IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION DURBAN

Case no A113/2013

REPORTABLE

Name of Ship: MT *Rio Caroni* (previously the MT *Amarylis*)

In the matter between:

CH OFFSHORE LTD	**Applicant**
And	
PDV MARINA SA	**First Respondent**
THE RIGHT, TITLE AND INTEREST OF THE FIRST RESPONDENT IN AND TO THE MT *RIO CARONI* INCLUDING ALL BUNKERS, LUBRICATING AND OTHER OILS, SPARE PARTS, PROVISIONS AND OTHER EQUIPMENT	**Second Respondent**
ALCOT SHIP MANAGEMENT CO	**Third Respondent**
ASTILLEROS DE VENEZUELA CA	**Fourth Respondent**
THE MASTER OF THE MT *RIO CARONI*	**Fifth Respondent**

Order:

(i) The application for the reconsideration of the order of 5 October 2013 succeeds.

(ii) The right, title and interest of the first respondent in and to the MT Rio Caroni is released from the arrest referred to in the order.

(iii) Paragraphs 7 and 8 of the order are recalled.

(iv) The applicant is ordered to pay the costs of the application for the reconsideration of the order, including those consequent on the employment of two counsel.

Judgment

Date: 05 November 2013

Ploos van Amstel J

[1] This is an application for the reconsideration of an order made in terms of section 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the AJRA) for the arrest of certain rights in a ship. The respondents are in terms of Uniform Rule 6(12)(c) entitled to have the order reconsidered as it was made pursuant to an urgent application and in their absence.

[2] It is the usual practice for applications for security arrests to be brought *ex parte*. See *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 833G. In an application for a reconsideration of the order the applicant who obtained the order for the arrest retains the onus of satisfying the court that it was entitled to the order. This is also the case where an application is brought to set the arrest aside. See *MV* Orient Stride: *Asiatic Shipping Services Inc v Elgina Marine Co Ltd* 2009 (1) SA 246 (SCA) para 5.

[3] The order authorised and directed the arrest of the second respondent for the purpose of providing security to the applicant for its claims against the first respondent for payment of hire and other charges arising out of the charter of vessels by the first and fourth respondents, which claims the applicant has advanced or intends to advance in arbitration and High Court proceedings in London.

[4] The first respondent, PDV Marina SA, is the owner of the property which was arrested, with the exception of the bunkers, which have been released. It is a company based in Venezuela and is a wholly-owned subsidiary and the shipping arm of Petroleos de Venezuela SA, which is Venezuela's state oil company. I shall refer to the first respondent as PDVM.

[5] The second respondent is described in the founding affidavit as 'the right, title and interest of PDV Marina SA in and to the MT Rio Caroni, including all bunkers, lubricating and other oils, spare parts, provisions and other equipment'.

[6] The MT Rio Caroni is a crude oil tanker which is lying at anchor outside Durban harbour. The right which the applicant sought to arrest is said in the founding affidavit to arise from a bareboat or demise charter-party over the vessel. The applicant contends that these are real rights which are located wherever the vessel is, and therefore susceptible to arrest by this court when the vessel is here. PDVM's contention is that its rights are contractual and not located within the jurisdiction of this court. I shall return to these submissions in due course.

[7] The background is briefly as follows. The applicant is CH Offshore Limited, a company in Singapore which provides offshore support services. In January 2008 PDVM chartered two vessels from the applicant. They were both anchor-handling tugs and supply vessels. Both charters were for a period of four years and in each case the daily rate was USD 47 600. In March 2008, with the agreement of the applicant, PDVM assigned the charter-parties to the fourth respondent, a company in Venezuela, on the basis that PDVM would remain liable, with the fourth respondent, for payment of the hire charges.

[8] Within a few months after delivery of the tugs the fourth respondent started to default with the payment of the hire charges. They were either paid late or not at all. When the tugs were eventually redelivered to the applicant in January 2013 its claim for arrear hire, additional hire and demobilisation charges exceeded USD 50 million.

[9] The claim was not paid and the applicant instituted proceedings in London against PDVM and the fourth respondent. This is the claim in respect of which it sought security by the arrest of the second respondent.

[10] Section 5(3)(a) of the AJRA provides as follows:

> 'A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the

> subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action *in personam* against the owner of the property concerned or an action *in rem* against such property or which would be so enforceable but for any such arbitration or proceedings.'

[11] It was not contended before me that the arrest of the movables on board the vessel was not in order, save for the bunkers, which are owned by the current time-charterer of the vessel and which have been released by agreement. The application for a reconsideration of the arrest relates only to PDVM's interest in the vessel and I will make no further reference to the movables.

[12] Although it is customary to refer to a party's 'right, title and interest' in something, we are really concerned with rights. Harms JA said in *MV* Snow Delta: *Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA) at 753B, that the phrase 'right, title and interest' can only refer to rights because the law does not protect titles and interests that do not translate into 'legal' rights.

[13] PDVM does not own the vessel. It is the charterer of the vessel in terms of a bareboat charter-party which incorporates a contract of purchase and sale on a hire-purchase basis. What needs to be considered is the nature of its rights in and to the vessel, where these rights are situated and whether they are susceptible to arrest for the purposes of providing security. I should mention that although the second respondent is described in the founding affidavit as 'the right, title and interest of PDVM in and to the MT Rio Caroni' it is said elsewhere in the affidavit that the application for the arrest relates to PDVM's right, title and interest 'in the bareboat charter of the vessel and in and to the vessel itself by virtue of its physical and legal possession thereof...'. It was not contended by counsel for the applicant that the application for the arrest related to the contractual rights of PDVM in the charter-party. The matter was argued on the basis that those contractual rights are not located here and that what was arrested were PDVM's rights in and to the vessel, which counsel referred to as possessory rights.

[14] Both counsel referred in argument to The *MV Snow Delta*. In that case an order was obtained, on an ex parte basis, for the attachment of the respondent's possessory right, title and interest in the vessel, including any possessory right which may arise from its possession and control of the vessel in terms of a demise charter-party. It later appeared that the respondent had chartered the vessel in terms of a time charter-party and not a demise charter-party, with the result that on the return day the rule nisi was discharged. On appeal the Full Court overturned the judgment and confirmed the rule nisi in other terms. What was then attached was 'all of [SSL's] right to and interest in the use and employment of the MV Snow Delta... which [SSL] might have by virtue of a time charter-party concluded between [SSL] and the said vessel's owner...'

[15] On appeal to the Supreme Court of Appeal the order of the Full Court was set aside and the order which discharged the rule was reinstated. The basis for the decision was that the Full Court had failed to distinguish between the personal right against the debtor and the vessel which was the subject-matter of the agreement. Harms JA said the charterer's rights in terms of the time charter-party were personal rights and their *situs* was where the debtor (the disponent owner) resided. They were therefore not within the jurisdiction of the South African courts and could not be attached here.

[16] I have to determine whether the position is different in the case of a demise charter-party, where the charterer has control and possession of the vessel. Some of the remarks in the *MV Snow Delta* suggest that the position may be different. Harms JA said the following at page 750E-F:

> 'This appeal is concerned essentially with the question whether the rights of a charterer (the hirer) of a ship in terms of a time charter-party can be said to be "property" which is located wherever the ship may be from time to time. A time charter-party does not entitle the charterer to the possession and control of the ship; in other words, the charterer has no real rights in relation to the ship but only contractual rights against the owner.'

What was attached at the *ex parte* hearing was 'all of [SSL's] possessory right, title and interest in the MV Snow Delta (the vessel) currently lying alongside at the port of Cape Town, including any possessory right which may arise from [SSL's] possession and control of the vessel in terms of a demise charter-party concluded between [SSL] and the vessel's owners'.

At 750 I-J Harms JA said:

> 'It will be immediately apparent to the reader that the order related to the attachment of real rights flowing from a demise charter-party (the charterer under a demise charter-party being regarded as the owner of the ship during the term of the charter) and not from contractual rights flowing from a time charter-party. The reason for this was that at the time of the launch of the application DTL believed that SSL had possession of the vessel in terms of a demise charter-party'.

[17] The nature of the demise charterer's rights and where they were located was not in issue in the appeal and what Harms JA said in this regard was *obiter*. He was obviously correct in saying that the time-charterer had no real rights in the vessel, but what I must consider is the position of a demise-charterer in the context of an arrest in terms of s 5(3).

[18] In a different context section 1(3) of the AJRA provides that 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. Section 3(4) provides that a maritime claim may be enforced by an action *in rem* if the claimant has a maritime lien over the property to be arrested or 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. The effect of these sections appears to be that the owner of cargo carried on the ship can enforce a claim for the loss of his cargo by way of an action *in rem* against the ship if the demise charterer would be liable to him in an action *in personam*. In other words, the ship may be sold in execution to satisfy a debt for which the shipowner was not liable. He is however invariably indemnified against his loss by a clause in the charter-party. Section 1(3) applies to actions *in*

rem instituted in this country. It does not apply to arrests for the purpose of providing security for claims in proceedings elsewhere. A security arrest in terms of s 5(3) is not a proceeding *in rem*. Wallis says in *The Associated Ship and South African Admiralty Jurisdiction*, at 309, that it is correctly described as a 'stand alone' procedure unconnected with any action before a South African court. He refers to *Shipping Law and Admiralty Jurisdiction in South Africa,* where Hare refers at 84 to the procedure as 'a stand-alone entitlement to arrest maritime property for security and for security only'. Also see *MV* Rizcun Trader *(4); MV* Rizcun Trader *v Manley Appledore Shipping Ltd* 2000 (3) SA 776 (C) at 785G.

[19] In the context of an arrest in terms of s 5(3), the deeming provision in section 1(3) does not apply. It is also not what Harms JA was referring to in *The Snow Delta*. When the judgment was delivered subsection (3) was not yet in existence. It was added to section 1 by section 10 of Act 65 of 2000, the date of commencement of which was 20 June 2003. The expression that the demise charterer is regarded as the owner of the ship during the term of the charter, to which Harms JA referred, is encountered in several reported cases and in academic writing. But what does it mean?

[20] Let us first consider the position of the owner of a ship which has been demise-chartered to a third party. He does not transfer ownership of the vessel to the demise-charterer. That much is clear from the terms of demise charter-parties. There is no intention to pass or receive ownership. The owner does not disappear for the duration of the charter. He retains the right to demand that the vessel be maintained and kept in a seaworthy condition. If the hire is not paid he can terminate the charter and take the ship back. In a situation of casualty the master has authority to act on behalf of the owner in connection with the salvage, although he is not his servant, and the owner will be liable to the salvors. See *CE Heath & Co (Marine) Ltd v Crimson Navigation Corporation SA* 1988 (1) SA 457 (D) at 460G. It seems plain that the vessel remains an asset in the estate of the owner.

[21] What then does it mean to say that the demise charterer is regarded as the owner of the ship for the duration of the charter? And how is this applied in practice?

[22] In this context there is an important distinction between bareboat or demise charters on the one hand and time and voyage charters on the other. Shearer J put it as follows in *CE Heath & Co (Marine) Ltd* at 460D-E:

> 'That the charter is on demise means that there is a complete handing over of possession of the vessel to the charterers so that no element of possession remains with the owner. This distinguishes it from a time or voyage charter in which what is let to the charterer is the services of vessels, crew and master. The owner remains in possession. In the demise charter, since possession is given to the charterer, generally speaking the master and crew are the employees of the charterer and not of the owner of the vessel.'

[23] It seems to be the transfer of possession and control of the vessel and the fact that the demise charterer employs the master and crew which form the basis of the expression that the charterer 'becomes', or 'is regarded' as 'the owner' or the '*de facto* owner' of the ship.

[24] In *Sandeman v Scurr* (1866) LR 2 QB 86, Cockburn CJ said in a demise charter 'the charterer becomes, for the time, the owner of the vessel, the master and crew become to all intent and purposes his servants, and through them the possession of the ship is in him'.

[25] In Halsbury's *Laws of England* 4 ed para 403 it is said that in the case of a demise charter-party the charterer 'becomes for the time being the owner of the ship; the master and crew are, or become to all intents and purposes, his employees, and through them the possession of the ship is in him. The owner, on the other hand, has divested himself of all control either over the ship or over the master and crew, his sole right being to receive the stipulated hire and to take back the ship when the charterparty comes to an end. During the currency of the charterparty, therefore, the owner is under no liability to third persons whose goods may have been conveyed upon the demised ship or who may have done work or supplied stores for her, and those persons must look only to the charterer who has taken his place'.

[26] In *The Law of Admiralty,* Gilmore and Black, 2 ed, an American text book, the learned authors say the following at 242:

> 'The most important consequences of the distinction between the demise and the other forms of charters flow from the fact that the demise charterer is looked on as the owner of the vessel *pro hac vice*. In consequence, he qualifies as the "'owner" for purposes of the statutes relating to limitation of liability; he can thus limit under those statutes where the voyage and time charterers clearly cannot. Far less palatable are some of the other consequences of standing in the owner's position. In general, all in personam liabilities arising out of the ship's operation are brought home to the demise charterer. It may be of immense economic importance to him that he, as owner, is the warrantor of seaworthiness of the vessel to seamen who work aboard her, and that he in consequence may be held liable for personal injuries suffered as a result of breach of the absolute duty to provide a safe place to work and safe implements to work with. He is the "employer" for purposes of personal injury liabilities to seamen under the Jones Act, since the crew is hired by him. The vessel, so far as third persons are concerned, is his vessel, and the men are his men; such of their defaults as are attributable to the owner and employer under respondeat superior doctrines are his to answer for.'

[27] In Payne and Ivamy, *Carriage of Goods by Sea*, 12 ed, Professor Ivamy says at 8-10 that a charter-party by demise is a lease of the vessel. He says:

> 'The master and crew are the charterer's servants, and the possession and control of the ship vest in him. Consequently, the shipowner has no responsibility in connection with goods shipped while the vessel is thus leased.'

[28] Davis says in *Bareboat Charters*, 2 ed 2005, at 1, that a charter by demise operates as a lease of the ship pursuant to which possession and control passes from the owners to the charterers. He says 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, although the phrases bareboat charter and demise charter are commonly used interchangeably. He says 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.

[29] Derrington and Turner, *The Law and Practice of Admiralty Matters,* Oxford University Press, 2006, at 87, refer to a demise charter as a contract of hire of the ship, under which possession of the ship passes to the charterer. They point out that the words 'beneficial owner' in s21 of the Supreme Court Act of 1981 refers to title rather than possession of the ship and refer to *The I Congreso* [1977] 1 Lloyd's Rep 536 where Goff J held that the words 'beneficially owned' in the previous Act referred only to cases of equitable ownership, whether or not accompanied by legal ownership, and were not wide enough to include cases of possession or control without ownership, however full and complete such possession and control may be.

[30] In Tetley, *Marine Cargo Claims,* 14 ed vol 1 at 578-9 it is said that a charterer by demise generally replaces the shipowner and is often referred to as an owner *pro hac vice* in the United States. He says the demise charterer replaces the shipowner as carrier, and this is confirmed by the signing of the bills of lading by the master or his authorised agent, who does so as agent of the demise charterer. The demise charterer would thus be liable as a defendant in a cargo claim in the same way as a shipowner, and in some circumstances the owner and the demise charterer may be held liable jointly.

[31] In *The Giuseppe di Vittorio* [1998] 1 Lloyd's Rep 136 at 156, Evans LJ said:

> 'What then is the demise charter? 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'.

[32] In *The Chevron North America* [2002] 1 Lloyd's Rep 77 [HL] 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 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 Lord Hobhouse referred to the judgment of Goff J in *The I Congreso* where he said the following at 561:

> '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 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 African common law of letting and hiring, and not from the contract of carriage. At 583 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.

[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.

[36] It remains to consider what rights the demise charterer has in and to the vessel and where the situs of those rights is.

[37] The charter-party in question is headed 'Bareboat Charter Party (Bareboat-Hire-Purchase). It was concluded on 27 May 2013. The owners are Noah Maritime Company of Marshall Islands. Clause 2 records that in consideration of the hire the owners had agreed to let and the charterers had agreed to hire the vessel for a period of 72 months on a bareboat-hire-purchase basis. Clause 6 records that the vessel shall be employed worldwide in lawful trades for the carriage of suitable lawful merchandise. Clause 9 records that the charterers would at the time of delivery take over and pay for all bunkers, lubricating oil, unbroached provision, paint, ropes and other consumable stores (and spare parts if any) on board in the vessel. Clause 10(a) records that during the charter period the vessel shall be in the full possession and at the absolute disposal for all purposes of the charterers and under their complete control in every respect. Clause 10(b) records that the charterers shall at their own expense and by their own procurement man, victual, navigate, operate, supply, fuel and, whenever required, repair the vessel during the charter period. It also records that the master, officers and crew of the vessel shall be the servants of

the charterers for all purposes whatsoever even if for any reason appointed by the owners. Clause 13(a) records that during the charter period the vessel shall be kept insured by the charterers at their expense against hull and machinery, war and protection and indemnity risks. Clause 28(a) records that the owners shall be entitled to withdraw the vessel from the service of the charterers and terminate the charter with immediate effect if the charterers fail to pay hire in accordance with the charter party and clause 29 records that in that event the owners shall have the right to repossess the vessel from the charterers. The charter party provides for the purchase of the vessel by the charterers on a hire - purchase basis with a down payment of USD 13 million, charter hire at the rate of USD 24 800 per day for a period of 72 months and a final purchase payment of USD 9,75 million. Clause 48 records that on expiration of the charter the vessel shall be taken over by the buyers, provided that they have fulfilled their obligations in terms of the contract.

[38] What then are the possessory rights in the vessel which have been arrested? A distinction is drawn between the right to possess something (the *ius possidendi*) and the entitlements and privileges which flow from the fact of possession (the *ius possessionis*). A *ius possidendi* can flow from either a personal right, like a contract, or a real right (eg ownership). On the other hand, a *ius possessionis* denotes all powers and privileges flowing from the mere basis of being in possession of a thing. See Silberberg and Schoeman, *The Law of Property*, 5 ed at 273. They say an owner, for example, will have both a *ius possidendi* and a *ius possessionis*, whereas a thief will only have the latter. A *ius possidendi* is thus not a requirement for acquiring possession, nor is it a requirement for the protection thereof. They point out that the protection of possession by way of the *mandament van spolie* does not distinguish between a *ius possidendi* and a *ius possessionis*. Instead, one of the consequences of possession is that the possessor has to be protected against dispossession. The learned authors say that an age-old debate centres around the question whether possession should be regarded as a factual situation or as a right, more particularly a real right. They say the question is mainly of academic interest as there is agreement as to the various legal consequences of possession. Sonnekus and Neels, *Sakereg Vonnisbundel*, 2 ed at 125-6 point out that if possession constituted a real right it should be an asset in the estate of the possessor. But it cannot be said that the *ius possessionis* of a thief is an asset in his estate. They say

that recognising mere possession as a real right would also have the consequence that there cannot be unlawful possession of a thing, which is not the case. In an article in 1988 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 276 AJ Van der Walt provides an interesting insight into the debate, which dates back to Roman times. He says with reference to the impossibility of an 'unlawful right':

> 'Hierdie voorbeeld bewys dat dit onmoontlik is om al die regsgevolge van besit aan die hand van die handhawing van subjektiewe regte te verklaar. Dit is meer akkuraat om te stel dat besit (feitelike beheer) 'n feitelike toestand is wat bepaalde regsgevolge het, sonder om al daardie regsgevolge noodwendig aan die hand van subjektiewe regte te probeer verklaar'.

[39] In *Smit v Saipem* 1974 (4) SA 918 (A) the majority of the court said the traditional approach in our law is that the possessor of land in terms of a hire-purchase agreement does not have a real right and referred to it as 'a lastige kwessie...- 'n gebied wat met moeilikhede besaai is'. Rabie JA, in a dissenting judgment, said categorically at 941A-B that a hire-purchaser has no real right in the thing which he purchased and has in his possession. *Perumal v Messenger of the Court and others* 1953 (2) SA 734 (N) is to the same effect. The case concerned the rights of a purchaser of land in terms of a hire-purchase agreement. Selke J said at 737H-738A:' ... a right under a hire-purchase agreement is, *prima facie*, a right *in personam*; and if one of the terms of the contract is that the hirer/purchaser shall enter into immediate occupation of the property bought, it seems to me that the possession is still based upon a right *in personam*.'

[40] A lessee of immovable property has a real right in the land and is protected by the *huur gaat voor koop rule.* See AJ Kerr, *The Law of Sale and Lease*, 3 ed at 437, and Silberberg and Schoeman, *The Law of Property*, 5 ed at 432. Zimmerman, *The Law of Obligations,* at 351, says the rule does not apply to leases over movables, and CG Van der Merwe, *Sakereg* 2 ed at 68 and 599 says it has not yet been accepted in our law that the hirer of a movable has a real right by virtue of his possession of it.

[41] The rights of PDVM in the charter-party are contractual rights. They constitute incorporeal property and have a value. Their *situs* is where the owner of the ship resides, as was held in the *MV Snow Delta.* Those rights can therefore not be attached here. Counsel for the applicant did not contend otherwise. His contention was that PDVM's possessory rights in the vessel are real rights which accompany the ship wherever it goes. I am not persuaded that this is so. PDVM has possession of the ship (a moveable) pursuant to a lease agreement. If its *ius possessionis* is a right and not merely a factual situation then it seems to me, in the light of the authorities to which I have referred, that it is not a real right. Its *situs* is therefore where the shipowner resides.

[42] The conclusion that PDVM's possessory rights in the vessel (as opposed to its ius possidendi in terms of the charter-party) cannot be arrested as security for the applicant's claim seems to me to accord with the practicalities. In *Zygos Corporation v Salen Rederierna AB* 1984 (4) SA 444 (C) at 461E Friedman J said the purpose of giving security is to make available assets with which a judgment creditor can satisfy a judgment in his favour. Wallis says at 309:

> 'The security arrest under section 5(3) is a procedure whereby property can be arrested and detained and ultimately, if no alternative security is provided, sold to satisfy a claim. In that sense it is more closely akin to the process of execution than it is to any form of action.'

[43] When Foxcroft J discharged the rule in the *MV Snow Delta* he said 'It also seems to me to be plain common sense that the attachable right cannot simply be a notional right but a right which sounds in money'. (See the judgment of the Cape Provincial Division in the *MV Snow Delta* 1998 (3) SA 636 CPD at 643B.) The *ius possessionis*, without PDVM's rights under the charter-party, will be of no commercial value to anyone. It was not suggested by counsel for the applicant that the purchaser of those rights will be entitled to operate the vessel. It is difficult to see on what basis the *ius possessionis* is an asset in the estate of PDVM and 'property' for the purposes of s5(3). If execution cannot be levied against the property arrested the only purpose of the arrest would have been to pressurise the charterer or the owner to put up security. I do not believe that this is a legitimate basis for an arrest

under s 5(3). This difficulty does not apply to the charterer's rights under the charter-party, but those rights are situated elsewhere and cannot be arrested here.

[44] I conclude therefore that the order for the arrest of PDVM's rights in and to the vessel should be recalled.

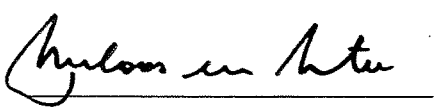
[45] The order which I make is as follows:

(v) The application for the reconsideration of the order of 5 October 2013 succeeds.

(vi) The right, title and interest of the first respondent in and to the MT *Rio Caroni* is released from the arrest referred to in the order.

(vii) Paragraphs 7 and 8 of the order are recalled.

(viii) The applicant is ordered to pay the costs of the application for the reconsideration of the order, including those consequent on the employment of two counsel.



PLOOS VAN AMSTEL J

Appearances:

For the Applicant	:	Adv. M Wragge SC / Adv. P J Wallis
Instructed by	:	Shepstone & Wylie Durban
For the First Respondent	:	Adv. S R Mullins SC / Adv. J D Mackenzie
Instructed by	:	Bowman Gilfillan Inc c/o Van Velden Pike Inc Westville Durban
Date of Hearing	:	18 October 2013
Date of Judgment	:	05 November 2013