Reportable

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Exercising its Admiralty Jurisdiction

Case No AC29/06

Name of Vessel: **MV *NEW MARKET***

In the matter between:

TAXFIELD SHIPPING LIMITED	Applicant
and	
THE CARGO CURRENTLY LADEN ON BOARD THE MV *NEW MARKET*	First Respondent
PARMEX LIMITED	Second Respondent
IBETO CEMENT COMPANY LIMITED	Third Respondent
ACCESS BANK PLC	Fourth Respondent
ASIANA MARINE INC	Fifth Respondent

JUDGMENT: DELIVERED 13 APRIL 2006

GRIESEL J:

1]The applicant, Taxfield Shipping Limited, is the owner of the MV *New Market* (*the vessel*). A cargo of 29 594 mt of Portland cement (*the cargo*) is currently on board the vessel. The cargo was arrested *in rem* pursuant to a warrant of arrest issued out of this court on 9 March 2006 at the instance of the second and third respondents. The second respondent is Parmex Limited (*Parmex*) and the third respondent is Ibeto Cement Company Limited of Nigeria (*Ibeto Cement*). The basis of the arrest was a claim that either Parmex or Ibeto Cement is the owner of the cargo, of which they claim delivery. (It has subsequently become evident that Parmex is currently the holder of the original bill of lading, and that Ibeto Cement will be entitled to the bill of lading when ownership of the cargo passes by delivery.)

2]Pursuant to the arrest of the cargo, the applicant launched the present proceedings as a matter of urgency, seeking an order setting aside the arrest of the cargo. The application is being opposed by Parmex and Ibeto Cement, whereas the fourth and fifth respondents, Access Bank Plc (*Access Bank*) and Asiana Marine Inc (*Asiana Marine*), play no active role in these proceedings and abide the decision of the court. I shall accordingly refer herein to Parmex and Ibeto Cement collectively as ‘the respondents’, except where it is necessary to refer to either of them individually.

3]The urgency of the present application is not in issue and arises, *inter alia*, from the fact that the cargo of cement is of a perishable nature, which may cause such cargo to deteriorate and, in the process, cause damage to the vessel.

Factual background

4]On 23 September 2005, the applicant and Asiana Marine entered into a voyage charterparty on the Gencon (1994) form in terms of which the vessel was chartered for a voyage from China to Port Harcourt in Nigeria. The vessel arrived at the port of Taizhou, China on 10 October 2005 and commenced loading the cargo shortly afterwards. It completed loading and departed from the port of Taizhou on 15 October 2005. On the same date, a bill of lading was issued on the Congenbill 1994 form on behalf of the master of the vessel pursuant to the terms of the charterparty.

5]On 24 November 2005, the vessel arrived at the port of Port Harcourt in Nigeria. A notice of readiness was tendered during the early hours of 25 November 2005 and the vessel was by that time ready to discharge the cargo. However, during the next three months, no-one presented the bill of lading to take delivery of the cargo. It appears from the documentary evidence that the cargo was due to have been imported by the Parmex, as seller, for Ibeto Cement, as purchaser, under the authority of an import permit issued by the Federal Ministry of Industry of Nigeria on or about 6 September 2005. This import permit was, however, cancelled by the Nigerian president on or about

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19 October 2005 – approximately four days after the vessel had sailed from the port of loading – with the result that the vessel was not permitted to discharge the cargo at Port Harcourt. The applicant was not informed of the cancellation of the import permit.

6]By 23 February 2006, after all efforts to obtain the requisite permission had failed, and based on the advice of its experts, the vessel was ordered to the next convenient port where the cargo could be discharged and sold.

Proceedings in Hong Kong

7]In the meanwhile, the applicant's attempts to obtain agreement from the other parties for the sale of the cargo were likewise unsuccessful. On 25 February 2006, the applicant accordingly caused an originating summons to be issued out of the High Court of the Hong Kong Special Administrative Region, Court of First Instance (*the Hong Kong court*). In the summons, the applicant sought an order authorising it to sell the cargo without prejudice to the rights of the other parties to the action and, after sale, to pay the proceeds, after deducting the expenses thereof, into an escrow account to be held by the applicant's solicitors or into court to abide the outcome of an arbitration to be held in Hong Kong in terms of the charterparty and the contract of carriage evidenced by the bill of lading.

8]At the hearing that took place on 7 March 2006, Ibeto Cement was represented by solicitors and applied for a postponement of the matter, which application was refused by the court. None of the other parties opposed the relief sought. The court accordingly granted an order as prayed.

Arrest of the cargo in Cape Town

9]The vessel arrived off Cape Town on or about 8 March 2006. When the vessel put into port to take on bunkers, the cargo was arrested at the instance of the respondents in terms of the aforesaid writ. In the summons, issued by the registrar on the same day, Parmex and Ibeto Cement alleged that each of them, in the alternative, was the owner of the cargo, and sought judgment for delivery of such cargo.

10]The applicant thereupon launched the present application, seeking an order setting aside the aforesaid writ on a variety of grounds. Failing the setting aside of the order on any of the grounds advanced, the applicant seeks the enforcement of the Hong Kong order, which will achieve the same result.

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Discussion

Locus standi of the applicant

11]In opposing the application, the respondents raised a point in limine, with which it is necessary to deal at the outset. The point relates to the locus standi of the applicant and is based on an allegation that the applicant had transferred its right to claim demurrage and damages to Asiana Marine. This appears from a letter, dated 13 February 2006, addressed by Asiana Marine's Hong Kong attorneys, Lin & Associates, to Access Bank, reading as follows:

> *'We are acting on behalf of the carrier/charterer, Asiana Marine Inc, which has suffered demurrage and detention loss damages and has the right to claim against your company for remedy accordingly. The shipowners – Taxfield Shipping Ltd – have transferred their right to demurrage and detention loss to our client.'*

In the result, so the respondents argued, the applicant, had 'no right to exercise any rights in terms of the charter party' when it launched the present application.

12]In reply, the applicant denied that a transfer of such rights had in fact occurred, as alleged by the attorneys. In support thereof, the applicant attached an email message from the same attorneys, stating as follows:

> *'We wish to clarify that although the original intention was for our client, Asiana Marine Inc, to obtain the assigned rights to claim from the shipowner of the "NEW MARKET", namely Taxfield Shipping Limited, for demurrage against Access Bank Plc, that the owner in the final instance did not sign or provide such a letter of assignment of rights to our client and that even though we had advised Access Bank Plc that our clients had the rights to claim they in fact did not obtain such rights in the end effect. Therefor the owner of the "NEW MARKET", Taxfield Shipping Limited, should still be vested with the right to claim as far as we know.'*

13]This explanation was described by the respondents' counsel as 'unsatisfactory' in view of the unequivocal statement contained in the earlier letter from the attorneys. In my view, however, the point *in limine* cannot succeed:

- The first, and obvious, point is that the allegation regarding transfer of rights did not emanate from the applicant, but from attorneys acting on behalf of Asiana Marine. The applicant cannot be held accountable for statements made by outsiders regarding its rights.

- Secondly, the applicant has furnished an explanation for the statements made, which explanation appears to be corroborated by the party who made them in the first place.

- Thirdly, the allegation that no transfer of rights had taken place is corroborated by the fact that Asiana Marine has not at any stage – either in the Hong Kong Court or in this court – come forward to assert any transferred rights, notwithstanding its status as a party in both applications.

- In these circumstances, it appears to me that the weight to be attached to the initial hearsay statement by the attorneys for Asiana Marine, insofar as it affects the applicant's locus standi herein, should be minimal.[1]

14]I accordingly turn to consider the individual grounds relied on by the applicant in support of the application to set aside the arrest.

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1 See s 6(4) of the Admiralty Jurisdiction Regulation Act 105 of 1983, as amended ('the Admiralty Act'); *Cargo laden and lately laden on board the MV* Thalassini *AVGI v MV* Dimitris 1989 (3) SA 820 (A) at 842H.

Impossibility of performance

15]The first ground was that it is impossible for the applicant to give effect to the order sought by the respondents by delivering the cargo to the respondents in the port of Cape Town. This is so, because there are no facilities in the port of Cape Town for the discharge of a bulk cargo of cement. Furthermore, the City and National Port authority will not permit the import of an 'environmentally unfriendly' cargo such as bulk cement.

16]The respondents acknowledged this obstacle. They contended, however, that the cargo may be discharged in Durban and they sought to achieve this goal by applying (on the eve of the hearing before me) in terms of s 5(2)(*c*) of the Admiralty Act for an order directing the vessel to sail to Durban and for the cargo to be discharged in that port. Simultaneously, application was made in terms of s 9(1) of the Act for leave to sell the cargo. Counsel for the respondents was unable to refer to any precedent for such an order, nor have I been able to find any. He argued, however, that the court has a 'very broad discretion' to exercise its jurisdiction in terms of s 5(2)(*c*) and relied in this context on a judgment of Nicholson J in *The Wisdom (No 2)*.[2]

17]In the view that I take of the matter, this 'counter-application' by the

2 Handed down on 31 January 2003 in the Durban and Coast Local Division, reported in M Stranex *Shipping Cases of South Africa* B201 at B209H–B210A.

respondents only becomes relevant if the applicant's other grounds for setting aside the arrest are dismissed and the arrest remains in place. I accordingly turn to consider those other grounds.

The applicant's possessory lien

18]The applicant's main ground for setting aside the arrest is based on its alleged lien for the damages that it claims to have suffered arising from the breach by Parmex and/or the holder of the original bill of lading issued in respect of the cargo. The applicant relied in this regard on the lien clause in the charterparty, reading as follows:

> *'8. Lien Clause*
> *The Owners shall have a lien on the cargo and on all sub-freights payable in respect of the cargo, for freight, deadfreight, demurrage, claims for damages and for all other amounts due under this Charter Party including costs of recovering same.'*

19]The applicant contended that this clause was incorporated in the contract of carriage evidenced by the bill of lading. This was disputed on behalf of the respondents. They referred to clause 1 of the conditions of carriage, contained on the reverse of the Bill of Lading, which provides:

> *'All terms and conditions, liberties and exceptions of the Charter Party, <u>dated as overleaf</u>, including the Law and Arbitration Clause, are herewith incorporated.'* [my emphasis]

They pointed out that no charterparty was in fact attached to the bill of lading or is to be found ‘overleaf’. Instead, the printed clause ‘*CHARTER PARTY Dated* -----’ on the face of the bill has not been completed inasmuch as no date has been inserted to identify the charterparty. In these circumstances, so it was argued, no charterparty was incorporated by reference, as a necessary pre-condition to such incorporation is absent.

20]I find this argument rather contrived and unpersuasive. The respondents are in effect asking the court to regard the whole of clause 1 as pro non scripto due to the failure to complete the clause identifying the charterparty in question. To my mind, a far more reasonable and businesslike interpretation would be to have regard to surrounding circumstances in order to identify the charterparty in question. This is an approach regularly followed by our courts in the sphere of contract law.[3]

21]I am fortified in this conclusion by no less an authority than Lord Denning MR in the Court of Appeal,[4] where he pointed out that it not infrequently happens that, when a printed form bill of lading provides for the incorporation of a ‘charter party dated ---’, the parties omit to fill in the blank.

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3 See eg Christie *The Law of Contract* 4ed (2001) 135 and authorities referred to therein.

4 *The ‘San Nicholas’* [1976] Vol 1 Lloyd’s Rep 8 (CA).

In response to a submission that the result of the blank is that the incorporation clause is worth nothing as it is not possible to incorporate a charter which is not identified in any way, the learned Master of the Rolls held:[5]

> *'I cannot for a moment agree with that contention. It seems to me plain that the shipment was carried under and pursuant to the terms of the head charter. The blanks were left because the master and the other people in Recife did not know its date and the parties to it so as to be able to fill them in. The head charter was the only charter to which the shipowners were parties: and they must, in the bill of lading, be taken to be referring to that head charter. I find myself in agreement with the statement in* Scrutton on Charterparties *(18ed (1974) at p 63):*
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> A general reference will normally be construed as relating to the head charter, since this is the contract to which the shipowner , who issues the bill of lading, is a party ….. It not infrequently happens that, when a printed form bill of lading provides for the incorporation of the "charter party dated----", the parties omit to fill in the blank. It is submitted that the effect is the same as if the reference were merely to "the charter party" and the omission does not demonstrate an intent to negative the incorporation.'

22]I respectfully adopt the reasoning set out in these authorities. Applying that approach to the facts of the present case, the applicant is the owner of the vessel and is party to the charterparty with Asiana Marine. The bill of lading was also issued on behalf of the master of the vessel, who represents the

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5 At 11. See also *The 'Sevonia Team'* [1983] Vol. 2 Lloyd's Rep 640 (QB) at 644; *The 'Nai Matteini'* [1988] Vol. 1 Lloyd's Rep 452 (QB) at 459.

applicant. I agree therefore that, notwithstanding the fact that the date of the charterparty was not inserted on the bill of lading, the effect of clause 1 on the reverse side of the bill of lading is to incorporate the terms, conditions, liberties and exceptions of the head charterparty.

23]I find, therefore, that the applicant established that it has a contractual lien over the cargo for all amounts due under the charterparty and any claim for damages and for the costs of recovering such damages. It may well be, as argued by the applicant, that it also enjoys a lien as bailee or a common law lien arising from expenses incurred in protecting and preserving the cargo. In view of my foregoing conclusion regarding the applicant's contractual lien, however, it is not necessary to come to any firm finding regarding these further issues. It is likewise unnecessary to consider the interesting arguments addressed to me on the question whether it is possible for an owner to vindicate movable property, other than the ship itself, by way of an action *in rem* against that property.[6]

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6 See in this regard the provisions of s 3(4) of the Admiralty Act and the interpretation of that sub-section by Blignault J in *The* 'Atlantic Pride'*: Siyadoba Fishing (Pty) Limited v Marine Radio Acoustic Devices CC* (judgment delivered on 21 November 2003, reported in M Stranex *Shipping Cases of South Africa* at B224).

24]It follows that the applicant is entitled to exercise a possessory lien over the cargo until it has been compensated by the cargo owner for these charges in accordance with the relevant provisions of the charterparty. In the circumstances, the arrest falls to be set aside.

Order

25]For the reasons set out above, the following order is issued:

(a) The arrest of the first respondent cargo is set aside.

(b) The second and third respondents jointly and severally are ordered to pay the costs of the application.

B M GRIESEL
Judge of the High Court