IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN
Exercising its Admiralty Jurisdiction

CASE NO: A72/2015

In the matter between:

MV 'PRIVGULF'	Applicant
And	
ING BANK N.V.	First Respondent
AEGEAN MARINE PETROLEUM S.A.	Second Respondent
SINOPEC ZHEJIANG ZHOUSHAN PETROLEUM	Third Respondent
DEUTSCHE BANK AG, NEW YORK BRANCH	Fourth Respondent
GREAT AMERICAN INSURANCE COMPANY	Fifth Respondent

Coram: Koen J

Heard: 20 May 2016

Delivered: 20 July 2016

O R D E R

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1. The rule *nisi* issued on 21 September 2015 in the application commenced by the Notice of Motion dated 16 September 2015 for the

joinder of *inter alia* the Third Respondent (Sinopec), is discharged in respect of the Third Respondent with costs.

2. The rule *nisi* issued on 12 January 2016 in the application commenced by the Notice of Motion dated 8 January 2016 for the joinder of the Fifth Respondent (Great American Insurance Company) as a party in the action *in rem* under case no A72/2015 in terms of s 5(1) of the Admiralty Jurisdiction Regulation Act as amended read with Admiralty Rule 11, is confirmed. The costs relating to that joinder are reserved for determination by the Court hearing the action *in rem*

J U D G M E N T

KOEN J:

Introduction

[1] The Applicant, MV 'Privgulf' seeks the joinder of the Third Respondent, Sinopec Zhejiang Zhoushan Petroleum Company Limited, ('Sinopec') and the Fifth Respondent, the Great American Insurance Company ('Great American Insurance') in terms of s 5(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act'), as third parties to an action *in rem* instituted by the First Respondent ('Ing Bank') against it.[1]

[1] The various parties are referred to by name rather than as Applicant, First Respondent and so forth so to avoid any confusion. There are in fact two joinder applications, the one dated 16 September 2015 seeking the joinder of the Second Respondent in that application, Aegean Marine Petroleum SA ('Aegean') and Sinopec and the other dated 8 January 2016 seeking the joinder of Great American Insurance. The rule *nisi* issued against Aegean for its joinder was subsequently discharged. The rule *nisi* issued in a separate application seeking the joinder of the Fourth Respondent, Deutsche Bank AG, New York branch ('Deutsche Bank'), was also discharged subsequently.

<u>The Claim by Ing Bank</u>

[2] The MV 'Privgulf' was arrested at the instance of Ing Bank *qua* Plaintiff, as the alleged assignee of the claims of O W Bunker Malta Limited ('OWBM') against it, *qua* Defendant.[2]

[3] The claims allegedly ceded pursuant to a security agreement concluded between *inter alia* Ing Bank and OWBM, are formulated as:

(a) CLAIM 1 – Payment of the sum of US$ 157 428.52 in respect of marine bunker fuels delivered on board the MV 'Privgulf' at Gibraltar on 15 October 2014, together with interest thereon at an agreed rate of 3% per month compounded monthly from the due date to the date of payment, as well as a 'delayed payment administration fee' of US$ 418.54;

(b) CLAIM 2 - Payment of the sum of US$ 214 189.64 in respect of marine bunker fuels delivered on board the MV 'Privmed' at Shanghai on or about 28 to 31 October 2014, together with interest thereon at an agreed rate of 3% per month compounded monthly from the due date to the date of payment, as well as a 'delayed payment administration fee' of US$ 586.23;

(c) CLAIM 3 – Payment of the sum of US$ 51 169.28 in respect of marine bunker fuels delivered on board the MV 'Privmed' at Shanghai on or about 31 October to 1 November 2014, together with interest thereon at an agreed rate of 3% per month, compounded monthly, from the due date to the date of payment, as well as a 'delayed payment administration fee' of US$ 350.[3]

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[2] Security was subsequently furnished by the Applicant to release it from the initial arrest, but it remains under 'deemed arrest' in terms of s 3(10)(a)(i) of the Act.

[3] The claims are *ex facie* the Particulars of Claim filed by Ing Bank 'maritime claims' as defined in section 1(1)(m) of the Act, enforceable *in rem*:

(a) in the case of claim 1, against the 'ship concerned', the MV 'Privgulf' in terms of the provisions of s 3(4)(b) and (5)(b) of the Act; and

The allegation in respect of each claim is that the fuel was 'caused to be delivered on board' by OWBM and hence that it is the party entitled to payment. There is no reference in the Particulars of Claim as to who actually physically delivered the fuel in each instance.

The Documentation

Claim 1:

[4] The bunker fuel delivered to the MV 'Privgulf' at Gibraltar was physically supplied on board by the Second Respondent, Aegean Marine Petroleum SA ('Aegean').

[5] The following appears from the relevant documentation:

(a) On 10 October 2014 a sales order confirmation was issued by OWBM to Bariba Corp in respect of the bunker fuel to be delivered to the MV 'Privgulf' at Gibraltar with delivery date 14 October 2014, for the account 'Master and/or owner and/or Charterers and/or MV 'Privgulf' and/or Bariba Corp';

(b) The bunker delivery was received by MV 'Privgulf' according to the bunker delivery receipts on 15 October 2014. A bunker confirmation was issued on 17 May 2005 by Aegean reflecting the seller as Aegean to OW bunker Spain SL. The buyer was reflected as 'MV 'Privgulf' and 'jointly and severally owners/managing owners/operating managers/disposant owners/charterers and GW Bunker Spain SL. Near receipt of this confirmation signifies acceptance of responsibility for payment of our bunker invoice by each and all of them'.

(b) in the case of claims 2 and 3, against the MV 'Privgulf' instead of the MV 'Privmed' in terms of the provisions of s 3(6) and (7) of the Act, because the same person who had the power, directly or indirectly, to control the owner of the MV 'Privmed' when the claims arose controlled the owner of the MV 'Privgulf' at the time when the action *in rem* was commenced.

(c) On 15 October 2014 Aegean issued an invoice for US$156 112.30 (page 60) to '"Master/owners/managing owners/charterers of MV 'Privgulf' and OW bunker Spain SL…"'. According to a subscript to this invoice 'a remittance must be free of all charges to:

> Beneficiary name DBAG STEF NY AEGEAN MARINE PATROLEUM SA
> Deutshe Bank Trust Company Americas
> …
> Ref:
> Aegean Marine Petroleum SA.'

(d) On 15 October 2014 OWBM issued an invoice to 'MV Privgulf and/or owners/charterers' at Bariba Corp for US$ 157 428.52.

(e) OWBM was subsequently liquidated.

(f) On 13 November 2014 PWC ING in a letter addressed to Bariba advised specifically that with reference to an English omnibus security agreement dated 19 December 2013 between OW Bunker A/S and certain of its subsidiaries (as Chargors) and ING Bank MV as security agent, that invoices or confirmations received by Bariba notifies that the relevant chargor or chargors had assigned by way of security to ING Bank all its rights in respect of all supply contracts with it (Bariba Corp) as may be constituted or supplemented by the OWB general terms and conditions generally and including without limitations specifically the unpaid invoice under the supply contracts and document 145 – S 19565 for an amount US$157 428.52. Para 6 of that letter specifically advised that:

> 'any payment by you which is not made in full compliance with the payment instructions in this notice will NOT extinguish the relevant payment obligations to the relevant chargor in respect of invoices under the relevant contract and you will remain fully liable for all amounts outstanding.'

(g) On 29 December 2014, Duane Morris, counsel for Aegean and its financiers in connection with the captioned Bunker delivery, being that of 15 October 2014 to ’Privgulf’ in a letter addressed to Bariba Corp and Privgulf Shipping Limited c/o Bariba Corp, demanded payment for the bunkers outstanding in the sum of US$156,112.36 immediately with payment to be made in US dollars to ’Deutsche Bank Trust Company Americas’. It was especially recorded that:

> ‘Failure to satisfy the outstanding debt or cause the Aegean interest to take all necessary steps to collect the sums due, including, but not limited to, execution of the lien upon the hull of the vessel for the unpaid Bunkers, without further notice to you or to the vessel. Please note that this letter is a formal demand for payment. The failure to honour this demand will result in our exercising all legal rights and remedies to effectuate payment without further notice.’

(h) On 18 July 2015 Mr Johnstone of Seadebt International in an email, acting for the ‘financiers of Aegean Marine Patroleum SA Bunker suppliers’ demanded payment of the bunker fuel delivered on 15 October 2014 by Aegean to the MV Privgulf at the port of Gibraltar. Again it was recorded that ‘failure to take appropriate steps to settle the matter may result in the ship being arrested as security as per shipping practice’.

(i) On 8 September 2015 this was followed up a by a further email to the accounts department at Bariba from Seadebt International recording that they had not received a reply and that ‘we are at the shipping practice placing you on notice that we are tracking your ship with a view to arrest for security’.

(j) On 12 August 2015 in a letter from Aegean to ‘Master/Owners/Managing owners/Operators of MVN/V PRIVGULF in respect of the delivery of bunker fuel for US$156 112.56’, advised that that amount as headlined ‘Receivables’ had ‘irrevocably sold and transferred to Deutsche Bank A. G. our ownership interest and all relevant claims whatsoever in respect of the headlined Receivables reflected in the subject invoice.'

(k) On 27 August 2015 notification was given by Deutsche Bank in accordance with a 'bill of sale' that 'with effect from 26 June, 2015' Deutsche Bank had 'sold, assigned and transferred to Great American Insurance Company, absolutely, full value received, all of its right, title and interest in, to and under the following account receivable …' which then specifically referred to invoice 8190 the OW Bunker entry for OW Bunker Spain SL in the amount of US$156 112.36.' That bill of sale was dated 27 August 2015.

Claims 2 and 3:

[6] The bunker fuel supplied forming the subject of claims 2 and 3, was physically delivered to the MV 'Privmed' at Shanghai by Sinopec.

[7] The following appears from the relevant documentation:

(a) The Sinopec Bunker delivery notes in respect of the deliveries made on 28 and 31 October 2014 to the MV 'Privmed' both refer to Sinopec's general terms and conditions being applicable.

(b) Sinopec's 'General terms and conditions for the sale of marine fuels (2014)' defines 'sellers' as meaning 'the party contracting to sell and deliver marine fuels.'

(c) On 27 October 2014 OWBM issued a 'sales order confirmation' to Bariba in respect of the deliveries made to Privmed between 28 October 2014 and 31 October 2014. The seller was reflected as OWBM and the account was for 'Master and/or owner and/or Charterers and/or MV "Privmed" and/or Bariba Corp.'

(d) On 28 October 2014 OWBM issued an invoice number 1245-S19691 to 'MV Privmed and/or owners/Charters' and at Bariba for the bunkers supply at Shanghai totalling US$214 189.64.

(e) On 30 October 2014 OWBM issued a sales order confirmation to Bariba Corp in respect of deliveries made to 'Privmed' at Shanghai between 31 October 2014 and 1 November 2014 for the account of Master and/or owner and/or Charters and/or MV 'Privmed' and/or Bariba Corp in respect of the fuel delivered.

(f) On 31 October 2014 OWBM issued an invoice number 145- S19687 to 'M/V Privmed and /or owners/charterers' of Bariba Corp for the fuel supplied in the sum of US$51 169.28.

(g) The two claims form part of supply contracts by OW Bunker Trading A/S and certain of its subsidiaries as referred to in the letter of 13 November 2014 by PWC ING to Bariba Corp which advised 'that all its rights in respect of all supply contracts …as may be constituted or supplemented by the OWB general terms and conditions as provided to you and as amended, restated or supplemented from time to time (the contract)' had been assigned by way of security to ING Bank N.V.

(h) In a letter dated 28 January 2015, Clyde & Co. acting for Sinopec in relation to the unpaid bunkers supplied to the M/V 'Privmed' claimed *inter alia* payment of the amount of US$212 860.18.[4] This letter specifically records:

> 'As you are aware, OW Bunker China Ltd is related to O.W. Bunker A/S, a Danish Company that is recently filed for bankruptcy. Our client has to date not received any payment for the bunkers.
> Without prejudice to any other claims which our client may have against you, our client has a claim for conversion and/or in tort if the Bunkers have been consumed or are being consumed in a manner inconsistent with our client's rights. Further, as you may be aware, some jurisdiction recognised that our

[4] Although the amounts of US$212 860.80 and US$50 469.70 claimed by Sinopec from the Applicant differ slightly from that claimed by Ing Bank in the action *in rem* they are in respect of the same supplies to the MV 'Privmed'.

client can exercise a maritime alien against the capital vessel for the unpaid Bunkers.
To this end, please pay the sum of US$ 212 860.18 to our client within the next 5 banking days'.

(i) A similarly worded letter dated 28 January 2015 was also addressed by Clyde & Co. to the same addressees in respect of the unpaid bunker supplied to the MV 'Privmed' on 31 October 2014 for US$50 469.70.

The Defendant's Plea

[8] In respect of the first claim the Defendant pleaded as follows:

'4.1 Defendant admits the delivery at Gibraltar on 15 October 2014 of the marine bunker fuels more fully described in paragraphs 8.1, 8.2 and 8.3.

4.2 Defendant avers, however, that the marine bunker fuels in question were supplied to it for the account of Aegean Marine Petroleum SA ("Aegean") who supplied such bunker fuel *qua* principal and not as the agent of Plaintiff.

4.3 Aegean has sought payment from the Defendant in respect thereof in the amount of US$ 157 428.52.

4.4 Save as aforesaid the allegations contained in this paragraph are denied.'

[9] The plea to the second and third claims is in similar terms, as follows:

'10.1 Defendant admits that on 28 October 2014 and at Shanghai the Marine Bunker fuel more fully described in paragraphs 17.1 and 17.2 were delivered on board the MV 'Privmed'.

10.2 Defendant avers, however, that the marine bunker fuels in question were supplied to it by Sinopec Zhejiang Zhousan Petroleum Co. Limited ("Sinopec") who supplied such bunker fuels *qua* principal and not as the agent of Plaintiff.

10.3 Sinopec has sought payment from Defendant in respect thereof in the amount of US$ 214 189.64.

10.4 Save as aforesaid, Defendant has no knowledge of the remaining allegations contained in this paragraph, cannot admit them and they are accordingly denied.'

Further it is pleaded that:

'16.1 Defendant admits the supply at Shanghai on 15 October 2014 of the marine bunker fuels more fully described in this paragraph.

16.2 Defendant avers, however, that such bunker fuels were supplied to it by Sinopec *qua* principal and not as the agent of Plaintiff.

16.3 Sinopec has sought payment from defendant in respect thereof in the amount of US$ 51 169.28.

16.4 Save as aforesaid, the allegations contained in this paragraph are denied.'

<u>The Case for Joinder</u>

[10] In the light of the aforesaid, Mr *Fitzgerald* SC for the Applicant submitted that the Applicant is facing competing claims for payment in respect of the same fuel delivered to it and the MV Privmed from ING, Sinopec and Great American Insurance and that in order to avoid being sued in a multiplicity of actions in competing jurisdictions, it is convenient and appropriate for Sinopec and Great American Insurance to be joined as third parties in the action *in rem.* He argued that an issue or question which will arise is whether the Applicant is liable to Ing Bank, or whether on receiving the bunker fuel it had become indebted to Aegean (now Great American Insurance as its assignee) and Sinopec. He argued that this issue should be determined in a manner binding on all and hence that there was the need for the joinder of Sinopec and Greater American Insurance. He argued further that no prejudice can be occasioned by the joinder in that ING's claim is secured and the Applicant has tendered to pay the claims of Sinopec and American Insurance if directed to do so by the Court.

<u>The Opposition to the Joinder</u>

[11] American Insurance has not opposed the application for its joinder. Its joinder has however been opposed by Ing Bank.

[12] The joinder of Sinopec was opposed by Sinopec and Ing Bank. In its affidavit in opposition Sinopec, in the words of its attorney with reference to the letter of demand, sets out its attitude to the joinder as follows:

> ‘There is no suggestion that there is any contractual relationship between the owner of the MV “Privmed” and Sinopec’, the claim of Sinopec against the MV “Privgulf” described in the letters of demand is one ‘for conversion and/or in tort if the bunkers have been consumed or are being consumed in a manner inconsistent with our clients rights’, that a claim in conversion of the claim recognised in the English law of tort and lies when there has been an unauthorised dealing with a chattel in a manner which deprives the claimant of the use and possession of the chattel, which is a claim for damages and not one for performance of the contract’, that if Sinopec has a claim for damages arising from the tort of conversion, this claim would be separate and distinct from the claim advanced by Ing Bank for performance of the agreements of sale. Accordingly he submits that there are ‘no questions or issues that have arisen or will arise in the action advanced by Ing Bank which might arise in an action that Sinopec might commence for damages in another jurisdiction which should be determined so as to bind Sinopec.’

In reply to this statement, the Applicant accepts that it may well be liable to pay to Ing Bank the outstanding contract price of the bunkers and services supplied to it, but points out that Sinopec:

> ‘…however, notwithstanding it submission that it had a contract of purchase and sale with OWB has now (sought) to assert a claim against the Applicant for the very same amount.’

<u>The Law</u>

[13] Section 5(1) of the Act, dealing with 'Powers of court', provides:

> '(1) A court may in the exercise of its admiralty jurisdiction permit the joinder in proceedings in the terms of this Act of any person against whom any party to those proceedings has a claim, whether jointly with, or separately from, any party to those proceedings, or from whom any party to those proceedings is entitled to claim a contribution or an indemnification, or in respect of whom any question or issue in the action is substantially the same as a question or issue which has arisen or will arise, between the party and the person to be joined and which should be determined in such a manner as to bind that person, whether or not the claim against the latter is a maritime claim and notwithstanding the fact that he is not otherwise amenable to the jurisdiction of the court, whether by the reason of the absence of attachment of his property or otherwise.'

[14] Section 5(1) is very wide in its application. In *MY 'Summit One' Farocean Marine (Pty) Ltd v Malacca Holdings Ltd and another*[5] paragraph 17 - 18 the following was said:

> 'Two questions arise. The first is whether the section permits the joinder of a defendant in the alternative. Merely because no express reference is made to a defendant in the alternative does not mean that the joinder of such a party is precluded. The language used, I think, is clearly wide enough to include such a party. The section permits, for example, the joinder of a person 'in respect of whom any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between the party [seeking the joinder] and the person to be joined…'. There is furthermore nothing in this section to indicate an intention to preclude the joinder of a person on the ground that to do so may result in a party over whom the Court would not otherwise have had jurisdiction possibly being found to be the only party liable. Given the wide language used, such a result could hardly have been beyond the contemplation of the legislature. In the circumstances, I can see no reason for construing s 5(1) so as not to include the joinder of an alternative defendant. … But the object of the legislature was clearly to permit all the parties to a dispute to be joined in an action. The absence of such a provision could well be

[5] 2005 (1) SA 428 (SCA) at para 17 and 18.

result in the undesirable situation of courts in different countries having to adjudicate on the same or substantially the same issues arising out of the same incident or set of facts.

[18] … In my view, the word "may" in s 5(1) is to be understood in its permissive sense and not in the sense of serving what is being described as a "predictive function"…This much, I think, is apparent from the use of the word "permit" in the phrase, the "court may … permit". The Court *a quo* accordingly had a discretion to permit or refuse the joinder of Romans. It did not exercise that discretion and this Court is now free to do so. It is common cause that the party with whom Farocean contracted was Romans. Ferocean's case is that it is uncertain whether Romans acted as a principal or as agent for Malacca. It therefore wishes to have both before the Court. … In the circumstances, it is appropriate, in my view, to permit the joinder of Romans as an alternative defendant in the proceedings.'

[15] The only jurisdictional prerequisites for a joinder are that there must be an issue or question which has arisen or which will arise between the Applicant and Sinopec and Great American Insurance:

(a) which is substantially the same as an issue or question in the action between the Applicant and Ing Bank; and

(b) which should be determined in such a manner as to bind Sinopec and/or Great American Insurance.

[16] The onus to prove these threshold requirements is on the Applicant.

<u>Evaluating the Opposition to the Joinder</u>

[17] Mr *Mullins* SC on behalf of Ing Bank referred to *inter alia* the decisions in *PST Energy 7 Shipping LLC and Another (Appellants) v OW Bunker Malta Ltd and another (Respondents)*[6] and *Precious Shipping Public Company Ltd and others v O.W. Bunker Far East (Singapore) Pte Ltd and others and other*

[6] [2016] UKSC 23 (11 May 2016).

matters.[7] The essence of Ing Bank's argument is that the issues or questions which may arise and require determination in the *in rem* action do not arise and will not arise as between MV 'Privgulf' and Sinopec and American Insurance, because on the affidavits neither of the parties sought to be joined in any way contest that the owners of the MV 'Privgulf' and the MV 'Privmed' had contracted with OWBM for the supply of the bunkers to the vessels, and that physical delivery was effected by Aegean and Sinopec pursuant to contracts they had in turn concluded with OW Bunker entities, so that neither Aegean or Sinopec would be vested with any contractual claim against the vessels or the owners thereof. Specifically as regards Great American Insurance, he emphasized that it is an assignee of the contractual claims Aegean, later Deutsche Bank, has against OW Bunkers Spain SL, and not any claim against against MV 'Privgulf', so there would be no common question or issue arising.

[18] The difficulty with that argument at a factual level is of course that Great American Insurance has not filed an affidavit setting out its attitude to the basis on which the Applicant seeks its joinder; indeed, it has not participated in the proceedings at all. Although the documentation might suggest that Aegean's claim was against OWBM, it did also invoice inter alia the Applicant for the bunker fuel supplied, and it did subsequently when payment was not forthcoming, demand payment from inter alia the Applicant. Whether all bunker supply invoices are as a matter of course or routine made out also to the 'Master/owners/managing owners/charterers of' a vessel, the possibility exists such a claim based on some variation of a contract might be pursued in due course by the Great American Insurance as assignee of the claims of Aegean against the Applicant. There has been no abandonment by Great American Insurance of any such claim, or at least an unequivocal statement under oath that it shall not pursue such a claim. Where such a claim can in theory exist, without there being a disavowal of any potential reliance on such a claim, it seems to me that a common issue or question which does arise in the action *in rem* and which has arisen or may arise

[7] [2015] SGHC 187.

between the Applicant and Great American Insurance is whether the Applicant is liable to the latter or Ing Bank for the fuel physically supplied to the MV Privgulf in Gibraltar. That issue should be determined to bind both Ing Bank and Great American Insurance.

[19] Sinopec, represented by Mr *Wragge* SC, expressly recorded in the affidavit filed in opposition to its joinder, and confirmed in Mr *Wragge's* address[8] from the bar, that it acknowledged the existence and validity of the contractual claims of Ing Bank. He argued that the existence of such a conceded contractual claim was in any event irrelevant to any other claim which Sinopec may have and may wish to advance against the MV 'Privmed' or its owner in some foreign jurisdiction where such claims may be recognised. In my view, that statement is correct. In so far as the action *in rem* against the MV 'Privgulf' is in respect of bunkers physically supplied by Sinopec to another ship, the MV 'Privmed', the action was one against the MV 'Privgulf' as an associated ship, and there is no conceivable explanation why the MV 'Privgulf' or its owner should have any personal liability to Sinopec, whether for conversion in tort or otherwise in respect of the bunkers delivered to the MV 'Privmed'.

[20] The demands from Clyde & Co for the unpaid Bunkers delivered to MV 'Privmed' were addressed to Privmed Shipping Limited, never to MV 'Privgulf', and did not seek to assert a claim based in contract, but at best possibly some claim for conversion and/or in tort which would only arise if the bunkers had been consumed or were being consumed in a manner inconsistent with the rights of Sinopec. These demands were not being made to the MV 'Privgulf' or her owner, Privgulf Shipping Limited. Nor was the threat of an arrest in respect of the MV 'Privgulf', but only for the possible arrest of the MV 'Privmed' as security for its claim if Privmed Shipping Limited does not pay the claim.

[8] As regards any action against the MV 'Privgulf' Mr *Wragge* made it clear that Sinopec does not intend to commence any proceedings in South Africa against the MV 'Privgulf' for amounts reflected as due and payable by the Privmed or its owner, as it has no cause of action against the Mv 'Privgulf' or its owner relating to the bunkers supplied to the MV 'Privmed' that would be recognised and sustained by a South African Court.

[21] I do not believe that any question will arise in the action *in rem* commenced by Ing Bank against the MV 'Privgulf' in respect of the bunker fuel supplied to the MV 'Privmed'. If the owner of the MV 'Privmed' is contractually liable to pay the purchase price of the bunkers supplied to the MV 'Privmed' to Ing Bank as an assignee of the claim of OWBM, then it will not matter whether Sinopec also has a claim enforceable against the owner of the MV 'Privmed' or the vessel itself, or not. The MV 'Privgulf' will be obliged to satisfy the claim of Ing Bank as it is not a case of two parties being liable in the alternative to Ing Bank. Ing Bank has a valid claim, enforceable against the MV 'Privgulf' in respect of the indebtedness of MV 'Privmed' to OWBM and is entitled to payment.

[22] It seems to me that there is no issue or question in the action *in rem* which will also arise between the MV 'Privgulf' and Sinopec, no issue has as yet arisen in the action *in rem* between the MV 'Privgulf' and Sinopec, and it has not been shown that any issue in the action *in rem* will arise as between the MV 'Privgulf' and Sinopec.[9]

[23] As regards the American Insurance Company, on the documentation produced the MV 'Privgulf' faced competing claims by Ing Bank and Aegean. Neither Aegean, nor American Insurance as the ultimate assignee of its claim,

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[9] Sinopec has disavowed reliance on any claim for a contract price in respect of the Bunker supplied. At best it confines its claim to one based on conversion. A claim in conversion lies where there has been an unauthorised dealing with a chattel in a manner which deprives the claimant of the use and the possession are the same. To the extent that all the Bunker fuel might not have been used thereby depriving Sinopec of the use and possession of its Bunker fuel only to the extent used, if the unused portion was returned, the Applicant would be entitled to a reduction in the contract price as against OWMB and ING's claim would be reduced accordingly. Inasmuch as in principle such a situation may arise, it is so unlikely and improbable as not to be countenanced as a possible issue or question which might arise in respect of the action *in rem* – see *Natal Fresh Produce Growers' Association and others v Agroserve (Pty) Ltd and others* 1990 (4) SA 749 (N) (Judgment of Howard JP on exception). As is also remarked in the context of a claim based on conversion in the judgment of Steven Chong J in *Precious Shipping*, 'the physical suppliers delivered the Bunkers to the vessels and must at least be taken to have intended for the bunkers to be consumed…This being the case, it is clear that no claim on conversion may lie.' Regarding the threat in the letter from Clyde & Co. that "some jurisdictions recognise that our client can exercise a maritime alien against Vessel for the unpaid Bunkers". South African Courts will only recognise liens recognised by English Law. There might be some claim Mr *Wragge* accepted for a lien in American Law but even there it attaches to the contractual supplier and not to any further parties.

has filed any affidavits to disavow reliance on the claim initially asserted by Aegean. As the claim asserted by Ing Bank as cessionary of the claim by OWBM relates to the supply of the same fuel to the MV ‘Privgulf’, the MV ‘Privgulf’ faces the real possibility of competing claims. Whether the American Insurance Company (as opposed to Ing Bank) is ultimately entitled to payment for that fuel from the MV ‘Privgulf’ raises questions or issues which are substantially the same as those which will arise in the action *in rem*. The capacity in which the fuel oil was delivered and the identity of the actual creditor in each case requires determination, which can best be determined by the joinder of Great American Insurance.

[24] Section 5(1) of the Act requires common ‘questions or issues’ and not necessarily causes of action. The joinder of American Insurance will enable the Applicant, *qua* Defendant in the action *in rem* to seek a declaratory, or such other relief as it may deem expedient, as to whether Ing Bank or American Insurance is entitled to payment of the amounts which the Applicant accepts it is liable to make in respect of the supply of the bunker fuel physically delivered by Aegean.

[25] Ing bank’s opposition to the joinder of the American Insurance Company is, with respect, taken no further by the two judgments referred to in paragraph [17] above. The Singapore judgment dealt with an inter-pleader situation and is different to the considerations which arise in a joinder application. In the case of an inter-pleader claims are asserted and pursued by parties possessed of the required facts to advance their claims in respect of a particular asset, which claims are necessarily adverse to each other. The judgment of Chong J identified the characteristics of an inter-pleader to include *inter alia* symmetry etc. He held, correctly in my view, that the applicants had to satisfy the court that they have a *prima facie* claim adverse to that of other claimants. On the facts in that matter he held that the applicants failed *prima facie* to establish a possible claim based on conversion to be an adverse claim or a competing claim. A clear distinction must be drawn between an inter-pleader claim and a joinder application. Joinders may arise in a variety of situations, the only requirement being a common question

or issue arising. The facts giving rise to a joinder at a Plaintiff's election will normally be within the knowledge of the Applicant seeking the joinder. But the position will be different where a Defendant decides to join a third party to achieve a decision which decides the issues between them. In these instances there may be very little evidence available to an Applicant. Thus in *MT Tigr* Owners of the MT *Tigr and another v Transnet Ltd t/a Portnet (Bouygues Offshore SA and another intervening)*[10] it was said that:

> 'The position of such a defendant is different from that of an applicant who is a prospective plaintiff seeking an attachment order or arrest. In the case of the latter, success in the main action is dependant solely on the establishment of the cause of action against the defendant. In the case of the former, success in the main action against the third parties is dependent on it being established that they are joint wrongdoers together with the defendant.'

Further on at page 869J - 870 it was said that:

> 'It is a common occurrence for a defendant who denies liability to join as a third party a potential joint wrongdoer from whom it will seek a contribution or indemnification in the event of it being found liable despite its denial. The illogicality and unfairness referred to by Comrie J of requiring a defendant in such circumstances to establish a *prima facie* case against itself would seem obvious, so does the practical difficulty of procuring the evidence required…. What the argument implies therefore is that a defendant in the position of Portnet who wishes to defend the plaintiff's claim against them but also to join a third party must either obtain an adduced *prima facie* evidence against himself or forgo the security provided by an attachment. To place a defendant in such a dilemma seems to me to adopt an approach which is both over-technical and unrealistic.'

Conclusion

[26] I am not persuaded that the Applicant has made out a case for the joinder of Sinopec. In respect of the relief claimed in the Notice of Motion dated 16 September 2015, the rule *nisi* issued insofar as it remains extant in

[10] 1998 (3) SA 861 (SCA) at 868 J.

respect of Sinopec (the rule *nisi* against Aegean having previously being discharged) falls to be discharged. There is no reason why Sinopec's costs relating to the unsuccessful attempt to join it should not be paid by the Applicant.

[27] I am however satisfied that the Applicant has made out a case for the joinder of the Fifth Respondent, Great American Insurance Company. In the application for the joinder of the Fifth Respondent pursuant to the Notice of Motion dated 8 January 2016, the rule *nisi* issued for its joinder as a party in the action *in rem* in terms of s 5(1) of the Admiralty Jurisdiction Regulation Act as amended read with Admiralty Rule 11 accordingly falls to be confirmed. In the exercise of my discretion on costs, it seems prudent and fair to me that the costs relating to such joinder be reserved for determination by the Court hearing the action *in rem*.

<u>Order</u>

[28] The following order is accordingly granted:

(a) The rule *nisi* issued on 21 September 2015 in the application commenced by the Notice of Motion dated 16 September 2015 for the joinder of *inter alia* the Third Respondent (Sinopec), is discharged in respect of the Third Respondent with costs.

(b) The rule *nisi* issued on 12 January 2016 in the application commenced by the Notice of Motion dated 8 January 2016 for the joinder of the Fifth Respondent (Great American Insurance Company) as a party in the action *in rem* under case no A72/2015 in terms of s 5(1) of the Admiralty Jurisdiction Regulation Act as amended read with Admiralty Rule 11, is confirmed. The costs relating to that joinder are reserved for determination by the Court hearing the action *in rem*.

KOEN J

<u>Appearances</u>

For the Applicant:	Adv. M J Fitzgerald SC
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For the First Respondent:	Adv. S R Mullins SC
Instructed by:	ENS AFRICA
Tel.: 031 301 9340	
Ref.: T Norton	
For the Third Respondent:	Adv. M Wragge SC
Instructed by:	Clyde & Co.
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