THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: AC14/2015

AQUARIUS MARITIME PTE LTD **APPLICANT**

And

MV *AGATIS* **FIRST RESPONDENT**
MERANTI BAHARI PT **SECOND RESPONDENT**
MERANTI MARITIME PT **THIRD RESPONDENT**

Coram: ROGERS J

Heard: **7 MAY 2015**

Delivered: **15 MAY 2015**

JUDGMENT

ROGERS J:

Introduction

[1] On 17 March 2015 and by way of an ex parte application the applicant ('Aquarius'), a Singaporean company, caused MV *Agatis*, then lying off Cape Town with a cargo of rice bound for the Ivory Coast, to be arrested in terms of s 5(3)(a) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act') as security for alleged claims by Aquarius (i) in respect of the management of *Agatis* and three other vessels to which I shall refer by their abbreviated names *Putih*, *Eboni* and *Ramin* and (ii) for the provision of security guards for two other vessels *Kenanga* and *Mahoni*. The third respondent ('Maritime') is the owner or deemed owner (as contemplated in s 3(7)(c) of the Act) of *Agatis*, *Putih*, *Kenanga* and *Mahoni*. The second respondent ('Bahari') is the owner or deemed owner of *Eboni* and *Ramin*. *Putih*, *Eboni*, *Ramin*, *Kenanga* and *Mahoni* are, in relation to *Agatis*, 'associated ships' as defined in s 3(7)(a) of the Admiralty Jurisdiction Regulation Act 105 of 1983. Maritime and Bahari are Indonesian companies.

[2] In the ex parte application the claims for the management of *Agatis*, *Putih*, *Eboni* and *Ramin* were alleged to total $2 002 677,78. Severance and repatriation costs for the crew and technical severance costs were estimated at a further $315 000. The claims for the provision of security guards for *Kenanga* and *Mahoni* were alleged to be $40 000 each.

[3] The management claims were alleged to arise from four BIMCO contracts (Shipman 2009), one in respect of each vessel. The BIMCO contracts were attached to the founding affidavit. In terms of clause 23(c) read with Box 21 the contracts are governed by Singaporean law, with disputes to be resolved by way of arbitration in Singapore. The contracts in respect of *Putih*, *Eboni* and *Ramin* were alleged to have been concluded on 1 March 2013 which is what the signed contracts reflect. The contract in respect of *Agatis* is undated but appears from the affidavits to have been concluded or to have commenced in November 2014. (Whether the contracts in respect of *Putih*, *Eboni* and *Ramin* were in fact signed in March 2013 is called into

question by a letter written by Aquarius on 29 November 2013 to which I shall refer later.)

[4] In respect of the provision of security guards, Aquarius alleged in the ex parte application that on 3 August 2014 it entered into so-called Guardcon contracts with Alphard Maritime Security Personnel ('Alphard') on behalf of Maritime as disponent owner for the provision of security guards for *Kenanga* and *Mahoni*. The two Guardcon contracts were attached to the founding affidavit. Aquarius alleges that Maritime failed to pay the fees owing to Alphard. Because Aquarius regularly uses Alphard's services, it paid Alphard the amount owing in respect of *Mahoni* so as to maintain good commercial relations. Aquarius has not yet paid the amount owing in respect of *Kenanga* and alleges that it is suffering serious reputational damage as a result of Maritime's default.

[5] On 17 April 2015 Maritime delivered an urgent application to set aside *Agatis*' arrest for hearing on 24 April 2015. Aquarius filed answering papers on 23 April 2015. On 24 April 2015 the application was postponed to 7 May 2015 with a timetable. Maritime filed replying papers on 30 April 2015. At the hearing on 7 May 2015 Mr Fitzgerald SC appeared for Aquarius and Mr L Burger SC for Maritime.

[6] In respect of the management claims, Maritime says that the BIMCO contracts attached to the ex parte application reflect that the management company entitled to management fees is not Aquarius but a related company Aquarius Shipping Solutions Pte Ltd ('Solutions') and that this is the true position. Aquarius was a sub-contractor to Solutions. Maritime says that the basis of the Guardcon claims is unclear. To the extent that they are based on the amount paid to Alphard in respect of *Mahoni*, the proof of payment attached to the ex parte application indicates that it was Solutions and not Aquarius which paid the money.

The law

[7] The requirements for a security arrest were dealt with by Wallis JA in *MV Pasquale della Gatta; MV Filippo Lembo; Imperial Marine Co v Deiulemar Compagnia di Navigazione Spa* 2012 (1) SA 58 (SCA) paras 19-26. The claimant

must satisfy the court (a) that he has a claim enforceable by an action in rem against the ship or against an associated ship; (b) that he has a prima facie case in respect of such claim, which is prima facie enforceable in the relevant foreign forum; and (c) that he has a genuine and reasonable need for security in respect of the claim. Where the claimant's prima facie case depends on factual inferences from the evidence, they must be inferences that can reasonably be drawn from the evidence, even if they are not the only possible inferences. The onus is not discharged by tenuous or far-fetched inferences. Furthermore, the facts from which the inferences are drawn must be proven facts and not matters of speculation.

[8] The question whether the requirement of a prima facie case is to be assessed solely with reference to the claimant's allegations or whether regard can be had to the opposing papers was left open by Wallis JA though he expressed a strong obiter view in favour of the latter approach. Nevertheless, from the authority cited by the learned judge of appeal in para 20 and from *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 831F-832C, it appears that the broader approach would not entail a determination by the court as to where, on the affidavits, the balance of probabilities lies regarding disputed facts.[1] But there may be facts alleged by the respondent which the claimant cannot and does not dispute. It thus seems to me that the claimant must in the first instance allege facts which, if accepted as true, establish his cause of action. If he does so, it may nevertheless appear from further undisputed facts alleged by the respondent that the cause of action is not tenable.

[9] Wallis JA also touched on the proof of foreign law (para 27). Ordinarily foreign law is a fact requiring to be proved by tendering expert evidence. This is unnecessary, however, 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'. One ready example is English admiralty and maritime law.

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[1] This is one of the meanings which the expression 'prima facie case' can bear, as it does for example in applications for provisional sequestration and provisional liquidation: *Kalil v Decotex (Pty) Ltd & Another* 1988 (1) SA 943 (A) at 976C-979B.

Has Aquarius established its claims prima facie?

[10] The contentious issue in this case is whether Aquarius has established a prima facie case in respect of its alleged claims. If it has, Maritime does not contest that the claims are enforceable by action in rem against *Agatis* and that Aquarius has a genuine and reasonable need for security.

[11] It is common cause that Aquarius' claims have to be determined by arbitration in Singapore and in accordance with Singaporean law. Maritime filed an opinion by Mr Winston Kwek of solicitors Rajah & Tann of Singapore. He says that English law as it stood immediately before 12 November 1993 is, by Singaporean statute, the law of Singapore. English cases decided after 12 November 1993 are not part of Singaporean law but are generally seen as persuasive. Counsel did not seem to think that there were, in relation to the present case, any material differences between English law and Singaporean law.

[12] In argument Mr Fitzgerald focused on Aquarius' alleged claim against Maritime for the provision of management services in respect of *Agatis*. This claim is for $666 170,64. Mr Fitzgerald appeared to accept that in respect of the services rendered in respect of *Putih*, *Ebony* and *Ramin*, Aquarius was a sub-contractor to Solutions. He conceded in argument that if Aquarius was a sub-contractor Singaporean law did not accord it a right of action against Maritime. This is borne out by the opinion of Mr Kwek, dealing with the rule of privity of contract (see also Leong *The Law of Contract in Singapore* (2012) at 1043-1044). Mr Fitzgerald submitted, however, that Aquarius was not merely a sub-contractor in respect of the services provided for *Agatis* and that the contractual arrangements in respect of *Agatis* were distinguishable from those in respect of *Putih*, *Ebony* and *Ramin*. Mr Fitzgerald did not seek to justify the arrest with reference to the Guardcon claims.

The standard BIMCO contract

[13] The standard BIMCO contract consists of Part I and Part II. Part 1 is a page containing 23 boxes for the insertion of yes/no answers or various particulars. Attached to this page are annexures 'A' to 'E' setting out respectively details of the

vessel (‘A’), details of the crew (‘B’), a budget (‘C’), particulars of associated vessels (‘D’) and a fee schedule (‘E’). Provision is made at the foot of the page for signature by the ‘Owners’ and the ‘Managers’. (I shall on occasion, for ease of expression, use these terms in the singular.) Part II consists of 28 standard clauses. Clauses 4, 5, 6 and 7 deal with four types of management services, namely technical management (clause 4), crew management and crew insurance (clause 5), commercial management (clause 6) and insurance arrangements (clause 7).

[14] Boxes 3 and 4 in Part I make provision for the insertion of the particulars of the ‘Owner’ and ‘Manager’. Particulars of the ‘Company’ must be inserted in Box 5. As will appear, the ‘Company’ may be the same entity as the ‘Manager’ or a different entity. Boxes 6, 7, 8 and 9 require the parties to indicate which of the four types of services dealt with in clauses 4 to 7 are to be rendered by the Manager. Box 14 makes provision for the insertion of details of the annual management fee envisaged by clause 12(a). Box 21 deals with the law applicable to disputes. Immediately above the provision at the foot of Part 1 for signature by the Owner and Manager are the words:

‘It is mutually agreed between the parties stated in Box 3 and the parties stated in Box 4 that this Agreement consisting of Part 1 and Part II as well as [annexures “A to “E”] shall be performed subject to the conditions contained herein. In the event of a conflict of conditions, the provisions of Part I and [annexures “A” to “E”] shall prevail over those of Part II to the extent of such conflict but no further.’

[15] Clause 2 in Part II provides that, with effect from the date stated in Box 2 for the commencement of the management services and continuing unless and until terminated as provided in the agreement,

‘… the Owners hereby appoint the Managers and the Managers hereby agree to act as the Managers of the Vessel in respect of the Management Services.’

The ‘Managers’ are defined in clause 1 as being the party identified in Box 4. ‘Management Services’ are the services set out in clauses 4 to 6 to the extent that those services have been selected in Part 1. Accordingly, and depending on the answers inserted in Part I, the Manager may provide all or only some of the services set out in clauses 4 to 7.

[16] To understand the expression 'the Company' in the BIMCO contract it is necessary to know that a crucial part of the technical management services described in clause 4 is management to ensure that the vessel complies with the International Management Code for the Safe Operation of Ships and for Pollution Prevention ('the ISM Code') and with the International Code for the Security of Ships and Port Facilities ('ISPS') and relevant amendments to Chapter XI of SOLAS.[2] The 'Company' is the entity with which port authorities and other authorities involved in international shipping will deal in regard to compliance with the Codes. I was told from the bar that there is a process of accreditation in order to be recognised as a 'Company' for purposes of the Codes. This appears to be borne out by Box 5 of Part I of the BIMCO contract which requires the 'Company' to be identified with reference to the ISM/ISPS Codes and to its IMO[3] unique company identification number.

[17] The BIMCO contract envisages that if the Manager is engaged to provide technical management services (which would be indicated by inserting 'yes' in Box 6) it will also be the Company, so that the same entity would be named in in Boxes 4 and 5. In particular, clause 8(b) in Part II states that where the Managers are providing technical management services in accordance with clause 4 they shall procure that the requirements of the Flag State administration are satisfied and

'… they shall agree to be appointed as the Company, assuming the responsibility for the operation of the Vessel and taking over the duties and responsibilities imposed by the ISM Code and the ISPS Code, if applicable.'

And clause 9(b)(i) provides that where the Manager is providing technical management services, it shall report to the Flag State administration its (the Manager's) details as the Company to ensure compliance with the ISM and ISPS Codes. Various clauses in Part II impose differing obligations on the Manager and Owner depending on whether or not the Manager has been engaged to provide technical management services. These clauses appear to take for granted that if the Manager has been engaged to provide technical management services it will also be the 'Company' (see clauses 5(a)(viii) and (ix); clauses 9(b) and (c); clause 9(e); clause 18(a)).

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[2] The International Convention for the Safety of Life at Sea, adopted by the International Maritime Organisation ('the IMO').
[3] See footnote 1.

[18] The contract confers no rights and imposes no obligations on the Company. Indeed, the latter is not a party to the contract at all.

[19] Clause 12 requires the Owner to pay the Manager the annual management fee stated in Box 14 for their services as Managers under the agreement.

[20] Clause 21 provides that the agreement constitutes the entire agreement between the parties and that no promise, undertaking, representation, warranty or statement by either party prior to the date stated in Box 2 shall affect the agreement. Any modification of the agreement is of no effect unless in writing signed by or on behalf of the parties.

[21] Clause 26 states that, except to the extent provided in sub-clauses 17(c) and 17(d), neither of which is relevant here, 'no third parties may enforce any term of this Agreement'.

The BIMCO contracts in this case

[22] In the present case Boxes 4 to 9 of Part I of the four BIMCO contracts were completed in an identical fashion: Solutions was identified in Box 4 as the 'Manager'; Maritime was identified in Box 5 as the 'Company' and its IMO unique company identification number furnished; Boxes 6 to 9 said 'Yes' in respect of technical management, crew management and commercial management and 'No' in respect of insurance arrangements. In Box 15 the 'Managers' nominated account', being the account into which the Manager's management fees were to be paid, was in each case the account of Solutions in Singapore.

[23] In the case of *Putih*, *Eboni* and *Ramin*, Box 23, in which was to be inserted the contact details for serving notice and communications to the Manager, contained Aquarius' name and address. In the case of *Agatis*, Box 23 contained Solutions' name and address. Solutions and Aquarius had the same addresses in Singapore.

[24] In the case of *Putih*, *Eboni* and *Ramin*, the stamp of Solutions appeared next to the signature of the person signing on behalf of the Manager. In the case of

Agatis, the stamp of Aquarius appeared next to the signature of the person signing on behalf of the Manager. The same individual, Mr Pankaj Mohan ('Mohan'), signed all four contracts on behalf of the Manager.

[25] Boxes 1 and 2 of the BIMCO contract record the date and place of the agreement and the date of commencement of the agreement. In the case of *Putih*, *Eboni* and *Ramin*, the place and date of the agreements was recorded as being 1 March 2013 and the commencement dates 7 August 2012, 6 January 2013 and 9 January 2013 respectively. In the case of *Agatis*, no particulars were inserted in these boxes.

[26] In the case of *Putih*, *Eboni* and *Ramin*, clauses 1 to 28 in Part I were signed without alteration. In the case of *Agatis*, certain clauses were scratched out. For example, clauses 5(a)(ix) and 9(e), which start with the words, 'if the Managers are **not** the Company' (emphasis in the original), have been deleted. The whole of clause 6, dealing with commercial management, is scratched out, being a clause applicable if the Managers are to provide commercial management. Clause 9(c), which deals with the Owners' obligations where the Managers 'are **not** providing technical management services in accordance with Clause 4' (emphasis in the original), has been deleted.

[27] Unless the parties, through an error of recordal, entered mistaken answers in Part I, they seem to have misunderstood the provisions of the BIMCO contract in regard to technical management services. Solutions was identified as the 'Manager' and was inter alia to provide technical management services. In these circumstances, the scheme of the BIMCO contract was that Solutions should have been identified as the 'Company' yet in each case Aquarius was so identified. In the *Agatis* contract, the confusion is compounded by the deletion of clauses which would have applied if the Manager and the Company were not the same entities.

[28] The ex parte application did not identify these difficulties. The supporting affidavit was drawn as if Aquarius were in each case the Manager. Mr Fitzgerald informed me that he had appeared in the ex parte application and frankly

acknowledged that Aquarius' legal team had failed to notice that the attached BIMCO contracts identified Solutions rather than Aquarius as the Manager.

[29] In my view, the ex parte application failed to make out a prima facie case in respect of the claims for management services. Aquarius was relying on four BIMCO contracts which identified Solutions, not Aquarius, as the Manager. On the face of the BIMCO contracts, Solutions and not Aquarius was the party which contracted with Maritime and Bahari. Even if Aquarius had actually done the work, this would not without more have entitled it to make a claim for management fees under the contracts.

[30] Maritime's affidavit in support of its application for the setting aside of the arrest was short and to the point. In respect of the claims for management fees, Maritime simply made the point that Aquarius was not in terms of the BIMCO contracts the Manager. Aquarius attempted to deal with this in answering papers to which Maritime replied. Although Aquarius was the respondent in the setting-aside application, it bore the onus of justifying the arrest. However in so doing it was not confined to the allegations made in its ex parte application; it was entitled to rely on all the information properly placed before the court in the setting-aside application (*MV Orient Stride; Asiatic Shipping Services Inc v Elgina Marine Co Ltd* 2009 (1) SA 246 (SCA) para 5 and authorities there cited). I shall assume, as did counsel, that this principle permits a claimant not only to allege additional facts in support of its original cause of action but to make out a different case in support of the arrest.

[31] Aquarius did not, in its answering affidavit, say that there had been an error in the completion of the contracts. It did not allege that the contracts fell to be rectified. One can thus put aside three notional possibilities for the anomalies I have mentioned: that the parties intended that only Aquarius should feature in Part I (and thus inter alia be the Manager); that the parties intended that only Solutions should feature in Part I (and thus inter alia be the Company); or that the parties intended that Aquarius and Solutions should be joint contracting parties in respect of different management services.

[32] This really seems to leave only one possibility, and it is the one supported by the evidence: that although Solutions was in all respects the Manager with the contractual obligation to provide all the services, Aquarius was the party which was actually going to do the work, at least in regard to the technical management services. Since Solutions was the Manager and the contracting party with the entitlement to the management fees, Aquarius would have to be viewed as a sub-contractor. In terms of clause 16 of Part II the Manager is not to sub-contract any of its obligations without the prior written consent of the Owner which is not to be unreasonably withheld. Clause 16 stipulates that in the event of such a sub-contract the Manager remains fully liable for due performance of its obligations under the agreement. By identifying Aquarius as the Company in Box 5, the parties to the BIMCO contracts (Maritime and Bahari on the one hand, Solutions on the other) were giving recognition to the fact that Aquarius would be the entity actually providing the technical management services.

[33] If the parties agreed that Solutions would be the contracting Manager inter alia in respect of technical management services but that Aquarius would be identified as the Company because it would actually be performing the technical management work on a sub-contract basis, they were proceeding on a basis at odds with the conception of the standard BIMCO contract. However, this misapprehension on their part would not entitle one to give the contracts a different meaning to the one the parties plainly intended.

[34] In the light of the approach which a court must adopt in deciding whether the claimant has established a prima facie case, I must accept Aquarius' averments in the answering affidavit to the effect that Solutions, unlike Aquarius, had no infrastructure to carry out technical and operational support management duties, that it was Aquarius which actually did the work giving rise to the claims for management fees, and that this was known to Maritime and Bahari. However, these facts do not in themselves establish that Aquarius rather than Solutions is the contracting party with the right to claim the management fees.

[35] The further allegations made by Aquarius' deponent, Mohan, in his answering affidavit confirm rather than refute the proposition that Solutions was the entity with

the contractual entitlement to the management fees. After stating that Solutions had no infrastructure to provide technical and operational management services, he alleged that Aquarius and Maritime concluded a written agreement confirming that Solutions 'would sub-contract the commercial and technical management of [*Agatis*] and the associated vessels to [Aquarius]'.[4] In support of this assertion he annexed a letter dated 29 November 2013 addressed by Aquarius to Maritime and Bahari.

[36] The opening paragraph of the letter referred to an existing BIMCO contract for *Putih* dated 1 August 2012 and to a meeting held between the parties in Singapore on 28 November 2013. The writer (Mohan) recorded the letter's purpose as being 'to place on record the various strategic changes discussed and agreed between the parties' with regard to the management of *Ramin*, *Eboni* and *Putih*. The current position as recorded in the letter was that as at November 2013 the only signed BIMCO contract was in respect of *Putih*. In the opening paragraph of the letter the date of the existing *Putih* contract was said to be 1 August 2012 though a few lines later the date is given as 1 August 2009 (as will appear below, the date 1 August 2012 seems to be correct). The letter recorded that the BIMCO contract in respect of *Putih* was to be replaced by a new BIMCO contract which would incorporate the provision of crew management services and commercial management services and would record Solutions as the Manager. This implies that crew management services and commercial management services were not being provided under the existing BIMCO contract dated 1 August 2009/2012 (ie that the existing contract only specified the provision of technical management services).

[37] In respect of *Eboni* and *Ramin*, the letter stated that no BIMCO contracts had as yet been signed but that Aquarius had taken over management of the vessels on 6 January 2013 and 9 January 2013 respectively. The letter recorded the parties' agreement that BIMCO contracts for these two vessels, with the same details and terms as the proposed new contract for *Putih*, would be executed as soon as possible.

[4] Paras 19 and 20.

[38] The letter continued (I substitute the terminology of this judgment for the names used in the letter):

'Both parties (Aquarius and Maritime) agreed that since Solutions has no infrastructure to carry out Ship Managers duties as per BIMCO, hence, Solutions shall be named Manager and shall sub-contract all ship management duties as per the BIMCO Shipman to Aquarius.

This change will not have any impact on the management fees paid by owners to the Managers and Aquarius will continue to perform all the duties of Ship Managers as listed in BIMCO SHIPMAN 2009 Clauses 4, 5, 8 and shall be fully responsible to ensure that the vessels are managed technically as per all international and national applicable regulations.

To this effect it was agreed that there will be no change to Box 5 [with regard to] ISM/ISPS code;

Except as specified herein, the BIMCO Shipman for all vessels shall remain in full force and effect and binding on the parties hereto.

Basis above, we shall revert with the amended BIMCO Shipman for all 3 vessels soonest. However, till such time, all existing BIMCO's are in effect as usual.'

[39] Since Mohan had said earlier in the letter that no BIMCO contracts had as yet been signed for *Eboni* and *Ramin*, it is difficult to understand what he meant by saying that until amended BIMCO contracts were signed all existing BIMCO contracts would remain in force. The letter calls into question whether the contracts in respect of *Putih*, *Eboni* and *Ramin*, as attached to the ex parte application, were actually signed on 1 March 2013. It seems that they must have been signed after the letter of 29 November 2013 and backdated. Indeed in his answering affidavit Mohan said that the BIMCO contracts were concluded subsequent to the sending of this letter. Aquarius pointed out in reply that the BIMCO contracts in respect of *Putih*, *Eboni* and *Ramin* purported to have been executed some months before the letter but neither side in their affidavits grappled with these aspects of Mohan's letter. Mohan's statement that the three BIMCO contracts were executed subsequent to the letter may well be right.

[40] Maritime's replying affidavit sheds some light on the matter. The deponent points out that, as appears from a company profile attached to its founding affidavit

in the application to set aside the arrest,[5] Solutions was only incorporated on 25 January 2013. The deponent says that *Putih*, *Eboni* and *Ramin* were previously managed by another party. During 2012 Aquarius approached Maritime and Bahari offering technical management services in respect of *Putih*. This led to the conclusion on 1 August 2012 of a BIMCO contract between Maritime and Aquarius in respect of *Putih* (Solutions did not yet exist). The deponent attached this contract to his affidavit. Part I identified Aquarius as the Manager and the Company. The only services selected for provision by Aquarius were technical management services. The deponent says that Bahari subsequently agreed that Aquarius could also take over the technical management of *Eboni* and *Ramin*, which was done on 6 and 9 January 2013 respectively. The deponent does not say that Aquarius' de facto assumption of technical management was at that stage accompanied by the execution of BIMCO contracts for *Eboni* and *Ramin*. At around this time, so the deponent says, a corporate reorganisation led to the establishment of Solutions and it was thereafter that the three BIMCO contracts bearing the date 1 March 2013 were executed.

[41] The BIMCO contract between Maritime and Aquarius attached to the replying affidavit must be the contract of 1 August 2012 in respect of *Putih* to which Mohan referred in the opening line of his letter of 29 November 2013. As at November 2013 there seem not yet to have been signed contracts for *Eboni* and *Ramin* though Aquarius was at that stage the party contracted to provide technical management services. What was thus discussed at the meeting of 28 November 2013 and recorded in the letter of 29 November 2013 was that the only then existing signed BIMCO contract, being the one between Maritime and Aquarius for *Putih* dated 1 August 2012, would be replaced by a contract between Maritime and Solutions in which the services to be provided would be extended to include crew management and commercial management. Identical contracts were also be signed for *Eboni* and *Ramin* (*Agatis* was not yet part of the discussions). However, and because the technical management services were to be sub-contracted by Solutions to Aquarius, the latter's particulars would continue to be recorded in Box 5, as had been the case in the BIMCO contract of 1 August 2012.

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[5] Record 283-287.

[42] Be that as it may, the BIMCO contract for *Putih* bearing the date 1 March 2013 as attached to the ex parte application accords with Mohan's letter in making provision for the Manager to provide crew management and commercial management services and in identifying Solutions as the Manager. The BIMCO contracts for *Eboni* and *Ramin* bearing the date 1 March 2013 as attached to the ex parte application reflect the actual commencement dates mentioned in Mohan's letter and accord with his letter in following the same pattern as the *Putih* contract.

[43] While the letter may not be a model of clarity, it is quite specific in recording that Solutions would be the named Manager and that Aquarius would perform all management duties on a sub-contract basis. This was not to have any impact on the management fees payable by Maritime and Bahari 'to the Managers', ie to Solutions. The fact that there had previously been a BIMCO contract of 1 August 2012 between Maritime and Aquarius in respect of *Putih* shows that there was a deliberate change in the identification of the Manager. The parties also applied their mind to the details to be inserted in Box 5. In context, what they must have understood was that because the actual work would be done by Aquarius (ie on a sub-contract basis) it would be identified as the 'Company' in Box 5.

[44] Mohan said in several places in his answering affidavit, with reference to the above letter and certain other documents, that Solutions was only the 'nominal manager and payment agent' and that the 'actual manager' or 'true manager' was Aquarius.[6] In the light of the manner in which the BIMCO contracts were completed, the letter of 29 November 2013 and Mohan's references elsewhere to sub-contracting, his statement that Solutions was the 'nominal manager' is an affirmation that the parties deliberately identified Solutions as the 'Manager' in the BIMCO contracts.

[45] The invoices attached to the ex parte application in support of the claims accord with the conclusion that Solutions rather than Aquarius was the Manager with the right to claim the management fees. The invoices for services supplied in respect of the management services and in respect of the Guardcon expenditure

[6] Paras 19, 29, 31 and 33.

were issued by Solutions in its own name, specifying its bank account for remittance of payment.[7]

[46] Mohan attached to his answering affidavit a 'Letter of Intent' dated 19 December 2012 addressed by Bahari to Aquarius, stating Bahari's intention, in relation to *Ramin* and *Eboni*, to appoint 'your good company as the Technical Manager of our ships' and requesting that management be effected as soon as possible. This letter was written before Solutions was incorporated and at a time when the parties may well have intended that Aquarius should be contracted to provide technical management services, as was already the case for *Putih* in terms of the BIMCO contract dated 1 August 2012.

[47] Mohan attached an identical undated Letter of Intent in respect of *Agatis*. It is likely that the Letter of Intent in respect of *Agatis*, which Mohan says was issued during November 2014, was likewise written prior to the signing of the BIMCO contract for *Agatis*. The Letters of Intent cannot override the terms of the BIMCO contracts subsequently signed. In any event, the Letters are not inconsistent with the letter of 29 November 2013 and Mohan's allegation in the answering affidavit that Aquarius was to provide technical management as a sub-contractor, something which was only permissible in terms of clause 16 with Maritime and Bahari's written consent.

[48] Mohan annexed certain other documents in support of his contention that Aquarius was the 'true manager'. For example, there were Certificates of Entry in respect of *Putih*, *Eboni* and *Ramin* in which Aquarius featured as a co-assured for Protection & Indemnity Insurance, being referred to as 'Manager' and 'Crew Manager'. However, there is no evidence that Maritime and Bahari were involved in the preparation of these Certificates. The precise nature of the insurance and why any particular entity would require it are not matters that were traversed in the papers. It is entirely plausible that Aquarius, as the party actually performing technical management services, was viewed as the entity which, from a management perspective, needed insurance. The same holds true for the Cover

[7] Record 131, 132, 133, 217 and 219.

Note for *Agatis*' Hull Interest Insurance, where Aquarius was again identified as an assured in its capacity as Manager.

[49] Another class of document which Mohan annexed were International Ship Security Certificates, issued in terms of the ISPS Code by the relevant Flag States for *Putih* (Indonesia) and *Eboni* and *Ramin* (Panama). However, these documents simply identify Aquarius as the 'Company' with particulars of its address and IMO number. That is consistent with Aquarius' identification as the Company, though not the contracting Manager, in the BIMCO contracts.

[50] Mr Fitzgerald submitted that *Agatis* stood on a different footing from the other three vessels. He acknowledged that the letter of 29 November 2013 made it difficult for him to argue that Aquarius was not a sub-contractor in respect of the other three vessels. He submitted, however, that because the *Agatis* contract was concluded about a year after the date of the letter, the letter could not be regarded as setting out the agreed arrangement for *Agatis*. He conceded that Mohan's affidavit did not draw this distinction but argued that Mohan's reference to a sub-contracting in respect of *Agatis* as well as the other three vessels was an 'error', having regard to the respective dates of the letter and the *Agatis* contract.

[51] However, Mr Fitzgerald could not point to any feature of the four BIMCO contracts or other documentation which would justify treating *Agatis* differently from the other three vessels. As I have said, Part I of the four BIMCO contracts was in relevant respects completed in identical fashion, except that in *Agatis*' case Box 23 contained Solutions' name, not Aquarius', which if anything strengthens rather than weakens the case for recognising Solutions as the contracted Manager. It is true that the company stamp used in the signing of the *Agatis* contract was Aquarius' stamp rather than Solutions' but Mr Fitzgerald did not suggest that this could affect the interpretation of the contract. The individual who signed the contract for the Manager, Mohan, was a person equally authorized to sign for Aquarius or Solutions. Either the incorrect company stamp was applied or Aquarius signed the contract as an agent for the nominated Manager. Although there was a Letter of Intent in respect of *Agatis* addressed to Aquarius, the same is true for *Eboni* and *Ramin*, so this cannot be a factor distinguishing *Agatis*' case from theirs. Similarly, Aquarius

featured as a co-assured not only in respect of *Agatis* but also in respect of the other vessels.

[52] I have mentioned that certain clauses in Part II of the *Agatis* contract were scratched through. Why this was done is obscure. For example, clause 6, dealing with commercial management, was completely scratched out despite the fact that in Part I it was stated that Solutions would be providing commercial management services. In other cases, clauses which are intended to be operative where the Manager and Company are not the same entity were scratched out, despite the fact that in Part I the identified Manager and Company were indeed different entities. Perhaps the parties considered that because Solutions and Aquarius were part of the same corporate group, clauses applicable to the situation where the Manager and Company are the same entity should remain operative. Indeed, and since from a contractual point of view Solutions was the party engaged to provide technical management services, one can understand why the parties may have wished to exclude the operation of clauses intended (on the conception of the BIMCO contract) to apply where the Manager is not providing technical management services, ie where the Owner has contracted separately (ie outside the scope of the BIMCO contract) with a third part to provide technical management services and thus to serve as the 'Company' in respect of the vessel.

[53] Submissions were made regarding the Singaporean approach to the interpretation of contracts. I was referred to Leong op cit at 300-301 and *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029, a decision of the Singaporean Court of Appeal, on the use of extrinsic evidence (see in particular the summary of principles in para 132 of the judgment). Although Mr Fitzgerald was anxious to persuade me of the liberal approach adopted by Singaporean law to extrinsic evidence, it was not apparent to me what extrinsic evidence he wished to deploy and in what way it aided the interpretation of the BIMCO contracts. Absent a claim for rectification, the contracts unambiguously identify Solutions, not Aquarius, as the Manager contracted to provide services and entitled to management fees.

[54] Among the principles summarised in *Zurich Insurance* are (i) that if a court is satisfied that the parties intended to embody the entire agreement in a written contract, no extrinsic evidence is admissible to contradict, vary, add to or subtract from its terms and (ii) that where extrinsic evidence is admissible, a court should always be careful to ensure that it is used to explain and illuminate the written words, not to contradict or vary them. Where the court concludes that the parties have used the wrong words, rectification may be a more appropriate remedy. The court also observed that a judge ought to be more reluctant to allow extrinsic evidence to affect standard form contracts and commercial documents. The BIMCO contracts are standard form commercial contracts. They contain an entire-agreement stipulation (clause 25) and a provision that no third party may enforce any terms of the agreement (clause 26). Evidence that Aquarius rather than Solutions was intended to be the Manager with the contractual entitlement to management fees would be evidence in violation of the entire-agreement stipulation and in conflict with the express terms of the contracts. But in any event the extrinsic evidence, to the extent that it is admissible as an aid to interpretation, does not lead to a conclusion that the parties intended Aquarius rather than Solutions to be the contracted Manager.

[55] In my view, therefore, Aquarius has not made out a prima facie case that it has a contractual right to claim management fees under the four BIMCO contracts.

Cession or assignment?

[56] Aquarius did not claim to have obtained a cession from Solutions. Mohan said in his answering affidavit[8] that clause 16 of the BIMCO contract only required written consent for a sub-contracting of the Manager's obligations. There was, he alleged, no prohibition on the Manager's entitlement to 'sub-contract any rights' under the agreement, 'which axiomatically must include the right to demand payment and/or to take action under the agreement to enforce such rights'. Mr Fitzgerald made no submissions in support of this proposition. Self-evidently a right to payment cannot be 'sub-contracted'. On the assumption that there is otherwise no

[8] Para 36.

impediment under Singaporean law to a cession or assignment of Solutions' rights to Aquarius, there is no allegation or evidence of a cession or assignment.

Promissory estoppel

[57] Mohan stated in his answering affidavit that Maritime was in any event precluded by promissory estoppel from now denying that Aquarius is the true manager with locus standi to arrest *Agatis*.[9] The foundation for this conclusion was an allegation that Maritime's conduct 'in acknowledging and in permitting [Aquarius] actively to manage the vessel for some two years without any objection' constituted 'a clear and unambiguous representation that [Aquarius] was indeed the true manager of the vessels'. Aquarius and Solutions had, so Mohan alleged, acted on such representations to their detriment.[10]

[58] In regard to the Singaporean law on promissory estoppel, which appears to be in accordance with English law, I was referred to the decision of the High Court of Singapore in *Oriental Investments (SH) Pte Ltd v Catalla Investments Pte Ltd* [2012] SGHC 246, particularly paras 82-93. In this case it was said that the doctrine of promissory estoppel 'protects a party's reliance on promises not supported by consideration' on the basis that 'the party has acted on the promise to his detriment and it is now inequitable for the promisor to go back on his promise' (para 82). The three elements which the promisee is required to prove were said to be trite, namely (a) that the promisor made a clear and unequivocal promise; (b) that the promisee acted in reliance on the promise; and (c) that as a result of the reliance the promisee suffered detriment. Additionally, the promisee must show that it would be inequitable for the promisor to resile from his promise (para 83).

[59] Mr Fitzgerald was unable to point me to any authority for the proposition that promissory estoppel provides an alternative way of, in effect, rectifying a contract. The notion of contractual rectification is well known in English law and thus, so I can assume, in Singaporean law. My analysis thus far has led to the conclusion that the BIMCO contracts were between Solutions on the one hand and Maritime and Bahari

[9] Para 40.
[10] Paras 37-38.

on the other and that Aquarius, as a sub-contractor to Solutions, actually did the technical management work. In the absence of rectification, I fail to see how promissory estoppel can result in Maritime being bound to accept that it contracted with Aquarius rather than Solutions.

[60] The learned authors of *Chitty on Contracts Vol 1 General Principles* 31st Ed describe promissory estoppel as an equitable doctrine that can be applied to arrangements which might formerly have been regarded as variations ineffective at common law for want of consideration (para 3-085). The three requirements mentioned in *Oriental Investments* are dealt with by the learned authors in paras 3-089 to 3-094, as is the need for the promisee to show that it would be inequitable for the promisor to go back on his promise (para 3-095). But they make the point that the doctrine only finds application where there is a legal relationship between the parties, generally though not necessarily a legal relationship established by contract (para 3-086 to 3-088). A pre-existing contractual relationship appears to be the most frequent setting for cases of promissory estoppel though it may also apply where the promise was made before the conclusion of the contract. The equitable doctrine provides a basis for one contracting party to prevent the other from relying on its strict contractual rights, even though the promise making this inequitable is unsupported by consideration and thus not, in English law, enforceable at common law. The learned authors emphasise that the doctrine is essentially defensive in nature, a 'shield and not a sword', so it does not give rise in itself to a cause of action (paras 3-098 to 30-101; see also *Halsbury's Laws of England* 5th Ed (2014) Vol 47 paras 385-391; *Lester & Another v Woodgate & Another* [2010] EWCA Civ 199 para 25). *Oriental Investments* fits this paradigm – the defendant (a landlord) was precluded by promissory estoppel from relying on a condition precedent contained in a clause of the lease between the defendant and the plaintiff as tenant.

[61] If there was a management contract between Aquarius and Maritime, the latter might be precluded from relying on one or other term of the contract if, before or after the conclusion of the contract, Maritime had made a promise inconsistent with the enforcement of the term in question and if the other requirements for promissory estoppel were met. However, if the BIMCO contract is, as I have found to be clear, one between Solutions and Maritime, Aquarius' invocation of promissory

estoppel would be an impermissible attempt to establish a cause of action (effectively a contract in its own name against Maritime) .

[62] But in any event, Mohan's very cursory allegations in support of promissory estoppel do not make out even a prima facie case for invoking the doctrine. Mohan does not actually say that by virtue of promissory estoppel Aquarius must be accepted as the Manager for purposes of the BIMCO contracts. What he says is that Maritime is estopped from denying that Aquarius was the 'true manager'. But in context what does that mean? If it means that Aquarius was the person which actually did the technical management work, Maritime does not deny it. A representation that Aquarius was the 'true manager' in that sense would not be a representation inconsistent with what Mohan elsewhere expressly alleges, namely a sub-contracting arrangement. There is certainly no evidence that Maritime ever represented that it viewed Aquarius rather than Solutions as the Manager with which it had contracted. Even if Mohan intended to make that assertion, it would be a conclusion unsupported by factual foundation.

[63] Mr Fitzgerald was also in some difficulty in explaining how Aquarius had relied to its detriment on any representation made by Maritime (detriment being understood broadly as encompassing a change of position in reliance on the representation, such that it would be inequitable for the promisor thereafter to go back on his promise). He suggested that Aquarius would be worse off if it had to look to an associated company, Solutions, for payment rather than being able to claim the money from Maritime. Apart from the fact that Mohan himself did not say so, the submission does not make sense. If one views Aquarius as a separate entity, there is no reason why it should be worse off looking to Solutions than to Maritime. If Aquarius was sub-contracted by Solutions to do the work, there must have been some inter-company arrangement for Solutions to be reimbursed. If there was not, Aquarius cannot complain. If one views Aquarius and Solutions from a group perspective, the claim could as well be advanced by Solutions as by Aquarius. As a fact, it was Solutions which issued the invoices.

Conclusion

[64] I do not intend to discuss the Guardcon claims because Mr Fitzgerald did not press them in argument.

[65] In the light of my conclusion that Aquarius has failed to established its claims on a prima facie basis, it is unnecessary to decide whether the arrest should in any event be discharged because of non-disclosure. Maritime complained that Aquarius failed in its ex parte application to draw to the urgent judge's attention that the contracting party according to the annexed contracts was Solutions, not Aquarius. I accept Mr Fitzgerald's explanation from the bar that Aquarius' legal representatives themselves failed to appreciate the discrepancy when moving the urgent application. This would not in itself deprive the court of its discretion to discharge the arrest for non-disclosure (see *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) para 21), though bona fides may be a relevant consideration in the exercise of the court's discretion. The non-disclosure was undoubtedly material. I do not think a judge whose attention had been directed to the terms of the BIMCO contracts and the manner in which Part 1 had been completed would, without more, have ordered *Agatis*' arrest. Even on the further information placed before me, I do not think a prima facie case has been established. But if I have erred in my assessment of the prima facie case, the remedying of the defect in the initial papers could not be regarded as a straightforward matter.

[66] Where an order obtained ex parte is discharged because of material non-disclosure, it is ultimately the non-disclosure of the litigant which is censured, even if the non-disclosure attributed to the litigant may on occasion be that of an agent such as a legal representative. The fact that there was a bona fide oversight by Aquarius' legal team does not mean that there was an excusable oversight by Aquarius itself. There is no evidence that Aquarius drew to its legal team's attention the identification of Solutions as the Manager or, importantly, furnished to them a copy of the letter of 29 November 2013. If Aquarius' legal representatives had seen the letter of 29 November 2013 before moving the ex parte application, they would have been alerted to the identification of Solutions as the Manager in the BIMCO contracts. They would have been bound to disclose the letter and I not doubt that

they would have done so. Although in the application to set aside the arrest Aquarius has tried to use the letter to its advantage, the sub-contracting arrangement which it appears to proclaim might well have been regarded by the urgent judge (as it has by me) as fatal to the management claims.

[67] Self-evidently the ex parte arrest of a ship can cause the owner material prejudice. The duty judge will often not have sufficient time to detect discrepancies unaided. The courts are entitled to expect a high degree of care and disclosure in such matters (see *MV Rizcun Trader (4); Rizcun Trader v Manley Appledore Shipping Ltd* 2000 (3) SA 776 (C) at 793I-794D).

[68] In terms of the ex parte order, a rule nisi was issued calling on interested parties to show cause on 31 March 2015 why the respondents should not be ordered to pay the costs of the arrest application. (This was the only part of the ex parte order which was the subject of a rule.) I was informed that the extended return day is now to be argued on 1 June 2015. The costs argument presupposes a subsisting arrest, the question being whether, given that the merits of the claims are in dispute, there should be a costs order at this stage or at all. Counsel were in agreement that if I set aside the arrest the rule nisi should be discharged.

[69] As a postscript, it may be wondered why, when the problem came to light, Solutions did not apply to join or be substituted as the claimant. The fact is that it did not and for all I know there are sound reasons why this step was not taken.

[70] I make the following order:

(a) The order made by this court on 17 March 2015, authorising the arrest of the MV *Agatis*, and the resultant arrest of the vessel, are set aside.

(b) The rule nisi contained in para 7 of the said order is discharged.

(c) The applicant is ordered to pay the third respondent's costs of this application.

ROGERS J

APPEARANCES

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