IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

CASE NOS : AC127/99
AC134/99
AC4/02

In the matter between :

THE MASTER AND CREW OF THE MT *"ARGUN"*
claiming under Case No AC127/99

THE FORMER CREW OF THE MT *"ARGUN"*
claiming under Case No AC134/99

THE MASTER AND CREW OF THE MT "ARGUN"
claiming under Case No AC4/02 ***Plaintiffs***

and

MT "ARGUN" Defendant

JUDGMENT DELIVERED THIS 12TH DAY OF SEPTEMBER, 2002

—

FOXCROFT, J : Three actions ***in rem*** against the defendant vessel, the *MT* "*Argun*" *"Argun",* at the instance of three groupings of Plaintiffs, have run their course. The claims, based on the maritime liens which seamen have for their wages, all concern unpaid wages to the master and various crews of the "*Argun*". Although the term *"maritime lien"* is not defined in the Admiralty Jurisdiction Regulation Act, 105 of 1983 ("the Admiralty Act") it is mentioned in sections 1(1), 3(4)(a) and 11.

In the definition section 1((1) under the definition of *"maritime claim"* is included any claim for, arising out of or relating to *"any maritime lien, whether or not falling under any of the preceding paragraphs".* (Subsection (y)).

Subsection (11)(4)(e), refers to *"a claim in respect of any maritime lien on the ship not mentioned in any of the preceding paragraphs".*

As CORBETT, JA (as he then was) said in **TRANSOL BUNKER BV v MV**

ANDRICO UNITY AND OTHERS, 1989(4)SA 325 (AD) at 331D,

> *"Thus the maritime lien is by definition a type of maritime claim and its importance lies in the facts that:*
>
> *a) it constitutes one of the bases upon which a claimant may found an action* ***in rem*** *(s3(4)(a)); and*
>
> *b) it confers a certain preference in the ranking of claims in terms of s11."*

The definition section was amended subsequent to this judgment so that the wording and numbering of the reference to a maritime lien in the definition section have changed.

CORBETT, JA went on to say that

"[It] suffices to say that in maritime law the term "maritime lien" denotes a legal concept which appears to have originated in the 19th century and which is to be found, sometimes in a slightly different guise or under a different name, in the legal systems of many maritime countries. …. Thus for example, English admiralty law has limited the maritime lien to claims relating to (1) salvage, (2) collision damage, (3) seaman's wages, (4) bottomry, (5) master's wages and (6) master's disbursements. Of these bottomry is now obsolete."

Our Admiralty Act provides that the law to be applied by South African courts in matters of substance is English admiralty law *"which would have applied with regard to such a matter at such commencement* [1983] *insofar as that law can be applied".* (English admiralty law as at 1983 is to be construed as a reference to that law including the relevant principles of private international law **(MARCARD STEIN & CO v PORT MARINA CONTRACTORS (PTY) LTD & OTHERS, 1995(3)SA 663 [AD] at 667C).**

As SCOTT, JA observed in **MT "ARGUN", 2001(3) SA 1230 at 1240B**,

> *"It is accordingly necessary to refer to the English admiralty law as at November 1983. But because the reference is to the law including the principles of private international law, the nature and effect of the rule sought to be applied must first be classified as one of substance or of procedure. If the former, the English law will apply; if the latter, the English private international rule will direct that the* ***lex fori*** *is to apply, in which event the appropriate law will be that of South Africa."*

CORBETT, JA also pointed out in the **ANDRICO UNITY** that in the United States of America, maritime liens arise from a far wider range of maritime claims, both in contract and in tort, while the essential effect of the maritime lien in English admiralty law is that

> *"It attaches* ***ex lege*** *to the ship or other property (for convenience I shall merely refer to the ship) in respect of which the maritime claim arose and it follows the ship, irrespective of changes in ownership or possession, and irrespective of the state of knowledge of the new owner or possessor." (at 331*

H-I)

Despite differences in American admiralty law, there are many common positions. For instance, in the USA the ***in rem*** suit is virtually unknown outside the admiralty court. In The Law of Admiralty, 2nd Ed by GILMORE AND BLACK, p. 35, the authors state that an understanding of its nature

> *"is not to be approximated without some conception of the substantive concept that underlies it: the "maritime lien". In American admiralty law, the maritime lien is a necessary condition for success in the suit **in rem**.*

The Canadian authorities referred to by TETLEY, Maritime Liens and Claims, 2nd Ed., show that the Canadian approach has remained very much in keeping, as one would expect, with English admiralty law.

FACTUAL BACKGROUND

The MT "*Argun*" is a medium sea tanker used primarily for replenishment of other vessels whilst at sea. Captain Korolev, who testified at the trial, confirmed that this was so, and that after her launching and until 1994, the ship was registered in the name of a Russian State company in the Vladivostok Marine Fishing Port. He testified that the ship was under the control of the Russian Auxiliary Pacific Ocean Fleet *('TOF')*.

It was common cause that in or about 1992 the ship was chartered out by *TOF* to a company by the name of National Pacific Limited ('NPL') in the British Virgin Islands. That company operated the ship in and around various ports in the Far East.

After repairs in Singapore and the failure to pay for those repairs, the *MT* "*Argun*" was arrested in Singapore in or about 1994 and was then transferred by *TOF* into the ownership of a Russian Joint Stock company by the name of *"Inaqua".*

Captain Korolev was referred to his contract of employment, which appears as Annexure 'ARG2.1' at p.34 of the Particulars of Claim in Case No AC 134. The same annexure appears in the pleadings in the other actions before me, and I refer to it only to show that there was no dispute, since Captain Korolev was not cross-examined as to the truth of this Contract of Employment. The Contract is dated 25 July 1995 and was for a period of six months, capable of being extended to seven or reduced to five months for operational convenience.

Paragraph 6 of the Contract.

The ship remained under arrest in Singapore and Captain Korolev and the new crew had to attend to various duties, including the refitting and refurbishment of the ship outside their normal duties as sea-going crew. The chairman of Inaqua, a certain Mr A Malyshev, agreed with Captain Korolev that he and his crew would be employed in accordance with written contracts, which were concluded. The contracts all appear in the Pleadings as annexures.

Captain Korolev confirmed that his crew had worked in accordance with their contracts and he testified that he had checked the Portage Bills. He confirmed the correctness of the calculations showing the amount due in wages to himself and to the crew. He also said that after six months there had been no replacement for him and no engineer officer to replace him as master, and work had simply continued. No one had come from the Inaqua Company to tell the crew to cease work and to leave the vessel, and the crew all carried on working.

Captain Korolev also referred to a settlement agreement which had come about in July 1996 when he, Captain Korolev, was informed that there was going to be payment of half of the amount due to him and his crew in Russia. The offer to pay these wages was conditional upon the withdrawal of the crew's action ***in rem*** in Singapore for wages. Eventually a settlement agreement was reached in the sum of US$530 300 to the crew in full and final settlement, but neither the instalment of US$18 300 nor any of the equal monthly instalments for the balance were paid. (Record, p.57)

After the vessel was released from Singapore, it continued to trade without any further legal difficulty until 25 May 1999. On that day, Sea Tech Pte Ltd of Singapore, one of the ship repairers in Singapore, arrested the ship in Cape Town under Case No AC 89/99. The arrests and actions by First and Second Plaintiffs under Cases AC 127/99 and 134/99 soon followed.

A great deal of litigation ensued, and Mr *Burger,* who appeared for Plaintiffs, submitted that the owner of the vessel, being the Russian Federation, had been successfully delaying the payment of wages of the crew for more than three years, and had still paid them nothing. He pointed out that the crew's claims were initially not even defended and that the crew of the vessel in both cases – AC 127 and AC 134/99 – had obtained default judgments. These judgments were only set aside in February 2002 after the Plaintiffs in the trial actions had set down the Defendant's applications for rescission. He also referred to the fact that Captain Korolev had testified that he had been threatened by a Mr Sokolov, who had telephoned him on two or three occasions from Russia, telling him that he – Sokolov – represented the Russian Government Property Committee and saying that if the crew continued with their action against the vessel and attempted to sell it,

> *"the crew members and he will be prosecuted by criminal procedure in Russia,*

first. Secondly they make the threats for crew members and to our families, that our families will have the problem in Russia in view of this and I check this information, because that same day I go to my wife at home and she confirmed me that some guys from Oil Compact come into my home and threat my wife with the problem to (indistinct) to my children in case I not withdraw the case here in Cape Town and in case I will – don't (indistinct) order of Oil Compact. I make the statement about this threats and blackmail and this statement somewhere in file and it was signed by radio officer and (indistinct) officer which presented on the bridge when I'm talking by phone with this guy, sorry with this gentleman, Mr Sokolov." (Record, p.99-100).

Captain Korolev went on to say that he had written a letter to the Russian Ambassador and was visited by the Russian Consul in Cape Town, who told him that

"Oil Compact didn't do nothing to the vessel, that this company didn't represent the Russian Federation in their stories. But it was the real fact and I (indistinct) they are thinking that we might have some problem in Russia from Oil Compact or from any other criminals. This way there are one of the reason for concluding the cession agreement was to protect us when we are come back to Russia. I think that's it." (Record, p.100)

After some debate at the Bar as to whether Captain Korolev and his crew had been threatened by the Russian Federation, Mr *Burger,* very fairly, stated from the Bar that the said Sokolov is head of Oil Compact, which is not part of the Russian Federation. He did add that the Russian Government does have a close connection with Oil Compact and submitted that the Russian Government would have to take part of the blame for these threats.

I do not accept that submission, since the Russian Federation may have known nothing about these threats at all and there was nothing, on the evidence, to show any connection between Mr Sokolov's threats and any knowledge of those threats on the part of the Russian Federation. Nevertheless, the fact that these threats took place was not disputed, and they do provide background to the cessions of claims, which I will deal with in due course when considering these Special Pleas raised by Defendant.

Despite these threats the master and crew have persevered, and a dispute has also arisen as to who should pay for the preservation costs and expenses of the vessel pending the final determination of this action. On appeal, the Sheriff and the Russian Federation successfully argued that the arresting creditors, including the crew members, should pay for preservation and other reasonable expenses.

MT "ARGUN" 2001(3) SA 1230 (SCA).

The failure of the crew to pay the expenses ordered by the Supreme Court of Appeal resulted in the Order of this Court that their arrests in Cases AC 127/99 and AC 134/99 lapsed during 2001.

This Order was given in Case No AC 42/2002 on 21 June 2002.

Mr *Burger* submitted that there can be no doubt as to the specially protected status of seamen in Admiralty law, and he referred to the remark of Sir WILLIAM SCOTT in the **MADONNA D'ldra, 1 Dodson 37 (1811) at 40**, where he said :

"Now, it must be taken as the universal law of this court, that mariner's wages take precedence of bottomry bonds."

The same Judge also referred to mariner's wages as a category of *"sacred lien"*, and in a later case, the **SYDNEY COVE, 1815 (2 Dods.11)** he continued in the same vein, observing that

"A seaman's claim for his wages was sacred so long as a single plank of the ship remained."

See also THOMAS, _*Maritime Liens*_ at paragraph 423, where THOMAS also points out that

"The master has never enjoyed the same weight of judicial sympathy as the seaman and although in relation to other claimants the master and seamen are treated as one, in relation to each other the seaman is probably superior."

No such difficulty arises in the present case, the interests of master and crew being the same.

The same Judge, now Lord STOWELL, referred to sailors as *"these men, who are the favourites of the law"* in the **MINERVA, 1825(1) HAGGARD 347 at 358**, leaving no doubt as to his view.

See also KAY, Shipmasters and Seamen, (1895) at p.30, where it is stated that

> *"A Court of Admiralty always sought to protect them against circumvention, oppression and injustice and even against misapprehension and error and was anxious that they should not be harassed with litigation and that questions of wages should be speedily settled."*

This passage was quoted with approval in *Ex parte* **THE CREW, MV "CARACAS BAY", 1977(4) SA 945(C) at 951H,** a decision which was later not followed in the

MV MOTORIA, 1979(3) SA 616 (C), but in which the Full Bench did not in any way touch on the quotation.

<u>THE SPECIAL PLEAS</u>

In the Minute of the pre-trial Conference held on 2 August 2002, it was recorded in paragraph 3.7 that the parties had agreed that

> *"3.7.1 Plaintiffs will bear the onus with regard to the merits of the case.*
>
> *3.7.2 Defendant bears the onus on the Special Pleas."*

The Special Pleas read as follows :

“1. The Defendant is and has at all material times been owned by the Sovereign State of the Russian Federation.

2. The Plaintiffs’ claims arise from written agreements allegedly entered into with Firetship Management (Pty) Ltd, the duly appointed agent of MPG.

3. The claims of the Plaintiffs are founded upon the existence of a maritime lien in respect of each claim which gave the Claimants a right of arrest in terms of section 3(4)(a) of the Admiralty Jurisdiction Regulation Act 105 of 1983 as amended (‘the Admiralty Act’).

4. It is not alleged that the Russian Federation is liable ***in personam*** *to the Claimants in respect of their claims and that, therefore, the requirements in section 3(4)(b) of the Admiralty Act is satisfied.*

5. On or about 10 August 1999 the Plaintiffs irrevocably ceded, assigned and made over all of their right, title and interest in and to their claims to Deneys Reitz Inc.

6. A copy of the cession signed by the First Plaintiff, from which the terms of the cession also signed by the other Claimants appear, is annexed hereto marked ‘PC.1’.

7. By reason of the cessions aforesaid the Plaintiff in this action became Deneys Reitz Inc proceeding in the name of the maaster and crew of *the MT "Argun".*

8. *The maritime lien of the master and crew of the MT "Argun" are as a matter of law not transferable by cession or assignment.*

9. *In the premises the Plaintiff, being Deneys Reitz Inc proceeding in the name of the master and crew of the MT "Argun", does not have maritime liens in respect of the claims set out in the Particulars of Claim and therefore no longer has an action enforceable* ***in rem."***

Defendant accordingly prayed that Plaintiffs' claims be dismissed with costs and that judgment be entered in Defendant's favour.

THE NATURE OF THE CESSIONS

While it is no doubt so that the cedents all ceded, assigned and made over to Deneys Reitz, their attorneys, all their rights, title and interest in and to their claims against the MT "Argun" for unpaid crew wages and ancillary claims, what follows in the Cession Agreement is the statement that

> *"The said claim is firstly ceded in part in consideration of the legal costs and disbursements incurred to date by Deneys Reitz Inc in connection with the enforcement and recovery of the said claim".*

It is then said that

> *"The said claim is secondly ceded in part* ***'in securitatem debiti'*** *for further legal costs and disbursements to be incurred by Deneys Reitz in connection with the enforcement and recovery of the said claim from date hereof",*

and then it is said that the claim is

> *"Thirdly ceded in part in consideration of Deneys Reitz Inc agreeing to pay me all amounts realised or received by it pursuant to its rights in terms of this*

agreement less all costs and disbursements … incurred by Deneys Reitz Inc in connection with the enforcement and recovery of the said claim."

It was then provided that Deneys Reitz

"shall, at its election, be entitled to enforce and prosecute the said claim as hereby ceded in my name in any legal process which may have been instituted by me for such recovery as aforesaid."

Deneys Reitz were also entitled to

"In turn cede the said claim to Hartless (Pty) Ltd during the course of any legal proceedings if they wished to."

The last paragraph of the Agreement provides that the document constitutes

> *"The entire agreement between the parties … and no variation, alteration, waiver, indulgence or consensual cancellation of the terms of this agreement shall be of any force or effect unless reduced to writing and signed by both parties to this agreement."*

Mr *Burger* made the point that these claims were all ceded after threats had been made to the crew and in order to secure their attorneys for fees (as to which see the evidence of Captain Korolev, p.99 line 2-p.100 line 12 and Ash, p.126 line 17 to p.128 line 15). The cessions also took place after the crew members had obtained default judgment in cases No AC 127/99 and AC134/99. The claims in respect of all the Plaintiffs in Case No AC4, Plaintiffs 1 to 21 in Case AC 127/99 and Plaintiff 1 in Case No AC 134/99 were then re-ceded to the crew members on 18 January 2002, before the action in Case No AC4/2002 was instituted, and also before the aforesaid default judgments were rescinded.

During the trial, Defendant made the following admissions in regard to the cessions and re-cessions, embodied in a written note :

"1. The Defendant admits that the cessions dated August 1999 forming part of Exhibit "B" are what they purport to be and were signed by the parties whose names appear thereon.

2. The Defendant admits that the "re-cessions" agreements dated in 2002 in respect of the claims of the Plaintiffs in case numbers AC4/2002 and the first 21 Plaintiffs in case no. A127/99 were signed by the parties whose names appear thereon prior to the issue of the Writ of Summons ***in rem*** *in case no. AC4/2002."*

As a fact, recessions in respect of the other Plaintiffs in AC127/99 (Plaintiffs 22 to 34) and AC 134/99 (Plaintiffs 2 to 6) occurred thereafter, but before ***litis contestatio***, which according to Mr *Burger* was July 2002. Mr *Burger* referred to The Law of South Africa, Vol 2 Re-issue under the title 'Cession', written by P M NIENABER, para.272 at pp.167-168. NIENABER makes the point that

"The proper construction of the phenomenon that one debt (the principal debt)

can be employed to secure another (the secured debt) has long been controversial."

The writer refers to one view that

"Cession ***in securitatem debiti*** *is an out and out cession on which an undertaking (****pactum fiduciae****) is super-imposed that the cessionary would restore the principal claim to the cedent upon satisfaction of the secured debt."*

Such an arrangement would result in a position where the right ceded would vest in the cessionary, leaving the cedent with a personal right only against the cessionary arising from the agreement to reclaim the right once the secured debt had been repaid. One flaw of such an arrangement is to leave the cedent exposed to the risk of the cessionary's insolvency.

NIENABER goes on to say that

"This is often not what the parties truly have in mind. What is more likely intended is that the cessionary should "hold" rather "own" the ceded debt pending satisfaction of the secured one."

As is pointed out in several references to authority in a footnote –

"The intention of the parties is a question of fact.

There is a practical need to accommodate such an arrangement. The parallel between it and the pledge of a corporeal asset led to the notion that the principal debt is pledged to the cessionary and that the cedent retains ownership in the right notwithstandiing its cession, which in the event of his insolvency would vest in his estate. It is a construction that has been criticised by courts and commentators alike. In its latest series of decisions the appellate division, mainly for reasons of expediency, reaffirmed the view, *expressed in the earlier cases but somewhat watered down in later ones, that the right is transferred but its bare dominium is not. A cession* ***in securitatem debiti*** *must now be taken to be in the nature of a pledge, unless the parties intended otherwise. The doctrinal difficulty may have been settled; many of the peripheral ones have not."*

On the evidence in the present matter, I have no doubt that the master and crew intended their attorneys to "hold" rather than "own" their ceded claim for wages pending satisfaction of the claims for attorneys fees. Captain Korolev and the witness Pedak made clear that the case had not become Deneys Reitz's case. Mr Pedak, in imperfect English under cross-examination by Mr *Wragge*, for Defendant, said that he had given power to Deneys Reitz "for this case". The next question was,

"Power to run this case on your behalf, for you, to run this case on your behalf? --- Yes?
Is that what the power you gave with Deneys Reitz was for? --- For getting

me money, help to me.

To help you get your money? --- Ja."

It was clear that Mr Pedak could neither explain the legal niceties of cession and recession, nor was he capable of explaining the position. I understood him to mean that he was incapable of speaking English sufficiently well to be able to explain what he understood.

On the facts, the evidence of Mr Ash – Plaintiff's attorney – puts the matter beyond doubt. His evidence at p.127 of the Record, line 13, is as follows :

"So accordingly I recommended to Captain Korolev that, in my view what should happen is that we should take cession, and it would be at least a limited cession for the purposes of covering our fees and disbursements, and I instructed Kim Rew, at that stage she was dealing with the matter on a day to

day basis, for Captain Korolev to put the cessions together and to procure them which she did."

At p.128, Mr Ash dealt with the recessions which were entered into after he became concerned that somebody might take, what he called, "some clever point about ***locus standi*** because of the existence of the cessions".

At p.129, he went on to say that he

"wanted to make it absolutely clear that the crews retained, and always have retained ownership of these claims, and I recommended to Captain Korolev that, for purposes of the documentation, a recession should be procured, and he agreed."

The file containing recessions which was admitted during the trial, and Captain Korolev's evidence as to his efforts to secure signatures of former members of the plaintiff crews in Russia, bore testimony to this intention.

In my view, the master and the crew never intended to give away their rights to sue for their wages on an outright basis. This was very much a situation where their attorneys, who after all were their agents, would hold the claims and pursue them to judgment, retaining security for their fees and agreeing to pay to them any remaining money after expenses had been met. The attorneys "were acting on behalf of their clients", to use the words of Mr *Wragge* in cross-examination. They were not acting for their own account.

There is another reason why the Plaintiffs never divested themselves of their right to claim unpaid wages against the Defendant.

I accept Mr *Wragge*'s argument as set out in the Special Pleas aforesaid that maritime liens are, as a matter of law, not transferable by cession or assignment.

THOMAS, Maritime Liens, p.265 para. 471, says that

> *"It has long been a common observation that a maritime lien represents an interest which is incapable of transfer so as to convey to the transferee the same privilege and right* ***in rem*** *as enjoyed by the transferor."*

In para.272 THOMAS adds that the older Admiralty authorities in English law place emphasis on a maritime lien as *"a privilege which enures solely to the benefit of the person of the lienee and which is incapable of transfer."* The oldest cited authority by THOMAS is an anonymous case in 1696, where prohibition was granted on a suit brought by a master of a ship in respect of wages paid by him to the seamen. The Admiralty Court was denied jurisdiction on the reasoning that

> *"… When the master has paid the seamen and they are discharged, there is*

an end of that privilege and indulgence to seamen, which is personal and can't be transferred."

THOMAS (para.274) lists the authorities in the 18th and 19th centuries, and deals with the status and rights of third parties who, in the absence of any pre-existing obligation, freely discharge a seaman's claim for wages. He states that this has caused some difficulty in the development of Admiralty Law. Does such a person,

"acting as a volunteer, who pays a seaman's wages, thereafter stand in the shoes of a seaman lienee, and thereby enjoy the same rights and privileges as would have been enjoyed by the seaman, to the extent of the payment?"

While there is a body of judicial pronouncement which clearly supports a quasi-subrogatory doctrine by which, following upon payment, the person paying "stands in the shoes " of the person paid and thereby enjoys the same rights ***in rem***, THOMAS says in para.475 that

"The great bulk of authority is however opposed to the notion that any quasi-subrogatory doctrine exists as of right but suggests that such an advantage may only be assumed by a volunteer after application has first been made to the Court and its approval given."

Despite Dr Lushington having seemingly approved of the "standing in the shoes" doctrine in the **WILLIAM F SAFFORD** in 1860, THOMAS points out that both before (the **NEW EAGLE,** in 1846) and after that decision (in the **CORNELIA HENRIETTA in 1866)** Dr LUSHINGTON firmly denied the existence of any doctrine to the effect that a person discharging a lien thereafter stands in the shoes of a benefited lienee. Dr LUSHINGTON insisted that such a volunteer could only claim such a benefit when acting with the sanction of the Court.

Coming into more modern times, the authorities were exhaustively reviewed in the **PETONE (1917)P.198**, where HILL, J declared :

"In my view the weight of authority is strongly against the doctrine that the man who has paid off the privileged claimant stands in the shoes of the privileged claimant and has his lien, whether it be regarded as a general doctrine or as applied to wages only."

Professor TETLEY in Maritime Liens and Claims, 2nd Ed. 1998 at p.1223, is somewhat cautious as to HILL, J's finding in the **PETONE**, saying that it is

"held out to be the strongest English authority against the assignment by force of law of a maritime lien for wages. The ***PETONE*** *is an extremely didactic and influential judgment, but its importance and what it holds has been over-emphasised. Upon close examination, it can be seen that the* ***PETONE*** *is really only authority for the proposition that a third party who pays seamen's wages, voluntarily and without any prior consent by the Court, is not subrogated by law in the maritime lien for wages of the seamen." (emphasis added).*

Despite this cautionary note, TETLEY, of course, realises that liens for wages are in a special position. He adds that assignment or subrogation by law of liens other than wage liens was not decided in the **PETONE** and continues,

> *"It should be remembered that seamen's wages have always been a special case and have been subject to restrictions: that is, assignment by anticipation is forbidden. Other liens should not be subject to such restrictions."*

The possibility of assignment or subrogation by contract or agreement of liens, including wage liens, was also left open in the **PETONE.**

TETLEY then points out that certain maritime liens may be assigned by operation of statute in the United Kingdom, but also records that in Canada

> *"The seaman's wage lien may not be forfeited by agreement, nor may he be*

deprived of any remedy for the recovery of his wages to which he would be entitled in the absence of such an agreement." ***[Canada Shipping Act, R.S.C.1985,c.S-9, sect.196(1)]***

TETLEY adds in a footnote that this section *"is to the same effect as sect. 39(1) of the UK's Merchant Shipping Act 1995, U.K.1995, c.21".*

TETLEY also reflects the Canadian position that Canadian Courts have almost without exception refused assignment of a maritime lien by force of law, the principal reason given being that the maritime lien is a personal right vested in a particular person. He makes the point that

"In such cases, the Courts are usually referring to a claim for wages". (p.1229)

In the Canadian Case, **WILLIAM RANKIN v THE ELIZA FISHER (1895) Ex.C.R. 461 at 469** McDOUGALL, LJ held that the debt for wages is assignable at common law, but the lien expires with the payment of the debt, adding :

"It has always been contrary to the policy of maritime law to invest him (the seaman) with any capacity to transfer this remedy against the ***res*** *to a third person."*

The decision is, of course, not in point in the present matter, since no debt for wages was assigned and the crews were never paid anything by any party, thereafter claiming to have received rights from them.

A contrary decision is **CANADIAN DREDGING CO v THE MIKE CORRY (1919) EX. C.R.61, (1919) 47 D.L.R.495**, in which it was held that after wages paid by salvors to the crew, the crew's lien vested in the salvors. As TETLEY points out at 1229, this judgment was rendered before the influential decision in the **PETONE** was reported, as the headnote editor is careful to point out. Thereafter in **PERCY CHARLES BONHAM v THE SARNOR (1921-22) 21 EX.C.R.183,** it was held that no transfer of a seaman's wage lien to an engineer was possible. The jurisprudence was reviewed and the **PETONE** again relied on. In 1996 in **SCOTT STEEL LTD v THE ALARISSA, 1996(2)F.C.883 at 925**, upheld in 1997 in the Federal Court of Canada, HARGRAVE P. expressed the same view while acknowledging the possibility of such an assignment with the leave of the court.

Canadian decisions, of course, carry special weight, since the Canadian history in terms of the operation of British admiralty courts parallels our experience, and are of great persuasive value as to what the English law would have been in 1983 which is, of course, the law to be applied in this country in admiralty legal questions of substance, as opposed to procedural matters.

I was referred by Mr *Wragge* to a decision in the Hong Kong High Court in the "SPARTI" reported in **LLOYDS REPORTS (2000) Vol.2 618**, where the owners of the vessel had fallen into financial difficulty and had asked the assignee, who was acting as the agent of the vessel in Colombo, to pay the crew. Although the assignee was under no legal duty to do so, it agreed to pay the crew, taking appropriate assignments from them. Issues for decision in the matter were (1), whether the maritime lien of wages was capable of being assigned and, if so, (2) whether it was invalid being prohibited by section 93(1) of the Merchant Shipping (Seafarers) Ordinance. WAUNG, J held that a maritime lien as understood by the British and Hong Kong Courts was regarded as a personal privilege which enured to the sole benefit of the maritime lienee and that it was not capable of being transferred, notwithstanding the wide wording of the Ordinance. The **PETONE** was considered and applied.

At p.622 of the Report, WAUNG, J made the following point :

> *"In a sense Mr Smith is of course correct that Mr Justice Hill left the point of assignability of maritime lien open but it seems to me that in the light of what was said and decided in the* ***PETONE,*** *there is little room left for the contention that maritime lien* ***(sic)*** *could be acquired or transferred by contractual assignment. Having regard to the reasons given by Mr Justice Hill as to why no maritime lien could be acquired or transferred by subrogation, the same*

reasons would equally be applicable against acquisition or transfer of maritime lien by contractual assignment. In fact I would have thought that there would be stronger objection against contractual assignment because in such a case it would not even require full payment to be made by the assignee to the assignor. With subrogation there is at least the merit of the person having paid off the wages and then in equity standing in the shoes of the crew. With contractual assignment, there would not even be the necessity for such payment."

I respectfully agree.

To revert to the Special Plea, Mr *Wragge* pleaded in paragraph 9 that

"the Plaintiff, being Deneys Reitz Inc. proceeding in the name of the master and crew of the MT "Argun", does not have maritime liens in respect of the claims set out in the Particulars of Claim and therefore no longer has an action enforceable ***in rem."***

In my view, this is not the legal effect of the fact that the maritime liens were not transferred to Deneys Reitz Inc. In the **BOLD BUCCLEUGH, (1852)7 Moo PC 257,** JERVIS, CJ provided what THOMAS (para 10) defines *as "the first comprehensive and authoritative definition of the maritime lien".*

> *"A maritime lien is well defined. ….. to mean a claim or privilege upon a thing to be carried into effect by legal process ….., that process to be a proceeding* ***in rem.***
> *….. This claim or privilege travels with the thing into whosoever's possession it may come. It is incohate (**sic**) from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding **in rem**, relates back to the period when it first atttached."*

The claim in this case is certainly, as Mr *Wragge* submitted, a claim for wages, but the lien cannot be seen as something separate from the claim. The claim ***in rem*** in this case is only possible because of the maritime lien, which is the claim upon the thing (ship in this case) which *"travels with the thing into whosoever's possession it may come",* as JERVIS, CJ said in the same quotation from the **BOLD BUCCLEUGH.**

As Lord DIPLOCK said in referring to this case in **THE HALCYON ISLE** [1980] 3 All Erf 21887 197 at 201i,

> *"JERVIS CJ, speaking in 1852, said that a maritime lien existed in every case in which the Court of Admiralty had jurisdiction to entertain an action* ***in rem*** *against a ship. Jurisdiction* ***in rem*** *and maritime lien went hand in hand". (emphasis supplied)*

I cannot conceive of the lien not passing to Deneys Reitz in this action ***in rem***, and yet some meaningful right to sue passing as a result of the cession. To repeat, the lien is the foundation of the claim upon the ship. That is the case which the master and the crew bring to this court. If Deneys Reitz have no lien upon which to ground their action, they have a *"right"* to sue without any substance. Nothing has been transferred to them by way of cession which enables them to get a judgment against the ship.

I therefore hold that there is no substance in the first Special Pleas in all three actions, and they are dismissed with costs.

It follows that there is no need to deal with any of the purported recessions, since there was nothing of substance to recede, no cessions having had the effect of entitling Deneys Reitz to proceed with actions ***in rem.***

A third Special Plea in Case No AC 134/99 may be shortly disposed of.

Mr *Wragge* applied to amend this plea to remove the words in the heading at p.81 before paragraph 10, "The Plaintiff's Alternative Claim". He also wished me to add the words *"claim and"* in the second last line of the Plea on page 82 so that it would read *"Wherefore the Defendant prays that the Plaintiff's claim and alternative claim be dismissed with costs and that judgment be entered in the Defendant's favour".* Mr *Burger* submitted that this amendment should not be allowed at such a late stage in the proceedings.

I am prepared to grant the amendment, but cannot accept the correctness of the Plea. It is based upon the argument that an agreement of compromise detailed in paragraph 11 of Plaintiff's claim in the alternative and entered into between National Pacific Ltd and six crew members, precluded the crew from obtaining relief on trial. The Special Plea appears to amount to an allegation that the claim arises from an agreement of compromise and that it is not enforceable since Plaintiffs do not have maritime liens over the Defendant.

The claim is in the alternative and only in the event that the Court should find that the Plaintiffs had compromised their claims against Defendant through the Agreement of Settlement entered into by Plaintiffs with National Pacific on 24 July, and are bound by that compromise.

Although the compromise was entered into, it was never given effect to. The crew did not divest themselves of any rights whatsoever, and no payment followed this compromise agreement.

As I have already held, the Plaintiffs do have maritime liens over Defendant in respect of all their claims and were never divested of those maritime liens. Their claims have remained intact throughout.

As far as AC4/2002 is concerned, Mr *Wragge* stated from the Bar that Defendant does not persist with its first Special Plea in regard to sovereign immunity.

THE QUANTUM OF THE CLAIMS

Mr *Wragge* indicated that the Russian Federation, being the owner of the vessel, did not wish to make any submissions regarding the arithmetic of the claims for which the Plaintiffs now seek judgment. Certainly, no indication during the cross-examination of the witnesses would suggest any such quarrel.

Mr *Wragge* did advance an argument in relation to Case AC134. He submitted that his admissions in paragraph 43 of Defendant's Plea and in the Plea in respect of each of the other Plaintiffs had been wrongly made and he sought leave to withdraw them.

Certainly, the admission that Plaintiffs (Captain Korolev and the crew) *"have a* *maritime claim"* arising out of employment on board, alternatively, the *"settlement"* referred to above, is wholly at variance with Defendant's case, as advanced by Mr *Wragge.* I am prepared to allow the admission to be withdrawn, but I do not accept the consequential argument that Captain Korolev and his crew had contracts for 6 months and that the further 6 months work, while Defendant was under arrest, was work for the Sheriff rather than their employer. If the work were, notionally, to have been *"for the Sheriff",* then the Sheriff would have been obliged to pay the crew. His preservation claim against the vessel would be that much higher. Either way, the owner would have had to foot the bill.

As Mr *Burger* also pointed out, the work done during the first 6 months *"contract"* period was done at a time when the vessel was already under arrest.

What I have said applies with equal force to all the Plaintiffs in Case AC.134.

INTEREST

As far as interest is cooncerned, Mr *Wragge* submitted that the prescribed statutory legal rate should only apply to judgments and debts *"couched in South African Rands"*. He did not refer to any authority for this proposition. He also submitted that I have a wide discretion as regards an award of interest by reason of the provisions of section 5(2)(f) of the Admiralty Act. That subsection empowers the Court to make such order as to interest, the rate of interest and the date from which it is to accrue, whether before or after the date of the commencement of the action, as to it appears just. He proceeded to argue that the Plaintiffs claims are formulated in US dollars and that it would be inappropriate to award interest at the prescribed legal rate currently prevailing in South Africa which takes into account the rate of inflation and other purely South African economic factors. He added that it had become the practice among admiralty practitioners to agree to interest on US Dollar and Sterling amounts at the rate of 8% per annum being the default rate applied by the United Kingdom Courts.

I do not see any merit in that submission. In the **MV SEA JOY, 1998(1) SA 487 at 506, CPD**, THRING, J referred to sections 5(2)(f) and 6(2) of the Admiralty Act. The latter subsection stipulates that the

> *"provisions of ss(1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in para (a) or (b) of that subsection."*

The learned Judge went on to hold that the provisions of the Prescribed Rate of Interest Act, as amended, were *"provisions of any law of the Republic applicable to any of the matters contemplated in para (a) or (b) of"* s.6(1) of the Admiralty Act, and that the obligation to apply English admiralty law *"shall not derogate"* from such provisions. In the result, THRING, J did award a lower figure, in his discretion, which was permissible because he was dealing with an unliquidated claim, in terms of s.2A(5) of the Prescribed Rate of Interest Amendment Act, 7 of 1997.

In the present matter, I am concerned with liquidated claims and I see no reason to depart from the prescribed rate of interest.

The law is clear that a South African Court can give judgment in a foreign currency, and will do so when loss is suffered in a foreign currency. A plaintiff is entitled to receive ***mora*** interest at the rate permitted by the law **(THOROUGHBRED BREEDERS' ASSOCIATION v PRICE WATERHOUSE, 2001(4) SA 551 [SCA] at 594D-E).**

The claims in this case are in dollars and judgment should, in my view, be in dollars, with interest, at the prescribed rate, also in dollars.

> See also **SKILYA PROPERTY INVESTMENTS (PTY) LTD v LLOYDS OF LONDON, 2002(3) SA 765 TPD at 815D-817B.**

Interest was due on these wages, if not paid, on a monthly basis.

Mr Burger supplied schedules of wages earned during each month and I accept these calculations for purposes of my award, and of interest in terms of my discretion in terms of s.5(2)(f). Mr Burger also submitted that the appropriate rate of interest is 15,5% per annum, being the rate presently prescribed.

I consider the application of the South African Prescribed Rate of Interest Act to be just in this case, and I intend to apply it.

COSTS

Mr *Burger* sought an order in terms of Admiralty Rule 8(3) that the Russian Federation be held personally liable for the crew members' costs in litigating this claim. Mr *Wragge*'s attitude was that the Plaintiffs sought, in their Notice of Amendment, an order that the Defendant and the owner pay costs on the scale as between attorney and client (Heads, para.42).

Mr *Wragge* resisted only the scale of costs and submitted that there was no basis for attorney and client costs in this case since the owner had not acted maliciously or unconscionably. He submitted therefore that no special order of costs, either against the Defendant or the owner, should be made.

As part of his argument for attorney and client costs, Mr *Burger* submitted that many defences raised at earlier stages in these proceedings were not ***bona fide***, and he cited a number of law points which were raised in the rescission application and not proceeded with. Despite Mr *Burger*'s submissions on these issues, I am not persuaded that there is not also merit in Mr *Wragge*'s answer, which was that as matters proceed, defences often get dropped without that meaning foul play. He also pointed to the fact that difficulties experienced in obtaining proper instructions, and poor communication with Russia, had been the cause of much of which Mr *Burger* had complained.

I do not think it is appropriate for an order of attorney and client costs to be made.

There was, in my view, no evidence suggesting that the owner was guilty of misconduct warranting the making of a punitive costs order, or any other special considerations which might have warranted such an order

As to the travel and subsistence costs of Captain Korolev, Mr *Wragge* submitted that a special order in this regard would usurp the Taxing Master's function and submitted that the proper course would be for Plaintiffs to obtain an order declaring Captain Korolev to be a necessary witness. Mr *Burger* agreed that that would be appropriate.

THE SHERIFF'S PRESERVATION COSTS

The Supreme Court of Appeal held in **MT "ARGUN" 2001(3)SA 1230** that the crew were liable to the Sheriff for preservation expenses and reasonable remuneration (*"preservation costs")* arising out of their arrest of the vessel. The Sheriff stated in AC 42/2002 that by the time that I was dealing with that matter, his exposure had risen to R4 654 878,53. Mr *Burger* submitted further that any argument that the preservation costs do not form part of the costs recoverable against the vessel and the Russian Federation would lead to a startling result. If the Sheriff's claim of more than R4½ million is correct, then it exceeds the claims of the Plaintiffs in cases AC 127/99 and AC 134/99 by a large margin. Another effect of not including the preservation costs of the vessel in the costs award in favour of the Plaintiffs would be that the Sheriff, if security were to be posted at this stage by the owners, would not be able to recover these costs, without further litigation and a further order.

I agree with Mr *Burger*'s argument that as a matter of logic – and, I might add, common sense – preservation costs must form part of a plaintiff's costs of suit in a situation like this. As he said,

> *"But for the institution of an action* ***in rem****, there would be no arrest of the maritime res. Without such arrest, the* ***res*** *does not fall into the custody of a*

> *sheriff. Without such custody there is no requirement on a sheriff to preserve the* ***res*** *and consequently no cost of preservation would be incurred."*

Mr *Burger* submitted further that the costs of preservation are incurred

> *"as a direct consequence of a plaintiff prosecuting its action* ***in rem*** *and are therefore nothing other than costs of suit properly so called."*

EXECUTION

Mr *Burger* also asked for a special order in regard to execution which he said had arisen because of the lapsing of the arrests in AC127/99 and AC 134/99. As Mr *Burger* said, upon obtaining judgment in those two actions, the crew – the plaintiffs – will have to execute against the vessel presently under arrest only in respect of the third action. In order to give effect to this judgment and to avoid further legal wrangling, he submitted that this Court should give effect to this judgment by making an order that judgment in respect of all claims should be executed against the vessel. He therefore asked for a declaratory order for directions in terms of Admiralty Rule 25.

Mr *Wragge* in turn submitted that the Sheriff's costs and reasonable remuneration do not constitute part of the Plaintiff's cost of suit and are not susceptible to taxation. His submission was that this should be left to the Sheriff and the owners to sort out. In the light of past history in that regard I do not consider that to be a fruitful exercise.

Mr *Wragge* also contested the right of Plaintiffs to obtain a special order of executability in respect of the first two actions.

In the interests of finality, I am prepared to make such directions which I do consider proper for the disposal of this matter.

I am satisfied that the Plaintiffs have proved their claims in this court, as amended, and are entitled to judgment. There will accordingly be an order as follows :

CASE NO AC 127/99

a) Defendant is ordered to pay to Plaintiffs the amount set out in the column headed *'Totals'* (in the TOTAL amount of US$99 662.39) in the attached document marked 'AC127/99' to each Plaintiff whose name and numbers appears on the particular line.

b) Defendant is ordered to pay interest at the rate of 15.5% per annum on each amount as indicated on the attached document to each Plaintiff whose name and number appears on the particular line from the dates appearing above each amount, in each of the 3 columns headed 30/04/99, 31/05/99 and 30/06/99.

c) Defendant vessl MT "Argun", and the Russian Federation are ordered to pay Plaintiff's costs of suit on a party and party scale including

i) the necessary travel costs of Captain Korolev, and

ii) the Sheriff's reasonable and necessary costs incurred in preserving the

Defendant vessel from the date of the Plaintiff's arrest until the lapsing of the arrest, and the Sheriff's reasonable remuneration earned in respect thereof.

iii) The costs of discovery.

(d) It is declared that Plaintiffs are entitled to execute their judgment ***in rem*** obtained in respect of the Defendant, against the Defendant.

CASE NO AC134/99

a) Defendant is ordered to pay to Plaintiffs the amount set out in the column headed *'Totals'* in the amount of US$176 780.06 in the attached document marked 'AC134/99' to each Plaintiff whose name and numbers appears on the particular line.

b) Defendant is ordered to pay interest at the rate of 15.5% per annum on each amount as indicated on the attached document to each Plaintiff whose name and number appears on the particular line from the dates appearing above each amount in each of the 13 columns headed 31/07/95, 31/08/95, 30/09/95, 31/10/95, 30/11/95, 31/12/95, 31/01/96, 29/02/96, 31/03/96, 30/04/96, 31/05/96, 30/06/96 and 31/07/96.

c) Defendant vessel MT "Argun" and the Russian Federation are ordered to pay the costs of suit on a party and party scale, including

i) the necessary travel costs of Captain Korolev'

ii) the Sheriff's reasonable and necessary costs incurred in preserving the Defendant vessel from the date of the Plaintiff's arrest until the lapsing of the arrest, and the Sheriff's reasonable remuneration in respect thereof, and

iii) the costs of discovery.

(d) Plaintiffs are entitled to execute their judgment ***in rem*** obtained in respect of Defendant, against the Defendant.

CASE NO AC 4/2002

a) Defendant is ordered to pay to Plaintiffs the amount set out in the column headed *'Totals'* in the amount of US$71 293,55 in the attached document marked 'AC4/2002' to each Plaintiff whose name and numbers appears on the particular line.

b) Defendant is ordered to pay interest at the rate of 15.5% per annum on each amount as indicated on the attached document to each Plaintiff whose name and number appears on the particular line from the dates appearing above each amount in each of the four columns headed 31/07/99, 31/08/99, 30/09/99 and 14/10/99.

c) Defendant vessel MT "Argun" and the Russian Federation are ordered to pay costs of suit on a party and party scale, including

i) the necessary travel costs of Captain Korolev;

ii) the Sheriff's reasonable and necessary costs incurred in preserving the Defendant vessel from the date of the Plaintiff's arrest until the release of the *MT "Argun"* from arrest and the Sheriff's reasonable remuneration earned in respect thereof; and

iii) the costs of discovery.

____
J G FOXCROFT

ANNEXURES TO JUDGMENT : Schedules of Wages – 3 pages

---ooo0ooo—

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

CASE NO : AC 42/2002

[RELATED TO CASE NO'S : AC127/99; AC134/99; AC4/02]

In the matter between :

THE OWNERS OF THE MT "ARGUN" Applicant

and

THE MASTER AND CREW OF THE MT 'ARGUN' CLAIMING UNDER CASE NO AC127/99 First Respondent

THE FORMER CREW OF THE MT 'ARGUN' **CLAIMING UNDER CASE NO AC134/99** Second Respondent

THE MASTER AND CREW OF THE MT 'ARGUN' **CLAIMING UNDER CASE NO AC4/2002** Third Respondent

THE SHERIFF OF CAPE TOWN Fourth Respondent

COUNSEL FOR APPLICANT : ADV M WRAGGE

ATTORNEYS FOR APPLICANT : WEBBER WENTZEL BOWENS, CAPE TOWN

COUNSEL FOR RESPONDENTS : ADV L BURGER

ATTORNEYS FOR RESPONDENTS : DENEYS REITZ INC CAPE TOWN

DATE[S] OF HEARING : 18 & 19.6.2002; 12 TO 20.8.2002

DATE OF JUDGMENT : 12.09.2002