THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 638/2010

In the matters between:

IMPERIAL MARINE COMPANY **Appellant**

and

THE MOTOR VESSEL *PASQUALE DELLA GATTA*

First Respondent

DEIULEMAR COMPANGNIA DI NAVIGAZIONE Spa

Second Respondent

and

IMPERIAL MARINE COMPANY **Appellant**

and

THE MOTOR VESSEL *FILIPPO LEMBO* **First Respondent**

DEIULEMAR COMPANGNIA DI NAVIGAZIONE Spa

Second Respondent

Neutral citation: *Imperial Marine Company v Pasquale della Gatta; Imperial Marine Company v Filippo Lembo* (638/10) [2011] ZASCA 131 (15 September 2011)

Coram: NAVSA, BRAND, LEWIS, LEACH and WALLIS JJA

Heard: 18 August 2011

Delivered: 15 September 2011

Summary: Arrest of vessels as security for claims being pursued in arbitration proceedings in London – requirement of a prima facie case – application of established principles to the drawing of inferences and the

evidence of experts – allegations of breach by charterer – supply of bunkers not in accordance with specification –breach of safe port, safe berth warranty – alleged breach of implied warranty under NYPE charter party form – alleged failure to redeliver vessel in the same good order and condition, fair wear and tear excepted – claim for counter-security – charterer alleging a failure by owner to deliver and maintain vessel in an efficient state causing it loss – basis for assessing – reasonably arguable best case.

ORDER

On appeal from: Western Cape High Court, Cape Town (Baartman J sitting as court of first instance):

[A] In the appeal against the judgment in the case of the arrest of the *Pasquale della Gatta* (Case No AC20/09 in the high court) the following order is made:

a) The appeal is dismissed with costs.
b) The cross-appeal is upheld with costs and the order of the high court is altered to read as follows:

'(i) The order for the arrest of the *Pasquale della Gatta* granted *ex parte* on 20 March 2009 and the deemed arrest of the vessel pursuant to the provision of security to obtain its release from that arrest are set aside.

(ii) The applicant is ordered to pay the costs of the application on the scale as between attorney and client.'

(c) The order for the provision of counter-security by the applicant, Imperial Marine Company, is set aside.

[B] In the appeal against the judgment in the case of the arrest of the *Filippo Lembo* (Case No AC 8/09 in the high court) the following order is

made:

(a) The appeal succeeds to the extent that paragraphs 6 and 7 of the order of the high court are altered in the following respects:

i) by the deletion in paragraph 6(a) of the amount of US$17 477 128.40 and its replacement by US$7 047 177.50;

ii) by the deletion in paragraph 6(b) of the figure of US$3 408 040 and its replacement by US$1 374 199,61;

iii) by the deletion in paragraph 7(a)(i) of the words 'claims1(a)-(f) US$20 485 587.17' and their replacement by 'claims 1(a), (b), (d) and (e) US$7 029 824.59;

iv) by the deletion of paragraphs 7(b) and (d);

but is otherwise dismissed.

(b) The cross-appeal succeeds and paragraph 2 of the order of the high court is altered in the following respects:

i) by the deletion of paragraphs 2(a)(iii) and (iv) thereof;

ii) by the deletion in paragraph 2(a)(v) of the figure of US$1 699 675.20 and its replacement by US$878 825.23;

iii) by the deletion in paragraph 2(a)(vii) of the figure of US$12 201 958.32 and its replacement by US$7 171 621.26.

(c) Each party is ordered to pay half the costs of and attendant upon the preparation of the record in relation to this matter being volumes 1 to 9 and 16 of the record of appeal and is otherwise ordered to bear its own costs.

JUDGMENT

WALLIS JA (NAVSA, BRAND, LEWIS AND LEACH JJA CONCURRING)

Introduction

[1] On 3 July 2003 Imperial Marine Company (Imperial Marine) and the second respondent, Deiulemar Compangnia di Navigazione Spa (Deiulemar), concluded a long term time charterparty on the NYPE form in respect of the *George T*, a Capesize bulk carrier of some 170 00 dwt. A dispute arose in 2005 when the vessel suffered damage to its main engine and underwent repairs at Pylos, Greece. Deiulemar treated the vessel as off-hire whilst it was under repair. It thereafter commenced arbitration proceedings against Imperial Marine in London in terms of the charterparty, alleging various breaches of the charterparty and claiming damages flowing from this incident. Imperial Marine responded with both a defence and a counterclaim to recover the unpaid hire and the cost of repairs. In June 2007 a further dispute arose over the dry docking of the vessel and this caused Deiulemar to terminate the charterparty. Both parties are pursuing the arbitration, albeit that progress has been slow and many of the claims now being advanced have not yet featured in the formal points of claim and defence or counterclaim. Nonetheless all are treated as being claims in those proceedings and I shall do likewise.

[2] Neither Deiulemar nor Imperial Marine held security for their claims, whether those already incorporated in pleadings or those they proposed to include by way of amendment. On 3 February 2009, and with

a view to remedying this, Imperial Marine obtained an order for the arrest of the *Filippo Lembo* in terms of s 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act) to provide security for some of its claims. Deiulemar challenged this arrest in respect of two of those claims and counterclaimed for an order in terms of s 5(2)(c) of the Act that the arrest be subject to a condition that Imperial Marine provide security for Deiulemar's own claims. Whilst this litigation was still underway Imperial Marine caused the *Pasquale della Gatta* to be arrested in respect of a further claim. Deiulemar responded by seeking to have that arrest set aside and counterclaimed conditionally for security for a claim under s 5(3) of the Act. Both arrested vessels were released against the provision of security in the form of P & I Club letters of undertaking.

[3] The two applications were argued together before Baartman J in the high court and both parties enjoyed some success. Imperial Marine maintained its security for two of the claims advanced in support of the arrest of the *Filippo Lembo* and also maintained its security arising from the arrest of the *Pasquale della Gatta*, albeit in an amount less than it had claimed. Deiulemar obtained the counter-security it sought in both sets of proceedings and also obtained costs orders in its favour. With its leave both parties appeal against the decision of the high court insofar as it went against them and seek to maintain that decision insofar as it favoured them.

The facts

[4] The charter in respect of the *George T* was for a period of 35 to 37 months, with the charterers having an option to extend the period for 11 to 13 months. Hire was payable by Deiulemar at a daily rate of US$16 350 for the initial period and US$17 350 for the extension period.

Deiulemar was obliged to provide and pay for fuel the specifications of which were stated in clauses 62 and 82. It was entitled to trade the vessel worldwide without limit subject to certain exclusions and subject also to the usual provision that it would only do so 'via safe port(s), safe berth(s), safe anchorage(s) always afloat'. There was an unlimited entitlement to sub-charter the vessel although Deiulemar remained liable for the obligations under the charterparty. Imperial Marine was obliged to provide a vessel that was in a thoroughly efficient state and for the duration of the charter to 'maintain her class and keep the vessel in a thoroughly efficient state in hull/holds, machinery and equipment'. On redelivery Deiulemar undertook that the vessel would be in the same good order and condition as on delivery, fair wear and tear excepted. None of this is in any way unusual.

[5] On 6 July 2003 the *George T* was delivered to Deiulemar and for the first two years there appear to have been no significant problems. The present disputes originate with the provision by Deiulemar of a bunker stem at Yeo Su, Korea on 4 March 2005. The vessel then sailed for Dampier in Australia and started burning these bunkers. Whilst it was en route to Dampier a sub-charter was concluded between Deiulemar and Dabkomar Bulk Carriers Ltd (Dabkomar), also on NYPE terms, back to back with the head charter, for a period up to 3 September 2007, minus 60 days in Dabkomar's option, at a hire rate of US$45 000 per day. In effect this was a sub-charter for the remaining period of the head charter inclusive of the extension period. The vessel completed its voyage to Dampier and loaded a cargo for Quingdao, China where it was delivered under the sub-charter. From there it returned to Yeo Su to take on a second stem of bunkers and then proceeded to Port Hedland in Australia. All this occurred between 16 March and the middle of May 2005, the

precise date of each event being immaterial, save that delivery under the sub-charter is said to have occurred on 23 April 2005.

[6] Whilst the vessel was en route to Port Hedland the chief engineer received a report that the bunkers delivered in the first bunker stem at Yeo Su were not in accordance with specification. This is accepted as correct, at least insofar as the Kineamatic viscosity of the bunkers is concerned. The engineer's response was to stop burning those bunkers and to switch to others. The unwillingness to use the initial Yeo Su bunker stem meant that when the vessel left Port Hedland it had insufficient bunkers to reach its destination at Redcar in the United Kingdom and it accordingly diverted to Colombo in Sri Lanka to take on additional bunkers. Its onward route was via Suez where there was a brief stoppage because of engine problems. Shortly thereafter it became apparent that the main engine had suffered major damage and required repairs. For that reason it went to Pylos, Greece where the repairs were undertaken over a period of a little over 71 days.

[7] Deiulemar claims that the reason for the breakdown in the main engine was a failure on the part of Imperial Marine to fulfil its obligations to provide a vessel with its machinery and equipment in a thoroughly efficient state and its further obligation to maintain it in such state. It accordingly contends that the detour to Colombo was an improper diversion and that the vessel was off-hire during that period as well as the periods of the breakdown at Suez and repairs at Pylos. It fixes its damages for this period as the difference between the hire it would have paid had the vessel been working and the hire it would have received from Dabkomar if the latter had not also contended that the vessel was off-hire during these periods. It invoked the arbitration clause providing

for London arbitration and served points of claim embodying this claim. Furthermore, on 29 September 2005, before the points of claim were delivered, Dabkomar had cancelled the sub-charter. Flowing from this Deiulemar pleaded that, if the cancellation were held to be valid in an arbitration pending between Deiulemar and Dabkomar, there would be a further claim for damages represented by the difference between the hire it would be obliged to pay under the head charter and the hire it would have earned under the sub-charter. It did not attempt to quantify these damages.

[8] Imperial Marine disputed these claims. It laid the blame for the damage to the main engine on the first Yeo Su bunker stem, which led to the vessel burning bunkers with excessive viscosity. It accordingly counterclaimed for the unpaid hire and the cost of the repairs to the main engine at Pylos. Over and above this it claimed an unspecified amount for the diminution in the value of the vessel arising from the manner in which the repairs to the engine's cylinder blocks were undertaken.

[9] The arbitration proceeded at a leisurely pace, in part because Deiulemar indicated that it intended to amend its points of claim to include new and revised claims and Imperial Marine was unwilling to agree to this. In the meantime the *George T* continued trading in terms of the charterparty. There was allegedly a deballasting problem at Richards Bay in February 2006 and between 23 June and 17 August 2006 it was taken out of service for its annual class survey and repairs at Zhoushan, China. It was then under sub-charter until 26 December 2006 after which it sailed for Richards Bay, where it arrived on 24 January 2007. Four days later it left with its cargo bound for Rotterdam.

[10] On 6 March 2007, whilst the *George T* was at Rotterdam, Imperial Marine sent a message to Deiulemar that during the course of tank cleaning of No 8 Double Bottom Tank (DBT), prior to inspection, damage to the tank had been discovered. This was described as being:

'… a large indentation over a distance spanning 8 web frames (about 28 metres), to a maximum depth of about 400 millimetres, and about 4.5 metres at the widest point.'

Surveyors were called in from Lloyds Register, with which the vessel was entered for class. They required repairs to be undertaken, some immediately and others at a later stage. For the purpose of the immediate repairs the vessel moved to Antwerp where substantial repairs, especially to the vessel's steel plating, were undertaken between 8 March 2007 and 12 May 2007. It then resumed trading but on 13 June 2007 Lloyds Register refused to extend the date for its next dry docking survey, which accordingly had to take place before 25 August 2007. Imperial Marine advised Deiulemar that they would send the vessel to Zhoushan, China for that purpose. After an exchange of correspondence Deiulemar's response was that this rendered further trading under the charter impossible. On 1 August 2007 they delivered a letter to Imperial Marine terminating the charter. Shortly prior to that the vessel had entered dry dock at Zhoushan and it remained there for the survey and repairs until 20 December 2007. These repairs also involved extensive work on and replacement of the vessel's steel plating.

[11] Two other facts should be mentioned before turning to consider the arrests of the two vessels in South Africa. The first is that, whilst the vessel was undergoing repairs at Antwerp, Imperial Marine sold it to Dalton Worldwide SA (Dalton) for a price representing the amount due under the outstanding mortgage over the vessel. Registration of the change of ownership occurred on 29 June 2007. The vessel thereafter

continued trading but was scrapped in March 2010 shortly before the cases were argued in the high court.

The claims

[12] Imperial Marine advanced three claims in support of the arrest of the *Filippo Lembo*. The first can be described shortly. It alleged that Deiulemar breached the charterparty by supplying out of specification bunkers at Yeo Su and that the use of these bunkers occasioned damage to the vessel's main engine. The unpaid charter hire in respect of the diversion to Colombo; the stoppage in Suez; and the period while the vessel was undergoing repairs at Pylos was claimed, as well as the cost of the repairs. Deiulemar accepted that a prima facie case had been made in respect of this claim and that Imperial Marine was entitled to security for it. The capital amount is US$4 506 796.03. Deiulemar also accepted that the security should cover interest at 6.5 percent on the amount claimed for three years, amounting to US$878 825.23, and the costs of the arbitration, which it agreed should be fixed in the sum of US$2 150 000. However, it contended that Imperial Marine already held security for costs in an amount of £250 000 and that the amount for costs should be reduced accordingly. The high court upheld this latter contention.

[13] In the counterclaim in the arbitration the second claim was formulated in the following way:

'Diminution in the value of the vessel as a direct result of the fact that, in order to avoid the need to wait for the manufacture and delivery of new blocks, the cracked cylinder blocks were repaired by way of Metalock stitching.'

In these proceedings this claim underwent a change. The affidavit in support of the arrest said it was a claim to recover the cost of replacing the repaired cylinder blocks with new blocks at a cost of US$700 000

apiece, totalling US$4.2 million, plus downtime for 120 days at US$25 000 per day, occasioning a loss of a further US$3 million. The claim was attacked on two grounds. They were first that new cylinder blocks were not required as the original repair was perfectly adequate, and second that the vessel was transferred to Dalton, without the cylinder blocks being replaced so that no damages were suffered. By the time of argument in the high court the vessel had been scrapped without replacing the cylinder blocks and this became a further reason for contending that no damages were suffered. Albeit that the repairs were never done, Imperial Marine contended that the cost of undertaking them is nonetheless, as a matter of English law, the proper measure of the diminution in value of the *George T*. The high court rejected this claim and reduced the amount of security accordingly.

[14] The third claim, which had not been raised in the arbitration, was for the cost of repairing the shell plating of the vessel in way of No 8 DBT. It was alleged that Deiulemar, in breach of its obligations under the charterparty, directed the vessel to load a cargo at Richards Bay, which was not a safe port, or alternatively at a berth at Richards Bay, which was not a safe berth. In the further alternative the claim was advanced on the basis of an implied indemnity arising under clause 8 of the charterparty. Imperial Marine relied on circumstantial evidence and contended that the inference to be drawn from this evidence is that an underwater protrusion from the wall of the berth at Richards Bay caused the damage noted in Rotterdam. This constituted a hidden danger and rendered either the port or the berth unsafe. The claim was disputed on the facts in regard to the cause of the damage and on the law relating to what constitutes a safe port and a safe berth and the existence of any implied indemnity. The high court accepted that Imperial Marine established the claim on the

requisite prima facie basis and upheld the arrest and the claim for security in respect thereof.

[15] It is convenient at this stage to deal with the claim advanced by Imperial Marine in support of the arrest of the *Pasquale della Gatta*. It was a claim for the cost of the repairs to the steel work of the vessel undertaken in 2007 at Antwerp and Zhoushan, other than those relating to the hull in way of No 8 DBT. When the vessel was inspected during the repairs at Antwerp considerable corrosion was discovered in the internal shell plating and steel members of numbers 7, 8, 9 and 10 DBTs. In seeking the arrest Imperial Marine said that this was due to the action of Sulphate Reducing Bacteria (SRB) and on two grounds blamed Deiulemar for the incursion of these bacteria. The first was that in breach of its obligations as charterer it directed the vessel to ports where it was particularly vulnerable to corrosion in consequence of the activities of SRB. The second was that in any event Deiulemar was obliged to re-deliver the vessel at the end of the charter in the same order and condition as it was on delivery at the commencement of the charter, fair wear and tear excepted, and that re-delivery with extensive corrosion caused by SRB was a breach of this obligation. Again this claim, and the expert evidence delivered in support of it, was disputed on the facts. In addition the legal basis for the claim was disputed. The high court sustained the arrest although it reduced the amount of security to be furnished.

[16] I turn to the claims that Deiulemar sought to have secured by way of the condition imposed on the arrest of the *Filippo Lembo*. It alleged that throughout the period of the charter Imperial Marine was in breach of its obligations to provide a vessel in a thoroughly efficient condition and to maintain it in that condition. It attributed any problems experienced

with burning the first bunker stem at Yeo Su to this. It claimed on the basis of an inspection of the damaged engine that the problems it experienced were long-standing and flowed from lack of maintenance and the manner of the ship's operation. It alleged that lack of maintenance was the reason for the corrosion of the ship's steelwork and necessitated the vessel going off-hire to undergo repairs. In addition it said that the engine problems meant that it failed to perform in accordance with the provisions of the charterparty. Deiulemar claimed damages for loss of income under the Dabkomar sub-charter; the loss of that sub-charter; and losses it said it incurred, both by way of additional expenditure and by way of loss of potential income, from its trading with the vessel after the termination of the sub-charter. It obtained an order that the arrest of the *Filippo Lembo* be made subject to a condition that this claim be secured in full, subject to an allowance to avoid duplication. In relation to the arrest of the *Pasquale della Gatta* it failed in its efforts to have the arrest set aside but succeeded in a conditional counter-application for security for a claim under s 5(4) of the Act arising from delays in securing the release of the vessel from that arrest. It was awarded the costs of both applications, including in the latter case the costs on an attorney and client scale.

The appeals

[17] Imperial Marine is the party more aggrieved by the decision of the high court. It appeals against the following aspects of the judgment:

(a) the reduction of its security for costs in the arbitration by £250 000, being the amount of security already provided by Deiulemar;

(b) the rejection of the claim for security in relation to the replacement of the cylinder blocks;

(c) the order attaching a condition to the arrest of the *Filippo Lembo* that

it provide security to Deiulemar in the full amount of its claims arising from the cancellation of the sub-charter and the alleged lack of seaworthiness and maintenance of the *George T*;
(d) the reduction of the amount of its security in respect of the corrosion claim;
(e) the order that it bear the costs of the two applications including, in the case of the *Pasquale della Gatta*, costs on the scale as between attorney and client.

[18] For its part Deiulemar seeks to sustain the orders of the high court insofar as they favour it and appeals against the following portions of those orders:
(a) the maintenance of the arrest and security in relation to the alleged damage to the No 8 DBT of the *George T* at Richards Bay;
(b) the dismissal of its application to set aside the arrest of the *Pasquale della Gatta*.

The law

[19] In *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris*[1] this court held that:

'A claimant applying for an order for the arrest of a ship in terms of s 5(3)(a) for the purpose of obtaining security in respect of a claim which is the subject of contemplated proceedings to be instituted in a foreign forum is required to satisfy the Court (a) that he has a claim enforceable by an action *in rem* against the ship in question or against a ship of which the ship in question is an associated ship; (b) that he has a *prima facie* case in respect of such a claim, which is *prima facie* enforceable in the nominated forum or forums of his choice, in the sense explained above; and (c) that he has a genuine and reasonable need for security in respect of the claim.'

The focus in the present case falls on whether the parties have established

1 *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 832J-833A.

the requisite prima facie case in relation to their respective claims. Whether there is a prima facie case may depend upon issues of both fact and law, as with Imperial Marine's claim for damage to the vessel allegedly suffered at Richards Bay and the claim arising from alleged SRB-induced corrosion. The starting point is the facts upon which any legal contentions are based.

[20] Scott JA addressed the topic of the evidence necessary to establish a prima facie case in *Hülse-Reutter & others v Gödde*[2] in the following terms:

'[12] The requirement of a *prima facie* case in relation to attachments to found or confirm jurisdiction has over the years been said to be satisfied if an applicant shows that there is evidence which, if accepted, will establish a cause of action and that the mere fact that such evidence is contradicted will not disentitle the applicant to relief – not even if the probabilities are against him; it is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused. This formulation of the test … has been applied both by this Court and the Provincial Divisions … One of the considerations justifying what has been described as generally speaking a low-level test … is that the primary object of an attachment is to establish jurisdiction; once that is done the cause of action will in due course have to be established in accordance with the ordinary standard of proof in subsequent proceedings. …No doubt for this reason Nestadt JA, in the *Weissglass* case … warned that a court "must be careful not to enter into the merits of the case or at this stage to attempt to adjudicate on credibility, probabilities or the prospects of success".

[13] Nonetheless, the remedy is of an exceptional nature and may have far-reaching consequences for the owner of the property attached. It has accordingly been stressed that the remedy is one that should be applied with care and caution … More recently, in *Dabelstein and Others v Lane and Fey NNO* 2001 (1) SA 1222 (SCA) at 1227H - 1228A, it was suggested that the time may come to reconsider the approach adopted in the past and to have regard also, in the assessment of the evidence, to the allegations in the respondent's answering affidavit which the applicant cannot

2 *Hülse-Reutter & others v Gödde* 2001 (4) SA 1336 (SCA) paras 12 - 14.

contradict. In the present case, however, the affidavits filed on behalf of the appellants are such that the issue does not arise and it is unnecessary to consider whether the test should be refined in the manner suggested.

[14] What is clear is that the "evidence" on which an applicant relies, save in exceptional cases, must consist of allegations of fact as opposed to mere assertions. It is only when the assertion amounts to an inference which may reasonably be drawn from the facts alleged that it can have any relevance. In other words, although some latitude may be allowed, the ordinary principles involved in reasoning by inference cannot simply be ignored. The inquiry in civil cases is, of course, whether the inference sought to be drawn from the facts proved is one which by balancing probabilities is the one which seems to be the more natural or acceptable from several conceivable ones … While there need not be rigid compliance with this standard, the inference sought to be drawn, as I have said, must at least be one which may reasonably be drawn from the facts alleged. If the position were otherwise the requirement of a *prima facie* case would be rendered all but nugatory …' (Most authorities omitted.)

[21] These appeals pertinently raise the issue whether Hefer ACJ was correct in suggesting in *Dabelstein*'s case that facts in the opposing affidavits that an applicant is unable to contradict should also be taken into account in weighing up whether the applicant has discharged the onus of establishing a prima facie case. The issue arises at various points in the consideration of the evidence presented by the parties in the present case. By way of example, in relation to the claim for the damage to the shell plating of No 8 DBT, a diagram of the berth at Richards Bay and an explanation of the mode of its construction is put up and not challenged by Imperial Marine. In regard to the SRB corrosion claim there are unchallenged affidavits by Dr Bailey and Dr Stott put in by Deiulemar that undermine certain key statements by Imperial Marine's expert witness, Dr Cleland. Should this evidence nonetheless be ignored in considering these claims, or should it be taken into account in considering

whether Imperial Marine has placed evidence before the court that, if accepted by the arbitrators, could reasonably lead to the conclusion that the claims will succeed?

[22] When this question was put to him counsel for Imperial Marine fairly accepted that the court should have regard to such evidence. That resolves the need to decide finally whether to adopt the approach of Hefer ACJ although, as the Constitutional Court has recently pointed out, deciding matters on the basis of concessions by counsel is not always satisfactory.[3] For that latter reason I indicate briefly why there is much to be said, in deciding whether the applicant has established a prima facie case, for taking into account the facts in the opposing affidavits that an applicant does not contradict, at least where there is no reason to believe that in future proceedings, with the advantages of discovery, those facts are capable of being challenged. The primary reason is that in principle to do otherwise is to shut one's eyes to relevant factual material that may fatally undermine the arresting party's claim and courts do not ordinarily disregard relevant and admissible evidence when reaching their decisions. Disregarding such evidence seems inconsistent with the constitutional requirement that both parties are entitled to a fair hearing and confers an unjustifiable advantage on the arresting party. In the present context, our courts have repeatedly stressed that the arrest of a ship is a matter with serious consequences.[4] That being so, it seems incongruous for a court faced with a decision whether to order or sustain such an arrest to ignore materially relevant and undisputed evidence.

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3 *Premier: Limpopo Province v Speaker of the Limpopo Provincial Government and others* [2011] ZACC 25, para 31.

4 Starting with a statement by Didcott J in *Katagum Wholesale Commodities Co Ltd v The MV Paz* 1984 (3) SA 261 (N) at 269H, quoted with approval by Corbett CJ in *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 581G-H and by Scott JA in *MV Snow Crystal: Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) para 36.

[23] The consideration of such evidence does not offend against any basic principle underpinning the traditional approach to proof of a prima facie case. Whilst the fact that the merits will be considered at a later stage is said to provide the justification for adopting this low-level test in cases of attachments to found jurisdiction, it is not relevant to the consideration of an application for a security arrest in terms of s 5(3) of the Act. A security arrest is not directed at establishing the court's jurisdiction in future proceedings but at obtaining final relief in the form of an order that security be provided for the outcome of proceedings in another forum, usually in another jurisdiction.[5] This is a special jurisdiction vested in our courts under the Act[6] and in determining whether to order an arrest it is inappropriate for the court to shut its eyes to admissible and relevant evidence that is not and cannot be disputed. This is particularly so because obtaining security may play a crucial role in decisions concerning the future conduct of the foreign proceedings and can even lead to their being abandoned or settled.

[24] Leaving that aside two other points fall to be made about the approach to proof of a prima facie case. They are first that where the applicant asks the court to draw factual inferences from the evidence they must be inferences that can reasonably be drawn from it, even if they need not be the only possible inferences from that evidence. If they are tenuous or far-fetched the onus is not discharged. Second the drawing of inferences from the facts must be based on proven facts and not matters of speculation. As Lord Wright said in his speech in *Caswell v Powell*

5 *Ecker v Dean* 1937 SWA 3 at 4 cited in *Shepstone and Wylie & others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1042C-D. Whilst there remains a deemed arrest of the vessel in terms of s 3(10)(a) of the ACT, even after it has been released from arrest against the provision of security, (see *MV 'Alam Tenggiri: Golden Seabird Maritime Inc v Alam Tenggiri SDN BHD* 2001 (4) SA 1329 (SCA) paras 12 to 15) in the ordinary course if a challenge to a security arrest is unsuccessful the South African courts play no further role in the proceedings in relation to which such security has been furnished.

6 When introduced it was unique internationally and even in jurisdictions where similar relief is now obtainable it is neither as straightforward nor as direct as in South Africa

Duffryn Associated Collieries Ltd:

'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish … But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.'[7]

[25] Lastly on the aspect of proof of a prima facie case, the parties relied on expert evidence in regard to certain claims, namely those based on the existence of SRB-induced corrosion and the damage allegedly suffered at Richards Bay, as well as the legal position in terms of English law, which governs the charterparty. In a trial action it is fundamental that the opinion of an expert must be based on facts that are established by the evidence and the court assesses the opinions of experts on the basis of 'whether and to what extent their views are founded on logical reasoning'.[8] It is for the court and not the witness to determine whether the judicial standard of proof has been met. How, if at all, are these principles to be applied in the context of an application where the applicant is required to show only that it has a prima facie case? There does not appear to be any authority dealing with this problem.

[26] In my view the court must first consider whether the underlying facts relied on by the witness have been established on a prima facie basis. If not then the expert's opinion is worthless because it is purely hypothetical, based on facts that cannot be demonstrated even on a prima facie basis. It can be disregarded. If the relevant facts are established on a

7 [1939] 3 All ER 722 (HL) at 733E-F, cited in *Motor Vehicle Assurance Fund v Dubuzane* 1984 (1) SA 700 (A) at 706B-D. See also *Great River Shipping Inc v Sunnyface Marine Limited* 1994 (1) SA 65 (C) at 75I-76C and particularly the statement that 'evidence does not include contention, submission or conjecture.'

8 *Michael & another v Linksfield Park Clinic (Pty) Limited & another* 2001 (3) SA 1188 (SCA) para 36 and generally paras 34 – 40.

prima facie basis then the court must consider whether the expert's view is one that can reasonably be held on the basis of those facts. In other words, it examines the reasoning of the expert and determines whether it is logical in the light of those facts and any others that are undisputed or cannot be disputed. If it concludes that the opinion is one that can reasonably be held on the basis of the facts and the chain of reasoning of the expert the threshold will be satisfied. This is so even though that is not the only opinion that can reasonably be expressed on the basis of those facts. However, if the opinion is far-fetched and based on unproven hypotheses then the onus is not discharged.

[27] Foreign law is treated as a fact requiring to be proved by tendering the evidence of a witness who can speak to the contents of that law. However, such evidence is unnecessary where the law in question can be ascertained readily and with sufficient certainty without recourse to the evidence of an expert, because the court is then entitled to take judicial notice of such law.[9] In many maritime cases our courts deal with English admiralty or maritime law. They are accustomed to considering questions arising out of bills of lading and charterparties and the operation of vessels. Since at least 1797 in the case of the Cape Colony[10] and 1856 in the case of the Colony of Natal[11] our courts have in relation to a wide variety of maritime matters been required in admiralty cases to apply

9 Section 1(1) of the Law of Evidence Amendment Act 45 of 1988. *Kwikspace Modular Buildings Ltd v Sabodala Mining Co SARL and another* 2010 (6) SA 477 (SCA) para 7.

10 According to Eric Walker, *A History of Southern Africa*, 3 ed (1968) at 126, 141 and 163 a vice-admiralty court was established in 1797; was revived when the Cape reverted to British control during the Napoleonic wars and was firmly established by the Charters of Justice of 1828 and 1832. See also Reinhard Zimmermann and Daniel Visser, *Southern Cross: Civil Law and Common Law in South Africa*, at 446, fn 59.

11 Natal acquired a vice-admiralty court after it became a crown colony by royal charter in 1856. These courts functioned in terms of the Vice-Admiralty Courts Act 1832 (2&3 Will IV c51) and thereafter, in terms of the Vice-Admiralty Courts Act 1863 (26 & 27 Vict. c24). Under Law 8 of 1879 (Cape); The Colonial Courts of Admiralty Act 1890 (53 & 54 Vict. C27) and s 6(1)(a) of the Act, our courts have consistently been required to apply English admiralty and maritime law to disputes including disputes such as those in the present case.

English admiralty and maritime law. That law is readily accessible in law reports and textbooks that are part of the standard libraries of the courts and practitioners in this field. In those circumstances it should generally speaking be unnecessary for it to be presented through affidavits from practitioners, who all too frequently (as in this case with Deiulemar's expert), are representatives of the parties. The undesirability of expert evidence from such a source has been the subject of previous comment from our courts.[12]

[28] I turn then to consider the various claims advanced in the present cases to assess whether, in the light of these principles, the parties have made out a prima facie case in relation to the claims on which each relies.

Imperial Marine's claims

Costs of the arbitration

[29] Imperial Marine sought security for the costs of the arbitration in an amount of US$2 150 000. Deiulemar accepted that this is a reasonable amount in respect of those costs. However, it contended that this amount should be reduced by £250 000,[13] being the amount of security already held by Imperial Marine in terms of a P & I Club letter of undertaking dated 28 November 2006, but furnished in February 2007, expressed in material part in the following terms:

'IN CONSIDERATION of your refraining …from applying to the Tribunal or taking any other steps to obtain security *for your costs of defending the Claims in the proceedings before the Tribunal* we … undertake to pay you … such sums as may be agreed in writing between you and Charterers (with our consent) to be due to you from Charterers *in respect of your recoverable costs of defending the Claims before*

12 *Stock v Stock* 1981 (3) SA 1280 (A) 1296F; *Atlantic Harvesters of Namibia (Pty) Ltd v Unterweser Reederei GMBH of Bremen* 1986 (4) SA 865 (C) 874F-J. For what is required of an expert witness, see *National Justice Compania Naviera SA v Prudential Assurance Co Ltd ("The Ikarian Reefer")* [1993] 2 Lloyds Rep 68 [QB (Com Ct)] at 81-2.

13 When converted to dollars the resulting balance is US$1 786 000.

the Tribunal or as may be awarded in your favour against the Charterers by Final award of the Tribunal …in respect of your said recoverable legal costs …
It is understood that this security for costs is intended for no particular stage of the aforesaid proceedings and that there is liberty generally to apply for further security for costs at any time.' (Emphasis added.)

[30] When that security was furnished Imperial Marine had delivered its points of defence and counterclaim and the parties were exchanging further information in preparation for the arbitration. The issues raised by the claim and counterclaim were intertwined and there was no question of the costs for defending the one and pursuing the other being incurred separately. It is plain that the security was given for the costs to be incurred by Imperial Marine in the further conduct of the arbitration generally. Accordingly, as held by the high court, the £250 000 must be taken into account in determining what security for costs should be given arising out of the arrest of the *Filippo Lembo*. Those costs must therefore be limited to US$1 786 000 and the appeal against this portion of the order of the high court must fail.

Replacement of the cylinder blocks

[31] This claim had two elements. The first was a claim for the cost of replacing the cylinder blocks amounting to US$ 4.2 million. The second was a claim for US$ 3 million being the anticipated loss of revenue due to the vessel being out of service while the replacement was to be undertaken. The latter claim is plainly without merit in view of the fact that the vessel was never withdrawn from service for the purpose of replacing the cylinder blocks. Accordingly no loss of revenue was suffered or will be suffered in the future.

[32] The evidence on the need to replace the cylinder blocks,

notwithstanding the temporary repairs effected in Pylos, is sparse. In the founding affidavit it was said that the claim was for the cost of replacement of the cylinder blocks and related downtime without any explanation of why this was necessary, or why the claim had been formulated in the counterclaim in the arbitration as one for the diminution in value of the vessel due to the blocks having been repaired by way of Metalock stitching. When this deficiency was pointed out Imperial Marine's Cape Town attorney deposed to an affidavit in which he said that at the time the counterclaim was delivered the cylinder blocks had been temporarily repaired with Metalock stitching 'so as to satisfy the requirements of the vessel's classification society, which are subject to periodic review'. He added that it was intended to amend the counterclaim.

[33] No certificate was annexed showing that Lloyd's Register, the vessels' classification society, had imposed any such requirement or qualification on the initial repair. Mr Luukas, a chartered engineer and experienced surveyor retained by Deiulemar, said that:

'Metalock repair of cast components is a recognised 'permanent' repair which is approved by Classification Societies albeit often subject to periodic review by way of memorandum on the ship's machinery certificate. Typically, if the repair remains successful, the requirement for review is deleted by Class.'

This was not challenged in the period of some eight months that elapsed between this affidavit being delivered and the hearing. As a matter of fact the cylinder blocks were not replaced in the nearly five years that elapsed between the repairs undertaken in Pylos and the scrapping of the vessel.

[34] I do not consider that Imperial Marine established a prima facie case that the repair to the cylinder blocks was inadequate or temporary or

that they needed to be replaced. However the claim must in any event founder on the law. Counsel for Imperial Marine submitted that in English law, which governs the charterparty, the measure of damages in a case such as this is the cost of repairs of the vessel. He relied upon the judgment of Greer LJ in *The London Corporation* [1935] 51 Ll L Rep 67 (CA),[14] which, he submitted, established the principle that in cases of damage to vessels the cost of repairs is the prima facie measure of the damages suffered by the owner. In that case a vessel had been damaged in a collision whilst laid up and the cost of repairing it had been agreed between the parties. Thereafter, and before the vessel was repaired, it was sold to be broken up. The question was whether the cost of repairs was nonetheless recoverable as damages. The court held that it was.

[35] Counsel relied on the following passage in the judgment:

'*Prima facie* the damage occasioned to a vessel is the cost of repairs, the cost which it is correctly estimated will be required to put the vessel into the same condition as it was in before the collision and to restore it in the hands of the owners to the same value as it would have had if the damage had never been occasioned. *Prima facie* the value of a damaged vessel is less by the cost of the repairs than the value would have been if undamaged. *It is quite true that it may be established that the estimate is a wrong estimate and that the value of the vessel undamaged is exactly the same as her value after she had been damaged.*'(Emphasis added.)[15]

However, a reading of the judgment reveals that the only evidence tendered by the appellant was the fact of the sale to shipbreakers and, both in the high court[16] and in the Court of Appeal, that was held to be insufficient to rebut the prima facie proof provided by the agreement between the parties on the cost of repairs.

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14 As followed and construed in *The 'Argonaftis'* [1989] 2 Lloyd's Rep 487 [QB (Adm Ct)].
15 At 69. The principle that Greer LJ articulated is still accepted in England. *Halsbury's Laws of England* (5 ed, 2008), Vol 94, para 829.
16 *The 'London Corporation'* [1934] 50 Ll L Rep 14 [Adm].

[36] I do not understand the judgment to alter the basic principle that the measure of the owner's loss is the diminution in value of the vessel.[17] All that it says is that the cost of repairs will prima facie be the measure of that loss[18] although that prima facie case may be displaced by evidence showing otherwise. However, it is unnecessary to explore the niceties of English law in this regard because this is not a claim falling within that principle. The cost of the repairs to the *George T* at Pylos, including the Metalock stitching of the cylinder blocks, was the subject of a separate claim and Imperial Marine's entitlement to security for that claim was not challenged. The claim in respect of the cylinder blocks was based on the contention that those repairs were temporary in nature and replacement of the repaired items was required. It arose after the repairs had been undertaken and was based on their inadequacy. In consequence of that inadequacy it was contended that the value of the vessel was diminished and that the measure of that diminution was the cost of replacing the cylinder blocks. This claim cannot be conflated with the original claim to have the damaged engine repaired.

[37] The evidence shows that the vessel continued to operate under the charterparty after the repairs had been undertaken at Pylos. No complaint was made of any malfunctioning of the engine or under-performance arising from its operating with repaired cylinder blocks. Although it underwent three sets of major repairs after leaving Pylos the cylinder blocks were not replaced. It was sold at a price represented by the

17 Harvey McGregor QC, *McGregor on Damages* 18 ed (2009) para 2-043 states the rule in these terms: 'Where the claimant's goods have been damaged, the basic pecuniary loss is the diminution in their value which is normally measured by the reasonable cost of repair.' This is more consistent with the maritime cases in which the principle has chiefly been stated and the leading case of *Darbishire v Warran* [1963] 3 All ER 310 (CA) than the unqualified statement in *Halsbury's Laws of England* 4 ed, Vol 12(1), para 862 that: 'The basic rule is that the measure of damages in the case of damage to a chattel is the cost of repair.'

18 In that respect there seems to be little difference in substance from the approach taken in our law to the proof of damages arising from damage to movable property: *Erasmus v Davis* 1969 (2) SA 1 (A).

outstanding balance on the mortgage over the vessel and the new owners did not replace the cylinder blocks or require Imperial Marine to do so. The vessel was scrapped five years later with the repaired cylinder blocks still *in situ*. The question then is whether the replacement of the old cylinder blocks by new ones would have altered its value either as a working vessel or as scrap. Prima facie the answer is in the negative. As a working vessel Imperial Marine and its new owner operated it without identifying any problem with the cylinder blocks. As scrap the value would be unaffected because a shipbreaker is largely concerned with the quantity of metal that can be extracted in breaking the ship and there is no reason to expect a material difference between the quantities of steel in old as opposed to new cylinder blocks.

[38] In those circumstances the high court was correct to disallow the claim for security in respect of the replacement cost of the cylinder blocks and the associated downtime claim. The appeal against this part of its order must fail.

Damage at Richards Bay

[39] The damage discovered at Rotterdam gave rise to a claim that first emerged in the founding affidavit in the application for the arrest of the *Filippo Lembo*. It was expressed in these terms:

'Further, whilst the vessel was at Rotterdam in March 2007 water ingress was observed into No. 8 Double Bottom Tank through a breach on the shell plating which, on closer scrutiny, appeared to be the result of impact damage which Imperial Marine believes was sustained during the vessel's call at Richards Bay in January 2007 but in any event during the lifetime of the charterparty to [Deiulemar]. The damage was repaired at Rotterdam and Antwerp in April/May 2007. '

The legal basis for the claim was said to be that the charterer, in breach of its obligations, had ordered the vessel to an unsafe port.

[40] Deiulemar attacked this claim on the basis that it was wholly speculative and refuted by the evidence of Mr Luukas and Mr Merckx, the latter a marine surveyor, both of whom had inspected the vessel while it was in Antwerp, before repairs were undertaken. They were adamant that the vessel displayed no sign of collision damage and that the breach in the shell plating in way of No 8 DBT was due to corrosion and failure of the underlying internal framework supporting the shell plating. In the case of Mr Luukas his views were set out in two detailed reports supported by photographs showing the damage and the corrosion of the internal framework of the vessel.

[41] In a further affidavit Imperial Marine's attorney said:

'The owner is unable to pinpoint precisely when the damage to the shell plating occurred. Its belief that it occurred at Richards Bay is a matter of inference, based on inspections previously carried out on the vessel and when and how the damage was first detected. Inspections (including, on occasion, inspections by divers) were regularly carried out on the vessel and the impact damage was not noticed before 5 March 2007 when, during a survey at Antwerp, a crack was found in the ship's side plating in way of web frame 125. The ingress of water was detected during the vessel's voyage from Richards Bay to Antwerp.[19] Shortly prior to this, while the vessel was discharging cargo, the crew had noticed water entering the No. 8 Double Bottom Tank and the vessel had called at Richards Bay approximately a month before the water ingress became apparent. Given the regularity of the inspections of the vessel and the fact that the water ingress had not been noticed previously, it is likely that the damage had occurred recently.

The damage to the shell plating was on the vessel's port side, where the plating had been bodily set in. The *George T* was berthed at Richards Bay with her port side

19 Presumably he meant Rotterdam.

against the berth. The vessel did not suffer any impacts from tugs. There were no reported collisions with other vessels or containers. There is also no evidence in the damaged area of movement ahead or astern, which therefore eliminated navigational error. *The most probable cause of the damage to the shell plating was impact with some protrusion from the berth at Richards Bay. This would make the berth in question unsafe*.'(Emphasis added.)

[42] Annexed to the affidavit was a report from Mr Armstrong, a surveyor, who had inspected the damaged shell plating in Antwerp after it had been cut out of the vessel. He noted that some of the structure of the plating 'could have been initially deformed some time ago – some parts certainly appear to be old damage'. He therefore advanced as a 'possibility' that the ship 'may have suffered a second impact/contact in an area which was already weakened'. Scratches that were noted on the external shell plating were discounted. His view was that the nature of the damage to certain frames was suggestive of an impact and the application of an external force. His conclusions were:

'Such distortion requires a substantial amount of energy consistent with the ship stopping against a firm object, and is not compatible with structural collapse. Secondly it appears from the corrosion on torn edges of fractures that the vessel may have suffered a significant impact some time ago which, together with the rate of wastage since that time could have weakened the structure sufficiently for a more recent moderate contact to have caused further damage.'

[43] In addition Mr Armstrong noted that on the starboard side of the vessel there was an indentation corresponding to the indentation of the outer shell of the vessel on the port side, although slightly further forward. According to Mr Luukas these indentations were smooth and lacked any sharp creases or indentation. That was not challenged by Imperial Marine. The significance of this observation is that Mr

Armstrong annexed to his report a photograph of the type of fenders used to separate rafted vessels at Cosco's Zhoushan Shipyard, where the vessel had undergone a survey and major repairs were effected between June and August 2006. In relation to these he expressed the view that 'these do not appear to be very resilient, and it is possible that the shape could match the port and starboard indentations. Noting the apparent age of some of the damage to the web frames, it would be worth investigating when the vessel could have been in contact with these or similar fenders and whether the position of the indentations above the keel accords with the drafts at the time.' There is no indication that this advice was followed.

[44] These views, tentatively expressed as they were, are inconsistent with the inferences that Imperial Marine seeks to draw as to the cause of these indentations. Whilst they lend support to the view that the vessel had come into contact with something they postulate two separate impacts, not one, and the earlier one is described as significant. In addition they highlight the distinct possibility, given the configuration of the indentations and the fact that there were corresponding indentations on both port and starboard plating, that the damage originated with the fenders in Zhoushan.

[45] Imperial Marine's attorney made it clear that its case is dependent on inferences that it claims should be drawn from the underlying facts. However these are limited or lacking in relevant detail. In regard to inspections, including underwater inspections, there is no detail as to date or place. Also no attempt was made to relate these inspections in point of time to the survey and repairs in Zhoushan. That is relevant because Imperial Marine wrote to Deiulemar on 16 March 2007 in regard to this

damage saying that the last clean underwater inspection had taken place in Singapore, but the evidence did not indicate that the vessel had called at Singapore between leaving Zhoushan and arriving at Richards Bay.[20] There was no factual basis for the contention that:

'Given the regularity of the inspections of the vessel and the fact that the water ingress had not been noticed previously, it is likely that the damage had occurred recently.'

[46] Nor is it logical to say that the absence of any report of a collision elsewhere involving a tug or some other vessel or object justified the inference of a collision with a protrusion from the berth in Richards Bay. This ignores the glaring absence of any report of an impact being sustained when the vessel was berthing in Richards Bay. It is hard to believe that an impact causing an indentation 28 metres long, 4.6 metres high at its maximum and set in by up to 400 mm, could have occurred whilst the vessel was engaged in the careful manoeuvring that entering a berth entails, without the pilot, any member of the crew or the crew of the assisting tugs noticing. Such an incident would ordinarily have been the subject of a note of protest by the Master and should have been reported to the port authorities and the vessel's P & I Club representative in Richards Bay, Captain Wood, but no such protest or report was made. The reports made to Lloyd's Register, with which the vessel was entered for class, were contradictory and referred both to a hull contact of which there were no details and heavy weather as the cause of the damage.

[47] What is finally decisive in assessing the evidence is the

20 On leaving Zhoushan on 17 August 2006 the vessel was under sub-charter to TMT for a voyage from Zhoushan to Saldanha where a cargo of iron ore was loaded for Rizao, China. From Rizao the vessel proceeded to Richards Bay. Unless it called at Singapore for bunkers – which would not ordinarily be an appropriate time to undertake a 'clean underwater' inspection – the message from owners must refer to an inspection at Singapore prior to the survey and repairs in Zhoushan. It is at the least inconsistent with the claim that there were regular underwater inspections by divers.

unchallenged evidence of Captain Wood. He testified that there has never been an incident of the type suggested involving a vessel berthing at Richards Bay, which is one of the busiest harbours in the world, largely dedicated to the loading of raw materials into bulk carriers. The existence of the suggested protrusion is inconsistent with the mode of construction of the berths at Richards Bay, as illustrated in a plan provided by the port authorities. It would require an object protruding more than two metres from the wall of the berth. Such a protrusion could hardly have gone unnoticed in a port as busy as Richards Bay and no attempt was made by Imperial Marine to call for an investigation of the berth to substantiate its claims. Bearing in mind the statement in the attorney's affidavit that: 'There is also no evidence in the damaged area of movement ahead or astern, which therefore eliminated navigational error'
the protrusion would have needed to be some 28 metres long and protruding more than two metres from the wall of the berth. It is inconceivable that such a protrusion would have gone unnoticed.

[48] The inference that Imperial Marine wants the court to draw is not a proper inference from the few facts that it placed before the court. In the light of all the unchallenged evidence the claim that the *George T* was damaged as a result of coming into contact with an underwater protrusion from the berth at Richards Bay is nothing more than speculation. Imperial Marine did not therefore satisfy the requirements for a prima facie case in respect of this claim. Accordingly, the high court should have disallowed it, and to that extent the cross-appeal by Deiulemar must succeed.

The corrosion claim

[49] This claim founded the arrest of the *Pasquale della Gatta*. It was originally expressed in this way:

'Imperial Marine has determined that the corrosion damage occurred as a result of the ballasting of the vessel with seawater containing Sulphate Reducing Bacteria ('SRB'). SRB are bacteria which reduce sulphate ions from seawater to form hydrogen sulphide, which react with ferrous ions from the plating and hull to form iron sulphides, which in turn cause accelerated corrosion damage. Imperial Marine contends that the bacteria entered the ballast tanks of the *George T* during the course of the charterparty as a result of following charterers' orders to areas to where she was more prone to pick up SRB from seawater loaded into her ballast tanks in those areas as part of the operation of the vessel.'

In that form the claim did not survive the affidavit in support of the application to set aside the arrest, which pointed out, on the basis of expert evidence, that SRB are found worldwide and are not even confined to seawater, so that their introduction into ballast tanks in the ordinary operation of a vessel is practically unavoidable.

[50] The claim was then reformulated on the basis of an expert report provided by Dr James Cleland. He based his report on calculations of the rate of corrosion he found in the vessel's tanks between the time of the survey and repairs to the vessel in Zhoushan in August 2006 and April 2007. From these calculations he concluded that the corrosion in the vessel's tanks was attributable to the actions of SRB. He accepted that SRB are omnipresent and said that what would have triggered their activity in this case was what he referred to as 'the impact' with reference to the indentation of the port side plating of the vessel in way of No 8 DBT. His conclusions were that:

'9.1.1 The excessive corrosion found at Antwerp in March 2007 in the No. 8 DBT of the *George T* was due to microbially-influenced corrosion due to a heavy infestation by sulphate-reducing bacteria *compounded and exacerbated by the mechanical and chemical effects of the impact;* and

9.1.2 The excessive corrosion found at Zhoushan in August/September 2007 in the 10 Top Side Tanks, the Fore Peak, the 10 Double Bottom Tanks and the After Peak of

the renamed SEA CORAL was also due to microbially-influenced corrosion due to a heavy infestation by sulphate-reducing bacteria compounded by the presence of sulphur-oxidizing bacteria.' (Emphasis added.)

[51] Imperial Marine's attorney explained that the 'impact which the *George T* experienced in Richards Bay' was the trigger for the infestation by SRB and consequent corrosion damage. That claim was problematic in view of the absence of evidence that there had been such an impact in Richards Bay, but it was dealt a devastating blow by the response, which pointed out that the corrosion claim did not relate to corrosion damage in relation to No 8 DBT but to the damage to the other tanks of the vessel where that 'trigger' mechanism for the development of microbially induced corrosion was absent.

[52] The day before the application to set aside the arrest was due to be argued an affidavit from Dr Cleland was filed attaching a further report in which the theory of SRB infestation being triggered by an impact in Richards Bay was abandoned and a fresh theory advanced. Dr Cleland now expressed the view that, because the attack of SRB-induced corrosion was much greater than anticipated in all DBTs, it was clear that the infestation of SRB had occurred prior to the summer of 2006 (when the vessel was in Zhoushan and the measurements of steel thickness on which he relied had been taken). Accordingly 'a re-assessment of the date of infestation' was necessary. He then identified from the vessel's ballast log 'two ports as candidates' and from the two (Quingdao and Xingang) he selected Xingang on the basis that there are two chemical factories and one plastic factory upriver of the port. The importance of this was not explained.

[53] The production of this new case prompted a postponement of the application and the delivery of affidavits by Drs Bailey and Stott, whose expertise in relation to microbially induced corrosion and SRB is unchallenged. They pointed out that the theory that every tank was infested with SRB at the same time in the same port is untenable. As to the choice of Xingang as the culprit port, on the basis of the presence of two chemical factories and one plastic factory, they said that Quingdao has more than three factories causing pollution of its waters, including chemical and plastic factories. In addition they said that the relevant nutrients for SRB bacteria would come from food processing plants and oil refineries rather than chemical and plastic plants. No attempt was made to rebut this evidence.

[54] Counsel for Imperial Marine properly accepted that his case stood or fell by the court accepting the final view of Dr Cleland as being sufficient to establish a prima facie case. It is not. First the facts on which he relied for his opinion are not established even on a prima facie basis. A glaring problem is that, once he fixed the commencement date as being January 2006, when the vessel called at Xingang, this necessarily impacted upon his calculations, which started from the steel thickness measurements in August 2006 at Zhoushan. This is not dealt with. His explanation for choosing Xingang instead of Quingdao is lacking in any reasoned foundation. In any event the notion of an infestation in all tanks occurring at one port and remaining in place thereafter in all tanks despite the vessel's undergoing a survey and repairs in Zhoushan, where in the ordinary course the vessel would have been deballasted to some extent, if not entirely, stretches credulity. The opinion expressed on this factual foundation is not within the reasonable range of expert opinion but is far-fetched and based on unproven hypotheses. It is accordingly insufficient

to discharge the onus of proof resting on Imperial Marine to establish a prima facie claim.

[55] It follows that the arrest of the *Pasquale della Gatta* was not justified and the high court should have granted the application by Deiulemar to have it set aside. The cross appeal directed at this result must therefore succeed. This renders it unnecessary to canvass the claim for counter-security for a possible claim in terms of s 5(4) of the Act, as that was expressly conditional on the application to set aside the arrest being unsuccessful. The order made in that regard must be discharged but without any penalty so far as costs are concerned. There was a challenge by Imperial Marine to the decision by the high court to award those costs on an attorney and client scale. However that was a matter in the court's discretion. Whilst some of the grounds on which it was exercised may not be applicable in the light of this judgment, the fact remains that the application was brought on a basis that proved spurious; the attempt to rescue that was also shown to be spurious; and the final version on which the claim was advanced lacked any merit. In those circumstances I can see no reason to interfere with the judge's discretion.

Deiulemar's claim for counter-security

[56] The parties approached the application for counter-security on the basis that an applicant for such security must satisfy the same requirements as an applicant for an arrest, namely a prima facie case in respect of the claim to be secured; that the tribunal before which the claim is to be debated has jurisdiction for that purpose; and that the applicant for counter-security must show a genuine and reasonable need for such security. This is in accordance with what was said by this court in *MV Wisdom C: United Enterprises Corporation v STX Pan Ocean Co*

Ltd 2008 (3) SA 585 (SCA) para 26.[21]

[57] However proof of these matters, whilst essential, is not necessarily decisive of the question whether counter-security should be ordered. As Comrie J pointed out in *The Heavy Metal*,[22] ss 5(2)(b) and (c) of the Act vest a court with a discretion and that should not be constrained by a formulaic approach to the exercise of that discretion. He said, and I agree, that the proper approach is that:

'In the first place, it is evident that s 5(2)(a) - (c) of the statute vests the court with a wide power, in its discretion, to order that security or counter-security be furnished for claims and counterclaims. Secondly, confining myself to counterclaims, clearly the Court must have jurisdiction, which is invariably present in the circumstances. Thirdly, it seems to me that an applicant must show at least a *prima facie* case in respect of its counterclaim(s). I say "at least" because less would not warrant security, while in my view more may be required in an appropriate case. Fourthly, I think an applicant must show a genuine and reasonable need for security. … Finally, the Court has a discretion which in my opinion should not be unduly circumscribed. All sorts of factors can arise in different cases which may affect the exercise of the discretion, such as whether the arrest was in terms of s 5(3); the location of the forum; whether the arresting party is a *peregrinus* of this Court; the nature of the counterclaims; and the effect that a "forfeiture" order may have on the arrestor's position … The list is not exhaustive. The Court may find itself weighing and balancing competing interests. The strength of the counterclaimant's case on the merits may then become a factor to be weighed in the balance. It follows from all this that I do not necessarily find myself in the "sparing" school of thought, but that I do recognise a substantial need for caution.'

[58] In determining the quantum of any counter-security the court may also have to exercise a discretion. A litigant is entitled to security in an

21 Approving what was said in the high court: *MV Wisdom C: United Enterprises Corp v STX Pan Ocean Co Ltd* 2008 (1) SA 665 (C) paras 36 and 38.
22 *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime Sdn Bhd* 2000 (1) SA 286 (C) at 298E – I.

amount determined on the basis of its reasonably arguable best case.[23] That requires the existence of the claim to be established on a prima facie basis and the quantum of security to be determined on the basis of the amount representing the reasonably arguable best case in respect of that claim.[24] The need for security in the amounts claimed must be established on a balance of probabilities.[25] However, the computation of those amounts may not always be straightforward and may require the court to exercise a discretion in determining the quantum of the counter-security to which the litigant is entitled.

[59] The exercise of such a discretion is pertinent in this case for two reasons. First Deiulemar advances its claims on alternative and inconsistent grounds and there is an admitted risk of duplication resulting in excessive security being granted. It attempted to accommodate the risk of duplication by deducting from the total of the claims advanced in the proposed amendment to its points of claim in the arbitration (US$23 213 371.73) the amount of one claim (US$5 721 243.33), arriving at an amount of US$17 477 128.40, which is the sum ordered by the high court by way of counter-security.[26] The papers are not clear in showing how the overlap was determined and it emerged in the course of argument that there are problems with the calculation by which it was determined. Some of these can be resolved only by the exercise of a broad discretion.

[60] The second reason is that the claims advanced by Deiulemar are

23 *Zygos Corporation v Salen Rederierna AB* 1984 (4) SA 444 (C) at 457C-D as qualified by *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 582F-J.
24 According to Gys Hofmeyr SC, *Admiralty Jurisdiction Law and PrActice in South Africa,* at 84, fn 218, this is the basis upon which Scott J approached the matter in the high court in *Bocimar*.
25 *Bocimar NV v Kotor Overseas Shipping Ltd,* supra.
26 There was an arithmetic error in Deiulemar's calculation but in the light of what follows that is immaterial.

claims for loss of profits. These are set out in the amended points of claim on the most optimistic possible basis with no allowance for contingencies.[27] However, in assessing the proper amount of security the court cannot be bound by the litigant's assessment of the value of its claim. Where that assessment includes items that should not be included, and makes no allowance for obvious contingencies, the court determining the security to which it is entitled must make an appropriate adjustment to accommodate these shortcomings. In doing so it will ordinarily be unable to make a precise calculation and will have to make a broad assessment of what is appropriate and fair on general grounds. Where a prima facie case and the need for security have been established the litigant should not be deprived of security by reason of an inability to make an exact assessment of its quantum. Nor should it be given security for claims that are over-optimistic.

The Dabkomar claims

[61] In the ordinary course of events, had there been no difficulties in operating the vessel, Deiulemar would have earned the difference between the hire under the head charter and the considerably larger amount by way of hire that Dabkomar agreed to pay under the sub-charter, throughout the relevant period of the charter. However, Dabkomar cancelled the sub-charter and Deiulemar now accepts that it was entitled to do so, irrespective of whether the cause of the breakdown was Imperial Marine's failure properly to maintain the vessel or its own fault in providing the out of specification stem of bunkers. I proceed on the same footing.

[62] One claim flowing from the sub-charter can be dealt with before

27 The sub-charter cancellation claim is calculated with the inclusion of the sub-charter period prior to its cancellation.

reaching the consequences of its cancellation. It will be recalled that when the vessel went to Colombo for bunkers and thereafter was briefly delayed in Suez before proceeding to Pylos for repairs, Deiulemar treated it as being off-hire and declined to pay hire for the relevant periods. Dabkomar adopted the same approach under the sub-charter. In the result Deiulemar lost the difference between the hire it would have paid and the hire it would have received during this period. The amount is US$2 197 773.59. This was the original claim in the arbitration and Deiulemar claimed counter-security for this amount. It presented evidence that, if in thoroughly efficient condition and properly maintained, the vessel should not have experienced problems with the out of specification bunker stem at Yeo Su. Furthermore the evidence was that an examination of the damaged engine in Pylos indicated that it had been operating for some time in a deficient condition. Although this was challenged in the heads of argument it is plain that if this evidence is believed in the arbitration it will warrant a finding in favour of Deiulemar. Accordingly a prima facie case was made out in respect of this claim and counter-security for it was properly ordered.

[63] The next claim was based on essentially the same cause of action. It was that the breaches of the charterparty in relation to the condition of the vessel and the failure to maintain it provided proper grounds for Dabkomar's cancellation of the sub-charter. As a result it was alleged that Deiulemar lost the benefit of a profitable sub-charter for the balance of the head charter period. For the reasons given in the previous paragraph it established a prima facie case in relation to this claim. However, the calculation of the claim presented some problems. The basis of calculation was an arithmetic exercise. The number of days remaining before the sub-charter could reasonably have been expected to expire if it

had run its ordinary course were taken and multiplied by the difference between the two hire rates. The difficulty relates to the number of days to be included in the calculation and its effect on the total amount of the claim.

[64] The claim has three components, two relating to the loss of hire under the sub-charter and the third giving credit for trading profits earned by Deiulemar after the cancellation. The first loss of hire calculation dealt with the initial period of he charter up to 6 August 2006. For that period the hire payable under the head charter was US$16 350 per day. The calculation arrived at a figure of US$9 988 324.94. An immediate problem is that it took as the starting point of the calculation the delivery date under the sub-charter of 23 April 2005 and then deducted certain periods when the vessel was off-hire. However, that has the effect of including days when the vessel was operating under the sub-charter and the hire should have been paid. There is nothing to indicate that it was not. The proper place to start is the date of Dabkomar's cancellation, namely 29 September 2005. There are 310 days[28] from then until 6 August 2006 and the hire differential was US$28 650 per day.

[65] In the affidavit in support of the application for counter-security it was said that the vessel 'was taken out of service for the purpose of the carrying out of repairs (primarily steel renewals) at Zhoushan, China, during the period 23 June to 17 August 2006'. In a witness statement by Deiulemar's London solicitor annexed to that affidavit it emerged that Deiulemar was informed on 21 June 2006 that it would be taken out of

28 Working in full days. It is impractical for present purposes to use the calculation based on the precise hour during a day when events occurred as is usually done in charterparty hire statements. That information is not available to us and in exercising our discretion we are not concerned to engage in 'a meticulous readjustment of economic interests between the parties' in the felicitous phrase of Van den Heever J in *Pucjlowski v Johnstone's Executors* 1946 WLD 1 at 8.

service for the purpose of undergoing its annual survey. Their complaint was that this took a long time and that a superficial survey revealed that various steel renewals were being carried out in addition to class requirements. The answering witness statement on behalf of Imperial Marine, dated 21 March 2007, pointed out that Deiulemar 'do not now and never have asserted that they have any claim arising out of' the period of time that the vessel was off-hire in Zhoushan. It also rebutted suggestions that the charterers were not kept apprised of progress with the survey. None of this was refuted in a replying witness statement. The claim only emerged when the amended points of claim were delivered in the arbitration. It proceeded on the footing that no part of the time taken at Zhoushan was permissible. Clearly that is incorrect once it is accepted that the vessel had to undergo an annual survey. The affidavit in opposition to the claim for counter-security made the point that the repairs to the vessel's shellplating were undertaken in accordance with class requirements. This was not rebutted save for a complaint that the reports and recommendations of the classification society were not provided.

[66] In my view Deiulemar did not make out a prima facie case in respect of this portion of its claim, but in any event it is so speculative and lacking in an adequate factual foundation that it would be inappropriate in the exercise of the court's discretion to order security for this period. That requires a period of 44 days to be deducted from the 310 days with which the calculation commences, leaving a balance of 266 days. On the basis of a hire differential of US$28 650 per day that results in a figure of US$7 620 900 in respect of this component of the claim.

[67] Turning to the period between 6 August 2006 and 3 September 2007, when the sub-charter would have terminated if it had run its course, I assume in favour of Deiulemar that Dabkomar would not have exercised its option to terminate up to 60 days earlier. In round figures that gives 394 days. However, account needs to be taken of the fact that it is unlikely that re-delivery would have occurred precisely on the stipulated date. In the calculations in the papers periods amounting cumulatively to a little over 86 days were omitted in calculating the remaining period of the sub-charter. Ten of these related to the survey period at Zhoushan. Two small deductions were unexplained. The remainder related to the repairs at Rotterdam and Antwerp. If the evidence for Deiulemar is accepted in the arbitration this will result in a finding that this last period was caused by a breach by Imperial Marine of its obligations in regard to the condition of the vessel and its maintenance. That being so these days should not have been excluded in calculating this element of the claim. The Zhoushan days should be deducted and an allowance made for possible re-delivery before 3 September 2007 and for the accepted need to satisfy a class requirement that there be an inspection before 25 August 2007. Working on a round figure of 360 days is in my view fair and allows for contingencies. This component of the calculation is then US$9 954 000.

[68] That gives a total loss of income on the sub-charter of US$17 574 900. From that the profits earned from trading after the cancellation of US$12 742 849 must be deducted. This leaves a figure of US$4 832 051. Deiulemar has established its entitlement to counter-security in this amount but that entitlement needs to be assessed in the light of the potentially overlapping claims.

The potentially overlapping claims

[69] Counsel for Deiulemar correctly accepted that claims, amounting in total to US$12 566 570.25, arose from the trading activities of the vessel after the cancellation of the sub-charter and could not be advanced in addition to the claim based on the loss of the sub-charter. That is because Deiulemar would not have traded the vessel for its own account or concluded other sub-charters if the sub-charter had not been cancelled, but would simply have collected the hire under the sub-charter each month. It accordingly advanced these claims in the alternative to its claim based on the cancellation of the sub-charter.

[70] By far the largest component of this amount was a claim for US$8 341 650. The claim arose because on 13 June 2007 Imperial Marine gave notice that following the discharge of the vessel's then current cargo it would be taken out of service and sent to a shipyard in China to undergo a dry docking required by class. Deiulemar contended that this was a routine bottom survey that should have taken only a day to complete and that the vessel's intermediate survey was not due until December after the expiry of the charter. It accordingly treated the owner's conduct as repudiatory of the charter, accepted the repudiation and claimed for the loss of profits it alleged it had suffered as a result.

[71] It is accepted by both parties that Imperial Marine were obliged to undertake a dry docking survey as required by class and had to do so before 25 August 2007. Imperial Marine had asked the classification society to extend the date so as to coincide with the vessel's intermediate survey in December 2007, but this request was refused. In correspondence between the London solicitors for the parties it was asserted on behalf of Deiulemar that the required survey could have been

done relatively quickly while the vessel was undergoing repairs to No 8 DBT at Antwerp, but that assertion was roundly rejected by the solicitors acting for owners. Reliance was placed on this correspondence in support of the claim, but I fail to see on what basis the conflicting assertions by the parties' solicitors amounts to any evidence of the correctness of the propositions they are asserting, especially when those assertions relate to technical matters of ship maintenance falling outside their area of expertise.

[72] Imperial Marine made arrangements for the dry docking to take place at Zhoushan in China after the vessel completed its then current voyage to Al Jubail. On 30 June 2007 Deiulemar placed the vessel off-hire on the grounds that they had been unable to find business for the ship after completing discharge at Al Jubail, which occurred on 2 July 2007, and would not be able to do so before the dry docking window closed. The vessel sailed to Zhoushan from Al Jubail. On 1 August 2007 Deiulemar cancelled the charterparty on the basis that there was no likelihood that the vessel would be redelivered for trading purposes after the dry docking in sufficient time for it to make commercial use of it. They attributed this to the failure to undertake the survey in Antwerp. As I have said there is no evidence to back up that claim.

[73] In those circumstances Deiulemar did not establish a prima facie case in respect of this claim. If it is excluded, then the claim arising from the cancellation of the Dabkomar sub-charter exceeds the amount of any claims arising from Deiulemar's trading of the *George T* after that cancellation. There are three of these, one relating to the period of repairs at Zhoushan in 2006 and the other two relating to the work and repairs in Rotterdam and Antwerp. The Zhoushan claim must be excluded for the

reasons given in not allowing this time period in the calculation of the sub-charter cancellation claim. The Rotterdam and Antwerp claims are prima facie established and the security should cover these claims.

Additional claims

[74] The other claims advanced by Deiulmar amounted in all to US$2 727 784.56. One of these claims, in an amount of US$ 1 429 992.44, was disallowed by the high court. Leave to appeal against its disallowance was neither sought nor granted. Accordingly this amount must be deducted in determining the amount of counter-security. Its deduction reduces the amount of these claims to US$1 297 792.12.

[75] The remaining claims included a claim for US$15 000 in respect of which Deiulemar's attorney said that a claim for security was not being pursued. He should be taken at his word. There was a claim for the balance of the provisional final hire statement of US$515 717.65. In support of this reliance was placed on the copy of the statement annexed to the founding affidavit. It was said that Deiulemar was not aware of any dispute in regard to this amount. That was not, however, the response of Imperial Marine's attorney who said that his client found the calculation incomprehensible. That is hardly surprising as an examination of the statement reveals that it includes amounts calculated on the basis of Deiulemar being successful in relation to some of the very issues that are in dispute between the parties in the arbitration. No prima facie claim was made out under this head.

[76] Next there was a claim for US$17 352.91 in respect of the short-loading of the vessel at Richards Bay in February 2006. It appears that such a claim was made by the vessel's then sub-charterer and was

accepted by Deiulemar on the grounds that there had been a failure to make the entire reach of the vessel available to the sub-charterer due to the presence of ballast that could not be stripped from the vessel before loading. A marine surveyor's report was put up in support of this claim and it seems clear that there were deballasting problems. The claim was challenged on the basis that there was no evidence of any maintenance problem but I agree with Deiulemar's attorney that an inability to pump ballast of itself points to such a problem. In any event there was prima facie a breach of the obligation to make the entire reach of the vessel's holds available to the charterer. The order for counter-security in respect of this claim was accordingly justified.

[77] Lastly there were a number of performance claims based on allegations that the vessel was at various times and on various voyages not able to steam in accordance with the speed and consumption figures given in clause 62 of the charterparty. The first problem with these claims is that these figures were given subject to certain weather and sea conditions and without guarantee. They are advanced in the draft amended points of claim on the basis of an allegation that 'the vessel failed to achieve the performance warranted under clause 62 of the charterparty'. However there was no guarantee. Most of the claims were not included in the charterer's provisional final hire statement. They were based on what was said to be a standard system of measurement of the performance of vessels but no basis was laid for its application to this charterparty and these voyages. In addition the vessel appears to have been under sub-charter during the voyages in question and there is no evidence that the sub-charterers advanced such claims, nor any response to the statement by Imperial Marine's attorney that the sub-charters contained the same performance figures on a back to back basis. In my

view no prima facie case was established in respect of these claims and counter-security should not have been ordered in respect of them.

Summary of Deiulemar's claims

[78] Deiulemar has established prima facie that it has the following claims:

a) A loss of hire claim of US$ 2 197 773.59 under the Dabkomar sub-charter for the deviation to Colombo and the period of repairs in Pylos;
b) A loss of hire claim of US$4 832 051 arising from the cancellation of the Dabkomar sub-charter;
c) A short-loading claim of US$17 352.91.

The total amount of these claims is US$7 047 177.50. In addition it seems to me that a prima facie case has been established in respect of the 'overlapping' damages claims arising from the unavailability of the vessel while it was detained at Rotterdam and Antwerp for repairs from 4 March 2007 to 12 May 2007. These claims are only valid if the loss of hire claim arising from the cancellation of the Dabkomar sub-charter is bad so no additional security should be ordered in respect of them. However the counter-security should cover them in order to allow for the possibility of the sub-charter cancellation claim failing. They amount to US$3 052 029.62.

[79] In the result the counter-security ordered by the high court should be reduced from US$17 477 128.40 to US$7 047 177.50 and the interest component falls to be adjusted accordingly. To that extent Imperial Marine's appeal against the order of the high court must succeed.

<u>Disposal of the appeals and costs</u>

[80] In the application arising from the arrest of the *Pasquale della Gatta* the cross-appeal by Deiulemar against the dismissal of its application to set aside the arrest of the vessel must succeed with costs. The order for counter-security made by the high court pursuant to the conditional counter-application must be set aside. Therefore Imperial Marine's appeal against the order for counter-security falls away. Its appeal against the quantum of security granted to it and against the order for costs in the high court falls to be dismissed.

[81] In the application arising from the arrest of the *Filippo Lembo* Imperial Marine's appeal against the order that it provide counter-security fails but its appeal against the quantum of that security succeeds and the amount for which it was ordered to provide security must be reduced to US$7 047 177.50 and the interest component is reduced to US$1 374 199,61. Its appeal against the orders reducing the amount of its security by US$7.2 million in respect of the claim for the replacement of the main engine cylinder blocks and its security in respect of costs by £250 000 fails as does its appeal against the costs order by the high court. Deiulemar's cross-appeal against the order that it provide security for Imperial Marine's claims in an amount of US$2 935 843.27 in respect of the claim for repairs to the shell plating at Antwerp succeeds. Both parties have achieved significant success in this court. A fair reflection of that would be to order each party to bear one half of the costs of and attendant upon the preparation of the record relating to this arrest[29] and otherwise that each party bear its own costs of the appeal and cross-appeal.

Order

[82] In the appeal against the judgment in the case of the arrest of the

29 Volumes 1 – 9 of the record.

Pasquale della Gatta (Case No AC20/09 in the high court) the following order is made:

a) The appeal is dismissed with costs.

b) The cross-appeal is upheld with costs and the order of the high court is altered to read as follows:

'(i) The order for the arrest of the *Pasquale della Gatta* granted *ex parte* on 20 March 2009 and the deemed arrest of the vessel pursuant to the provision of security to obtain its release from that arrest are set aside.

(ii) The applicant is ordered to pay the costs of the application on the scale as between attorney and client.'

(c) The order for the provision of counter-security by Imperial Marine is set aside.

[83] In the appeal against the judgment in the case of the arrest of the *Filippo Lembo* (Case No AC 8/09 in the high court) the following order is made:

(a) The appeal succeeds to the extent that paragraphs 6 and 7 of the order of the high court are altered in the following respects:

i) by the deletion in paragraph 6(a) of the amount of US$17 477 128.40 and its replacement by US$7 047 177.50;

(ii) by the deletion in paragraph 6(b) of the figure of US$3 408 040 and its replacement by US$1 374 199,61;

(iii) by the deletion in paragraph 7(a)(i) of 'claims 1(a)-(f) US$20 485 587.17' and its replacement by 'claims 1(a), (b), (d) and (e) US$7 029 824.59';

(iv) by the deletion of paragraphs 7(b) and (d);

but is otherwise dismissed.

(b) The cross-appeal succeeds and paragraph 2 of the order of the high

court is altered in the following respects:

i) by the deletion of paragraphs 2(a)(iii) and (iv) thereof;

(ii) by the deletion in paragraph 2(a)(v) of the figure of US$1 699 675.20 and its replacement by US$878 825.23;

(iii) by the deletion in paragraph 2(a)(vii) of the figure of US$12 201 958.32 and its replacement by US$7 171 621.26.

(c) Each party is ordered to pay half the costs of and attendant upon the preparation of the record in relation to this matter being volumes 1 to 9 and 16 of the record of appeal and is otherwise ordered to bear its own costs.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	M J Fitzgerald SC (with him D Melunsky) Instructed by Bowman Gilfillan Inc, Cape Town Lovius-Block, Bloemfontein
For respondent:	S Mullins SC Instructed by Shepstone & Wylie, Cape Town Matsepes Inc, Bloemfontein.