

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: A45/2012

(Exercising its Admiralty Jurisdiction)

Name of vessel: mv "Kota Jaya"

In the matter between:

PACIFIC INTERNATIONAL LINES (PTE) LTD

Applicant

and

CAPEWINDS TRADING 33 CC

Respondent

J U D G M E N T

THATCHER AJ

BACKGROUND

[1] In March or April 2011, the respondent, Capewinds Trading 33 CC ("Capewinds") concluded a contract with the applicant, Pacific International Lines (PTE) Ltd ("PIL") for the carriage of four reefer containers of apples from Cape Town to Douala, Cameroon, on board a vessel operated by PIL. The cargo of apples was found on arrival to be damaged and could neither be sold nor salvaged. This occurred, Capewinds alleged in a summons issued subsequently, because the cargo was not delivered within a reasonable period and/or the

electricity supply to the reefer containers (used to cool the containers) was insufficient. In consequence, Capewinds alleges that PIL is liable to compensate it for its damages in the amount of € 238 354,33.

[2] On the 25th October 2011 and on the 22nd December 2011, an attorney of Cox Yeats, for Capewinds, requested firstly PIL and then PIL's attorneys, Bowman Gilfillan, to put up security for Capewinds' claim failing which it would have no alternative but to arrest one of PIL's ships calling in South Africa to obtain security for its claim which would, Capewinds' attorney stated in his letter of the 22nd December 2011, be for proceedings in this court. On the 20th January 2012, Mr Brown of Bowman Gilfillan sought clarity on the security required but advised that his client's offices were closed until the 25th January 2012 and accordingly the matter of security could not be determined until that date. He further stated that "we trust that your client will not proceed with an arrest of any of [PIL's] vessels until that date."

[3] Apparently no security was forthcoming as on the 16th February 2012 Capewinds' attorney addressed a letter to Bowman Gilfillan in which he states as follows:-

"Please confirm that your client is prepared to provide security for the claim for Durban proceedings. If so, please let me have a draft letter of undertaking. I am concerned about the fast approaching time bar so your urgent response would be appreciated. ... Security was requested as far back as early December 2011 i.e. two and a half months ago. If the Club is not prepared to establish security on the basis requested, we will be forced to arrest a P&I (sic) vessel."

[4] It would seem that Capewinds' attorney had then sent Mr Reddy of Bowman Gilfillan a letter of undertaking ("LOU") acceptable to Capewinds because on the 2nd March 2012, Capewinds' attorney sent a letter to Mr Reddy stating that PIL had had ample opportunity to consider the wording of the LOU and its quantum and unless agreement was reached by the 7th March 2012, he would *"take steps to arrest a PIL vessel."*

[5] On the 5th March 2012 Mr Reddy replied with amended wording to the LOU. Those amendments were apparently not accepted because on the 9th March 2012 an LOU was established by and large in accordance with Capewinds' attorney's draft. That undertaking was furnished by The Standard Steamship Owners' Protection and Indemnity Association (Asia) Ltd ("the Club") with which PIL had protection and indemnity cover.

[6] The undertaking is in the following terms: -

"In consideration of your releasing from arrest and/or refraining from arresting or re-arresting and/or interfering in any other way with the use or trading of the above ship or any other ship or property or asset in the same or associated ownership or management, we, [the Club], on behalf of [PIL] the carrier under the above bills of lading, hereby agree to pay to you such sum or sums as may be adjudged without the right of appeal by a competent court or arbitration tribunal or agreed between the parties with our consent to be due to you from the carrier in respect of the above matter, provided always that our total liability hereunder shall not exceed ... € 351, 139,61 ... inclusive of interest and costs. This undertaking is given without prejudice to any rights or defences of the carrier, including their right to limit liability.

Payment of any amount of capital and interest due in terms of this undertaking shall be effected by the Club within 14 ... days of receipt by Bowman Gilfillan ... of a written demand, addressed to us and enclosing this undertaking together with a copy of the written settlement agreement

or final unappealable judgment of the High Court of South Africa as the case may be ...

The Club:

1. *submits to the jurisdiction of the KwaZulu–Natal High Court, Durban for the purpose of any claim by you against it for payment under this letter of undertaking;*
2. *chooses as its domicilium citandi et executandi, for the purposes of those proceedings, the offices of PIL South Africa, 9th Floor, Corporate Place, 9 Gardiner Street, Durban”*

[7] On the 19th April 2012, Capewinds brought an action in personam in this court against PIL for damages arising from the alleged breach of contract by PIL, the cause of action being that summarised in paragraph 1 of this judgment.

[8] On the 10th May 2012, Mr Reddy, in a letter to Capewinds' attorney, contended that the summons was defective inter alia because in personam proceedings had been instituted whereas on the 6th March 2012 Capewinds' attorney had recorded that Capewinds' claim was in rem. Mr Reddy also added a third paragraph which is as follows:

“3. There is no averment in the Summons as to the basis for jurisdiction of the Kwa–Zulu Natal High Court.

All our client's rights and defences, including, and not limited to, the above and, specifically, our client's right to challenge the jurisdiction of the Kwa–Zulu Natal High Court, remain reserved.”

[9] Capewinds proceeded to amend its summons by alleging further that its claim was a maritime claim by reason of section 1 (1) (d), (h), (i), and/or (ee) of the Admiralty Jurisdiction Regulation Act, 1983 ("the Act"), and that the Durban

High Court had jurisdiction by reason of section 2 of the Act read with sections 3 (2) (a), (b) and (c) of the Act.

[10] On the 8th August 2012, PIL launched this application for an order that:-

- (a) the action in personam be declared null and void; alternatively
- (b) the court in terms of section 7 of the Act decline to exercise its admiralty jurisdiction in those proceedings;
- (c) it be declared that the deemed arrest of the mv “KOTA JAYA” and other property pursuant to the letter of undertaking of the 9th March 2012 has lapsed and ceased to be of force and effect, alternatively that such deemed arrest be set aside;
- (d) the original letter of undertaking dated the 9th March 2012 be returned to Bowman Gilfillan.

PIL also sought an order that Capewinds pay the costs of the application.

[11] Capewinds has opposed the application and has in turn brought an application for an order that the mv “KOTA BUNGA” be joined in the action as a second defendant and for an order amending the summons in the action consequent upon such joinder.

[12] At the hearing, counsel for Capewinds, Mr Wallis, informed me that should PIL’s application to declare the action null and void fail, Capewinds would not

persist with its joinder application. Mr Wallis and counsel for PIL were also in agreement that the application for an order that this court decline to exercise its jurisdiction fell to be determined only if the application to declare the action in personam null and void failed.

[13] I turn now to consider the application for an order that the action in personam be declared null and void.

Whether the action in personam is null and void

[14] Mr Cooke submitted that PIL was entitled to this order because:-

- (a) upon a proper interpretation of the LOU, and having regard to the contemporaneous correspondence between the parties' attorneys at the time, Capewinds was not entitled to enforce the claim by an action in personam because the LOU was established solely to prevent the arrest of a PIL ship, not to prevent the attachment of any property of PIL and section 3 (10) (a) (i) does not create both a deemed arrest and a deemed attachment but one or the other;
- (b) in those circumstances, there had not been a deemed attachment as contemplated by section 3 (10) (a)(i) of the Act;
- (c) PIL had neither consented nor submitted to the jurisdiction of the Durban High Court as required by section 3 (2) (c) so as to confer jurisdiction in the action on this court.

[15] Capewinds contends it is entitled to pursue its action in personam because:-

- (a) there is a deemed attachment of the property within the meaning of section 3 (10)(a)(i) of the Act in the light of the LOU furnished;
- (b) PIL had in any event consented or submitted to the jurisdiction of this court.

[16] The issue is thus whether Capewinds has satisfied the requirements of section 3(2)(b) or 3(2)(c) of the Act.

[17] It is accepted by PIL that the facts alleged in the summons, if proved, would establish a cause of action in personam against PIL.

[18] It must be borne in mind that the undertaking is in the following terms:-

"In consideration of your releasing from arrest and/or refraining from arresting or re-arresting and/or interfering in any other way with the use or trading of the above ship or any other ship or property or asset in the same associated ownership or management, we ... hereby agree to pay you such sum ... as may be adjudged ... to be due to you from the carrier ..."
(my underlining)

[19] Mr Cooke submitted that the terms of that undertaking were simply "boilerplate" provisions ordinarily found in such undertakings. However I must attribute meaning to those words and have regard to their context by reading

them in light of the document as a whole and the circumstances in which it came into existence.

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at 603 F to 604 D

[20] The background to the preparation of the document is provided by Mr Reddy at paragraph 12 of his founding affidavit where he states that *“the LOU was put up as a matter of commercial necessity, to ensure no interruption to [PIL’s] business.”* Mr Reddy in his replying affidavit at page 86, paragraph 15, contended *“that the LOU employs standard wording, and is not crafted for the particular situation at hand.”* and therefore the court ought to be *“cautious in seeking to derive the purpose of the LOU exclusively from its wording.”* Mr Reddy stated that if the LOU was meant to include attachment, it would have said as much.

[21] Mr Reddy at page 87 paragraph 16.2 of his replying affidavit went on to state that the words *“interfering in any other way with the use or trading of the above ship or any other ship or property or asset”* were intended to cater for situations which had allegedly occurred in Vietnam, South America and smaller ports in China where no formal warrant of arrest had been obtained for the vessel but it had been detained by local authorities.

[22] Mr Reddy further contended at page 88 paragraphs 17.2 to 19 that the only immediate threat was the threat of arrest. Attachment was not threatened, and accordingly the LOU had not been established to prevent attachments.

[23] Mr Wallis submitted that the wording of the LOU was sufficiently wide to encompass attachment. The LOU specifically stated that it was provided "*[in] consideration for [Capewinds not arresting or] interfering in any other way with the use or trading of the above ship or any other ship or property or asset*" owned by PIL.

[24] I agree with Mr Wallis. Mr Reddy cannot have it both ways. If the LOU must be read as not being crafted for the particular situation at hand but to prevent any interference in any way with the use or trading of any ship owned by PIL, it seems to me that the LOU must also be in consideration for Capewinds refraining to attach any of PIL's vessels. An attachment would result in an interruption to PIL's business as much as an arrest or any informal detention.

[25] Mr Cooke contended that it was clear from the correspondence that the LOU was put up to prevent the arrest of a PIL ship, not an attachment. It is true that Capewinds' attorney in his correspondence threatened an arrest, not an attachment of a PIL vessel. However, given the wide undertaking which PIL on its own version intended to cover circumstances other than arrest, there is no valid reason why the LOU should be construed as not being security against attachment as well.

[26] Section 3 (10)(a)(i) of the Act provides for the position where, prior to arrest or attachment, security is put up to prevent an arrest or attachment. Having found that the LOU provides for security to prevent attachment of property, it

must follow that in terms of section 3 (10)(a)(i) property is deemed to have been attached.

[27] Accordingly it must follow that Capewinds has satisfied the requirement of section 3(2)(b) of the Act. Capewinds was therefore entitled to institute an action in personam against PIL.

[28] In the light of that finding, it is unnecessary for me to consider at this stage the second ground advanced by PIL for the order declaring the action in personam null and void, namely that PIL had not consented or submitted to the jurisdiction of this court. However, Mr Wallis submitted that whether PIL had consented or submitted to the jurisdiction was relevant in the determination of the question whether this court should, in terms of section 7 (1) (a) of the Act, decline to exercise its admiralty jurisdiction in the proceedings.

[29] I shall accordingly deal with the issue of consent or submission to jurisdiction when I deal with PIL's application in terms of section 7 (1) (a).

[30] It is to this application which I now turn.

Whether this court should decline to exercise its admiralty jurisdiction in the action in personam

[31] Section 7 (1) (a) of the Act provides as follows:

“Disputes as to venue or jurisdiction

(1)(a) A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that any other court in the Republic or any other court or any arbitrator, tribunal, or body elsewhere will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court or by such arbitrator, tribunal or body.”

[32] The court must be of the opinion that:-

- (a) the court in Singapore will exercise jurisdiction in the proceedings;
- (b) it is more appropriate that the proceedings be adjudicated in Singapore than in South Africa.

[33] I interpose to state that PIL originally sought an order that the court decline to exercise its admiralty jurisdiction and in the alternative that the action be stayed in terms of section 7(1)(b) of the Act pending its determination by a court in Singapore. However, in Singapore PIL intends raising the defence that the claim is time-barred in terms of Singapore law and thus no purpose is served by staying the claim in South Africa. I did not understand Mr Wallis to dispute that the claim is prescribed in Singapore. Indeed he relies upon this factor as being one which should cause this court not to decline to exercise its jurisdiction in the action.

[34] It is common cause that the bill of lading provides as follows:-

“31. Law and Jurisdiction

- (1) *The contract evidenced hereby or contained herein shall be governed by Singapore law.*

- (2) *Any claim against the Carrier hereunder shall be determined by the Singapore courts to the exclusion of the jurisdiction of the courts of another country. The Carrier shall however be entitled to pursue any claim against the Merchant in Singapore or in any other jurisdiction in which the Merchant has assets."*

[35] PIL relies upon an opinion of a Singapore lawyer, Mr Augustine Liew to satisfy the requirement that the Singapore court will exercise jurisdiction in the proceedings. This is clear from paragraph 51 of Mr Reddy's founding affidavit. Capewinds, according to its attorney at paragraph 61 of his answering affidavit, does not dispute this.

[36] Both counsel were agreed that as the parties had concluded a contract which required that claims in terms thereof were to be determined by the courts in Singapore to the exclusion of the courts of any other country, the onus rested upon Capewinds to show why it should be permitted to pursue its claim in South Africa. Capewinds also had to show that the discretion the court had to allow it to proceed in South Africa had to be exercised judicially and only when a "very strong case" had been made out.

mv Iran Dastghayb v Terra-Marine SA 2010 (6) SA 493 (SCA) at 502F–G

[37] I am bound to follow the decisions of the full bench in:

mv Spartan-Runner v Jotun-Henry Clark Ltd 1991 3 SA 803 (N);

mv Achilleus v Thai United Insurance Co Ltd and Others 1992 (1) SA 324 (N) at 334 C to J.

Both of these cases in turn followed the principles summarised by Brandon J in *The Eleftheria* [1969] 1 Lloyd's Rep 237 at 242 which are as follows:

- “(1) *Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.*
- (2) *The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.*
- (3) *The burden of proving such strong cause is on the plaintiffs.*
- (4) *In exercising its discretion, the Court should take into account all the circumstances of the particular case.*
- (5) *In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:*
 - (a) *In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.*
 - (b) *Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.*
 - (c) *With what country either party is connected, and how closely.*
 - (d) *Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.*
 - (e) *Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would:-*

- (i) *be deprived of security for that claim;*
- (ii) *be unable to enforce any judgment obtained;*
- (iii) *be faced with the time-bar not applicable in England; or*
- (iv) *for political, racial, religious or other reasons be unlikely to get a fair trial."*

[38] Both counsel sought to apply these principles to the facts of this case.

Where the evidence is situated or readily available and the effect of that on the convenience and expense of a trial in Durban and Singapore

[39] Mr Reddy in his replying affidavit states that the principal issues are likely to concern the alleged delay in delivering the cargo and the performance of the reefer containers. I agree. Capewinds in its summons alleges that these are the breaches of contract.

Mr Reddy further states that:-

- (a) the planning of PIL's vessels is carried out in Singapore where the two witnesses who will testify on the delay issue are based;
- (b) at least one witness from Tema in Ghana will be required to explain the long delay during trans-shipment due to congestion at the port of Tema; PIL plans to call a Captain Tabbica, who is based in Ghana, on this issue;
- (c) the evidence of the performance of the reefer containers will have to be given by the Master, a Sri Lankan national and possibly the Chief Officer

and a technical manager (it is not clear precisely which of the crew members whose names appear on a schedule in the replying affidavit will have to testify: suffice to say none is from Singapore or South Africa with all being from the Indian subcontinent or from the Philippines);

- (d) PIL's evidence on the seaworthiness of the vessel would be from one or two witnesses who live and work in the United Kingdom;
- (e) insofar as evidence pertaining to the South African fruit is concerned, PIL intends retaining the services of marine consultants and surveyors in Singapore whom he names;
- (f) as to the condition of the cargo in Cameroon, the evidence of a Cameroonian surveyor or surveyors is necessary and will be called.

[40] Mr Wallis on the other hand contended that the factual witnesses would largely be South African.

[41] It is true that the witnesses as to the state of the fruit when it was packed and loaded in Cape Town would be from South Africa and that almost certainly the evidence as to the conclusion of the contract would be provided by people in South Africa. However that is only one aspect of the matter. It seems to me that all of the other necessary witnesses will not be from South Africa but would be from Ghana and Cameroon and possibly Singapore. Insofar as the evidence of the Master or anyone else who were on board the ship is concerned, they are seafarers and thus could be anywhere in the world and accordingly it does not

matter to them whether the trial is held in Durban or Singapore. What is certain however is that, the cargo having been loaded in Cape Town, all of the witnesses would have to travel varying distances whether the trial is held in Durban or Singapore.

[42] Mr Wallis criticised the number of witnesses PIL contemplated calling, submitting that the issues were not defined, presumably thereby contending that until the issues had been properly defined, no proper estimate of the evidence which would be necessary was possible. He submitted that the relevant witnesses would be predominantly in South Africa and Cameroon. It is true that witnesses from these countries would no doubt have to testify as to the condition of the cargo at the commencement of and at the conclusion of the voyage. However the breach of contract alleged by Capewinds is not only the alleged delay in delivering the cargo. It is also the malperformance of the reefer containers. Mr Reddy indicated who would be required to testify on this aspect and it cannot be said that this evidence would be irrelevant. Of course it would be open to the parties in preparing for trial to reach agreement on any number of issues, but at this stage one must assume that no admissions will be made by either party.

[43] In the circumstances, it cannot in my view be said that the evidence is situated or more readily available in Durban than Singapore.

Whether the law of Singapore applies, and if so, whether it differs from South African law

[44] In terms of section 31 of the bill of lading, the contract is governed by Singapore law. Brandon, J in *The "Eleftheria"* (*supra*) at page 246 stated as follows:-

"It seems to be clear, however, that, in general, and other things being equal, it is more satisfactory for the law of a foreign country to be decided by the Courts of that country."

In this case the parties were agreed that there was no evidence that Singapore law differed from South African law in any material respect. The principle enunciated by Brandon, J must nevertheless be a factor which must be taken into consideration and is a factor not in favour of the local forum hearing the trial.

The connection the parties have with South Africa and Singapore

[45] This is a neutral factor, Capewinds being a South African company with its place of business in Cape Town while PIL's place of business is in Singapore.

Whether PIL genuinely desires a trial in Singapore or whether it only seeks procedural advantages

[46] Mr Reddy in his founding affidavit states that PIL genuinely desires that the terms of the contract of carriage be enforced and that this dispute be determined in Singapore. Mr Reddy states that the bills of lading contain the exclusive jurisdiction clause and the application of Singapore law because it is essential to PIL's business that all claims arising from the bills of lading contracts be

determined in a consistent and predictable manner. PIL apparently operates a fleet of 141 vessels with a total capacity of approximately 297 520,00 TEUs, it concludes hundreds of thousands of contracts every year involving bills of lading, its liner services sail to more than 500 locations in 95 countries and it receives approximately 350 cargo claims a year. For that reason it is essential to PIL's business that all claims arising from these bills of lading be determined in a consistent and predictable manner. Mr Reddy concludes that the PIL genuinely desires that the dispute be determined in Singapore. That PIL desires a trial in Singapore is in preference to a foreign jurisdiction is understandable.

[47] Mr Wallis on the other hand submitted that PIL simply seeks a procedural advantage since the claim will be time-barred in Singapore. This aspect is related to the further principle set out in *The "Eleftheria"* (*supra*) namely that Capewinds would be prejudiced by having to sue in Singapore because it would be faced with a time-bar not applicable in Singapore.

Whether Capewinds would be prejudiced in having to sue in Singapore

[48] Both counsel were in agreement that Capewinds would be prejudiced by having to sue in Singapore and that that prejudice was on the face of it irreparable as the expert evidence of the Singapore lawyer Mr Liew is that PIL would be able to raise successfully the defence that Capewinds' claim was time barred. Counsel were agreed that this would not be the case if Capewinds litigated in South Africa.

[49] Mr Cooke submitted that this was not a relevant consideration because:-

- (a) no explanation has been given as to why Capewinds failed to issue protective proceedings in Singapore, despite it being evident that PIL would take a jurisdictional point;
- (b) having regard to PIL's financial strength, there was no need for Capewinds to proceed in this jurisdiction to obtain security for its claim;
- (c) the court should not permit Capewinds' failure to comply with a time limit in the contractual forum in which it agreed to litigate, to result in Capewinds improving its position in the wrong forum.

[50] According to the summons, Capewinds claim arose in approximately April 2011. Mr Liew, the Singapore lawyer, has expressed the opinion that in terms of Article III Rule 6 of the Hague-Visby Rules, Capewinds' claim rose on either the 31st May 2011 or the 1st June 2011 being the date of the delivery of the cargo. In those circumstances the one year time-bar came into effect on the 31st May 2012 or the 1st June 2012.

[51] In the case of The "Nantai Prince" reported in 1996 SCOSA A 12, the court also had to consider the position where the claim was time-barred in the agreed jurisdiction. In that case the bill of lading provided that the contract would be governed by Chinese law and that any action against Nantai was to be brought in

Taiwan, Republic of China. The owners of the cargo transported from Durban to Incheon in South Korea obtained an order for the attachment of Nantai Line's right, title and interest in the Nantai Prince to confirm the jurisdiction of the court in an action to be instituted against it arising from the cargo being stolen. It brought the application in the High Court in Durban because its claim would be time-barred anywhere else. McCall J, applying the heavier onus applicable in cases of a breach of an exclusive jurisdiction clause, held that the applicant had failed to show "*strong cause*" why the action should proceed in Durban. He said that the applicant had given no information on which to judge whether the claimant had acted reasonably in commencing the proceedings in South Africa in order to interrupt the time-bar and in failing to take out a protective writ or other proceedings in Taiwan in order to preserve its claim there.

[52] It appears from the papers that on the 6th October 2011, Capewinds' attorney had corresponded with PIL in regard to the claim. Significantly Capewinds' attorney was in February 2011 aware of the existence of a time-bar. I say so because on the 16th February 2012 he wrote to Mr Reddy seeking an urgent response, stating as follows:-

"I am concerned about the fast approaching time bar so your urgent response would be appreciated."

There is no explanation why, notwithstanding such knowledge, steps were not taken in Singapore to preserve its claim.

[53] Mr Wallis submitted that PIL had consented or submitted to the jurisdiction by, on the 9th March 2012, providing the LOU which, he said, contemplated litigation in South Africa. He also pointed to the correspondence between the parties, and in particular the letter of Capewinds' attorney dated the 22nd December 2011 and the 16th February 2012. He submitted that both the LOU and the correspondence supported the notion that PIL knew that the security was to be for a claim to be made in the Durban High Court, and yet PIL did not disclose that it would challenge the jurisdiction of that court. It was presumably this apparent lack of challenge to the jurisdiction that resulted in no protective proceedings in Singapore being taken.

[55] It is not correct that PIL did not dispute that this court had jurisdiction prior to the claim being time-barred in Singapore. The letter of Bowman Gilfillan dated the 10th May 2012 pertinently raised the question of jurisdiction. That letter contained the following paragraph:

"3. There is no averment Summons as to the basis of jurisdiction of the Kwa-Zulu Natal High Court.

All our client's rights and defences, including, and not limited to, the above and, the specifically our client's right to challenge the jurisdiction of the Kwa-Zulu Natal High Court, remain reserved."

[56] This is as clear an indication as one could get that PIL reserved the right to challenge the jurisdiction of the Kwa-Zulu Natal High Court to determine the action. It is also a clear indication that PIL had neither consented nor submitted to the jurisdiction by delivering the LOU. In any event, one cannot rely upon one's opponent's conduct to explain a failure by one to take appropriate legal action.

[57] Importantly, that letter was received on or shortly after the 10th May 2012, a time when Capewinds' claim had not become time-barred in Singapore. No reason is given by Capewinds why in the light of this letter, steps were not taken to preserve its right of action in the Singapore courts three weeks before the claim became time-barred there.

[58] In the circumstances, I am of the opinion that Capewinds has not shown "strong cause" why the action should proceed in Durban. I accordingly am of the view that this Court should decline to exercise its admiralty jurisdiction in the action in personam instituted by Capewinds.

[59] Mr Wallis submitted that if the Court declined to exercise its jurisdiction to determine the action, it ought to impose two conditions namely that:-

- (a) PIL not raise the defence of the time-bar in the Singapore proceedings;
- (b) PIL tender security equivalent to the letter of undertaking for the proceedings that take place in Singapore.

[60] As to the first condition, Mr Wallis conceded that he had been unable to find any reported cases where such an order had been made. He relied solely upon the remarks of Lord Goff, which were obiter, in *The "Spiliada"* [1987] 1 Lloyd's Rep 1 at 18.

[61] He submitted that the court had, in terms of section 5(2) of the Act, the power to make such an order. In my view that subsection does not confer the power on the court to make such an order the effect of which would be to dictate the conduct of litigation in a foreign court. I accordingly decline to make such an order.

[62] Insofar as the question of security equivalent to the letter of undertaking is concerned, Mr Reddy in his replying affidavit stated that PIL is a major Singapore company, that its turnover in 2010 was US\$ 3,9 billion and that its projected group profits for the year 2011 were US\$ 4 billion. He also stated that there is no suggestion by Capewinds, and that there cannot be any, that PIL will not comply with any final judgment against it in Singapore and accordingly that Capewinds has no need for security. I appreciate that this was raised in reply. However, had Capewinds reason to dispute this and to contend that PIL was not in a position to satisfy any judgment of a Singapore court, in my view, it would have been permissible to raise this in a further affidavit. It did not do so.

[63] Accordingly I decline to make an order that PIL tender security equivalent to a letter of undertaking for proceedings should they take place in Singapore.

COSTS

[64] The general rule is that costs are awarded to the successful litigant. Capewinds has been successful in opposing PIL's application for an order declaring Capewinds action in personam null and void. On the other hand PIL

has been successful in its application for an order that the court decline to exercise its jurisdiction in the action. In those circumstances in my view the appropriate order to make is that there be no order for costs in both applications and in the application for joinder.

[65] Accordingly I make an order in the following terms:

1. Pacific International Lines (Pte) Ltd's application to have declared null and void Capewinds Trading 33 CC's action in personam is dismissed.
2. This court declines to exercise its admiralty jurisdiction in those proceedings.
3. The original letter of undertaking dated the 9th March 2012 furnished to attorneys Cox Yeats which received it on behalf of Capewinds Trading 33 CC shall be returned to Bowman Gilfillan Incorporated, the attorneys for Pacific International Lines (Pte) Ltd within 7 (seven) days of the grant of this order.
4. There shall be no order for costs in this application or in the application for joinder.

Application heard on:	13 th September 2013
Counsel for the applicant:	Adv D J Cooke
Instructed by:	Bowman Gilfillan
Counsel for the first and second respondents	Adv P J Wallis
Instructed by:	Cox Yeats
Judgment handed down on:	26 th September 2013