PROCEEDS OF THE
SALE OF THE MV “TARIK III”**

FIRST RESPONDENT

SEVEN SEAS SHIP CHANDLERS L.L.C

SECOND RESPONDENT

JUPITER SHIPPING AND TRADING LTD

THIRD RESPONDENT

BILGE GIDA KUMANYACILIK SAN. VE TIC.

FOURTH RESPONDENT

ARKAS PETROL URUNLERI VE TICARET A.S.

FIFTH RESPONDENT

DAMEN SCHELDE MARINE SERVICES B.V.

SIXTH RESPONDENT

MARICHEM MARIGASES LIMITED

SEVENTH RESPONDENT

KPI BRIDGE OIL LIMITED

EIGHTH RESPONDENT

BRYVAL CO LTD TRADING AS ZEBA MARINE

NINTH RESPONDENT

MONJASA DMCC	TENTH RESPONDENT
WORLDWIDE ENERGY SERVICES LTD	ELEVENTH RESPONDENT
NOBLE RESOURCES SRL	TWELFTH RESPONDENT
BUNKERNET LTD	THIRTEENTH RESPONDENT
TALL SHIPS (PTY) LTD T/A LBH	FOURTEENTH RESPONDENT
TRANSNET NATIONAL PORTS AUTHORITY	FIFTEENTH RESPONDENT
STURROCK GRINDROD SHIPS AGENCIES	SIXTEENTH RESPONDENT
GARANTI FINANSAL KIRALAMA A.S	SEVENTEENTH RESPONDENT
ZEOS SHIPPING AGENCY SERVICES AND	
PETROLEUM TRANSPORT TRADING LTD	EIGHTEENTH RESPONDENT

Application for the partial confirmation of the Referee's Report and related directions

This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been released to SAFLII. The date and time for hand-down is deemed to be 15h00 on 06 May 2021.

ORDER

Moodley J

1. The Report of the Referee dated 10 September 2015 is confirmed.
2. The Applicant is directed to pay the costs of this application taxed or agreed, such costs to include the costs of the Fifth, Eighth and Tenth Respondents in respect of:
 - 2.1 Mr MacWilliam SC;
 - 2.2 Mr Bowley;
 - 2.3 Turkish attorneys Yalcin Toyager & Tufekci Law office;
 - 2.4 The expert witnesses Prof/Dr Topuz and Prof Yavuz.
3. The Fifth, Eighth and Tenth Respondents are given leave to defend the costs claims of Credit Europe against the Fund on taxation and/or to agree the reasonable quantum of those costs claims.

4. The counter-application by the Seventeenth Respondent is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel, where so employed.

JUDGMENT

Delivered 6 May 2021

Moodley J

Introduction

[1] This is an application in terms of s 10A(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('AJRA')¹ for an order with regard to the payment out of the fund ('the Fund')² constituted by the proceeds of the judicial sale of the motor vessel 'Tarik III' ('the Vessel'). The order sought entails a partial confirmation of the report by Advocate Darryl Cooke, as referee ('the Referee').³

[2] The Vessel was sold and the Fund was constituted pursuant to an order of this Court granted on 5 December 2014 ('the Sale Order'). The Sale Order provided further for the appointment of the Referee with the authority to receive and examine claims lodged against the Fund and objections thereto, and to report thereafter to the Court on the validity and the ranking of claims submitted against the Fund.

[3] The Vessel was sold by public auction on 4 February 2015. Credit Europe Bank N.V. ('Credit Europe'), who is the applicant herein, and the second to eighteenth respondents (and the master and crew of the Vessel) lodged claims against the Fund with the Referee. On 10 September 2015 the Referee delivered his final report to this Court ('the Report') setting out his recommendations as directed in respect of the

¹ Section 10A provides the following:

'Power of court regarding claims against fund -

(1) The court may make an order with regard to the distribution of a fund or payment out of any portion of a fund or proof of claims against a fund, including the referring of any of or all such claims to a referee in terms of section 5(2)(e).'

² The first respondent.

³ Mr Cooke has disclosed that he engaged the services Mr Z Cornelissen, an advocate at the Cape Bar to assist with the examination of the claims and the report. I shall nevertheless refer to 'the Referee' in this judgment.

validity and ranking of the claims of the second to eighteenth respondents for payment out of the Fund, the value of which on that date was USD1 823 044,44.

The Referee's Report

[4] It is common cause that the majority of the claimants did not arrest the Vessel *in rem* prior to her sale. However, as their claims are based on the underlying *in personam* liability of Caliskan Ic Ve Dis Ticaret Sanayi A.S ('Caliskan'), who was the charterer of a demise charter in respect of the Vessel, the second to twelfth respondents (collectively referred to as 'the disputed claimants/suppliers') relied further on the deeming provision in s 1(3) of AJRA which stipulates that: 'For the purposes of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise.' As explained in *Hare Shipping Law and Admiralty Jurisdiction in South Africa*:

'Liabilities of the vessel *in rem* which depend upon the underlying personal liability of her owner, will not generally be incurred as a result of acts of the demise charterer and or its master and crew. But s 1(3) of the Admiralty Jurisdiction Regulation Act deems the demise charterer to be the owner "for the purposes of an action *in rem*, for the period of the charter by demise."' ⁴

The learned author further states:

'Now the vessel stands for the debts of the demise charterer, but only for the duration of the charter.'⁵

[5] Consequently the primary areas of contention in the claims process were:

(a) The extent to which the respective claimants were entitled to rely on the deeming provision in s 1(3), if at all. This involved the consideration of whether the leasing agreement/demise charter ('the demise charter')⁶ had terminated, and if so when the termination occurred.

(b) The validity of the claims by the seventeenth respondent, Garanti Finansal Kiralama A.S ('Garanti'), which was the registered owner of the Vessel prior to her judicial sale, and which had concluded the demise charter with Caliskan. Garanti's

⁴ J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) at 743.

⁵ *Ibid*, at 743 fn 66.

⁶ The demise charter is also described in the documents of record as the 'Statutory Form Leasing Agreement', the 'Financial Leasing Agreement' and the 'leasing agreement', and in certain correspondence between the parties as the 'bareboat charter'. For the sake of consistency in this judgment, it will be referred to as the 'demise charter'.

claims included claims for 'outstanding hire' and for costs incurred by Garanti in relation to the Vessel whilst she was under arrest.

[6] In his Report to the Court, the Referee recommended payment of Credit Europe's damages claim, ranked as contemplated in s 11(4)(f) of AJRA, and its preservation claim, ranked as contemplated in s 11(4)(a). The Referee, being of the view that the demise charter was still extant at the time of the sale, concluded that all the claimants (save for Garanti) were entitled to rely on the deeming provision in lodging their claims against the Fund. He therefore recommended, inter alia, the payment of the claims of the second to sixteenth respondents but rejected Garanti's claims.

[7] Credit Europe's claims and the ranking as aforesaid are not in dispute. With the exception of two claims,⁷ all of the other claims which the Referee recommended be paid, rank above Credit Europe's damages claim as they are all necessities claims, and fall to be ranked in accordance with s 11(4)(c)(v) of AJRA.

[8] I am mindful that the Referee's report is a recommendation which does not bind the Court. In *Associated Marine Engineers (Pty) Ltd v Foroya Banki PF*⁸ it was held that while a court is not bound by recommendations made by the referee, it will in given circumstances give effect to the recommendations of the referee. Nevertheless, I am indebted to Mr Cooke for his thorough investigation and comprehensive report which has been of invaluable assistance in determining the issues referred to this Court.

Credit Europe's application

[9] This application was commenced by Credit Europe on or about 16 October 2015. Initially Credit Europe sought relief in two parts:

(a) The relief sought in Part A related to confirmation of the Referee's Report in respect of the claims of Credit Europe and the thirteenth to sixteenth respondents, and

⁷ The claim of Noble Resources SRL, who is the twelfth respondent herein, and one of the claims of Marichem Marigases Limited, the seventh respondent were subsequently withdrawn.

⁸ *Associated Marine Engineers (Pty) Ltd v Foroya Banki PF* 1994 (4) SA 676 (C) at 683H.

the payment out of the Fund of those claims ranking in terms of s 11(4)(a)⁹ (the preservation claims) and s 11(4)(b) of AJRA, and the payment of legal costs.

(b) The relief sought in Part B was *inter alia* for:

- (i) The immediate payment of the residual funds in the Fund to Credit Europe, subject to the retention of sufficient funds to satisfy the payment of any legal costs outstanding pursuant to Part A of the order;
- (ii) Alternatively, that the second to twelfth respondents be directed to commence actions *in rem* against the Fund to so as to prove their claims, and that Credit Europe be given leave to defend those claims on behalf of the Fund.
- (iii) Payment to Credit Europe of the costs of this application on an attorney and own client scale from the Fund with the costs to be ranked in accordance with s 11(4)(a) of AJRA.

[10] On 12 January 2016 the Court granted a consent order in respect of certain of the relief sought in Part A. The Court ordered the payment of the relevant claims (which have been paid), and directed that the balance of the funds be retained in the Fund pending the determination of the opposed application in respect of the remaining relief. At that stage the second to the twelfth and seventeenth respondents had filed notices of opposition.

[11] Before this Court, Credit Europe filed an amended draft order setting out the relief it seeks. In effect, Credit Europe seeks partial confirmation of the Referee's report as it requires this Court to refuse the payment of higher ranked necessities claims as recommended by the Referee. Such an order will ensure that Credit Europe's claim for costs and as residual creditor, will be paid. The relief sought also includes the confirmation of the Report in respect of the recommendation that Garanti's claims not be paid, as clarified by Mr *Mullins* SC who with Mr *Mackenzie*, represented Credit Europe in this application.

[12] At the hearing of this matter, Arkas Petrol Urunleri VE Ticaret A.S ('Arkas'), KPI Bridge Oil Limited ('KPS') and Monjasa DMCC ('Monjasa'), the fifth, eighth and tenth respondents respectively (collectively referred to as 'the Opposing Suppliers'), who

⁹ Excluding the Sheriff who had already been paid out of the Fund.

were represented by Mr *MacWilliam* SC assisted by Mr Bowley, persisted in their opposition. They seek confirmation of the Referee's report in its entirety which would ensure the payment of their claims, and the costs of their opposition to this application.

[13] Garanti, which was represented by Mr *Gordon* SC, who appeared with Ms *Pudifin-Jones*, also persisted with its opposition to the relief sought by Credit Europe. Garanti further filed a counter-application comprising a main and alternative claim, in which it seeks payment of its claim for preservation costs contrary to the recommendation by the Referee.

[14] Although Credit Europe requested two days for the hearing of this matter and the days of 8 and 9 May 2017 were allocated, a further day was necessary for the completion of argument by the respondents together with Credit Europe's response. At the next hearing on 7 September 2017, towards the end of his substantial reply, Mr *Mullins* referred to the amended draft order sought by Credit Europe. He made further submissions in respect of the costs sought by Credit Europe in the amended draft order and undertook to file a further amended order, specifically in respect of the costs order sought in respect of this application. The reason therefor was that the parties were in agreement that the costs of this application should not be paid out of the Fund but be borne by the unsuccessful party/parties.

[15] Subsequently, on 29 September 2017, Credit Europe's attorneys filed a written note which tendered 'an explanation of the orders sought by the Applicant'. In response thereto counsel for the Opposing Suppliers delivered 'Fifth, Eighth and Tenth Respondent's Objection and reply to the Applicant's written note of 29 September 2017'. In the response, Mr *MacWilliam* expressed his disquiet that the written note was not a revised draft order but constituted 'an improper attempt by the Applicant, long after the conclusion of oral argument, and without leave of the Court, to further argue its case under the guise of a note.' Mr *MacWilliam* stated further that Credit Europe had sought to make amendments to the relief it sought which had not been sought in the documents filed of record or at the hearing. Thereafter Mr *Mullins* submitted a response on behalf of Credit Europe to the objections raised by the Opposing Suppliers.

[16] As recorded above, Mr *Mullins*' submissions on the issue of costs sought by Credit Europe necessitated amendments to the amended draft order, and I requested Mr *Mullins* to provide me with a draft order duly amended in accordance with his submissions. Mr *Mullins* undertook to do so. There is accordingly no need to consider any further 'explanatory' submissions by any of the parties, especially as all parties were accorded a fair opportunity to complete their substantial submissions in Court, and no consent was sought to file any further or explanatory submissions.

The dispute

[17] In brief, Credit Europe submits that the Referee erred:

- (a) in concluding that the demise charter had not terminated and was still extant at the time of the sale;
- (b) in concluding that the disputed claimants could rely on the deeming provision in lodging their claims against the Fund; and
- (c) in recommending the payment of those claims.

[18] Credit Europe does not challenge the merits or ranking of the claims of the disputed claimants on any basis other than that a claimant cannot rely on the deeming provision contained in s 1(3) of AJRA to lodge a claim against the Fund, if it has not arrested the Vessel *in rem* prior to the sale and while the demise charter was still extant. Mr *Mullins* therefore argued that s 1(3) does not afford the right to participate in a ship fund where no action *in rem* has been timeously brought against the ship, and that the Opposing Suppliers must at the very least demonstrate on a balance of probabilities that the demise charter was extant at the time of the sale of the Vessel.

[19] It is common cause that of the disputed claimants, only Arkas and KPI Bridge actually arrested the Vessel *in rem*; Arkas on 19 November 2014, and KPI Bridge on 17 December 2014. Credit Europe submits that neither Arkas nor KPI Bridge has demonstrated on a balance of probabilities that the demise charter was extant on the respective dates of arrest. Credit Europe further relies on a statement made by Garanti's South African attorney, Mr Clark, on the legal advice of Garanti's Turkish attorney, Mr Senol, to the effect that the demise charter had terminated on 15 June 2014 pursuant to a notice dated 15 April 2014. It therefore contends that the demise charter:

‘ . . . terminated on 15 June 2014, or thereafter, and some considerable time before the Court ordered the sale of the vessel on 5 December 2014, and in any event some considerable time before 5 January 2015 when Garanti and Caliskan purported to conclude the Debt Liquidation Agreement, and in any event before the sale of the vessel on 4 February 2015.’

[20] Mr *Mullins* submitted that while Credit Europe’s claim and ranking are not in dispute, there is no basis upon which this Court could conclude, on the affidavits, that the disputed claimants are entitled to have their claims recognised as valid against the Fund. Therefore, it would be appropriate to order payment to Credit Europe unless the Court were to find that there remains some prospect that the disputed claimants can establish their claims in trial actions. In that event, they should be given the opportunity to institute proceedings against the Fund, with Credit Europe being given leave to defend those actions on behalf of the Fund.

[21] The Opposing Suppliers and Garanti dispute both the arguments advanced on behalf Credit Europe in respect of the termination of the demise charter. Garanti and Caliskan, the parties to the demise charter, allege that the demise charter was at all relevant times, valid and binding and reflected in the Turkish International Ship Registry. Garanti has not only denied that the demise charter was terminated by the parties, but has also provided an explanation for the misconception relied on by Credit Europe in its argument that there is written correspondence confirming the termination of the demise charter on 15 June 2014.

[22] Mr *MacWilliam* contended that Credit Europe’s reliance on the statement by Garanti’s attorney that the demise charter had been terminated was misplaced. He pointed out that not only was this an incorrect hearsay statement but the legal advice which precipitated the statement was also wrong. He emphasised that the incorrect advice was recanted shortly after it was given and Garanti has repeatedly and unequivocally disavowed the incorrect legal advice, and persisted that the demise charter was not terminated.

[23] Mr *MacWilliam* also advanced extensive and detailed argument to counter the assertion by Credit Europe that the demise charter was terminated at the very latest before the judicial sale of the Vessel. He pertinently pointed out that when the Sale

Order was granted on 5 December 2015 directing that all claims be submitted to the Referee, there was no suggestion by Credit Europe or any other party that such claims should first be preceded by the arrest of the Vessel. Further even until after the sale of the Vessel and the creation of the Fund, Credit Europe and the other claimants accepted without qualification that Caliskan had been the demise charterer of the Vessel. He therefore contended that the Opposing Suppliers were entitled to rely on s 1(3) of AJRA to substantiate their claims against the Fund without arresting the Vessel or commencing an action *in rem*.

[24] As noted by the author Hofmeyr '[w]here a claim is disallowed by the referee or disputed, the onus is on the claimant to prove its claim'.¹⁰ In *The Kingston Bristowe J* stated that 'implicit in the order referring all the claims to the referee that, in the event of dissatisfaction with the referee's recommendations, the claimant whose claim is rejected or challenged should have to establish it.'¹¹ Bristowe J further stated that 'where a claim is disputed . . . each such claim must be established by the claimant who has advanced it and adopt the normal approach that "he who asserts must prove".¹² Given that the disputed claims were lodged in terms of s 1(3) of AJRA, the issues that lie for determination are threefold:

- (a) Is the reliance of the Opposing Suppliers on s 1(3) to lodge claims against the Fund sustainable if, as creditors of the demise charterer, they have not arrested the Vessel or commenced proceedings *in rem*?
- (b) Was the demise charter terminated by Garanti and Caliskan?
- (c) If it was terminated, what is the relevant date that the demise charter has to be extant in order for the claims of the Opposing Suppliers to be properly allowed by the Referee/and the Court?

Does a claim lodged in terms of s 1(3) of AJRA require an arrest or action *in rem* by the claimant?

[25] It is common cause that at all material times, specifically when the Vessel was arrested, the Sale Order issued and Vessel was sold, Garanti was the owner of the Vessel. However, the Vessel was susceptible to arrest *in rem* in respect of the claims

¹⁰ G Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 2 ed (2012) at 289.

¹¹ *The Kingston In Re Creditcorp Ltd* 1991 SCOSA D78 (D) at 84G.

¹² *Ibid* at 85B-C.

of Credit Europe against Caliskan, the demise charterer, pursuant to the provisions of s 1(3) of AJRA. Therefore, when the Vessel was first arrested on 26 May 2014 in this jurisdiction by Credit Europe pursuant to an action *in rem*, that action was based on the alleged *in personam* liability of Caliskan, the demise charterer, not Garanti. Once arrested, the Vessel was susceptible to being sold in execution to satisfy the liability of Caliskan, although the liability was not that of Garanti. As stated by Ploos van Amstel J in *CH Offshore Ltd v PDV Marina SA*, s 1(3) of AJRA allows a ship to be 'sold in execution to satisfy a debt for which the shipowner was not liable'.¹³

[26] The Sale Order was made in term of s 9(1) of AJRA, which pertains to the sale of arrested property and provides that: 'A court may in the exercise of its admiralty jurisdiction at any time order that any property which has been arrested in terms of this Act be sold.' In paragraph 4 of the Sale Order, it was ordered '[t]hat a Fund be established from the proceeds of the Sale which shall be dealt with as follows: . . .'. This is consistent with s 9(2) of AJRA which stipulates that: 'The proceeds of any property so sold shall constitute a fund to be held in court or to be otherwise dealt with, as may be provided by the rules or by any order of court.' The order is also consistent with s 3(11)(a)(ii) of AJRA which provides that: 'There shall in any particular case be a fund consisting of- ... (ii) the proceeds of the sale of any property mentioned in subsection (5)(a) to (e), either in terms of any order made in terms of section 9, or in execution or otherwise.' Section 3(11)(b) of AJRA stipulates that: 'A fund shall, *for all purposes, be deemed to be the property sold or the property in respect of which the security or an undertaking has been given*' (emphasis added).

[27] Consequently, as properly submitted by Mr *MacWilliam*, when a ship is sold in terms of s 9(1) of AJRA, based on an arrest founded on the deemed ownership of the demise charterer in terms of s 1(3), the fund that is created in terms of ss 9(2) and 3(11)(a)(ii) is a fund that is deemed to be the property of the demise charterer in terms of s 3(11)(b) read with s 1(3). Importantly, the fund is deemed to be the property of the demise charterer for all purposes, not only for the purposes of the party that made application for the order in terms of s 9(1). This includes the satisfaction of claims by other claimants founded on the *in personam* liability of the demise charterer.

¹³ *CH Offshore Ltd v PDV Marina* 2013 JDR 2513 (KZD), para 18.

[28] I am therefore in agreement with Mr *MacWilliam*'s submission that:

' . . . the provision in s 3(11)(a)(ii) that deems the fund to be the property that was sold, constitutes an important link in the process that allows claimants to obtain payment of their claims from the fund. Absent the fund being deemed to be owned by the charterer by demise there would be no basis for parties with claims based on the *in personam* liability of the demise charterer (such as Credit Europe) to receive payment from the fund.'

[29] However the action *in rem* that provided the jurisdictional foundation for the order for the sale of the Vessel and the creation of the Fund, is stayed by the Sale Order. This is because the Sale Order, which was made in terms of s 10A(1) of AJRA, is an order with regard to 'the distribution of a fund . . . or proof of claims against a fund, including the referring of any of or all such claims to a referee in terms of section 5(2)(e)', and it is, accordingly, an order which is subject to the provision of s 10A(2) of AJRA which provides:

'(a) If an order is made referring all such claims to a referee or if the court so orders, all proceedings in respect of claims which are capable of proof for participation in the distribution of the fund shall be stayed and any such claim shall be proved only in accordance with such order.

(b) The costs of any proceedings already instituted but which have been stayed in terms of paragraph (a) shall be added to any relevant claim proved in accordance with any such order.'

[30] Therefore the Sale Order had the legal effect of staying all proceedings in respect of claims capable of proof for participation in the distribution of the fund (pursuant to s 10A(2)(a)). It is because the actions *in rem* were stayed by the Sale Order, that Credit Europe was obliged to deliver a fresh notice of its claims and supporting affidavits to the Referee as provided for in the Sale Order. Similarly, the Opposing Suppliers and all other claimants were required to deliver fresh notices of claim and supporting affidavits to the Referee. Effectively the claims procedure as set out in the Sale Order superseded proceedings previously commenced.

[31] This reasoning supports the contention of the Opposing Suppliers that they did not need to institute an action *in rem* or arrest the Vessel in order to lodge claims legitimately with the Referee, nor were their claims precluded from payment as

asserted by Credit Europe. Authority for this reasoning is found in the following excerpt from Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa*:

'It is not necessary for a claimant to have instituted an action or, where the property has been sold, to proceed against the fund or to proceed to judgment before being entitled to have its claim taken into account in the distribution of a fund'.¹⁴

[32] In *Continental Illinois National Bank and Trust Co. of Chicago v Greek Seaman's Pension Fund*, Thirion J was required to determine 'whether or not the respondent has a claim against the fund in the light of the fact that it did not cause the vessel to be arrested prior to its sale'.¹⁵ He rejected the argument that s 3(5) of AJRA required a claimant against a fund to have effected an arrest of the property and to have instituted action in respect of its claim, holding:

'While the ship is under arrest in the Court's jurisdiction the Court has control over it and exercises jurisdiction over it . . . while the Court is exercising jurisdiction over the ship by virtue of an arrest no further arrest would be required in respect of the institution of other proceedings against it. In *The Africano* [1894] P 141 at 149 it was said:

"The arrest enables the Court to keep the property as security to answer the judgment. This does not at all imply that the Court holds the property only for that plaintiff, or for that plaintiff in priority to others of the same class. The true view is, I think, that the Court holds the property, not only for the first plaintiff, but also for at least all creditors of the same class who assert their claims before any unconditional decree is announced."

Be that as it may, once the stage has been reached that the arrested *res* has been sold in terms of s 9 and the proceeds are being held as a fund in Court, there can surely be no need for a further arrest. The Court then has full control over the proceeds and the proceeds can only be paid out on an order of the Court. Furthermore, a requirement that a claimant, in order to be entitled to share in the distribution of a fund in respect of his claim, would have to have instituted an action, when he is not required to obtain a judgment on it, would be a purposeless formality in a statute which eschews formalism and technicality and which aims at the expeditious and efficacious determination of claims.¹⁶

Thirion J held further that:

'The purpose of an arrest of the property in an action *in rem* is to give the plaintiff security in respect of his claim and to establish the Court's jurisdiction in respect of the property. Where

¹⁴ G Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 2 ed (2012) at 287-288.

¹⁵ *Continental Illinois National Bank and Trust Co. of Chicago v Greek Seaman's Pension Fund* 1989 (2) SA 515 (D) at 523F-G.

¹⁶ *Ibid* at 527B-F.

as happened in this case there had been an arrest of property, albeit by another claimant, and the property has, pursuant to such arrest, been sold in terms of s 9 of the Act and the proceeds are being held in terms of s 11 as a fund in Court, then the Court's control over the proceeds is complete. The proceeds can only be paid out on an order of Court and the Court would only authorise a payment out of the fund when it is satisfied that all persons who have claims with regard to the fund have had an opportunity to lodge their claims and when it is satisfied that the order of priority laid down in s 11 has been observed. When the stage has been reached that the proceeds of the sale are being held as a fund, any need for an arrest as a prerequisite to a further party's introduction to the proceedings must surely have fallen away in respect of proceedings for the distribution of the fund.¹⁷

[33] In my view, this judgment provides comprehensive reasoning which negates the assertions of Credit Europe that the claims of the claimants which did not arrest the ship or institute actions *in rem* should have been rejected by the Referee and that payment thereof should not be allowed by this Court.

Was the demise charter terminated?

[34] Credit Europe arrested the Vessel on 26 May 2014 in this jurisdiction pursuant to an action *in rem*, based on the *in personam* liability of Caliskan, the demise charterer. Therefore, it is not in dispute that the demise charter was in existence at that date. It is also significant to note, as pointed out by Mr *MacWilliam*, that, at all material times prior to the sale of the Vessel on 5 February 2015, there was never any suggestion by Garanti, Caliskan, Credit Europe, or any other party, that the demise charter was not still in existence. Credit Europe itself brought the sale application on 2 October 2014 on the basis that the demise charter remained in existence, and Garanti expressly opposed the sale application 'on the basis that the bareboat charterparty remained in place, valid and binding between the parties'.

[35] Nevertheless Credit Europe in this application avers that the demise charter was not extant at the time of the judicial sale or even when the Vessel was arrested by the fifth and eighth respondents on 19 November 2014 and 17 December 2014, respectively. It avers that the fifth and eighth respondents have failed to establish that the demise charter was extant when the Vessel was arrested by them, although the

¹⁷ Ibid at 537H-538B.

existence or otherwise of the demise charter was not in issue when these arrests were effected. Mr *Mullins* therefore argued that the Opposing Suppliers bore the onus to prove that the demise charter was extant at all relevant times.

[36] This submission was, in my view, properly refuted by Mr *MacWilliam*, who submitted that it was Credit Europe who bore the onus. Referring to the cases of *Chetty v Naidoo*¹⁸ and *Naik v Panday*¹⁹ as analogous authority, Mr *MacWilliam* relied on the principle that where it is common cause that the parties had entered into a lease, the plaintiff bears the onus to prove the termination. In *Naik v Panday* the court held that the plaintiff bore the onus, irrespective of whether the plaintiff relies on the termination in his founding papers or whether the defendant pleads that there is a lease, and the plaintiff replicates that the lease was terminated. This principle was approved in *Chetty v Naidoo*.

[37] In my view, although the onus to prove their disputed claims lie on the Opposing Suppliers, Credit Europe who relied on the demise charter in establishing its own claim, and is now the only party who alleges that the demise charter was terminated, must establish that allegation on a preponderance of probabilities. However, Credit Europe is clearly uncertain as to when the alleged termination occurred, pegging the alleged termination date between 15 June 2014 and prior to the sale on 5 February 2015. It raises alternate arguments in support of the possibility that the demise charter terminated at one of a number of alternate times. In any event, in the light of the finding by this Court that a claimant with an *in personam* claim against the charterer does not have to arrest the vessel to rely on s 1(3) of AJRA once the vessel has already been arrested, the dates of the arrest by the fifth and eighth respondents have no significance, and require no attention.

[38] The Opposing Suppliers contend that the demise charter was extant at the time of the sale, but in order to be able to rely on the deeming provision in lodging a claim against a fund a claimant need only demonstrate that the demise charter was extant

¹⁸ *Chetty v Naidoo* 1974 (3) SA 13(A) at p 20A-24A.

¹⁹ *Naik v Panday* 1952 (1) P.H. A3 (D) at 13.

at the date of the Sale Order and the appointment of a Referee. This argument is consistent with the reasoning in paragraphs 29 and 30 *supra*.

Factual Matrix prior to the judicial sale of the Vessel

[39] Because of the dispute as to whether the demise charter had been terminated or was extant at the time when the Fund was constituted, it is appropriate to set out the relevant facts leading up to the judicial sale of the Vessel:

(a) At all relevant times prior to the judicial sale of the Vessel, Garanti, a financial leasing company incorporated in Turkey, was the registered owner of the Vessel from 1 January 2008 being the date of delivery of the Vessel, or at least by 28 January 2008.²⁰

(b) On 31 October 2007, Garanti and Hazar Denizcilik Ic Ve Dis Ticaret ('Hazar') concluded a demise charter in respect of the Vessel for a period of 50 months up to 8 November 2011. Under the terms of the demise charter, Garanti was to remain the owner of the Vessel until the end of the period of the demise charter and until payment of the final amount due under the demise charter was made. On 14 February 2011, Garanti and Hazar extended the demise charter to 15 December 2015.

(c) However when the business of Hazar was taken over by Caliskan with effect from 1 January 2014, by agreement between Caliskan and Garanti, Caliskan was substituted for Hazar as the demise charterer of the Vessel and assumed Hazar's rights and obligations from the effective date. Therefore, the demise charter was to continue in the same form. Prior to the arrest of the Vessel, Caliskan employed the master and crew of the Vessel and was responsible for the day-to-day management and commercial activities of the Vessel.

(d) Caliskan subsequently experienced financial difficulties. On 17 March 2014, the Eleventh Commercial Court, Anadolu, Istanbul granted a preliminary injunction order in terms of the Turkish Enforcement and Bankruptcy Code, in terms of which enforcement proceedings against Caliskan were postponed for a period of one year, to 17 March 2015.

(e) On 17 April 2014, Garanti served a notice dated 15 April 2014 on Caliskan and the individual guarantors calling upon Caliskan to make payment of arrears for hire in

²⁰ Garanti's ownership of the vessel prior to its judicial sale on 5 February 2015 was not challenged in the application to sell the vessel or in the proceedings before the Referee.

the sum of USD 789,790.68 and default interest of USD 2,028.34 within 60 days of service of the notice ('the alleged termination notice').

(f) On 24 April 2014, Garanti and Caliskan agreed to extend the demise charter by way of an amended payment plan ('the amended payment plan'), by increasing the capitalised debt to USD 11,763,010 and agreeing on a new repayment plan. Caliskan's trustees did not authorise or ratify the amended payment plan.

(g) On 26 May 2014, by way of an action *in rem* commenced by Credit Europe under case number A31/2014, Credit Europe arrested the Vessel in Richards Bay. In effecting the arrest Credit Europe relied on s 1(3) of AJRA pursuant to which Caliskan was, for purposes of the action *in rem*, deemed to be the owner of the Vessel for the duration of the demise charter.

(h) On 23 June 2014, Caliskan brought an application to set aside Credit Europe's arrest seeking an order that the Court should decline to determine the matter in terms of s 7(1) of AJRA. However, Caliskan's attorneys, Shepstone and Wylie, withdrew as attorneys of record on 8 July 2014 and the application to set aside the arrest was not pursued.

(i) On 2 October 2014, Credit Europe launched an urgent application for the sale of the Vessel in terms of s 9 of AJRA, which Garanti opposed unsuccessfully.

(j) On 5 December 2014 the Court granted an order for the judicial sale of the Vessel. The Vessel was subsequently sold by way of a judicial public auction on 8 February 2015, whereafter the Fund was established under the control of the Registrar and the Referee was appointed to deal with claims against the Vessel and the Fund.

(k) On 5 January 2015, Garanti and Caliskan purported to enter into a Debt Liquidation Agreement ('Debt Liquidation Agreement'), but the Debt Liquidation Agreement was not signed by a representative of Caliskan or approved or ratified by its trustees or the bankruptcy Administrator of Caliskan.

Argument

[40] Mr *Mullins* submitted that the Opposing Suppliers' reliance on the evidence of Mr Ilker Tasliyurt, the head of the Risk Monitoring Department of Garanti, in support of their contention that the demise charter was still extant at the time of the sale was unsustainable. He contended that Mr Tasliyurt's personal knowledge was limited and he did not identify the persons who provided him with the specific information on which he relies in his various affidavits. Mr *Mullins* therefore argued that the averments made

on behalf of Garanti, particularly by Mr Tasliyurt, were fundamentally unreliable and fall to be rejected. He pointed out that even the Referee was dissatisfied with the reliability of the submissions made by Garanti in support of the claim for outstanding hire. However, the Referee erred by nevertheless accepting Garanti's self-serving averments to the effect that the demise charter had not been terminated and remained extant at the time of the sale. Mr *Mullins* contended that the Referee ought not to have accepted any of Garanti's evidence regarding the termination of the demise charter. He submitted that the Court should rely on the expert opinions furnished by Credit Europe, alternatively refer the matter to trial so that the experts may be interrogated on their opinions.

[41] Mr *MacWilliam* contended in response that there is direct evidence that the demise charter was indeed in force and was never terminated. Therefore, Credit Europe is obliged to put up the facts to prove the allegations upon which it relies, and not to rely on surmise. Instead Credit Europe seized upon incorrect hearsay advice in the affidavit of Garanti's South African attorney, Mr Clark, that he had been advised that the demise charter had been cancelled with effect from June 2014. It then used this incorrect statement as the basis of its opposition to the claims of the Opposing Suppliers and other necessary suppliers whose claims rank ahead of Credit Europe. Mr *MacWilliam* pointed out that the 'legal advice' ran contrary to numerous prior statements regarding the continued existence of the demise charter, and contrary to the conduct of both Caliskan and Garanti.

[42] Further, on 10 June 2015 Garanti itself stated that the hearsay advice by Mr Senol, who is Garanti's Turkish legal representative, was wrong, and thereafter reaffirmed several times that the demise charter remained of full force and effect until the sale of the Vessel. Mr *MacWilliam* therefore submitted that the opinion of the Turkish experts should not take precedence over the averments on oath by the parties to the demise charter, which are consistent with the conduct of the parties subsequent to the delivery of the alleged termination notice. He nevertheless offered a detailed analysis of the opinions of the experts respectively employed by Credit Europe and the Opposing Suppliers.

Discussion

[43] It is common cause that as neither the Opposing Suppliers nor Credit Europe are parties to the demise charter, they have no personal knowledge of the dealing between Caliskan and Garanti insofar as the demise charter is concerned. Nor are they able to challenge on a factual basis the persistence of both Caliskan and Garanti, that the demise charter which was to have ended in December 2015, remained valid and binding as it was never terminated until the sale of the Vessel. Caliskan and Garanti do not dispute the validity of the alleged termination notice served by Garanti on Caliskan. However, they assert that there was no intention to proceed with the termination because the parties agreed on the amended payment plan and supplementary agreement.

[44] In Garanti's answering affidavit, Mr Tasliyurt states: 'The effect of the parties signing the payment plan referred to above was, by agreement between Garanti and Caliskan, to suspend the operation of the Notice dated 15 April 2014.' Therefore, there was consensus between the parties as to the status of the notice and termination. By way of analogy, the following excerpt from *Kerr's Law of Sale and Lease*²¹ provides the apposite legal principle in respect of a notice of termination: 'Notice is a unilateral act and once given it is final - it cannot be withdrawn, except with the consent of the other party...'. Even though the notice was 'suspended', it was effectively ignored by the parties after the signing of the amended payment plan. This is indicative that the intention of the parties was that the amended payment plan superseded the notice. Further the existing demise charter was amended to the extent of the *supplementary* agreement, a further indication that the original demise charter remained extant.

[45] It is also common cause that, until the sale of the Vessel, all the parties, including Credit Europe, accepted without qualification that Caliskan was at all material times the demise charterer of the Vessel. This is not unexpected as the Turkish International Ship Registry reflects Caliskan as the demise charterer of the Vessel pursuant to the demise charter up until the judicial sale of the Vessel in execution on 4 February 2015. On 23 June 2014 Caliskan brought an application in this jurisdiction to set aside the arrest of the Vessel. Had the demise charter been terminated by the

²¹ G Glover *Kerr's Law of Sale and Lease* 4 ed at 574.

alleged termination notice served by Garanti in April 2014, Caliskan would not have had the *locus standi* to bring that application. Caliskan's attorney stated under oath in the founding affidavit in that application that Caliskan as 'the current bareboat charterer of the vessel' was 'required to redeliver the vessel to her Owners at the end of the charter.' The Vessel's insurance was endorsed on 30 June 2014 and the 'Managing Owner' was recorded as 'Caliskan'.

[46] There is also no record of Garanti demanding redelivery of the Vessel from Caliskan or attempting to take possession thereof, as provided in clause 6.3/article 42 of the demise charter. If the demise charter were terminated, the Vessel would have to have been restored to Garanti. Instead Garanti and Caliskan entered into an amended payment plan for payment until December 2018, which is consistent with the assertion by the Opposing Suppliers that the amended payment plan superseded Garanti's alleged termination notice delivered in April 2014. In effect there was a tacit withdrawal of the notice by Garanti with the consent of Caliskan.

[47] Mr *Mullins* however submitted that Caliskan took no part in the judicial proceedings after August 2014 and had effectively abandoned the Vessel, from which it could be further inferred that the demise charter had been terminated prior to that date by way of Garanti's alleged termination notice. Mr *MacWilliam* however, correctly in my view, pointed out that while Caliskan could do little after the arrest by Credit Europe, it did not abandon the Vessel. Caliskan's crew remained on the Vessel until October 2014, when at Credit Europe's instance, the master was removed by the Sheriff. Caliskan then repatriated the crew. Caliskan would not have retained its crew on the Vessel if in fact the demise charter had terminated in June 2014, nor would Horizon (Caliskan's agent) have continued to act as the Vessel's manager on behalf of Caliskan after the alleged date of termination. It was also once the Sheriff assumed responsibility for the preservation of the Vessel that Caliskan stopped payment of the P & I insurance. It is also relevant that Caliskan/Horizon made arrangements for the bunker supply in September 2014. In my view, nothing in the conduct of Caliskan sustains the inference that it abandoned the Vessel, and more importantly, that the demise charter was terminated.

[48] Further Credit Europe acknowledged in its Practice Note in the urgent sale application it launched on 2 October 2014 that it was common cause that: '(c) the owner of the respondent is Garanti, a Turkish financial leasing company; (d) *the bareboat charterer of the vessel is Caliskan*, a Turkish company. . .'.²² Therefore, even on Credit Europe's own version the demise charter was extant months after it was allegedly terminated by Garanti's notice.

[49] The doubt that the demise charter may have terminated prior to the sale of the Vessel first arose on 18 February 2015, when Garanti's South African attorney, Mr Clark, deposed to an affidavit in support of Garanti's claims against the Fund in which he stated that he 'was recently advised by Mr Senol that [Garanti] cancelled the bareboat charter with effect from 15 June 2014.'

[50] Garanti, which does not rely on the deeming provision for its claim in this Court, persists that the demise charter was extant at the time of the sale. Through Mr Tasliyurt, it has stated that '[t]he bareboat charter was not terminated at any point prior to the judicial sale of the vessel on 5 February 2015', and provided a substantial explanation for this statement and why the confusion about the status of the demise charter arose. Mr Tasliyurt's version²³ is as follows: The alleged termination notice, which is a valid notice, was not furnished to Garanti's attorneys until shortly before Garanti's claim against the Fund was filed on 18 February 2015. Although the notice was served on Caliskan, Garanti and Caliskan agreed to extend the demise charter with an amended payment plan on 24 April 2014. The effect of the signing of the payment plan was to suspend the alleged termination notice. Therefore, the demise charter between Garanti and Caliskan was never terminated and remained extant and binding on the parties until the judicial sale of the Vessel.

[51] Mr Tasliyurt further confirmed that the instructions given to Mr Senol were that 'the bareboat charter remained in place at all material times and that it was accordingly the responsibility of Caliskan to deal with the daily operational issues relating to the vessel.' The alleged termination notice was not sent to Garanti's attorneys because it

²² Emphasis added.

²³ In the founding affidavit to Garanti's counter-application.

was not relevant to its challenge to sell the Vessel. However, in the course of preparation of Garanti's claim, a copy of the alleged termination notice was sent to Mr Senol.

[52] Mr Senol inadvertently overlooked the payment plan agreement of 24 April 2014 and concluded that the effect of the notice under Turkish law was the termination of the demise charter on 15 June 2014 because the outstanding hire had not been paid by that date. Mr Senol conveyed his incorrect conclusion to Mr Clark who then made the same incorrect averment in his supporting affidavit filed with Garanti's claim against the Fund. Nevertheless, the alleged termination notice had been superseded by the payment plan agreement of 24 April 2014. Mr Tasliyurt also furnished a second notice dated 8 May 2014, which was sent to the guarantors of the demise charter and not Caliskan. He avers that in terms of the second notice the operation of the alleged termination notice was suspended and no longer valid as a matter of Turkish law.

[53] Mr Senol confirmed this explanation²⁴ and also expressed his view that: '... as a matter of Turkish law the payment plan agreement between Garanti and Caliskan had the effect of suspending the Notice dated 15 April 2014 with the effect that the bareboat charter was not terminated on 15 June 2014. I confirm that this accords with Garanti's instructions to me and the instructions that I was given in regard to this issue on 2014.' Mr Senol further confirmed that he inadvertently overlooked the payment plan agreement which led to his mistaken conclusion that the demise charter had been terminated by way of the alleged termination notice.

[54] In a further affidavit delivered to the Referee on 10 June 2015, Mr Senol again affirmed that the instructions that he received from Garanti during the course of their opposition to the sale application, and which were passed on to Mr Clark, 'were that the Bareboat Charter remained in existence, valid and binding between the parties, and had not been terminated'. Mr *MacWilliam* submitted that this is consistent with Garanti's conduct in opposition to the sale application, which Mr Senol records was 'premised on the basis that the bareboat charterparty remained in place, valid and binding between the parties'. Mr Senol again admitted that the hearsay statement by

²⁴ Confirmatory affidavit to the founding affidavit deposed to by Mr Tasliyurt.

Mr Clark that the demise charter was cancelled was made on the strength of his incorrect legal conclusion in February 2015, based on his own interpretation of Garanti's notice 15 April 2014 and apologised for the resultant confusion.

[55] Although Credit Europe has submitted that Garanti's *volte face* was suspicious, Garanti's persistence that the demise charter was not terminated is consistent with the fact that the demise charter remained registered in the Turkish Shipping Registry, which in fact delayed the judicial sale. Had the demise charter been terminated because of Caliskan's default, and whether Garanti took back its Vessel or not, it would have been expedient for Garanti to deregister and cancel the public record of the demise charter. By the deregistration Garanti would have avoided the risk of any other debts of Caliskan attaching to the Vessel. However, the Vessel was sold and the proceeds on the sale have been utilised to defray the debts of Caliskan.

[56] Credit Europe also relies on the fact that Caliskan's trustees/administrators did not authorise or ratify the amended payment plan entered into by Caliskan and Garanti on 24 April 2014 to aver that the supplementary agreement was not valid and could not disturb the termination procedure commenced by Garanti. However, the legality or otherwise of the amended payment plan does not impinge on the intention of Garanti not to give effect to the alleged termination notice and not to terminate the demise charter. Caliskan too accepted the benefit of the amended payment plan.

[57] Further, as stated by Credit Europe's own Turkish expert, Pro Akkanat, albeit in relation to the Debt Liquidation Agreement, the invalidity of an agreement 'does not preclude reliance on the statements in an invalid agreement which records the acceptance of particular legal facts.' The parties must have accepted that there was an existing demise charter in order to rearrange the payment and supplement the existing demise charter. As already held, the fact that Caliskan brought the application to set aside the arrest of the Vessel indicates that the parties thereafter conducted themselves as though the demise charter was not cancelled by the notice.

[58] To sustain its alternative averment that the demise charter must have been terminated by 5 January 2015, Credit Europe relied on the purported Debt Liquidation Agreement dated 5 January 2015 and the fact that the outstanding indebtedness of

Caliskan to Garanti was reduced to US\$500,988 by 5 January 2015 (having been US\$ 11,763,010 as at 15 April 2014). Credit Europe's argument that the Debt Liquidation Agreement establishes that the demise charter was terminated is premised on its terminology. The preamble to the Debt Liquidation Agreement provides that:

'This Agreement has been arranged. . . to determine the principles and procedures of evaluation and liquidation of the debts payable to creditor *due to the termination of the leasing agreement* executed between the Debtors and the Creditor stated herein.' (Emphasis added by Credit Europe).

There are no less than eight further references to the termination of the 'leasing agreement' (demise charter) or to the terminated agreement(s).

[59] The Opposing Suppliers contend that there is no proper basis for Credit Europe's inference, particularly not in the face of unequivocal statements by Garanti representatives confirming that the demise charter was not terminated. To the contrary, the fact that on 5 January 2015 the parties were still attempting to conclude a Debt Liquidation Agreement, appears to be an indication that the demise charter had not been terminated.

[60] Credit Europe's argument is undermined firstly by the fact that the draft Debt Liquidation Agreement was unsigned and therefore there is no valid agreement between Garanti and Caliskan. Secondly, Credit Europe asserted that there is no evidence that Caliskan made any further payments to Garanti under the demise charter or amended payment plan after April 2014. Credit Europe averred that this non-performance by Caliskan indicated that the amended payment plan was of no force or effect and that the demise charter had been terminated by Garanti's notice in June 2014. However, it now relies on the fact that the outstanding indebtedness of Caliskan to Garanti was reduced to argue that this establishes that the demise charter was terminated. In my view, the reduction in its indebtedness establishes that there was payment by or on behalf of Caliskan, although it is not clear whether it was strictly in accordance with the amended payment plan.

[61] Thirdly the references in the Debt Liquidation Agreement to the 'termination of the leasing agreement' appear to be a recordal of the fact that upon signature thereof, the demise charter would terminate. As recorded in the Referee's report, Garanti itself

clarified that the purpose of the Debt Liquidation Agreement was get payment from Caliskan but 'should not be regarded as indicating that at the time of the preparation of the documents, Garanti was of the view that the charter was terminated'. The Referee issued directions on 12 June 2015 to Garanti to explain the apparent contradiction in Mr Talisyurt's affidavit in support of its claim: Mr Tasliyurt stated that the demise charter was not terminated although the Debt Liquidation Agreement referred to the 'Terminated Leasing Agreement'. The Referee subsequently accepted the explanation offered through Mr Tasliyurt that standard terminology was utilised in the drafting of Debt Liquidation Agreement and 'the terminated agreement' should not be interpreted to mean that the demise charter had been terminated.

[62] There is in any event no factual evidence which would lend probative value to Credit Europe's assertion that the demise charter must at the least have been terminated by the time Debt Liquidation Agreement was drawn up. What the Debt Liquidation Agreement does do is to sustain Garanti's stance that it did not terminate the demise charter pursuant to the alleged termination notice it served on Caliskan in April 2014.

[63] The conspectus of the facts and the conduct of Caliskan and Garanti weigh the probabilities in favour of a finding that the demise charter was not terminated as alleged by Credit Europe. Before this Court, Garanti abandoned its claim for outstanding hire. It could therefore no longer be alleged that its persistence that the demise charter had not been terminated was in any way self-serving. On the contrary, Credit Europe's sweeping proposition that the Referee ought to have rejected all Garanti's averments because he was dissatisfied with some of its submissions (relating to Garanti's claims), is self-serving because Credit Europe has not provided a sound basis therefor. The Referee, in my view, dealt with the issue of the termination of the demise charter comprehensively and thoroughly.

The Referee's interrogation of the alleged termination of the demise charter

[64] In his Report, the Referee dealt with the termination of the charter as a preliminary issue to the determination of the claims and their ranking. He investigated the issue not only through a consideration of the objections, replies and rejoinder by the claimants, but he also requested further information from three parties, two of

whom were Credit Europe and Garanti. The Referee also gave directions to Garanti, as referred to above and considered supplementary submissions by Credit Europe and the eighth and ninth respondents. His final report on the termination of the demise charter is therefore comprehensive.

[65] Credit Europe lodged a uniform objection to the claims of several parties with the Referee, the basis of which was the same as raised in this application: the claimants whose claims were founded on the deeming provision in s 1(3) of AJRA were precluded from enforcing their claims against the Fund after the termination of the demise charter. The submissions of the eighth and ninth respondents in reply closely align with paragraphs 43 to 61 of the foregoing discussion. In addition the respondents, relying on the Turkish legal authority of Dr M Topuz,²⁵ submitted that under Turkish Law, even when a demand is served on the defaulting lessee, a leasing agreement such as the demise charter is not terminated automatically when the lessee defaults with payment. In order to terminate the lease, a separate notice of termination must be given following the failure to perform in the period stated in the original demand. Further, under Turkish law, Calsikan was under a duty to re-deliver the Vessel to Garanti in order for there to be a proper termination of the demise charter. The respondents pointed out that Garanti had not demanded delivery or taken any steps to take possession of the Vessel.

[66] In its rejoinder, Credit Europe furnished the legal opinion of its Turkish lawyer, Mr Cavus, to the effect that there was no requirement to serve a second notice in the termination process on the defaulting party. The termination declaration is contained in the payment notice and such termination notice is irrevocable. Mr Cavus opined further inter alia, that the payment plan agreement of 24 April 2014 did not novate the demise charter and the vested rights of Garanti as lessor under the termination notice of 15 April 2014 were not prejudiced.

[67] Mr Cavus' further opinion related to the right of an innocent party to terminate a lease if a material breach by one of the contracting parties renders the lease intolerable. This advice is not relevant as Garanti has denied that it terminated the

²⁵ Dr Topuz is later referred to as Prof Topuz. I have retained the title used by the Referee in his report.

demise charter. Mr Cavus also suggested that the termination was evident from the abandonment of the Vessel on 17 October 2014 when the crew disembarked, the statement in the Debt Liquidation agreement that the lease had been terminated and the allegation by Mr Clark in the claims affidavit that the demise charter had been terminated pursuant to the notice served by Garanti. These very points were subsequently advanced in argument on behalf of Credit Europe in this Court.

[68] The Referee thereafter addressed questions to each of the three parties interrogating their submissions, specifically in relation to the respective Turkish legal opinion each party relied on. I do not intend to traverse the Referee's questions and the responses noted under clause '2.3.4 Request for further information' in his report. I note however that the pertinent and detailed questions interrogated the issue of termination of the demise charter thoroughly and should be read as if incorporated herein. The outcome was that the eighth and ninth respondents submitted to the Referee an opinion from Dr Topuz in which he confirmed and elaborated on the principles of Turkish law relied on by the eighth and ninth respondents in their initial submissions.

[69] Dr Topuz maintained that the demise charter had not been terminated. With reference to the supplementary agreement, he pointed out that the words 'the agreement is terminated' in Article 2 indicated that the demise charter was still effective; the new payment schedule only ended on 11 December 2018 (Article 3); and that Article 7 stated that the provisions of the charter shall continue to have effect. He stated that '[t]he fact that the parties agreed with their mutual will and decided that the agreement between them was still in effect invalidates all termination claims based on the old warning letter.'

[70] He therefore furnished reasons based specifically on the terms of the new payment plan and supplementary agreement entered into by Garanti and Caliskan, for concluding that the payment period stipulated in the 'warning letter' or termination notice was renounced and the termination notice and procedure were revoked before the expiration of the termination period. In doing so, Dr Topuz disagreed with the view of Mr Cavus that because the rescheduled payment plan stated that it would not be a novation of the demise charter, the default position of Caliskan continued and the

vested rights of Garanti were not prejudiced. Dr Topuz also found that Garanti's alleged termination notice did not comply with article 68/b of the Turkish Bankruptcy and Enforcement Law and was not a valid termination letter.

[71] Credit Europe submitted the opinion of Mr Cavus that as matter of Turkish Law, the Caliskan bankruptcy protection order of 17 March 2014 did not prevent a creditor from exercising its rights to terminate a contract with the bankrupt company.

[72] The Referee asked Garanti detailed questions relating to its claim and the demise charter, many of which arose from the averment in its claims affidavit that the demise charter had been cancelled. In response, Garanti filed the aforementioned affidavits of Mr Talisyurt and Mr Senol, in which they explained the error about the termination of the lease agreement and confirmed that the demise charter had remained in place until the judicial sale in February 2015. Consequently, the Referee issued further directions to the parties to obtain clarification on the changed circumstances. Garanti was, inter alia, specifically requested to explain the discrepancy between Garanti's confirmation that the demise charter was not terminated and the references to the 'terminated' lease agreement in the Debt Liquidation Agreement.

[73] In response Mr Tasliyurt reported that the Debt Liquidation Agreement, which was intended to make Caliskan agree to the payment plan, was prepared using the 'standard form wording that Garanti uses in documents of this nature' and 'should not be regarded as indicating that at the time of preparation of the document, Garanti was of the view that the Financial Leasing Agreement (charter) was terminated'. He also stated that Caliskan and not Garanti, had employed the crew at all relevant times, specifically between 15 June 2014 and October 2014, and that the Vessel had remained in Caliskan's control. Caliskan and/or its agent Horizon had paid for the repatriation of the crew. Horizon had also attended to various operational matters on behalf of Caliskan.

[74] Credit Europe who had premised its objection largely on the retracted or disavowed allegation of termination of the demise charter, was also permitted to file supplementary submissions. The central point then made by Credit Europe was that

when Caliskan relinquished physical possession and control of the Vessel in October 2014 by removing the master and crew and had no further involvement with the Vessel, it ceased to be the charterer of the Vessel by demise for the purposes of s 1(3) of AJRA. This is clearly the reason why Credit Europe offered October 2014 as an alternative termination date in this Court. It also expressed grave reservations about the form and content of the affidavits of Messers Tasliyurt and Senol.

[75] In their supplementary submissions the eighth and ninth respondents denied that there was any factual or legal basis for Credit Europe's contention that the demise charter was terminated by Calsikan's repatriation of the crew in October 2014, or that Caliskan had abandoned the Vessel when the responsibility for its preservation had been placed on the Sheriff.

[76] The Referee was, in effect, faced with the same arguments and submissions that were made in this Court, except for the additional expert opinions of Professor Akkanat obtained by Credit Europe to counter that of Dr Topuz, which found favour with the Referee. However, the Referee had the advantage of obtaining directed clarification from the parties themselves, on affidavit where so required, on the focal and crisp issue of whether or not the demise charter was terminated. Through that fair process, the Referee compiled a substantial body of facts and submissions for his analysis and assessment of 'the status of the contractual relationship between Caliskan and Garanti, and what legal interest did Caliskan have in the vessel at material times'.

[77] The Referee concluded that:

'... once the parties to the charter concluded the amendment to the payment plan on 24 April 2014, it did not remain open to Garanti to terminate the charter upon the expiry of the 60 day period, nor could there have been any automatic termination upon this date. Article 41(a) of the charter gave Garanti the right to terminate the charter upon default of the payment plan. Upon the payment plan being amended, Caliskan was no longer in breach of the payment plan and any right which may have accrued to Garanti in this regard must have lapsed.'

[78] The Referee favoured the view of Dr Topuz in reaching this conclusion. I also find the opinions of Dr Topuz logical and well-reasoned and consequently more

persuasive than that of Mr Cavus. Dr Topuz was also an independent party, unlike Mr Cavus who was Credit Europe's legal counsel and his opinion preceded the correction of Mr Clark's erroneous statement by Garanti in the affidavits of Mr Tasliyurt and Senol. There is cogent authority that expert evidence from a source that is not neutral is undesirable.²⁶ I further share the Referee's view that Caliskan's lack of involvement in the operations of the Vessel after August 2014 is not a reliable yardstick to measure its deemed ownership, a point that Credit Europe persisted with before this Court.

[79] Having considered Garanti's explanation in respect of the Debt Liquidation Agreement, the Referee found that the document did not afford any support for the argument that the demise charter was terminated. No further cogent reason was offered by Credit Europe in this Court. I am satisfied that this argument may properly be disposed of without further consideration. This then also negates 5 January 2015 as the alternative date of termination offered by Credit Europe.

[80] Finally, I am also in agreement with the Referee that, faced with the confirmation by Caliskan and Garanti that the demise charter was never terminated, and the concomitant conduct of the parties, the circumstantial evidence relied on by Credit Europe was insufficient to establish such termination. It is clear that the Referee was mindful that there was also circumstantial evidence which neutralised the evidence pointing towards termination. He also factored in his view that Garanti's submissions had certain 'unsatisfactory features'. I am in the premises unable to find any reason to fault or find error in the Referee's reasoning or recommendation that the demise charter was never terminated.

The Turkish legal opinions on the termination of the demise charter

[81] In this application Credit Europe and the Opposing Suppliers have furnished further opinions of Turkish legal experts. Their respective submissions on the validity of the opinions to the pertinent issues in dispute and how this Court should deal with the differing opinions are polarised. Credit Europe submits that the Court should rely on the opinions of its experts Mr Cavus and Prof Akkanat. If, however the Court is

²⁶ See *MV Pasquale Della Gatta*; *MV Filippo Lembo*; *Imperial Marine Co v Deiulemar Compagnia Di Navigazione SPA* 2012 (1) SA 58 (SCA) at 72B; *Stock v Stock* 1981 (3) SA 1280 (A) at 1296F.

unable to resolve the dispute between the experts, the matter should be referred to trial so that the experts may present oral testimony in those proceedings. The Opposing Suppliers contend that this Court does not even have to consider the opinions of the Turkish law experts unless Credit Europe successfully defeats the other defences raised by the Opposing Suppliers. They submit that the direct evidence of Garanti, Caliskan and the public record of the continuation of the demise charter in the Turkish International Ship Registry demonstrate that the demise charter was not terminated pursuant to the April 2014 termination notice.

[82] Mr *MacWilliam* argued further that the opinions of Mr Cavus and Prof Akkanat do not deal with this direct evidence nor do their opinions to the contrary create a genuine dispute of fact. He referred the Court to *The Asphalt Venture*,²⁷ in which there was a dispute in relation to foreign law, as in this case. The opposing parties in *The Asphalt Venture* placed expert opinions on Indian Law before the court a quo. On appeal, the Supreme Court of Appeal criticised the court a quo for ‘accepting the plausibility of the opinion of Bergshav’s experts, without analysing that evidence’, and pointed out that a court ‘is not bound to accept the view of experts and it may, for cogent reasons, accept the testimony of one as against that of another where they are at odds.’²⁸ On this authority, the plausibility of its Turkish law experts must first be analysed by the Court. Mr *MacWilliam* submitted that aforesaid comments in *The Asphalt Venture* sustained the Opposing Suppliers’ argument that Credit Europe’s contention that the dispute between the Turkish Law experts should be resolved by way of oral evidence is without merit.

[83] I have considered the detailed arguments of Mr *Mullins* and Mr *MacWilliams* on the opinions of the experts. I have already expressed my reservation about the independence of Mr Cavus and the relevance of his opinion. The Referee also preferred Dr Topuz’s opinion to that of Mr Cavus. It is also relevant that Mr Cavus’s legal opinion which was given on 17 April 2015, preceded the correction by Mr Tasliyurt and Mr Senol of Mr Clark’s error and their unequivocal statement that there

²⁷ *The Asphalt Venture; Windrush Intercontinental SA & another v UACC Bergshav Tankers AS* 2017 (3) SA 1 (SCA).

²⁸ *Ibid*, para 31.

had in fact been no termination,²⁹ and was therefore based on the incorrect hearsay allegation of Mr Clark that the demise charter had been terminated. As espoused by the court in *Imperial Marine*, unless the underlying facts relied on by an expert witness have been established, the expert opinion is worthless and should be disregarded, because it is purely hypothetical.³⁰

[84] The same principle applies to both opinions of Prof Akkanat. In Credit Europe's replying affidavit deposed to by its attorney, Mr Prain, it is clear that Prof Akkanat based his first opinion on his understanding of the facts based on translated 'instructions from Credit Europe's local attorneys'. Further, both opinions were based on copies of 'certain documents presented to the High Court.' Prof Akkanat does not specify which documents he considered. Specifically, there is no indication that he considered the crucial answering affidavit of Mr Tasliyurt or any other evidence of Garanti, including that placed before the Referee, intended to establish that the demise charter was not terminated. As pointed out by Mr *MacWilliam*, Prof Akkanat does not mention any of Mr Tasliyurt's unequivocal statements made under oath that the demise charter was never terminated and that Garanti's alleged termination notice of April 2014 was superseded by the payment plan. Nor does Prof Akkanat attach any significance to Mr Tasliyurt's evidence that Garanti did not accelerate the payment obligations of Caliskan.

[85] In my view Prof Akkanat's opinions are therefore hypothetical as he has failed to establish the underlying facts on which he based his opinions, and therefore his opinions fall to be disregarded. Consequently, there is no need to consider any of the Turkish legal opinions further, or Credit Europe's submission that oral evidence is the appropriate means to resolve the disputes on Turkish Law.

[86] I have already found that Credit Europe has advanced no persuasive argument or furnished substantive evidence that the demise charter was terminated on the other dates it refers to in its wide ranging surmise about the termination. There is therefore no legal or factual basis on which to find that the demise charter was terminated

²⁹ The affidavit of Mr Tasliyurt was furnished to the Referee on 10 June 2015.

³⁰ *MV Pasquale Della Gatta; MV Filippo Lembo; Imperial Marine Co v Deiulemar Compagnia Di Navigazione SPA* 2012 (1) SA 58 (SCA) at 71B-C.

consequent to Garanti's notice on 15 June 2014 or on any of the alternative dates suggested by Credit Europe. I am satisfied that the Referee's recommendation that the demise charter had never been terminated at any time prior to the judicial sale of the Vessel is in no way undermined by the additional arguments presented by Credit Europe in this Court.

[87] In the premises, I am satisfied that Credit Europe has failed to discharge its onus to prove on a balance of probabilities that the Referee erred in concluding that the demise charter was extant at the time of the judicial sale and that the disputed claimants could therefore rely on the deeming provision. I am also satisfied that the Opposing Suppliers have discharged their onus to prove their claims which are disputed by Credit Europe before this Court. Consequently there is no reason to refuse the confirmation of the Referee's report insofar as it relates to the recommendation of the payment of the Opposing Suppliers claims.

[88] In terms of the relief set out in its amended draft order, Credit Europe sought costs on an attorney and own client scale ranked in terms of s11(4)(a) if it were successful in defeating the claims of the Opposing Suppliers and Garanti. However, at the hearing of the matter the parties were *ad idem* that the costs of this application should be borne by the unsuccessful party, and should not be paid out of the Fund. Consequently, Credit Europe must bear the costs of the parties who opposed this application. The Opposing Suppliers have submitted that costs should be awarded on a party and party scale. I am in favour of this submission as I am of the view that costs on a higher or punitive scale are not warranted.

Garanti's claims before the Referee and its counter-claim in this application

[89] Garanti opposes Credit Europe's application insofar as it relates to Garanti's claim for preservation costs, because the Referee has not recommended payment of its claim. It is common cause that while the Vessel was under arrest in Richards Bay and Durban at the instance of Credit Europe, Garanti paid various amounts for bunkers delivered and provisions supplied to the Vessel, the Vessel agent's fees, insurance, outstanding hire and made payments to the master and crew of the Vessel. As Garanti abandoned its claim for outstanding hire under the demise charter and premium

payments for Protection & Indemnity (P&I) and Hull and Machinery (H&M) Insurance before this Court, those claims are not relevant to this discussion or judgment.

The Referee's Report

[90] In asserting the relevant claims before the Referee, Garanti contended its payments had the effect of preserving the Vessel for the benefit of the arresting parties and other creditors of the Vessel and the Fund, and ought to rank as preservation costs:

(a) In terms of s 11(4)(a) of AJRA which provides:

‘(4) The claims mentioned in subsection (2) are the following, namely—

(a) a claim in respect of costs and expenses incurred to preserve the property in question or to procure its sale and in respect of the distribution of the proceeds of the sale;’

(b) alternatively in terms of s 11(4)(c)(i), (v) or (viii), ‘as a result of Garanti having stepped into the shoes of the relevant supplier’ in terms of s 11(8) of AJRA which provides:

‘(8) Any person who has, at any time, paid any claim or any part thereof which, if not paid, would have ranked under this section, shall be entitled to all the rights, privileges and preferences to which the person paid would have been entitled if the claim had not been paid.’

[91] Several objections were raised against Garanti's claim by Credit Europe and the respondents in this application. The main objections were that:

(a) Garanti was the owner of the Vessel at all relevant times when it incurred the expenditure to preserve the Vessel and in doing so acted as owner preserving its own property. The intention of the legislature could not have been to permit an owner of a vessel to recover from a fund costs incurred in respect of its own property to the prejudice of third party creditors. Garanti's expenditure did not give rise to a maritime claim enforceable against the Vessel *in rem* or a maritime claim against the Fund based on the *in personam* liability of Garanti itself.

(b) Section 11(4)(a) of AJRA does not establish a basis for a claim against the Fund. It deals only with the ranking of claims which have been proved.

(c) An owner cannot acquire claims under s 11(8) of AJRA where it is itself the debtor. Payment of the supplier's claim extinguishes the debt.

[92] In its response to the objections Garanti stated *inter alia* that:

(a) In respect of the preservation claim, it is not relevant to consider the identity of the party which made the payment or whether there would have been a claim enforceable against the Vessel in terms of either s 3(4) or s 5(3) of AJRA.

(b) Section 11(4)(a) should be purposively interpreted. By virtue of the wording of s 11(4)(a) the legislature created a *sui generis* category of claims which are entitled to be ranked under s 11(4)(a) if there is a sufficiently close connection between the costs and expenses incurred and the preservation of the Vessel. Therefore the relevant costs and expenses must have been incurred to preserve the Vessel, which preservation is in the interests of the general body of creditors against the Fund. The fact that the payment was made by the owner is irrelevant.

(c) Provisions are supplied for the benefit of the master and crew and therefore for the Vessel itself and accordingly fall within the ambit of preservation costs and expenses. Garanti has furnished sufficient proof of its claim. Garanti also provided a schedule of payments to the master and crew who had to necessarily remain on board the Vessel while under arrest to preserve the Vessel. Had the Sherriff paid the master and crew, he would have been able to recover these payments as preservation costs. There is no reason why Garanti should not be entitled to do so.

[93] In their rejoinder the Eighth, Ninth and Tenth Respondents (referred to as Zeba et al in the Report) disputed that s 11(4)(a) establishes a *sui generis* basis for payment out of a Fund without an underlying enforceable claim and contended that there is no wording in the subsection or the statutory framework as a whole that permits such an interpretation. Garanti has admitted that it does not have a claim that would be enforceable under either s 3(4) or s 5(3)(a), and cannot identify any party against which it enjoys a claim in law. Therefore it has no legal basis for its claim.

[94] In his analysis of Garanti's claim the Referee noted that '[i]n advancing a claim against the Fund, Garanti seeks to share in the proceeds of the sale of its own property. This is a novel proposition.' The Referee then identified three issues he considered relevant to the resolution of Garanti's claim:

'(1) Does it matter that Garanti would not have been able to enforce its claim against the vessel under the Act?

(2) If it does matter, is Garanti saved by section 11(8) of the Act?

(3) In any event, insofar as some of the claims lie against Caliskan, is Garanti entitled to rely upon the provisions of section 1(3) of the Act?’

[95] In his consideration of the first issue the Referee found authority in *The Kingston*³¹ to conclude that:

‘Garanti would have to show that it has a maritime claim which it would have been entitled to enforce against the vessel under the Act. Save insofar as the claims lie against Caliskan . . . , there is no suggestion that Garanti would have been able to advance its claims by arresting or attaching the vessel.’

Thus, an enforceable maritime claim would have to be established before a ranking under s 11 could be considered.

[96] The Referee then considered whether the principle established in *The Kingston* applied to preservation claims. Garanti had submitted that the auctioneer and Sheriff were entitled to proceed against the Fund although they would not have been entitled to proceed against the Vessel under AJRA. The Referee found that the auctioneer and Sheriff’s claims were clearly distinguishable: the Sale Order provides for the payment of their claims from the Fund, and the Sheriff may in any event proceed against the Fund for fees not covered in the Sale Order under s 11(8) of AJRA. He also found it relevant that while other parties who incur preservation costs generally do so in order to maintain the value of the asset for the benefit of all creditors, an owner who incurs preservation costs usually does so to protect his own interests. The Referee pointed out that Garanti opposed the sale application and ceased contributing to the preservation of the vessel after about September 2014.

[97] The Referee also agreed with Zeba et al that s 11(4) deals with the manner in which claims ought to be ranked for purposes of the Fund’s preferential distribution and does not create a legal basis upon which a maritime claim is founded, finding authority in the comments of Ploos van Amstel J in *MV Da Qing Xia*.³² In rejecting Garanti’s submission the Referee stated:

‘Garanti’s argument that the only relevant consideration is whether there is a sufficiently close connection between the expenses and/or costs incurred and the preservation of the vessel is

³¹ *The Kingston In Re Creditcorp Ltd* 1991 SCOSA D78 (D).

³² *MV ‘Da Qing Xia’: LBH Mozambique Limitada v MV ‘Red Fin’* 2015 JDR 0706 (KZD), para 15 (also reported as *The DA Qing Zia* SCOSA D410 (D)); Referee’s report p. 63.

accordingly, in our view, not correct. There is simply no warrant for this in the Act. Even in respect of preservation costs, it is necessary that the claimant first demonstrate that it enjoys a claim which is enforceable against the vessel under the Act. This entitlement must be located outside of section 11(4)(a) of the Act, whether that be in contract, delict, enrichment, or with reference to the sale order or section 11(8) of the Act.'

[98] In respect of the second issue viz Garanti's reliance on s 11(8), the Referee was not persuaded by the submissions of Credit Europe and Zeba et al that the payment by Garanti extinguished the claims. Examining the provenance and historical context of s 11(8), the Referee concluded that s 11(8) obviated the need for a person who voluntarily paid the claim of a lienor to obtain the leave of the Court before he could step into the shoes of the lienor,³³ and that the beneficiary of s 11(8) is a 'Samaritan' who pays a maritime claimant.³⁴

[99] He accordingly rejected the submission that s 11(8) encompasses claims by an owner who pays its own debt for which it is contractually liable. He considered further that when an owner pays the debt of a demise charterer such payments should be treated as payments by the owner of its own debts. He reasoned that:

'Although the claim lies against the demise charterer, it is enforceable, in South Africa at least, against the owner's property, ie the vessel. In this sense, it is also a claim which burdens the owner, and the owner discharges the claim in order to protect its own property. Viewed thus, the payment of such a claim by the owner is not entirely voluntary, nor is the owner acting purely altruistically.

If an owner were entitled to employ section 11(8) to claim against a fund, it would be able to use this mechanism to avoid the consequences of the rule in *The Kingston*. This is another ground for confining the import of section 11(8) to third parties.'

The Referee therefore concluded that Garanti was not entitled to employ s 11(8) to found a claim against the Fund.

[100] On the third issue of whether Garanti was entitled to rely on the provisions of s 1(3) of AJRA, the Referee considered the following excerpt from the judgment of Ploos van Amstel J in which he issued the Sale Order:

³³ *Mak Mediterranee Sarl v The Fund Constituting The Proceeds of The Judicial Sale of The Mc Thunder (S D Arch, Interested Party)* 1994 (3) SA 599 (C) 1994 (3) SA 599 (CPD) at 608B.

³⁴ *J Hare Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) at 170.

'The commercial connection between the owner and the demise charterer is a close one. The owner allows the charterer to use the ship for the duration of the charter as if it is the owner. . . Ship owners know that the ship can be arrested for certain liabilities of the demise charterer, who indemnifies the owner against this eventuality. The provisions in the (Act) in the regard are aimed at assisting creditors to obtain payment of what is due to them without difficulties relating to jurisdiction and security for their claims.'³⁵

The Referee was satisfied that Ploos van Amstel J had in mind the difficulties of third party creditors and not the owner. He also considered it relevant that Garanti had secured the obligations of Caliskan to it through guarantors and had recovered substantial amounts from them.

[101] The Referee pointed out that s 1(3) is designed to assist claimants who contracted with a demise charterer under the impression that they were dealing with the owner. Clearly this excludes the owner itself. Similarly in *The Chenebourg*³⁶ the court was satisfied that it was unlikely that s 1(3) was intended to give the real owner a moratorium in respect of claims *in rem* against the ship for which the owner was personally liable.³⁷ Therefore a creditor of either the owner or the demise charterer may proceed against the vessel. Creditors of Garanti and creditors of Caliskan were entitled to arrest the Vessel and both sets of creditors may claim against the Fund. The Referee reasoned that if Garanti were permitted to employ s 1(3) to claim against the Fund, it would potentially be competing against its own creditors and further, reduce payment to similarly or lower-ranked creditors of itself and Caliskan. The Referee concluded that s 1(3) should not be construed to allow Garanti's claim against the Fund.

[102] The Referee consequently recommended that none of Garanti's claims should be allowed against the Fund. He nevertheless added a rider in which he provided a synopsis of his views on Garanti's claims in the event this Court were to hold that Garanti is entitled to proceed against the Fund.

³⁵ *Credit Europe Bank NV v MV Tarik III & another* 2014 SCOSA B569 (KZD) para 22.

³⁶ *The Chenebourg Lauritzen Bulkcar A/S v The Chenebourg The Cape Gulf Maple Maritime Inc v E.A.S.T International Ltd* 2009 SCOSA C183 (D).

³⁷ See also G Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 2 ed (2012) at 123-124.

Garanti's counter-application

[103] In February 2016, Garanti filed a counter-application to this application for payment of its claim for preservation costs together with interest and enforcement costs from the Fund.³⁸ In its main claim in the counter-application, Garanti seeks an order for the ranking of its preservation costs in terms of s 11(4)(a) of the Act. In its alternative claims in terms of s 11(4)(c), Garanti alleges that it was entitled to step into the shoes of those who ought to have paid the preservation costs in terms of s 11(8) of the Act. The counter-application is opposed by Credit Europe and the Opposing Suppliers. The crisp issue before this Court, as it was before the Referee, is whether Garanti's claim against the Fund falls within the provisions of s 11(4)(c) in that it was 'a claim in respect of costs and expenses incurred to preserve the property in question', or whether Garanti is excluded from claiming the preservation costs it incurred from the Fund because it was the owner of the vessel.

[104] In this Court, Garanti took issue with the Referee's views and recommendation in respect of its claim and contended that the Referee erred in rejecting Garanti's main claim on the mistaken assumption that an owner was precluded from claiming preservation costs against the Fund although s 11(4)(a) contains no such preclusion. Mr *Gordon* confirmed that Garanti's case is that the legislature has created a *sui generis* category of claims which should be ranked under this section provided that there is a sufficiently close connection between the costs and expenses incurred and the preservation of the vessel.

[105] Mr *Gordon* submitted that there is no basis in law or fact to exclude Garanti's claim based only on Garanti's identity as owner of the vessel. Further there is nothing in the wording of s11(4)(a) which suggests that a particular party, including the owner, is not entitled to recover such costs or that the rights of other parties such as creditors of the vessel, should be regarded as greater than that of its owner. Mr *Gordon* argued further the fact that a claim could be ranked under a different subsection under s 11 does not preclude it from constituting a preservation cost under s 11(4)(a).³⁹

³⁸ Garanti seeks payment of four of the six claims which were lodged with and rejected by the referee

³⁹ Gauntlett AJ stated in *Pentow Marine (Pty) Ltd v The Fund Being The Proceeds of The Sale of The Mv Argos (Transnet Ltd T/A Portnet Objecting)* 1994 (2) SA 700 (C) at 704B-C: 'Claims are not however in principle excluded from being ranked in terms of s 11(4)(a) merely because they are given a specific statutory ranking by the lawgiver in terms of [another subsection]'.

[106] Garanti's alternative claim for preservation costs is based on s 11(8) of AJRA and is dependent upon this Court finding that, as a matter of Turkish law, the demise charter with Caliskan was not terminated but remained in place until January 2015, alternatively to the point of the judicial sale of the Vessel. Garanti submitted that it would, in these circumstances, have an underlying claim against the Fund by virtue of the deeming provision contained in s 1(3) of AJRA in terms of which Caliskan is deemed to have been the owner of the Vessel for the period of the demise charter for purposes of an *in rem* action. Mr *Gordon* noted that this submission did not constitute an admission that in order to recover preservation costs there must be some underlying claim against the vessel and/or the Fund. He submitted that there was no rational basis to hold that the owner of a vessel is entitled to recover preservation costs in circumstances where there is an extant demise charter over the vessel but not in circumstances where no such demise charter exists.

Opposition to the counter-claim

[107] Credit Europe has opposed Garanti's claims for preservation costs on two bases:

- (a) the costs claimed cannot fall to be determined as preservation costs if paid by the owner. Credit Europe adopted the reasoning of the Referee's reasons as to why, even if Garanti could prove its payments and non-recovery of the various expenses, it does not as a matter of law have a claim against the Fund which may be ranking in terms of s 11 of AJRA. However if the Court rejects the s 11(4)(a) claim and considers Garanti's 11(4)(c) claim, the factual disputes about the termination of the demise charter will be relevant and the claim should be referred to oral evidence.
- (b) Credit Europe speculates that these costs have already been recovered by Garanti through Caliskan and its guarantors.

[108] Mr *Mullins* emphasized the onus on Garanti to prove the legal basis of its claims. In *The Stainless Kobe (No 2)* Galgut J held:

'... an application is an ordinary process of the law, one whereby the party concerned should prove its case in the usual way. ... the procedure being an application rather than a trial, and

the relief sought being final in nature, an order cannot be granted. . . if there are reasonable grounds for doubting the correctness of the . . . (applicant's) factual allegations.'⁴⁰

On this authority, Mr *Mullins* submitted that even if the Court were to find some legal basis upon which Garanti can recover expenses incurred against the Fund, the Court cannot recognise the claim on the application papers alone.

[109] The Opposing Suppliers also contend that there is no legal basis for Garanti's claim. Mr *MacWilliam* argued that before s 11 can have application, there must be an underlying claim that would be capable of being enforced in terms of either s 3(4) or s 5(3)(a) of AJRA. He submitted that a claimant who is not entitled to proceed against admiralty property such as a ship, is not entitled to share in the fund which took its place. He contended that Garanti had failed to satisfy either of the requirements of s 3(4) of AJRA, namely:

- (a) Garanti must either have had a maritime lien over the Vessel; or
- (b) the owner of the Vessel must have been liable to Garanti in an action *in personam* in respect of the cause of action concerned. Instead Garanti relies on s 11 of AJRA which only sets out a statutory scheme for the ranking of claims. Specifically s11(4)(a) does not establish a basis for a claim against the Fund; it only deals with the ranking of claims which have been proved.

[110] It is apparent that much of the same arguments were advanced in this Court as were in respect of Garanti's claim before the Referee. These submissions were comprehensively analysed by the Referee. I shall therefore restrict myself to a consideration of the issues pertinent to Garanti's claim only to the extent I find it necessary to supplement, or distinguish from, the Referee's analysis.

Preservation claims and the assessment thereof

[111] In terms of s 1(1)(m) of AJRA, a maritime claim means 'any claim for, arising out of or relating to . . . the supplying of goods or the rendering of services for the employment, maintenance, protection or preservation of a ship.' Section 11 of AJRA provides for the ranking of maritime claims established against a fund. Section 11(4)(a) and s 11(4)(c)(v) mention preservation claims and costs. While a claim may be

⁴⁰ *The Stainless Kobe (No 2) 't Wapen Van Marion BV v The Fund Constituted By The Proceeds of the Sale of the MV Stainless Kobe* SCOSA D69 (D) at D77E-78A.

classified as a maritime claim under more than one category of maritime 'topic' set out the definition of 'maritime claim', in terms of s 11, which is peremptory: maritime claims 'shall be paid in the order prescribed in subsections (5) and (11)'.⁴¹ Further where there is an inconsistency between the definition of maritime claim in s 1(1) and the description of claims in s 11, s 11 should prevail.⁴²

[112] In *The Avalon*, Thirion J described preservation costs as costs which 'are reasonably and necessarily incurred to prevent any material deterioration in the condition of the property.'⁴³ The costs and expenses arising from the arrest of a ship and its subsequent detention, preservation and management and its ultimate appraisal and sale constitute a first charge against the fund.⁴⁴ Section 11(4)(a) provides that a first-ranking claim against the Fund includes 'a claim in respect of costs and expenses incurred to preserve the property in question or to procure its sale and in respect of the distribution of the proceeds of the sale' after the vessel's arrest, generally referred to as a preservation claim.

[113] As correctly stated by the Referee, the enquiry in the test for preservation claims concerns the nature of the claim rather than the identity of the claimant. Although preservation costs are usually incurred by the Sheriff as he is under a statutory duty to take all steps to keep the vessel in custody and to ensure the preservation of the vessel, first-charge preservation costs may be incurred by other creditors. The Referee noted as pertinent the view of Hofmeyr AJ in *Petjalis Engineering* that:

'... there may well be circumstances where such costs and expenses are incurred by someone other than the marshal [the Sheriff in current practice] and, in this event, such costs and expenses would... fall within the scope of s 11(1)(a) [the predecessor to section 11(4)(a)] and would rank accordingly.'⁴⁵

⁴¹ J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) at 174.

⁴² *Ibid* at 176.

⁴³ *The Mv Avalon Curnow Shipping Ltd v Brooks No & another* 1996 (4) SA 989 (D) at 1008G-H.

⁴⁴ G Hofmeyr *Admiralty Jurisdiction and Practice* 2 ed (2012) at 295.

⁴⁵ Referee's report page 8; *Petjalis Engineering Works (Pty) Ltd v South African Transport Services & another* 1988 (1) SA 103 (C) at 116E-F.

[114] A broader interpretation of preservation costs was endorsed by Hugo J in *The Maharani*⁴⁶ and Gauntlett AJ in *The Argos*.⁴⁷ It is on this basis of this authority that the author Hare states:

‘Ranking against a fund therefore should be based upon the premise that any claimant who has rendered services in the interests of preserving the vessel while she is under arrest and pending sale, may, in appropriate circumstances be accorded the ranking status of first-charge s 11(4)(a) “preservation” costs.’⁴⁸

Section 11(4)(c)(v) of AJRA covers claims ‘in respect of the repair of the ship, or the supply of goods or the rendering of services to or in relation to a ship for the . . . maintenance, protection or preservation thereof,’ which are ranked on a different level to preservation claims ranked under s 11(4)(a).

[115] A prerequisite for claims under s 11(4)(a) is that the costs and expenses must be incurred while the ship was under arrest up until the judicial sale, if any. Claims under s 11(4)(c)(v) ‘encompass all other claims relating to “the act of keeping . . . (the vessel) from injury or destruction”’ and must have arisen no more than one year before they are brought against the vessel or the fund.⁴⁹ The Referee recognised that the fact that a claimant is entitled to be ranked at a lesser category, does not mean that it is not also entitled to a preservation ranking. Finally, it is not necessary that there be a direct connection between the preservation expense and the ultimate sale of the vessel.⁵⁰

Discussion

[116] It is not in dispute that claims for bunkers, provisions supplied, vessel agent’s fees and payments to master and crew are maritime claims in terms of s 1(1)(m) of AJRA and are in the nature of preservation claims. Mr *Gordon* confirmed that he was in agreement with the legal framework set out by the Referee in terms of which preservation claims are to be assessed and that the Referee correctly dealt with

⁴⁶ *Universal Group Ltd t/a Island View Shipping Co v The Fund Created By The Sale Of The Mv Maharani, Ex Mv Claire A Tsaviris, & another* 1990 (2) SA 480 (N).

⁴⁷ *Pentow Marine (Pty) Ltd v The Fund Being The Proceeds of The Sale of The Mv Argos (Transnet Ltd T/A Portnet Objecting)* 1994 (2) SA 700 (C).

⁴⁸ J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) at 173.

⁴⁹ *Ibid* at 172; *Mv Ocean King Den Norske Bank Asa V Mv Ocean King, Her Owners And All Other Parties Interested In Her (Sheriff For The District Of The Cape Intervening)* 1997 (4) SA 349 (C) at 351F.

⁵⁰ *The Mv Avalon Curnow Shipping Ltd v Brooks No & another* 1996 (4) SA 989 (D) at 1007G-1008E.

Garanti's s 11(4)(a) and s 11(4)(c) claims separately. However, he took issue with the Referee's conclusion that it was relevant that Garanti would not have been able to enforce its claim against the Vessel under AJRA and Garanti had not cited any authority where an owner has lodged a claim against a fund, whether successfully or not. He also contended that the Referee erred in his interpretation and application of the legal principles set out in *The Kingston*,⁵¹ *The Maharani*⁵² and *The DA Qing Xia*.⁵³

Section (11)(4)(a) of AJRA

[117] Section (11)(4)(a) provides:

'The claims mentioned in subsection (2) are the following, namely –

(a) a claim in respect of costs and expenses incurred to preserve the property in question or to procure its sale and in respect of the distribution of the proceeds of the sale.'

Mr *Gordon* submitted that the principles of contextual and purposive interpretation as set out by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁵⁴ should be applied to s 11(4)(a). It would be unduly restrictive to interpret s11(4)(a) to exclude the recovery of preservation costs simply because they were paid by the owner of the vessel, as opposed to another creditor or the Sheriff. He contended that the Referee erred in his assessment of Garanti's main claim on the mistaken assumption that an owner was precluded from claiming preservation costs against the Fund when s 11(4)(a) contains no such preclusion.

[118] However in my view if the principles of contextual and purposive interpretation are applied to s 11(4)(a), then the section cannot not be considered in isolation. Firstly, it must be considered within the broad context of AJRA as a whole, and secondly, within the context of s 11 of AJRA in particular.

[119] Section 11(4)(a) contains a reference to the claims mentioned in subsection 11(2), which states: 'The claims contemplated in subsection (1)(a) are claims mentioned in subsection (4) and confirmed by a judgment of a court in the Republic or

⁵¹ *The Kingston In Re Creditcorp Ltd* 1991 SCOSA D78 (D).

⁵² *Universal Group Ltd T/A Island View Shipping Co V The Fund Created By The Sale Of The Mv Maharani, Ex Mv Claire A Tsavlis, & another* 1990 (2) SA 480 (N).

⁵³ *MV 'Da Qing Xia': LBH Mozambique Limitada v MV 'Red Fin'* 2015 JDR 0706 (KZD).

⁵⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; see also *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.

proved in the ordinary manner.’ Section 11(1)(a) provides: ‘If property mentioned in section 3(5)(a) to (e) is sold in execution or constitutes a fund contemplated in section 3(11), the *relevant maritime claims* mentioned in subsection (2) shall be paid in the order prescribed by subsections (5) and (11).⁵⁵ Section 11(5) states: ‘The claims mentioned in paragraphs (b) to (f) of subsection (4) shall rank after any claim referred to in paragraph (a) of that subsection. . . ’. This subsection stipulates that any claim referred to in section 11(4)(a) shall rank ahead of all other claims.

[120] Therefore, reading s 11(4)(a) in the proper context, it is clear that in order for s 11 to apply, there must, in the first place, be a ‘maritime claim’ ‘confirmed by a judgment of a court in the Republic or proved in the ordinary manner’. ‘The fund’ referred to in s 11(1)(a) is a fund contemplated by s 3(11)(a)(ii) of AJRA and is deemed for all purposes to be the property sold in terms of s 3(11)(b). A maritime claim can only be pursued in an action *in rem* against the Vessel (or the Fund), or in an action *in personam* against the party that was the owner (or deemed owner) of the Vessel at the time of the order pursuant to which the Fund was constituted. Only such maritime claims, once established, can be ranked in terms of s 11(1). As Bristowe J observed in *The Kingston*, s 11(1) ‘deals with the ranking of claims, not the recognition of them’.⁵⁶

[121] The learned judge’s further comments are pertinent to the issue of whether an owner may legitimately claim preservation costs against a Fund:

‘Finally I find it hard to believe that the legislature intended that a claim which could not be enforced under the Act should share in the preferential distribution of a fund created under the Act, especially having regard to the jealous provisions of section 10. It is plain, in my view, that it is only a maritime claim which would be enforceable under the Act which is entitled to rank in terms of section 11(1)(a)-(e).’⁵⁷

A similar pertinent comment was made by Ploos Van Amstel J in *MV Da Qing Xia*.⁵⁸

‘Section 3(11)(b) in turn provides that a fund shall, for all purposes, be deemed to be the property sold or the property in respect of which the security or an undertaking has been given. The fund in other words takes the place of the property which had been attached or arrested.

⁵⁵ Emphasis added.

⁵⁶ *The Kingston In Re Creditcorp Ltd* 1991 SCOSA D78 (D) at D98E.

⁵⁷ *Ibid* at D92E-F.

⁵⁸ *MV ‘Da Qing Xia’: LBH Mozambique Limitada v MV ‘Red Fin’* 2015 JDR 0706 (KZD), para 13.

The question then arises why a claimant who was not entitled to proceed against such property in admiralty should be entitled to share in the fund which took its place.'

[122] The same question may properly be asked of Garanti in respect of its preservation claims. It is apparent that s 11(4)(a) must be read and interpreted in the context of all the related provisions, and not in isolation. It is only when s 11(4)(a) is not read in that proper context or a purposeful interpretation applied, that one can argue that s 11(4)(a) establishes a *sui generis* claim, which does not preclude the owner on the basis that the owner is not mentioned in the provision.

A sufficiently close connection?

[123] Mr *Gordon* submitted that the relevant test in regard to the expenses incurred by a claimant to preserve a vessel is whether there is a sufficiently close connection between the expense in issue and the preservation of the vessel. As authority for his argument Mr *Gordon* referred to *The Argos* in which the court held that:

'Evident considerations of policy, commercial expediency and equity would suggest that costs or expenses incurred while the vessel is thus *in custodia legis*, and which are sufficiently related to the execution of this process, should form a first charge on the fund.'⁵⁹

The court in *The Argos* also acknowledged that s 11(4)(a) is 'directed at the accomplishment of a sale in the interests of all recognised creditors'.⁶⁰

[124] However, as stated in paragraph 120 above, before a ranking in terms of s 11(4)(a) may be determined, there must, in terms of s 11(2), be a 'maritime claim', 'confirmed by a judgment of a court in the Republic or proved in the ordinary manner'. Garanti cannot simply aver that it has a preservation claim because the act of providing bunkers or supplying provisions or paying vessel agent's fees was intended to and did have the effect of preserving the vessel. In order to share in the Fund a claim has to be a maritime claim in its own right and it is incumbent upon Garanti to establish all the requirements for a maritime claim. Claims against the Fund must contain full details of when the claim arose and how it is made up. As stated by Hofmeyr:

'a claim cannot be said to have arisen until it comes into existence, that is, until all its constituent elements have arisen. . . The proposition that a legal claim comes into existence

⁵⁹ *Pentow Marine (Pty) Ltd v The Fund Being The Proceeds of The Sale of The Mv Argos (Transnet Ltd T/A Portnet Objecting)* 1994 (2) SA 700 (C) at 706H-I.

⁶⁰ *Ibid* at 708F.

only when all the elements making up the claim have come into existence is undeniably correct.’⁶¹

[125] The general principle is that to claim under s 11 against a Fund established from the proceeds of the sale of a vessel, a claimant must establish a ‘claim’ in contract, delict or unjustified enrichment. The comments in the following excerpt, although made in a context which is different from this matter, reinforces the requirement that there has to be a legally enforceable claim. It also fortifies the conclusion that it is not enough to show that the expense claimed related to the preservation of the Vessel, as contended for by Garanti. There has to be an underlying obligation.

[126] In *Transol Bunker BV v MV Andrico Unity*⁶² the court stated:

‘In the present case Grecian-Mar and Transol instituted their respective actions *in rem* by causing the *Andrico Unity* to be arrested by order of the Court *a quo* on the basis of their respective claims for the price of stores and provisions and bunkers supplied to the vessel in Argentina. Their claims for the price of the goods supplied undoubtedly constituted maritime claims within the definition in sec 1(1) of the Act. This is not in dispute. The question, however, is whether these claims gave rise to maritime liens, *thus grounding the claim by each of the appellants to be entitled to institute an action in rem against the vessel in terms of sec 3(4)(a) of the Act.*’ (emphasis added)

Therefore, the mere fact that the goods and services paid for by Garanti fall within the ambit of the definition of a maritime claim in s (1)(1)(m) is insufficient to establish either that Garanti itself has an enforceable maritime claim in respect of the Vessel, or that it has a right to be ranked under s 11(4)(a). The aforesaid comments are also consistent with the argument advanced by Mr *MacWilliam* there must be an underlying claim that would be capable of being enforced in terms of either s 3(4) or s 5(3)(a) of AJRA before s 11 can have application. He pointed out further that Garanti has not been able to identify the alleged debtor *in personam* in respect of its various claims.

⁶¹ G Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 2 ed (2012) at 137-138.

⁶² *Transol Bunker BV v Motor Vessel “Andrico Unity” & others; Grecian-Mar SRL v Motor Vessel “Andrico Unity” & others* [1989] 2 All SA 303 (A).

The Constitutional Argument

[127] Mr *Gordon*'s constitutional argument was premised on ss 25(1)⁶³ and 39(2) of the Constitution of South Africa 1998, which respectively entrench the right to property and require a statutory interpretation that promotes the spirit, purport and objects of the Bill of Rights. He submitted that it was unconstitutional to arrest ships for debts that are not owed by the true or registered owner as it constituted an arbitrary deprivation of property. However, there was no application for an order declaring the deeming provision in s 1(3) or the sale of a vessel under s 9 or any other specific section or sections of AJRA to be unconstitutional. Mr *Gordon* contended rather for a constitutional interpretation of AJRA which protected the property rights of ship owners like Garanti.

[128] However as acknowledged by Mr *Gordon* himself, the charter of ships including demise charters, are instruments of commercial expediency. Garanti although the registered owner of the ship, is a financial leasing company. It generates income through the lease of its vessels. It does not have resources to conduct the business and industrial activity related to ships. Therefore these activities are undertaken by the demise charterer. While this is a mutually beneficial arrangement, the demise charterer would not be able to conduct its business without incurring debts and acquiring creditors. It is improbable that creditors would provide the demise charterer with the requisite services and supplies to conduct its business without security. Consequently security is furnished to creditors of the demise charterer through its deemed ownership of the chartered vessel.

[129] In the circumstances of the present matter, Garanti leased its Vessel but retained its ownership while the demise charterer Caliskan became the deemed owner of the vessel which furnished security for the debts of Caliskan. Mr *Gordon* emphasised that the word 'deeming', with its connotations of 'unbreakable' and 'untouchable' indicated that the demise charterer is deemed to be the owner for as long as the demise charter is in existence.

⁶³ Section 25(1) of the Constitution provides that: 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

[130] In *Credit Europe Bank NV v MV Tarik II & another*⁶⁴ Ploos van Amstel J noted arrests under deeming provisions are incorporated in national laws worldwide and have been a feature of international maritime law for some time. Therefore it was not unexpected or unknown to Garanti that the chartered vessel may be arrested for the debts of Caliskan. This was a risk that Garanti voluntarily assumed in the course of its leasing business. Furthermore, in AJRA the deeming provisions are aimed at assisting creditors to obtain payment of debts with difficulties relating to jurisdiction and security of their claims. Therefore the arrest and consequences of such arrest such as the judicial sale of the Vessel and the distribution of the proceeds/Fund to creditors, can hardly be described as arbitrary deprivation of property. To the contrary, it is because Garanti is the owner of the vessel (and subsequently the Fund) that it is precluded from claiming against its own property for its preservation.

[131] A similar argument was advanced before Ploos van Amstel J in Garanti's opposition to the sale of the vessel.⁶⁵ Garanti submitted that the sale of the owner's vessel in terms of s 9 of AJRA to satisfy the claims against the charterer by demise pursuant to the deeming provision in s 1(3) of AJRA cannot be justified and amounts to 'arbitrary deprivation of property' as intended in s 25(1) of the Constitution. Garanti did not contend that s 3(4)(b) or s 1(3) or s 9 of AJRA were unconstitutional. It contended for an interpretation of the sections which did not offend against the Constitution. Ploos van Amstel J held that:

'... the interpretation contended for by Garanti is irreconcilable with the wording of the sections under consideration. The deeming provision in s 1(3) is expressly stated to be for the purposes of an action *in rem*. In this context a charterer by demise is deemed to be the owner of the ship. The effect of this section, read with sections 3(4)(b) and (5) is that a maritime claim may be enforced by an action *in rem* if the demise charterer of the property to be arrested would be liable to the claimant in an action *in personam*, and the action shall be instituted by the arrest of the ship or the other property specified in sub-section (5). An interpretation of section 9(1) that a court may not order that a ship which has been arrested in an action *in rem* be sold unless the claim *in personam* lies against its owner is inconsistent with these provisions. It will negate the deeming provision in section 1(3). And what is the point in allowing an action *in*

⁶⁴ *Credit Europe Bank NV v MV Tarik II & another* Case No A80/2014 (D).

⁶⁵ *Ibid* paras 10-22.

rem against the ship based on a claim *in personam* against the demise charterer if the ship cannot be sold?’⁶⁶

[132] The learned judge therefore found that the interpretation contended for was not a reasonable one and would amount to an amending of AJRA which is impermissible absent a constitutional challenge against the relevant sections. He noted that M J D Wallis in *The Associated Ship and South African Admiralty Jurisdiction*⁶⁷ expressed the view that s 1(3) will pass constitutional muster, provided it is not applied to associated ships. I find no cause to disagree with the reasoning of Ploos van Amstel J which is pertinent to Garanti’s argument in its counter-claim in this Court. In the premises, I remain unpersuaded that Garanti’s claims should be permitted on constitutional grounds.

Are preservation claims *sui generis*?

[133] Mr *Gordon* submitted that the notion of a *sui generis* claim he was advancing, is further sustained because the auctioneer, the Sheriff and the Referee have been found to have ‘preservation’ claims under s 11(4)(a) against the Fund, although they do not have an underlying claim against the Vessel. He submitted further that it would be unduly restrictive to interpret s 11(4)(a) to exclude the recovery of preservation costs simply because they were paid by the owner of the Vessel, as opposed to another creditor or the Sheriff.

[134] While a vessel is under arrest, the Sheriff (and the arresting creditor) are liable for the preservation expenses for the ship.⁶⁸ The Sheriff or a third party creditor has a claim against a ship in respect of which it has incurred preservation expenses because the ship is not owned by them. They incur the costs and expenses to preserve the vessel because it is in the interest of the creditor/s of the owner or deemed owner. And they are paid out of the Fund only because there is an underlying liability by the owner to pay those costs. Like the Sheriff, the auctioneer and the Referee fulfil roles that are

⁶⁶ Ibid para 18.

⁶⁷ M J D Wallis *The Associated Ship and South African Admiralty Jurisdiction*, PhD thesis (University of KwaZulu-Natal) (2010) at 370. This thesis was published in a book: Wallis *The Associated Ship & South African Admiralty Jurisdiction* (SiberInk, South Africa, 2010).

⁶⁸ *The MT Argun: Sheriff of Cape Town v MT Argun, Her Owners and all Persons Interested in Her and Others; Sheriff of Cape Town and Another v MT Argun, Her Owners and all Persons Interested in Her and Another* 2001 (3) SA 1230 (SCA).

specifically mentioned in s 11(4)(a) as their costs are incurred 'to procure' the sale of the ship and are 'in respect of the distribution of the proceeds of the sale' respectively. They also do not own the Vessel and there is an underlying liability by the owner to pay their costs.

[135] In the course of his argument, Mr *Gordon* submitted that had Garanti not paid the bunker and other costs the Vessel would not have been able to sail from Durban to Richards Bay – and that in doing so it acted not in its own interests but in that of the creditors of Caliskan. However when asked what was Garanti's 'special interest' in paying preservation costs which were usually paid by parties other than the owner, eg the party who arrested the ship or the Sheriff, he responded that:

'You don't have to have any bigger interest or any more special interest than to be the owner of the ship. You want to save your ship. You want to preserve your ship. Your ship is the thing which can be hired out and you can get income from. So it's not self-serving. It won't be paying ourselves if we were to recover these amounts.'

[136] With respect, this argument is contradictory because it confirms that Garanti was preserving the Vessel not for any altruistic reason or the benefit of the creditors but to protect its own property for its own benefit. A preservation claim is intended to obtain reimbursement of expenses and costs incurred in preserving the Vessel for the benefit of the creditors. If Garanti's claims as owner were allowed, the security of the arresting creditors would be eroded.

[137] In the light of the foregoing considerations and conclusions, I am unable to find that the arguments advanced by Garanti to sustain its main claim for preservation costs have any merit. I also do not find it necessary to deal with Mr *Gordon*'s contention that the Referee erred in his interpretation and application of the legal principles set out in *The Kingston*,⁶⁹ *The Maharani*⁷⁰ and *The DA Qing Xia*,⁷¹ as his argument in that respect was to reinforce the submissions that I have dealt with. The Referee's recommendation in any event accords with the conclusion I have reached in respect of Garanti's main claim.

⁶⁹ *The Kingston In Re Creditcorp Ltd* 1991 SCOSA D78 (D).

⁷⁰ *Universal Group Ltd T/A Island View Shipping Co v The Fund Created By The Sale Of The Mv Maharani, Ex Mv Claire A Tsavlis, & another* 1990 (2) SA 480 (N).

⁷¹ *MV 'Da Qing Xia': LBH Mozambique Limitada v MV 'Red Fin'* 2015 JDR 0706 (KZD).

[138] Turning to Garanti's alternative claim premised on its reliance on s 11(8), I am of the view that the Referee was correct in his reasoning and conclusion as set out in paragraphs 98-99 of this judgment, and that Garanti's alternative claim must also fail.

Garanti's crew payment claims

[139] In the notice of claim filed with the Referee on 18 February 2015, Garanti claimed payment of the sum of USD 257 030. 58, such claim to rank in terms of s 11(4)(a) of AJRA, alternatively in terms of s 11(4)(c)(i). The Garanti Claim Affidavit alleged that various payments were made to the master and crew, and submitted that: '... having regard to the fact that the vessel was under arrest at the time of these payments and that the Master and crew of the vessel were responsible for the preservation of the vessel, these payment ought to rank as preservation costs in terms of section 11(4)(a) of the Admiralty Act'.

In the alternative, Garanti alleged that by virtue of having made various payments it had 'stepped into the shoes of each of the crew members referred to and its claim for this amount ought to rank in terms of section 11(4)(c)(i) of the Admiralty Act'. However, Garanti did not specifically identify the legal cause for the payments allegedly due to the persons reflected in annexures 'AC 24', 'AC 26', 'AC 28' and 'AC 30' to its claim affidavit.

[140] In his report the Referee noted that Garanti stated it paid the following amounts to the Master and crew as wages:

- (a) US\$ 55 149.51 in 11 August 2014.
- (b) US\$ 62 311.28 on 17 August 2014.
- (c) US\$ 73 980.85 on 28 August 2014.
- (d) US\$ 62 721.50 on 12 September 2014.

[141] Garanti provided a schedule with the names of the master and crew and the respective amounts paid to them, and crew lists with the names of the master and crew and the dates upon which their wages became due and payable. The Referee had reservation about the crew lists because they were not authenticated nor were they on either Garanti's or Caliskan's letterheads. Garanti also did not disclose where the lists came from.

[142] Credit Europe and Zeba et al raised objections, inter alia, on the basis that no contracts of employment were provided to prove the employment of the master and crew and the amount of the wages to which each person was entitled. Mr P Holloway, the attorney for the Opposing Suppliers, pointed out specifically that Garanti provided no evidence to prove:

- (a) that each of the persons that Garanti allegedly paid were employed on the Vessel and for what period;
- (b) the terms and conditions of the relevant contracts of employment;
- (c) the performance rendered by each of the persons concerned;
- (d) the computation of the amounts allegedly owed to each of them with reference to the relevant contracts of employment and the services performed; and
- (e) that the monies which were allegedly due owing and payable to each of the persons concerned, was not paid.

In effect, Garanti did not adduce the requisite evidence to establish the validity and existence of any of the crew claims which allegedly underlay the payments that Garanti is purported to have made.

[143] However the Referee accessed employment contracts from the documents removed by the Sheriff from the Vessel which confirmed that many of the crew who appeared on Garanti's lists did conclude employment contracts with Caliskan. Some 'officers payslips' and 'ratings payslips' were also among the documents but the Referee was unable to reconcile them with the amounts claimed by Garanti. Without the usual monthly wages accounts document produced by the master, the Referee could not be certain that the amounts claimed by Garanti were correct.

[144] The Referee therefore did not recommend payment of Garanti's claim for master and crew payment but he recorded that if Garanti furnished the proof that the lists upon which it relies are accurate, whether by reference to the master's monthly wage accounts, correspondence between the master and Caliskan/Horizon or an affidavit from the master, the Court may be in a position to allow this part of the claim.

[145] In its counter-application, Garanti provided further evidence in support of this claim, which allegedly included:

'112.1. email exchanges between Horizon and Garanti between 8 August 2014 and 11 September 2014 in which Horizon requested Garanti to effect payment of crew wages for the months of May, June, July and August 2014;

112.2. email exchanges between Horizon and Garanti during September 2014 in which Horizon requested updates on whether payment of the aforementioned crew wages had been made by Garanti and for payment of the crew's wages for the month ending August 2014; and

112.3 copies of Garanti's proofs of payment to the Master and crew of the vessel which correlate with the amounts Horizon requested Garanti to pay.'

[146] However, the following documents were in fact furnished:

(a) Annexure 'IT 24.3' purports to be a list of payments to crew on the Vessel for June 2014. The page is not legible. Annexures 'IT 24.3.1' - '24.3.24' are allegedly IBAN for payment for the 24 crew listed on 24.3 on 11 August 2014.

(b) Annexure 'IT 24.4' purports to be a list of payments to crew on the Vessel for May 2014. The page is not legible. Annexures 'IT 24.4.1 - IT 24.4.21' are allegedly IBAN for payment for the 21 crew listed on 24.4 on 11 August 2014.

(c) Annexure 'IT 24.5' purports to be a list of payments to crew on the Vessel for July 2014. The page is not legible. Annexures 'IT 24.5.1' - 'IT 24.5.25' are allegedly IBAN for payment for the 25 crew listed on 24.5 on 28 August 2014.

[147] The following translated emails were furnished:

(a) Annexure 'IT 24.1': Email dated 11 August 2014, from Horizon to Oral Eren of GL (Garanti Leasing)- Asset Management in which Horizon furnished 'IBAN details of the Truva and Tarik 3 seamen covering the period May-June- July 2014'.

(b) Annexure 'IT 25': Email dated 8 August 2014 from Murat Yidrim of Horizon to Oral Eren of GL- Asset management attaching a request from Horizon's personnel department, copied to Caliskan. The attached email dated 8 August 2014 is an internal email from the human resources manager for Horizon to Mr A Taymez recording that there is a 'seamen salary problem' because the salaries of the petty officers and crew of Tarik 3 (the Vessel) and Truva 1 have not been paid for the months May June and July.

(c) Annexure 'IT26': Email dated 11 September 2014 from M Yildrim of Horizon to Oral Eren of GL-asset management copied to Caliskan. Yildrim states that August wage lists of the seamen are attached.

(d) Email dated 9 September 2014 from O Eren GL Asset Management to M Yidirim of Horizon copied to Caliskan requesting 'payroll for seaman for the month of August (name surname, GB IBAN amount etc...)'. the email also states '(Truva 1 Masters wage for August was paid, keep it out of lists pls, thx)'.

(e) Email dated 28 August 2014 from I Tasliyurt of Garanti to Murat Yildirim of Horizon requesting 'payroll for seaman for the month of July (name surname, GB IBAN amount etc...)'. In the grid below the text is the names of both Truva 1 and Tarik 3 (the Vessel).

Discussion

[148] Firstly, it is not for this Court to attempt any reconciliation of the payments claimed with the crew lists and the additional documents which purportedly are 'copies of Garanti's proofs of payment to the Master and crew of the vessel which correlate with the amounts Horizon requested Garanti to pay'. It is also discourteous to the Court to present illegible documents for perusal. There are also a number of anomalies in the documents provided. The most glaring is that Garanti stated in its claim documents that it effected payments on 11, 17 and 28 August and 12 September 2014. The IBAN documents reflect payments on 11 August and 28 August 2014 only.

[149] There is no record of the August payroll. Yet Garanti has alleged that 'Horizon requested Garanti to effect payment of crew wages for the months of May, June, July and August 2014' and the documentation provided 'correlate with the amounts Horizon requested Garanti to pay'. In fact, the requests cover the period 'May-June-July' only. Even the email of 28 August 2014 is a request from Mr Tasliyurt of Garanti to Murat Yildirim of Horizon requesting 'payroll for seaman for the month of July'. Yet according to earlier email dated 11 August 2014 from Horizon to Oral Eren of GL-Asset Management, Horizon furnished 'IBAN details of the Truva and Tarik 3 seamen covering the period May-June-July 2014'. This creates an uncertainty as to what documents in relation to the Vessel in this matter (Tarik III/3) were actually received by Garanti.

[150] I am also in agreement with Mr *MacWilliam's* contentions that the documentation now belatedly put forward by Garanti still does not address the difficulties that the Referee identified. It also does not assist in reconciling the amounts

claimed by Garanti to the payslips removed from the Vessel, nor does it identify how each amount claimed was calculated, nor how it allegedly relates to any particular agreement of employment, nor the service allegedly rendered pursuant thereto. Garanti has made no attempt whatsoever to reconcile the amounts claimed by it to the documentation removed from the Vessel (which reconciliation the Referee was unable to do). In the result, there is nothing in the four additional documents which addresses either the objections raised by the Opposing Suppliers or the underlying problem which the Referee had with Garanti's claim. Therefore Garanti's claim for crew payments must be refused.

[151] Garanti has failed to prove that it is entitled to payment of any preservation costs or expenses from the Fund. Accordingly, its claims fall to be dismissed and Garanti must pay the costs occasioned by the opposition to its claims.

Costs

[152] What remains for determination is the issue of costs arising from the amended draft order filed by Credit Europe. The Referee has provided a concise but relevant basis for his recommendations in respect of payments and ranking of costs of claimants. He specifically recorded that:

'Where this report recommends that a party be awarded costs, this includes any costs that have been incurred in instituting action against the vessel in respect of the claim in question, as well as the costs of lodging the claim against the Fund and related costs such as responding to objections, replying to our queries, and arranging payment from the Fund.'

[153] AJRA contains the following relevant statutory provisions in relation to costs:

- (a) Section 11(4)(a) sets out a ranking in respect of: 'a claim in respect of costs and expenses incurred to preserve the property in question or to procure its sale and in respect of the distribution of the proceeds of the sale;'
- (b) Section 11(7) provides: 'A court may, in the exercise of its admiralty jurisdiction, on the application of any interested person, make an order declaring how any claim against a fund shall rank.'
- (c) Section 11(10) provides: 'Interest on any claim and the costs of enforcing a claim shall, for the purposes of this section, be deemed to form part of the claim.'

[154] To the extent that AJRA makes no provision to the contrary, the common law in relation to costs must apply. The rules generally applied are:

- (a) A successful party is usually entitled to its costs.⁷²
- (b) All costs are in the court's discretion.⁷³
- (c) A court must exercise its discretion to award costs judicially after considering the facts of the case, and any factor it finds relevant including, inter alia, the conduct of a party.⁷⁴
- (d) A court may for good reason deprive a successful party of all or a portion of its costs.

[155] In its amended form, Credit Europe seeks an order which foreshadows a finding by this Court that the claims of the Opposing Suppliers and Garanti will not be allowed in accordance with the Referee's recommendation:

'1. The Report of the Referee dated 10 September 2015 is hereby further confirmed, to the extent that:

1.1 The Referee has recommended payment of the damages claim of the Applicant, ranking in terms of section 11(4)(f) of the Admiralty Jurisdiction Regulation Act, 105 of 1983, as amended ("the Act"), including his recommendation in relation to interest thereon, and the legal costs incurred in lodging the claim against the Fund.

1.2 The Referee has recommended the payment from the Fund of the legal costs incurred by the Applicant in successfully opposing any claim lodged against the Fund.

1.3 The Referee has recommended the rejection of the claims of the Seventeenth and Eighteenth respondents.

2. The Registrar is directed to pay the balance of the funds in the Fund to the Applicant, subject to ensuring that sufficient funds are retained in the Fund to cover the payment of legal costs, as taxed or agreed, of:

2.1 the Thirteenth, Fourteenth and Sixteenth respondents incurred in prosecuting their claims already paid from the Fund, as recommended by the Referee;

2.2 the Thirteenth Respondent, pursuant to the sale order dated 5 December 2014.

3. The Registrar is directed to pay any of the aforesaid legal costs to the respective parties once taxed, or agreed by those claimants retaining an interest in the Fund.

⁷² *Minister of Defence & others v South African National Defence Union* 2007 (1) SA 422 (SCA) at 433E.

⁷³ *Graham v Odendaal* 1972 (2) SA 611 (A) at 616; *Naylor & another v Jansen* 2007 (1) SA 16 (SCA) paras 14-23).

⁷⁴ *Gelb v Hawkins* 1960 (3) SA 687 (A) at 694.

4. The Registrar is directed to pay any residue left in the Fund, once the legal costs as aforesaid have been taxed or agreed and paid to the respective parties, to the Applicant.'

This proposed order does not accommodate payment of the Opposing Suppliers' claim which this Court has approved. The proposed order also authorises payment of Credit Europe's costs of this application from the Fund. However, as held earlier in this judgment, the costs of this application will have to be borne by Credit Europe.

[156] In the alternative, Credit Europe seeks an order consistent with its alternative submissions that the Opposing Suppliers should be ordered to institute actions in *rem* against the Fund. This alternative relief is not competent in the light of the findings of this Court.

[157] Finally Credit Europe seeks the following declaratory relief:

'11.1 Any claim for the payment of the legal costs incurred by a party ("the successful opponent") in successfully opposing a claim lodged against the Fund by another party shall have the same ranking as the claim lodged against the Fund by the successful opponent.

11.2 A successful opponent is not entitled recover such costs from the Fund unless it has a valid claim against the Fund itself.

11.3 The legal costs incurred by the Applicant in relation to the preservation and sale of the vessel, and the constitution of the Fund, are recoverable pursuant to and in terms of the sale order dated 5 December 2014 or interlocutory order dated 14 January 2015, or otherwise.'

[158] I am unable to discern the rationale for such declaratory relief if the award of costs and the ranking of costs are comprehensively provided for in AJRA. It is not in dispute that the Vessel was arrested pursuant to the institution of an action *in rem* and sold at the instance of Credit Europe, or that Credit Europe incurred preservation costs. The enforcement and preservation costs incurred by Credit Europe are specifically provided for in AJRA. The enforcement claims are covered in s 11(10) of AJRA which provides that 'costs of enforcing a claim shall, for the purposes of this section, be deemed to form part of the claim'. The preservation costs are covered in s 11(4)(a) as constituting 'costs and expenses incurred to preserve the property in question or to procure its sale'.

[159] It is common cause that Credit Europe was awarded costs in the sale order dated 5 December 2014 or interlocutory order dated 14 January 2015. In respect of costs included in the orders of court, as explained in *Mt 'Argun' v Master and Crew of The Mt 'Argun' Claiming Under Case No AC127/99 & others*:⁷⁵

'While it is true that preservation costs and expenses are differentiated, for ranking purposes, from the costs of enforcing the claim, this cannot detract from the fact that a costs order covers not only the costs of instituting a claim and prosecuting it to judgment but also the expense of (a) executing against property belonging to a judgment debtor, (b) preserving it until the execution sale and (c) the sale itself.'

[160] Therefore the Referee, correctly in my view, assessed Credit Europe's 'Existing Costs Order Claims' as follows:

'Having regard to the fact that Credit Europe already enjoys a costs order in relation to the arrest of the vessel and the application for the sale of the vessel, there is no need for any further order to be given in this regard. Credit Europe also obtained an order in its interlocutory application regarding the sale of the vessel on 14 January 2015. To the extent that the existing orders do not encompass the "*sale of the vessel itself and creation of the Fund*", we do not believe that any case has been made out for such costs in these proceedings.'

[161] This recommendation has found favour with the Opposing Suppliers. The Opposing Suppliers also agree with the recommendation of the Referee that Credit Europe's legal costs associated with the submission and proof of the preservation claim ought to be paid out the Fund, and ranked in accordance with s 11(4)(a) of AJRA. However, they dispute the scale on which Credit Europe seeks such costs.

[162] In respect of the costs incurred by Credit Europe in lodging its claims against the Fund, the Referee stated:

'... it is not usual for applicants in sale applications to be allowed a preferential scale of costs in relation to the costs of advancing their claims against the Fund. The reason for allowing attorney and own client costs is that these parties have acted in the interest of all creditors in obtaining the sale order. This reason does not apply to the costs incurred in presenting their claims against the Fund. Therefore we do not believe that the costs of the "*arrest of the Ship*" extend to the costs of proving a claim against the Fund.'

⁷⁵ *Mt 'Argun' v Master and Crew of The Mt 'Argun' Claiming Under Case No AC127/99 & others* [2003] 4 All SA 139 (SCA), para 48.

The Referee noted further:

‘Credit Europe seeks attorney and own client costs in respect of its claim against the Fund to the extent that such costs fall within the ambit of the sale order. For the reasons given above. . . , we do not believe that paragraph 9.2 of the sale order encompasses the costs of advancing claims against the Fund. Credit Europe is thus only entitled to costs on the ordinary party and party scale.’

[163] I am in agreement with the Referee’s recommendation on the issue of the relevant scale. He has provided clear justification for his recommendation in a review of the authorities as to when attorney and own client costs would be competent and when it should not be ordered. There is no justification for attorney and own client costs as sought by Credit Europe, which has in any event the advantage of its costs ranking under s 11(4)(a).

[164] The Opposing Suppliers submit that the Referee has correctly dealt with the costs to be awarded to the claimants against the Fund, including Credit Europe, and that the ranking by the Referee is consistent with the ranking provided for in AJRA, and therefore the Referee’s report should be confirmed in this respect too. What they do dispute is that all various costs claimed in the draft bills of costs attached to the founding affidavit as annexures ‘4a’, ‘4b’ and ‘4c’ (totalling R1 983 035.26 in respect of legal costs) are all costs that properly fall to be paid in terms of the orders of court dated 5 December 2014 and 14 January 2015. They submit, properly in my view, that the extent to which claims for costs under the existing costs orders fall to be paid is a matter for determination by the taxing master. On that basis, the Opposing Suppliers have requested leave to defend the costs claims of Credit Europe against the Fund on taxation, and/or to agree the reasonable quantum of those costs claims. I see no reason why this request should be refused. The taxing master will have the benefit of submissions from both parties which ought to facilitate a fair taxation of the costs.

[165] I have, in the premises, been unable to find that Credit Europe’s application for only a partial recommendation of the Referee’s report is justified, whether it be on the issue of the claims of the Opposing Suppliers or on the issue of the costs and ranking thereof. The dismissal of Garanti’s claim is also consistent with the Referee’s

recommendation. I am accordingly satisfied that the Referee's report should be confirmed in its entirety.

[166] The Opposing Suppliers have prayed that they be awarded the costs of Mr Bowley who, in his capacity as an attorney with the right of appearance, assisted in the compilation of the Opposing Suppliers' heads of argument and the costs of the Opposing Suppliers' Turkish attorneys Yalcin Toyager & Tufekci Law office, including the costs of expert witnesses Prof Topuz and Prof Yavuz. No objections were raised to this request. In any event, the costs of the Turkish agents and the expert witnesses were incurred as a consequence of Credit Europe's reliance on the alleged termination of the demise charter. I am satisfied that these costs may properly be allowed.

ORDER

1. The Report of the Referee dated 10 September 2015 is confirmed.
2. The Applicant is directed to pay the costs of this application taxed or agreed, such costs to include the costs of the Fifth, Eighth and Tenth Respondents in respect of:
 - 2.1 Mr *MacWilliam SC*;
 - 2.2 Mr Bowley;
 - 2.3 Turkish attorneys Yalcin Toyager & Tufekci Law office;
 - 2.4 The expert witnesses Prof/Dr Topuz and Prof Yavuz.
3. The Fifth, Eighth and Tenth Respondents are given leave to defend the costs claims of Credit Europe against the Fund on taxation and/or to agree the reasonable quantum of those costs claims.
4. The counter-application by the Seventeenth Respondent is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel, where so employed.

MOODLEY J

APPEARANCES**Dates of hearing : 8-9 May 2017; 7 September 2017****Date of judgment : 6 May 2021**

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