Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN
(Exercising its admiralty jurisdiction)

Case No. AC13/2018

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 7 June 2022
Date of judgment: 17 June 2022

Name of ship: *MV Madiba 1*

In the matter between:

ANDRE VAN NIEKERK Plaintiff/Respondent

and

THE MV "MADIBA 1" Defendant/Applicant

JUDGMENT

BINNS-WARD J

[1] The registered owner of the MV *Madiba 1*, which was arrested pursuant to the institution of an action *in rem* by the plaintiff in respect of a maritime claim that it has

against the charterer by demise[1] of the vessel, Meltt (Pty) Ltd (in liquidation) (hereinafter referred to as 'Meltt'), has applied for leave to amend its plea in the action. The plaintiff opposed the application.

[2] The vessel was arrested in the circumstances provided for in terms of s 3(4)(b) read with s 1(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the AJRA'). Section 3(4) provides as follows in relevant part:

> 'Without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action a maritime claim may be enforced by an action *in rem* –
>
> (a) ...
>
> (b) if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.'

Section 1(3) provides:

> 'For the purposes of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise.'

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[1] The following explanation (quoted by Gross LJ in *Ark Shipping Company LLC v Silverburn Shipping (IOM) Ltd* [2019] EWCA Civ 1161 (10 July 2019); [2019] 2 Lloyd's Rep 603 in para 6) of the character of charters by demise or 'bareboat' charters as they are also called is given in M Davis, *Bareboat Charters* (2nd ed., 2005), at para. 1.1:

'*A fundamental distinction is drawn under English law between charterparties which amount to a demise or lease of a ship, and those which do not. The former category, known as charters by demise, operate as a lease of the ship pursuant to which possession and control passes from the owners to the charterers whilst the latter, primarily comprising time and voyage charters, are in essence contracts for the provision of services, including the use of the chartered ship. Under a lease, it is usual for the owners to supply their vessel "bare" of officers and crew, in which case the arrangement may correctly be termed a "bareboat" charter. The charterers become for the duration of the charter the de facto "owners" of the vessel, the master and crew act under their orders, and through them they have possession of the ship.*'

In what has been described as the leading statement on the nature of a charter by demise, Evans LJ, in *The Guiseppe* (sic) *di Vittorio* [1998] 1 Lloyd's Rep 136 at 156, said '*Its hallmarks, as it seems to me, are that the legal owner gives the charterer sufficient of the rights of possession and control which enable the transaction to be regarded as a letting – a lease, or demise, in real property terms – of the ship. Closely allied to this is the fact that the charterer becomes the employer of the master and crew. Both aspects are combined in the common description of a "bareboat" lease or hire arrangement.*'

See also the various other definitions to the same effect helpfully collected in *The Rio Coroni* SCOSA A111 (KZD); and on SAFLII *sub nom. CH Offshore Ltd v PDV Marina SA and Others* [2013] ZAKZDHC 62 (5 November 2013) in para 22-32.

The plaintiff therefore relied on Meltt's deemed ownership of the vessel, in terms of s 1(3) of AJRA, to arrest it for the purposes of the action *in rem*.

[3] The owner has already pleaded a denial that the vessel was on demise charter to Meltt at the time it was arrested. Without prejudice to its position in respect of the already pleaded defence, it seeks by way of the proposed amendment to introduce, contingently, two special defences based, respectively, on s 1(3) of the AJRA and s 359(1)(b) of the Companies Act 61 of 1973, that (if good in law) could become relevant were its first mentioned ground of defence rejected.

[4] The intended special pleas read as follows:

> '**First special plea: Section 1(3) of the Admiralty Act** [ie the AJRA]
>
> 4. On a proper and sensible construction of the language of section 1(3) of the Admiralty Act, and having regard to its context, the reference to a charterer by demise in the subsection does not include a charterer by demise (in liquidation) in respect of which a winding up has commenced.
>
> 5. An application for the liquidation of Meltt was issued, and thereby presented to the Court, on 14th March 2018.
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> 6. The plaintiff instituted its action *in rem* in terms of section 3(5) of the Admiralty Act by the arrest of the defendant on 22nd March 2018.
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> 7. A provisional winding-up order in respect of Meltt was made on 17 April 2019.
>
> 8. A final winding-up order in respect of Meltt was made on 29 May 2019.
>
> 9. The liquidator of Meltt was finally appointed on 2 September 2019.
>
> 10. Section 348 of the Companies Act, 61 of 1973 ("the Companies Act"), provides that:
>
> > "A winding-up of a company shall be deemed to commence at the time of the presentation to the court of the application for the winding-up."
>
> 11. In the premises, at the time of the institution of the plaintiff's action *in rem*, the liquidation of Meltt had commenced. The plaintiff accordingly had no entitlement to rely on the deeming provision in section 1(3) of the

Admiralty Act for the purpose of enforcing its claim and the arrest of the defendant, therefore, is null and void.

WHEREFORE the owner prays that the plaintiff's action *in rem* be dismissed with costs, including the costs of two counsel.

Second special plea: Section 359(1)(b) of the Companies Act

12. Further, and in any event, the owner refers to what is pleaded in paragraphs 5 to 10, and the first sentence of paragraph 11, above.

13. Section 359(1)(b) of the Companies Act provides that:

"(1) When the court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200 –

(a) ....

(b) Any attachment or execution put in force against the estate or assets of the company after the commencement of the winding up shall be void."

14. An arrest pursuant to an action *in rem* constitutes an attachment or execution, as described in section 359(1)(b).

15. Furthermore, properly and sensibly construed, the *in rem* arrest of a vessel based on section 1(3) of the Admiralty Act, constitutes an attachment or execution put in force to enforce or execute a claim against the demise charterer as the deemed owner of the vessel, and is an "attachment or execution" as described in section 359(1)(b).

16. The arrest of the defendant is accordingly void.

WHEREFORE the owner prays that the plaintiff's action *in rem* be dismissed with costs, including the costs of two counsel.'

[5] The factual allegations in the intended amendment must, of course, be accepted at their face value for the purpose of deciding the application for leave to amend. Those alleged in paragraphs 5 – 9 of the intended first special plea are in any event common ground. Meltt was thus deemed, by virtue of s 348 of the 1973 Companies Act, to have been in liquidation when the action *in rem* was instituted by the arrest of the defendant vessel. It is admitted on the pleadings that after noting its intention to defend the action on 26 March 2018 the owner provided security to the plaintiff to secure the release of the vessel.

[6] In *Rennie N.O. v South African Sea Products (Pty) Ltd* 1986 (2) SA 138 (C), Berman AJ held that the arrest of a ship for the purpose of an action *in rem* was an 'attachment' within the meaning of s 359(1)(b) of the 1973 Companies Act, and accordingly void if it was effected at any time after winding-up proceedings *against the owner* had commenced as provided in s 348 of that Act, provided, of course, that a winding-up order was in fact made in such proceedings. Consistently with that finding, the learned judge also held that the provisions of s 10 of the AJRA, which currently reads:

> '**Vesting of property in trustee, liquidator or judicial manager excluded in certain cases**
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> Any property arrested in respect of a maritime claim or any security given in respect of any property, or the proceeds of any property sold in execution or under an order of a court in the exercise of its admiralty jurisdiction, shall not, except as provided in section 11 (13), vest in a trustee in insolvency and shall not form part of the assets to be administered by a liquidator or judicial manager of the owner of the property or of any other person who might otherwise be entitled to such property, security or proceeds, and no proceedings in respect of such property, security or proceeds, or the claim in respect of which that property was arrested, shall be stayed by or by reason of any sequestration, winding-up or judicial management with respect to that owner or person.'[2]

were of no application if the arrest of vessel occurred after the commencement of the winding-up of its owner. The judgment in *South African Sea Products* was followed in *The Nantai Princess* 1997 (2) SA 580 (D) and, in a case where the vessel owner had been placed under business rescue, also in *The Polaris* 2018 (5) SA 263 (WCC).

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[2] Section 10, as it was at the time that the judgment was given in *South African Sea Products* supra, was subsequently amended by s 7 of Act 87 of 1992, only to change what had been a reference to what was then s 11(10) of the statute to s 11(13) of the AJRA as it currently is. Section 11(10) had until amended by Act 87 of 1992 provided: '*Any balance remaining after all claims referred to in paragraphs (a) to (e) of subsection (1) have been paid shall be paid over to the trustee, liquidator or judicial manager who, but for the provisions of section 10, would have been entitled thereto*.' Its current iteration in its substituted form as s 11(13) provides: '*Any balance remaining after all claims referred to in paragraphs (a) to (e) of subsection (4) have been paid shall be paid over to the trustee, liquidator or judicial manager who, but for the provisions of section 10, would have been entitled thereto or otherwise to any other person entitled thereto*.'

[7] The factual context in *South African Sea Products* and *The Nantai Princess* was, however, materially different from that in the current matter. In both those cases the maritime claim debtors that were in the course of being wound-up when the vessels were arrested *in rem* were the owners of the attached vessels. Meltt, by contrast, as the demise charterer, is not the owner; it is only deemed to be the owner in the sense provided for in s 1(3) of the AJRA. The determinative consideration in *South African Sea Products* and *The Nantai Princess* was that at the time they were arrested pursuant to the writs in the actions *in rem* the vessels concerned were part of the assets already sequestered by law for the benefit of the *concursus creditorum* in the vessel owners' estates. It was for that reason that, by virtue of the voiding provisions of s 359(1)(b) of the 1973 Companies Act, they were no longer amenable to being validly attached. In opposing the owner's application for leave to amend, the plaintiff contends that that is a factor that materially distinguishes this matter from the earlier cases on which the owner relies in support of its proposed amendments.

[8] The plaintiff argues that the deeming provision in s 1(3) of the AJRA does not have the effect of transferring any of incidents of ownership from the actual owner of the vessel to its charterer by demise, and that the vessel accordingly is not an asset that vests in Meltt's liquidator for the benefit of the *concursus creditorum* in the company's winding-up. The owner, on the other hand, whilst agreeing that s 1(3) does not have the effect of divesting it of its ownership of the vessel, contends that the effect of the subsection, read with s 359(1)(b) of the 1973 Companies Act, is that the attachment of the vessel for the purposes of an action *in rem* in respect of a maritime claim against Meltt, as the charterer by demise, was void and that, accordingly, the action *in rem* falls to be dismissed. In other words, the owner contends that the deeming effect of s 1(3) of the AJRA results in the vessel being regarded for the purposes of Meltt's winding-up as if it were the property of the demise charterer. In adopting that position the owner is, however, not actuated in any way out of a concern to protect the interests of the *concursus creditorum* in Meltt's insolvent estate, but rather, in its own interest, to put the vessel beyond the reach of any of Meltt's creditors.

[9] The nub of the plaintiff's objections to the proposed amendments is that, if allowed, they would not disclose a legally cognisable defence and consequently be

excipiable. It is well established that despite the generally indulgent approach that the courts adopt in allowing bona fide applications for the amendment of pleadings so as to facilitate the proper ventilation of the issues in the case, they nevertheless ordinarily will not grant leave to amend if the amendment being sought would give rise to a pleading that would clearly be excipiable; see Van Loggerenberg (ed), *Erasmus, Superior Court Practice* vol 2 RS17, 2021, at D1-338 and the authorities cited there in footnote 77.

[10] All turns on the import of s 1(3) of the AJRA. The provision was inserted by s 10 of the Sea Transport Documents Act 65 of 2000 and came into effect on 20 June 2003. It was therefore not in existence when *South African Sea Products* and *The Nantai Princess* were decided, not that it would in any event have had any bearing in those matters as the maritime claim debtors in both those cases were the actual, not the deemed, owners of the vessels concerned.

[11] It is evident from the academic commentary and the reported cases that s 1(3) of the AJRA was from the outset not regarded as the most clearly expressed insertion. It was recognised that on a purely literal construction it could lead to consequences that it was most improbable that the legislature could ever have intended. John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* 2nd ed (2009, Juta) made the following observations about the insertion of s 1(3) into the AJRA:

> 'The origin of this amendment is unknown. It does not derive from the South African Maritime Law Association, nor was it subjected to any debate in the maritime fraternity. It has the effect of extending the associated ship provisions to ships owned by demise charterers which, in itself, is not too radical a departure from the English deeming provisions which allow the arrest of a vessel *in rem* in a claim against her demise charterers, nor indeed from the 1952 Arrest Convention from which those powers derive. But the deeming provision does now extend the operation of the associated ship arrest in South African admiralty. The 'now' and 'then' analogy above has been extended to provide an arrest of chartered ships thus:

The associated ship would be now demise chartered by a company which is now controlled by a person who was then charterer of the guilty ship or controlled the company which then chartered the guilty ship when the maritime claim arose.

There is an alarming anomaly in the corollary to the new deeming provision however: it is arguable that if the demise charterer is deemed by s 1(3) to be the owner of the vessel, then the true legal owner is displaced for the duration of the demise charter. This would mean that no ordinary statutory right of arrest *in rem* (short of a maritime lien) could be brought against the ship, because the required personal ownership link between the debtor legal 'owner' and the ship cannot be established. Accordingly, while the vessel is on demise charter, the true owner's creditors would not be able to arrest the ship to enforce claims *in rem* against that true owner. This is both anomalous and inequitable. It could not have been the intention of the legislature in enacting the new deeming provision.

The new deeming provision would seem to have been an overkill: it would surely have been sufficient simply to provide, along with English practice, that an arrest *in rem* may be brought, in terms of s 3(4)(b), if the owner or the demise charterer of the vessel would be liable to the claimant in an action *in personam*. It is suggested that such an amendment would be enough to allow claims *in rem* against a charterer debtor's demise chartered ships, whether as direct claims or associated ship claims, and that s 1(3) is an unnecessary and unwanted extension that should be repealed. Unless and until this happens though, the simple arrest *in rem* is in some peril, however semantic. It is to be hoped that a court asked to interpret the new deeming provision would put a very restrictive meaning on it in a way that merely adds the debtor charterer as 'deemed owner' but does not remove the true owner debtor in its own right. To make such a fundamental change to the arrest procedure would surely have required specific words removing the true owner from the equation altogether.'[3]

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[3] In §2-2.7. The position in the United Kingdom is regulated in terms of s 21(4) of the Senior Courts Act (formerly called 'the Supreme Court Act'), 1981, which provides:
'*In the case of any such claim as is mentioned in section 20(2)(e) to (r), where—*
(a)the claim arises in connection with a ship; and

As will be seen in my discussion below of the limited jurisprudence concerning the subsection, not everything that Professor Hare had to say about the import of s 1(3) has subsequently been endorsed (in particular, his remarks about the extension of the associated ship provisions), but his prayer that the subsection be given a limited and sensibly purposive meaning does thus far seem to have been answered by the courts.

[12] I am aware of only three reported cases in which the import of s 1(3) has been considered: *The Pacific Yuan Geng* 2011 (4) SA 461 (WCC), *The Chenebourg* 2011 (4) SA 467 (KZD) and *The Rio Coroni* SCOSA A111 (KZD) (and on SAFLII *sub nom. CH Offshore Ltd v PDV Marina SA and Others* [2013] ZAKZDHC 62 (5 November 2013)).

[13] In the first mentioned of these matters, this court (per Smit AJ), adopting a purposive construction, rejected the submission of counsel for the arresting party in that case (who, by chance, happens also to be lead counsel for the owner in the current matter) that the ordinary literary meaning had to be accorded to the word '*owner*' in s 1(3), with the effect that the associated ship provisions in sub-secs 3(6) and (7) applied for the purpose of enforcing a maritime claim against a charter by demise. The court instead agreed with the commentary in Hofmeyr, *Admiralty Jurisdiction Law and Practice in South Africa* (1st ed) at p.74 that '(u)*nless s 1(3) is restrictively construed to apply only to claims in rem against the ship concerned in respect of which the charterer is liable, the section has far reaching results. Thus on*

(b)the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,
an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against—
(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.'
Other countries have similar statutory provisions. S 4(4) of the Singaporean High Court (Admiralty Jurisdiction) Act (introduced by the High Court (Admiralty Jurisdiction) (Amendment) Act 2004 (Act 2 of 2004)) is a replication of the UK legislation. Section 18 of the Australian Admiralty Act, 1988 (Cth) provides:

'***Right to proceed in rem on demise charterer's liabilities***
Where, in relation to a maritime claim concerning a ship, a relevant person:
(a) was, when the cause of action arose, the owner or charterer, or in possession or control, of the ship; and
(b) is, when the proceeding is commenced, a demise charterer of the ship;
a proceeding on the claim may be commenced as an action in rem against the ship.'

a literal construction, the real owner of the ship who charters it by demise runs the risk of it being arrested by reason of the charterer at some stage, possibly even before the conclusion of the charter, having attracted liability in respect of another ship, either owned or chartered by demise by the charterer. It seems unlikely that this was contemplated'.

[14] In *The Chenebourg*, Kruger J agreed with the restrictive and commercially sensible construction applied to s 1(3) in *The Pacific Yuan Geng*. The learned judge added (in para 19) that there was '*a further aspect which requires consideration. If one adopts the literal meaning of s 1(3), a situation will arise whereby the owner of a demise-chartered vessel will find that its vessel is subject to arrest and possible sale in respect of debts incurred in relation to some other vessel with which the owner of the demise-chartered vessel has no connection at all. This may have constitutional implications in that it may be in conflict with the constitutional bar on the arbitrary deprivation of property*'.

[15] The relevance of these two judgments for present purposes is that they confirm, albeit indirectly, that s 1(3) of the AJRA must be construed with due regard to the apparently intended object of its enactment; an approach entirely in accord with the modern method of statutory interpretation propounded in judgments such as *Cool Ideas* and *Capitec Bank*.[4] They both recognised that the deeming provision could not properly be construed to treat a charterer by demise in all respects as if it were the real or actual owner, for to do so would lead to obviously unintended consequences. That is also the theme of the commentary on the provision in the forementioned works by Hare and Hofmeyr.

[16] It is interesting, however, that the construction accorded to s 1(3) in both these judgments attributed to it the same import as the far more clearly worded provisions of s 21(4) of the Senior Courts Act, 1981 of the United Kingdom (quoted in note 3 above), which was apparently enacted to give statutory force to art. 3(4) of the International Convention Relating to the Arrest of Sea-going Ships (Arrest

[4] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16 (5 June 2014); 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) in para 28 and *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99 (9 July 2021); [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) especially in para 46-51.

Convention), 1952.[5] Indeed, in a footnote in their heads of argument, the owner's counsel described art. 3(4) of the 1952 Arrest Convention as 'the genesis' of s 1(3) of the AJRA. The plaintiff's counsel shared that view. In my opinion that characteristic might well serve as a subliminal indication in the judgments in *The Pacific Yuan Geng* and *The Chenebourg* of the intended object of the provision, for there is little doubt about the proper meaning of the English provision.

[17] The insight into s 1(3) that I have found most useful for present purposes, however, is that provided in the judgment of Ploos van Amstel J in *The Rio Coroni*, especially in the passage at para 32-35, which (i) illustrates how care must be taken in applying the provisions of s 1(3) in the context of the operation of unrelated legislation (in this case the 1973 Companies Act) and (ii) confirms that s 1(3) does not affect the nature of the demise charterer's rights in the vessel. This is what the learned judge said:

> '[32] In *The Chevron North America* [2002] 1 Lloyd's Rep 77 [HL][6] the vessel berthed at a terminal in Shetland for the purpose of loading crude oil from the terminal into her cargo tanks. The terminal was owned and operated by BP Exploration Operating Co Ltd. The vessel's mooring winches rendered during heavy weather and she moved off the berth, causing damage to the loading arms on the jetty to which she was attached. In the action instituted by BP it relied, *inter alia*, on section 74 of the Harbours, Docks and Piers Clauses Act, 1847, which provided inter alia: '…The owner of every vessel… shall be answerable… for any damage done by such vessel… to the harbour, dock, or pier or the quay or works connected therewith…'. One of the issues on appeal was whether, where a vessel is

[5] See Angus Stewart, '*The Owner's Vulnerability to the Liabilities of the Demise Charterer*' (2015) 29 ANZ Mar LJ 85. Article 3(4) of the 1952 Arrest Convention provides: '*When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claim. The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.*' Article 3(1)(b) of the 1999 Arrest Convention contains a similar provision.

[6] Also reported on BAILII sub nom. *BP Exploration Operating Co Ltd v Chevron Transport (Scotland)* [2001] UKHL 50 (18 October 2001).

hired out under a bareboat demise charter-party, section 74 imposes liability on the registered owner of the vessel or on the charterer. The Law Lords were unanimous in holding that the word 'owner' in the section was a reference to the registered owner of the vessel, and did not include a bareboat charterer. At 101 [in para 90] Lord Hobhouse referred to the judgment of [Robert] Goff J in *The I Congreso* [[1977] 1 Lloyd's Rep 536; 1978 QB 500] where he said the following at 561 [LLR]:

> 'It is true that a demise charterer has in the past been described variously as "owner *pro hac vice*"…or as a person who is "for the time the owner of the vessel"…or as a person with "special and temporary ownership"… I doubt however if such language is much in use today; and its use should not be allowed to disguise the true legal nature of a demise charter… A demise charterer has, within limits defined by contract, the beneficial use of the ship; he does not have the beneficial ownership as respects all the shares in the ship.'

Lord Hobhouse said the importance of this judgment is that it demonstrates the limits of basing arguments upon the use of the expression 'owner pro hac vice' and recognises that if modern legislation is intended to use the word 'owner' as meaning demise charterer it is likely to say so expressly. The *I Congreso* was followed and applied in *The Father Thames* [1979] 2 Lloyd's Rep 365 in preference to *The Andrea Ursula* [1971] 1 Lloyd's Rep 145.

[33] I am conscious of the fact that these decisions were decided in a context different from the present one. They nevertheless demonstrate the point that a demise charterer does not during the period of the charter step into the shoes of the owner in all respects, and that the statement that the charterer 'becomes, for the time, the owner of the vessel' should not be taken literally.

[34] I think this approach is supported by the discussion of the demise charter-party in Hare *Shipping Law and Admiralty Jurisdiction in South Africa,* at 580[7] and further. The learned author says at 581 that as a lease, a charter by demise carries with it the general consequences of a contract of letting and hiring of movables. And these would derive from the South

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[7] From p. 738 of the 2nd Ed.

> African common law of letting and hiring, and not from the contract of carriage. At 583[8] he lists the likely legal consequences of the hiring of a vessel by demise charter, all of which appear to me to be consistent with what I have said in this regard.
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> [35] The statement that the demise charterer is regarded as the owner seems to me to refer generally to his obligations arising out of the operation of the vessel and as the employer of the master and crew, rather than to his rights in the vessel. The reality is that he leases the vessel. His rights flow from the charter-party. Whatever rights he may have in and to the vessel are not based on his ownership or deemed ownership of it.' (My underlining.)

[18] Accepting that s 1(3) of the AJRA was introduced to bring this country's relevant statutory regime into line with the forementioned provisions of the Arrest Conventions in like manner to legislation to equivalent effect introduced in other parts of the world[9] affords a contextual basis for interpreting it as having the same import as those provisions. There is nothing in the Act to suggest any intention by the legislature by means of s 1(3) to alter the juristic character of a demise-charterer's rights in the chartered vessel. Thus, there is nothing in the Act to support the notion that the subsistence of a demise charter-party displaces the owner's proprietary rights in the vessel while the contract is in place.

[19] I think this can usefully be illustrated in relation to the issue in the current matter by postulating the following example given with reference to s 10 of the AJRA. Assume that the vessel is arrested in an action *in rem* in respect of a maritime claim against the demise charterer and the demise charterer is shortly thereafter placed into liquidation. By virtue of s 10 of the AJRA, the vessel or the proceeds of its sale or the security given for its release from arrest would not thereupon vest in the charterer's liquidator. The only interest that the liquidator would have in such a situation would be in the charterer's contractual rights against the vessel's owner. That would be so because, regardless of the deeming provision in s 1(3), ownership in the vessel at all times remained with the real owner. And if there were any residual

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[8] At pp. 741-745 of the 2nd Ed.

[9] See the examples given in note 3 above.

from the security provided by the owner for the release of the vessel from arrest or from the proceeds of the sale of vessel after the claims of the maritime claim creditors had been settled, the money would, in terms of s 10, go to the real owner of the vessel as '*the person entitled thereto*' (within the meaning of those words in s 11(13) of the AJRA), not to the demise charterer's liquidator.

[20] In my judgment, if one accepts – as I consider one has to in the absence of a clear indication to the contrary in the statute – that it was not the object of s 1(3) to alter the incidence of the real ownership of the vessel liable to be arrested *in rem* by virtue of it being chartered under a demise charterparty, nor to detract from the effect *inter se* of the contractual relationship between the owner and the charterer by demise, then the evident intention in the enactment of the provision becomes readily apparent. It is to render vessels chartered by demise liable to arrest in actions *in rem* in respect of maritime claims against the charterer whereas, before the introduction of s 1(3), the vessels would have been liable to arrest in actions *in rem* only in respect of maritime claims against the owner. In other words, s 1(3) results in the charterers by demise being regarded for the purposes of the institution of an action *in rem* as if they were the real owner, but only for the purpose of making the vessels chartered by them subject to arrest. It is therefore the property of the real owner, not that of the deemed owner, that is placed at risk of arrest by the provision.

[21] Such a construction would reflect an interpretation wholly consistent with the accepted primary import of the verb 'deemed' in statutory usage. As Innes J remarked in *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13 at 33 '... *the word "deemed" ... may be employed to denote merely that the persons or things to which it relates are to be considered to be what really they are not, without in any way curtailing the operation of the Statute in respect of other persons or things falling within the ordinary meaning of the language used*'. It would also be a construction that would allay the concerns of those commentators who have expressed concern that the provision might be construed to displace the real owner pro tem so that maritime claims against the real owner could not be enforced by actions *in rem* against the chartered vessel while the demise charterparty was in operation, something the commentators opined was unlikely to have been intended.

[22] As already discussed, it is also a construction that would be consistent with an intention by the legislature to bring our law in the relevant respect into line with that which in 2000 prevailed widely internationally and continues to do so. The practical need for such legislation and the policy considerations that inform it were, with respect, succinctly and accurately summarised by Steven Chong J (as he then was) in the High Court of Singapore in *The "Chem Orchid"* [2015] SGHC 50; [2015] 2 Lloyds Rep. 666 in explaining (at para 78) the introduction, in 2004, of an equivalent provision[10] into the Singaporean High Court (Admiralty Jurisdiction) Act:

> '... third parties who provide services to or load cargo on vessels will often be unaware that the particular vessel is on bareboat charter. Previously, this placed them in an acutely vulnerable position because bareboat chartered vessels were insulated from arrest. Following legal reforms in many jurisdictions, this is no longer the case ... . The consultation paper prepared by the Attorney-General's Chambers which preceded the 2004 Amendment in Singapore noted that, although allowing a bareboat chartered vessel to be arrested might, at first blush, appear rather "startling" as it effectively allowed recovery against the shipowner for the liabilities of the charterer, this was nevertheless internationally acceptable and, on the whole, desirable because "an effective admiralty regime should not cast the burden of determining ownership or other relationship with the vessel on the person dealing with the vessel" ... . The legislative scheme in Singapore today – as it is the case across many leading maritime jurisdictions – therefore appears to have struck the balance in favour of third parties who can now deal with a vessel safe in the knowledge that, regardless of whether the party with whom they directly transact is the owner or bareboat charterer, they can arrest the vessel as security for their claims.'

The reason for singling out charterers by demise in s 1(3) of the AJRA and its (often better worded) equivalents in other maritime jurisdictions is that the other types of charterparty (viz. a time charterparty or a voyage charterparty) do not provide for the transfer of possession and control of the vessel to the charterer, and thus third

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[10] See note 3 above. *The "Chem Orchid"* may be accessed on CommonLII at http://www.commonlii.org/sg/cases/SGHC/2015/50.pdf (accessed on 14 June 2022).

parties dealing with the vessel will, unlike the situation when it is chartered by demise, transact with the owner or its agent and not the charterer.

[23] Construed in the manner I have described, s 1(3) of the AJRA enables maritime claim creditors of a vessel's demise charterer to arrest the property of an unrelated party (ie the real owner) to obtain security for their claims. With reference to the language of s 359(1)(b) of the 1973 Companies Act, the arrest of the vessel does not result in the 'attachment' of or 'putting into force of execution' against the charterer's property. It is the real owner's property that is arrested, and thereby rendered liable to be sold to provide a fund, not the charterer's.[11]

[24] The owner's counsel argued, however, that the demise charterer fell to be regarded as the lessee of the vessel and that the arrest of the ship resulted in the post-liquidation attachment of its contractual right to possession and control of it. That right, so the argument proceeded, formed part of the charterer's assets and its attachment was therefore void by reason of s 359(1)(b) of the 1973 Companies Act. The owner's counsel argued that the demise charterer's contractual rights 'cleave to' the ship and are inseparably bound up in it.

[25] The judgment of Colman J in *Montelindo Compania Naveira SA v Bank of Lisbon and SA Ltd* 1969 (2) SA 127 (W) was cited in support of the contended characterisation of the demise charterparty as a lease. The charterparty in *Montelindo* was not a demise charterparty, however. Its terms were not fully described in the judgment, but it is clear enough that the contract in that matter was either a voyage or a time charterparty. Unsurprisingly in the circumstances, its characterisation by the learned judge as a contract of lease was held by the Supreme Court of Appeal in *The Silver Star* [2014] ZASCA 194 (28 November 2014); [2015] 1 All SA 410 (SCA); 2015 (2) SA 331 (SCA) to have been incorrect.[12] I nevertheless have no reason to question the correctness of Colman J's analysis and conclusions as they would apply to a demise charterparty. Indeed, the plaintiff's

[11] Cf. *The Rio Coroni* supra, at para 20.

[12] Per Wallis JA, at para 34 in footnote 26.

counsel acknowledged in his argument that it is widely accepted that a demise charterparty is in essence a contract for the lease of the vessel.[13]

[26] Accepting that Meltt's rights under the lease formed part of its 'property' (in terms of the very wide definition of the word in the Insolvency Act 24 of 1936), and that they would therefore constitute part of its assets within the meaning of s 359(1)(b) of the 1973 Companies Act, does not, however, sustain the conclusion that those rights were attached when the hirer's vessel was arrested for the purpose of the institution of an action *in rem* by one of the charterer's creditors.

[27] The charterer's rights were personal in nature, and they were part and parcel of a contractual relationship involving a bundle of reciprocal rights and obligations that Meltt had with the owner of the vessel. The arrest of the vessel might have been an event that rendered the contract impossible of further performance (although dependant on the facts that would not necessarily be the case), but that does not make it an attachment of any of Meltt's contractual rights. The property that is being attached in terms of the peculiar form of prejudgment execution that the arrest of a vessel in an action *in rem* entails is that of vessel's actual owner; in this case Isocorp Investments (Pty) Ltd, not Meltt's.

[28] Meltt's rights under the charterparty were not situated where the vessel was, but where the owner of the vessel resided; see *The Rio Coroni* at para 41.[14] Thus, if the owner resided outside the jurisdiction of the court where the action *in rem* was instituted, it would be starkly evident that the arrest of the vessel could not and did not involve the attachment of the charterer's rights. In this case, according to the pleadings, the owner is resident in Bloemfontein, whereas the vessel was arrested in Cape Town.

[29] The arrest of the vessel in any event did not determine the charterparty. It has no bearing on the applicable principles but, on the facts alleged on the pleadings, the vessel was released from arrest, and therefore if the charterparty was still current (as

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[13] See note 1 above.
[14] Citing *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd* [2000] ZASCA 169 (31 August 2000); 2000 4 SA 746 (SCA); [2000] 4 All SA 400 (SCA), (at para 9-14).

mentioned a matter in dispute on the pleadings), there should have been no difficulty with Meltt continuing to use it under the contract. Assuming that the charterparty subsisted when Meltt was placed into liquidation, s 37 of the Insolvency Act confirms that the commencement of Meltt's winding-up would not have determined the contract. The liquidators were given three months from the date of their appointment, in terms of s 37(2), to decide whether to continue with the lease or to determine it, and in the event of them failing to give notice of a decision in that regard the lease was deemed to have been determined at the end of the three-month period. This serves as further confirmation that the contractual rights identified by the owner's counsel were not attached when the vessel was arrested.

[30] To sum up then, the deeming provisions of s 1(3) of the AJRA were introduced to place a third party (the actual owner of the chartered vessel) at risk for the charterer's maritime claim debts in relation to the chartered vessel; they were not put in place for the benefit of the *concursus creditorum* in the charterer's insolvent estate should it be wound-up through an inability to pay its debts. The rationale for the judgments in *South African Sea Products* and *The Nantai Princess* finds no application when the company that is being wound up is not the actual owner of the vessel that is arrested for the purpose of the action *in rem*.

[31] For all the foregoing reasons I have concluded that the owner's contemplated first special plea proceeds from a misdirected apprehension of the effect of s 1(3) of the AJRA and that the pleaded facts do not support the owner's intended reliance on s 359(1)(b) of the 1973 Companies Act for its intended allegation that the arrest of the vessel was void and the prayer that the action *in rem* should consequently be dismissed. In other words, I consider that if the owner were permitted to introduce the special pleas, they would both be susceptible to exception.

[32] In the result:

1. The application is refused.

2. The vessel's owner is ordered to pay the plaintiff/respondent's costs of suit.

A.G. BINNS-WARD
Judge of the High Court

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