In the KwaZulu-Natal High Court, Durban

Republic of South Africa

(Exercising its Admiralty Jurisdiction)

Case No : A45/2013

Name of Ship : mv 'AS Venetia' / 'AS Valentia'

In the matter between :

Oceantask Corp	Applicant
and	
mv 'Venetia'	First Respondent
MS 'AS Valentia' GmbH & Co. KG	Second Respondent
MS 'AS Venetia' GmbH & Co. KG	Third Respondent

Judgment

Lopes J

[1] This is an application to set aside the arrest of the first respondent pursuant to an ex parte order granted by this court on the 30th March 2013. The first respondent was arrested as an associated ship of the mv'AS Valentia' which is

owned by the second respondent. The arrest, in terms of s 5(3)(a) of the Admiralty Jurisdiction Regulation Act, 1983 ('the Act') was in order to obtain security for the applicant's claims against, inter alia, the second respondent in the Athens Multi Member Court of first instance ('the Greek court').

[2] The history of the matter may be summarised as follows :

(a) on the 7th October 2009 in Athens, the applicant ('Oceantask'), a company registered in accordance with the laws of Marshall Islands, concluded a time charter party on the New York Produce Exchange form with the second respondent ('Valentia KG'), a company registered in accordance with the laws of Germany and which carries on business in Hamburg;

(b) the subject matter of the charter party was the mv 'AS Valentia' which was hired by Oceantask for a period of 12 months on the conditions set out in the charter party;

(c) the third respondent ('Venetia KG') is similarly a company registered in Germany and carrying on business at the same premises as Valentia KG. Venetia KG is the owner of the associated ship, the first respondent;

(d) the charter party was extended by an addendum recap dated the 18th October 2010 agreed to at Athens, with minor variations related to the fact that the mv 'AS Valentia' was a newbuilding at the outset of the charter party;

(e) on the 3rd May 2011 and apparently believing they were entitled to do as a result of an alleged misrepresentation by the representatives of Valentia KG, Oceantask purported to rescind the extension and terminate the charter party

on the basis of a repudiatory breach. On the 4th May 2011 Valentia KG accepted Oceantask's conduct as a repudiatory breach of the charter party;

(f) the breach alleged by Oceantask related to the fact that their representatives claimed to have been misled into believing that the mv 'AS Valentia' was a Liberian registered vessel, when in fact the ship was on both the Liberian and German ships' registers;

(g) Clause 45 of the charter party dealt with arbitration and provided :

'(b) LONDON

All disputes arising out of this contract shall be arbitrated at London and, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic Mercantile & Shipping Exchange and ***L.M.A.A***. one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire. ... Any dispute arising hereunder shall be governed by English law. ***Arbitration Act* 1996 to apply**.'

(h) the addendum which was concluded at Athens on the 18th October 2010 provided inter alia, that :

'Otherwise all terms and conditions to remain as per present AS Valentia/Oceantask Charter Party dated 07th October, 2009, except

- In section 4.1 delete the paragraph reading "since the vessel is a newbuilding ... or closer day to it."'

(i) The dispute then became the subject of an arbitration in London before three arbitrators. They published their final award on the 4th October 2012, finding in favour of Valentia KG against the applicant Oceantask in the sum of

US$2 367 230,34. The arbitrators' award was payable forthwith together with interest at the rate of 5% per annum and costs;

(j) in a very full and detailed arbitration award they found that Valentia KG's representatives did not make any misrepresentation to Oceantask's representatives at the time of negotiation of the terms of the addendum. They then went on to deal with the representations alleged by the applicant on the basis that those representations had been made at the time the addendum was negotiated. The charterers found that even had the correct position regarding the alleged misrepresentation been explained to Oceantask's representatives at the relevant time, they would nonetheless have concluded the charter party. They also found that what was expressly stated in a questionnaire as having been untrue and part of the misrepresentation, was in fact true and that no misrepresentation was made.

[3] Having lost the arbitration on the 5th October 2012, Oceantask did not, as it was enjoined by the arbitrators to do, forthwith make payment of the amount of the arbitration award. Instead Oceantask filed a criminal complaint in Athens on the 14th January 2013 against representatives of Valentia KG and on the 13th March 2013 and the 23rd March 2013 Oceantask filed two civil actions against Valentia KG and the representatives of Valentia KG cited in the criminal complaint. The cause of complaint in all three actions was the alleged misrepresentations dealt with by the arbitrators.

[4] The writ issued on the 13th March 2013 in the Greek court claimed the annulment of the charter party and the extension in its entirety. In the second action

instituted on the 23rd March 2013 Oceantask sought joint and several liability against Valentia KG and its representatives in a sum exceeding €7 000 000. It was to secure those payments in the Greek court that the application to arrest the first respondent was brought in this court.

[5] In order to arrest a ship with the object of obtaining security in respect of proceedings in a foreign forum, an applicant is required to show :

(a) a claim enforceable by an action *in rem* against the ship concerned or where the ship concerned is an associated ship against that ship;

(b) a prima facie case in respect of the claim which is prima facie enforceable in the nominated forum of choice; and

(c) a genuine and reasonable need for the security claimed.

[6] These requirements were set out in *Cargo Laden and Lately Laden on Board the mv Thalassini Avgi v mv Dimitris* 1989 (3) SA 820 (A). With regard to the establishment of a prima facie case, Botha JA stated at page 831 H :

'In the analogous case of an attachment of property *ad fundandam jurisdictionem* an applicant will need show no more than that there is evidence which, if accepted, will establish a cause of action. ... This approach is well-established in cases of attachment of property to found jurisdiction ... In our judgment, it is the proper approach to be applied to applications for the arrest of a ship in terms of s 5(3)(a) of the Act, and we hold accordingly.'

In dealing with the ship owner's response to the satisfaction of those requirements, Botha JA continued at page 833 C :

'It follows, then, that when once the criteria mentioned above are met, the respondent shipowner who would oppose the granting of an order must raise, and discharge the *onus* of proving, some countervailing factor of sufficient weight to persuade the court not to grant the order.

The Act was later amended to include the power to arrest a ship where the applicant has an action *in personam* against the owner of the property concerned.

[7] Mr *Gordon* SC who appeared with Mr *Wallis* for the applicant, contended that the loss claimed by Oceantask in the Greek court is pursuant to Valentia KG's misrepresentation which results in both the charter party and the arbitration clause contained therein being nullified. This dispute, which is referred to the Greek courts, is not the same dispute as that before the arbitrators because the dispute before the arbitrators was a contractual one, whereas the actions in the Greek courts are based on tort. Mr *Gordon* submitted that the Greek court will apply the *lex fori* and the Greek law has to be established as a question of fact. Those facts are not easily established because various experts have given evidence on the Greek law, all relying on their own translations of the original Greek texts into English. The material disputes between the experts cannot be resolved on the papers.

[8] Mr *Fitzgerald* SC, who appears for the respondents together with Ms *Mills*, submitted that the Greek court would uphold a defence of *res judicata* in that the actions in Greece are between the same parties, and based on the same facts as existed in the English arbitration proceedings.

[9] Mr Fitzgerald submitted that in order to determine the approach of the Greek courts towards the defence of *res judicata*, one must first look at the Private International Law rules of Greece in order to understand which system of law would be applied. A Greek court considering the second writ (i.e. the claim for restitution) would use English law and not the Greek civil code.

[10] Mr *Fitzgerald* submitted further that :

(a) on the basis of the aforegoing, Oceantask had not established a prima facie case in respect of its claims in the Greek court, which are prima facie enforceable in that court;

(b) the arrest of the first respondent ship provides no security for the applicant's claims; and

(c) even if the Greek court were to entertain Oceantask's claims it would have to apply English law in adjudicating those claims because of the choice of law clause in the charter party. In terms of the Greek conflict of law rules, in cases such as duress, fraud, etc in contracts, such claims are adjudicated in accordance of the *lex causa* (the law governing the contract). As Oceantask's claims in the Greek court are based on the Greek Civil Code they cannot succeed. This is because, according to English law as was agreed to in the arbitration clause, Oceantask's claim was dismissed.

[11] In order for me to consider whether the applicant has established a prima facie case which is prima facie enforceable in the Greek court, it is necessary to examine :

(a) the law to be applied;

(b) possible defences *in limine*, for example *res judicata*; and

(c) the facts as they will affect the Greek proceedings.

[12] With regard to the law to be applied, a number of Greek legal experts have put up affidavits in support of the contentions as to the Greek law. Those experts are :

(a) Dr George Constantine Panagopoloulous – who is a solicitor and partner with the Piraeus firm of attorneys representing the respondents. He is admitted as an attorney in Greece and admitted to the Supreme Court of Greece. He is also admitted as a solicitor of England and Wales and as a barrister and solicitor of the Supreme Courts of Victoria, Australia. He holds a doctorate in law;

(b) George Theocharidis – who holds a doctorate in law from Aristotle University of Thessaloniki in Greece and an LLM degree from the University of Cambridge. He teaches maritime law as a Fellow in the Economic University of Athens. He is also a member of the London Maritime Arbitrators Association and the Greek Maritime Law Association;

(c) Dr Gregory J Timagenis – who is a Greek lawyer who was admitted to the Piraeus bar in 1971 and has practiced law in Greece since 1972. He has practiced before the Supreme Court since 1981, having a Degree in Law from

the University of Athens, a Master of Laws degree (LL.M) in maritime law and Law of the Sea from the University of London and a Doctor of Philosophy (Ph.D) in the Law of the Sea from the University of London.

They all claim extensive knowledge of, and experience in, admiralty matters.

[13] Mr *Gordon* submits that because of the differences in translation between the various experts, none of their views could be relied upon. Mr *Fitzgerald* on the other hand, submits that the evidence of Dr Timagenis has not in any way been contradicted by the applicant despite having had the opportunity to do so in further supplementary affidavits.

[14] In examining the different views of the legal experts, I do not intend to rely upon the submissions of Dr Panagopoulous. This is because he is a solicitor and partner of the attorneys representing the applicant in Greece. In my view it would be safer to rely upon the independent evidence of the other experts. In saying this I cast no aspersion upon the independence of Dr Panagopoulous, but objectively it would be fairer if I were to rely on the other experts where possible. In this regard I refer to the dicta of Wallis JA in *Imperial Marine Co v Deiulemar Compagnia Di Navigazione SPA* 2012 (1) SA 58 (SCA) at paragraph 27 where, in dealing with the acceptance of English law by our courts, he stated:

'... it should generally speaking be unnecessary for it to be presented through affidavits from practitioners, who all too frequently ... are representatives of the parties. The undesirability of expert evidence from such a source has been the subject of previous comment from our courts.'

[15] Mr Theocharidis, who gave his views on Greek law in support of the applicant, dealt with the following matters:

(a) the requirement of service of the Greek writs : I do not understand this to be a contentious issue in this application save for the suggestion by Dr Panagopoulous that the action has not yet been instituted in Greece because of the lack of service of the writs on the respondents. In my view non-service is of no moment because the provisions of s 5(3)(a) of the Act provide that a security arrest may be effected for a claim which is the subject of contemplated proceedings;

(b) that the Greek court has international jurisdiction in respect of matters of the type instituted by Oceantask in the two cases before the Greek court : I do not understand this to be disputed to the extent that the respondents contend that the Greek court would have no jurisdiction whatsoever. As pointed out by Mr Theocharidis, an objection to jurisdiction on the basis of *res judicata* would have to be raised as a point *in limine*. In this regard Mr Theocharidis holds the view that Oceantask's claim in tort does not fall within the ambit of the arbitration clause in the charter party;

(c) the defence of *res judicata* : Reference is made to various articles in the Greek code of civil procedure and Mr Theocharidis opines that *res judicata* is linked to the substantive issue determined by the previous proceedings. His view is that *res judicata* would not be applicable because the object of the litigation in the arbitration, and in the proceedings before the Greek courts, are not the same. The arbitration award was determined by the application of English law to a contractual liability, as opposed to a consideration of Greek

law in respect of a tort, and that the claim of Oceantask is founded in the Greek Civil Code and falls to be determined in accordance with Greek law.

[16] Mr Theocharidis concluded that the Greek courts have jurisdiction to consider claims which are not precluded by the arbitration clause and that the defence of *res judicata* is unlikely to be upheld. In addition he opined that an unjust enrichment claim by Valentia KG would be unsustainable.

[17] Mr Timagenis on the other hand, maintains that the question to be answered is whether the arbitration clause covers claims in both contract and tort between the parties, arising in the context of, or relating to the charter party. The Greek rules of Private International Law and the Greek case law provide that the scope of an arbitration clause is governed by the national law governing that clause. In the instant case the parties agreed in the charter party that any dispute would be governed by English law. Accordingly the arbitration clause is also governed by English law which the Greek court will use in interpreting it.

[18] Mr Timagenis then deals with the position in the event that the arbitration clause is to be governed by the *lex fori* – Greek law. In this regard the Greek Civil Code provides at Article 173 that the true intention of the parties should be sought, and in Article 200 that agreements are interpreted as required by good faith taking into account business practice. According to the Greek authorities quoted by Mr Timagenis, where an arbitration clause provides for the submission to arbitration of

'all disputes arising out of a contract', that clause would cover claims in tort arising between the parties in connection with the contract. Mr Timagenis opines that the arbitration clause may be determined separately from the charter party in Greek law. The submissions of Oceantask in the first Greek writ that the existence or otherwise of the alleged fraudulent misrepresentation should be adjudicated on the basis of Greek law is wrong. The law which will be applied according to the laws of Greek Private International Law is the law of the contract – English law.

[19] Mr Timagenis states that Greek law recognises the defence of *res judicata*. He sets out the provisions of Article 903 of the Greek Civil Procedure Code which covers res judicata. His view is that as the requirements in Article 903 are satisfied in the present case, the validity of the arbitration clause could not be challenged in the first Greek writ. This is because the arbitration award made the validity of the arbitration clause *res judicata*.

[20] Mr Timagenis also deals with the defence of *res judicata* with regard to the merits of the arbitration. He has also dealt in detail with the question of the ability of Oceantask to recover on the basis of unjust enrichment.

[21] Mr Timagenis is accordingly of the view that the Greek courts will not accept jurisdiction because of the arbitration agreement (presumably taken as a point *in limine*), and will accept the defence of *res judicata* with regard to the validity of the arbitration clause in the charter party, and the validity of the charter party and the

addendum. Such a finding would be fatal to both of Oceantask's claims in the Greek court.

[22] In applying the foreign law in this matter I am mindful of the dicta of van Heerden J in *Atlantic Harvesters of Namibia v Unterweser Reederei* 1986 (4) SA 865 (C) at 874 E :

'In our Courts, foreign law is a matter of fact to be decided on evidence and the proper evidence is that of experts, that is to say, of lawyers practising in the courts of the country whose law our Courts want to ascertain. The Court is not bound to accept the view of either of them. On the other hand, the Court may for cogent reasons accept the testimony of one as against that of the other where they are at issue. Furthermore, if in their evidence the experts have referred to passages in the Code of the country whose law we are endeavouring to ascertain, it would certainly be most unreasonable to hold that this Court is not at liberty to look at those passages and consider what is their proper meaning.'

[23] In assessing the role of the Greek law experts, I accept that they are all suitably qualified to express opinions on maritime law and the Greek law. I find, however, that the views of Mr Timagenis are preferable to those of Mr Theocharidis because the latter did not deal with the important aspect of the law to be applied by the Greek courts. I accept the evidence of Dr Timagenis that a Greek court will apply English law in determining a proper interpretation of the arbitration clause and would uphold a defence of *res judicata* to the claims.

[24] There is no doubt that the claims raised in the Greek courts with regard to the misrepresentations allegedly made by the second respondent's representatives are identical to those which were dealt with by the arbitrators. The arbitrators fully

considered the alleged misrepresentations and found not only that they do not exist, but had they existed, they would not have been material misrepresentations.

[25] With regard to the interpretation of the arbitration clause in English law, I refer to the matter of *Fiona Trust & Holding Corporation and Others v Privalov and Others* [2007] UKHL 40. In *Fiona Trust* it was alleged by the owners that charter parties were procured by the bribery of senior officers of the owners. What the court had to consider was whether, as a matter of construction, the arbitration clause covered the question of whether the contract was procured by bribery and whether it is possible for a party to be bound by submission to arbitration when he alleges that, but for the bribery, he would never have concluded the contract containing the arbitration clause. At paragraph 13 of the speech of Lord Hoffman, he stated the following :

'13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrators' jurisdiction. As Longmore LJ remarked, at para 17 : "If any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."'

[26] Mr *Gordon* pointed to the fact that it was emphasised in *Fiona Trust* that reliance was placed on the separability of the arbitration clause from the main agreement. This was pursuant to s 7 of the Arbitration Act, 1996 – the arbitration clause being treated as a distinct agreement. Mr *Fitzgerald* pointed out in reply that

the arbitration clause with which we are concerned specifically provides for the applicability of the Arbitration Act, 1996.

[27] In the founding affidavit to lead the arrest of the first respondent Oceantask's attorney stated that :

'... there has already been an arbitration in London dealing *inter alia* with these issues of fact, albeit that the issues of law relative thereto were considered in the context of a contractual dispute and applied in accordance with English law, ...'

He also concedes that notwithstanding Oceantask's contentions that the findings in the London arbitration were wrong, there is no reasonable prospect of success on appeal. He records at the same time that the arbitration regime in London does not allow for an appeal on findings of fact. That being so, my view is that there would therefore appear to be very little, if any, prospect that a Greek court would not uphold the defence of *res judicata* on the merits of the charter party dispute.

[28] In my view the applicant has not established a prima facie right to arrest the first respondent (even accepting the fact of association), which is prima facie enforceable in the Greek court. It is accordingly unnecessary for me to deal with the interesting point raised by Mr *Fitzgerald* regarding Oceantask's failure to establish a need for security, because the first respondent ship is mortgaged far in excess of its value.

[29] In my view the conclusion I have arrived at accords with the justice of the case. Oceantask repudiated the charter party by relying on an alleged misrepresentation by Valentia KG. Those claims were fully dealt with by three London arbitrators who unanimously ruled against Oceantask. They ordered Oceantask to pay an amount of US$2 367 230,34. The award was handed down on the 4th October 2012. Having undertaken in the arbitration agreement, and by its participation in the arbitration, that it would honour the award made by the arbitrators, Oceantask then declined to do so. In the founding affidavit to lead the arrest of the first respondent, it is stated :

'That amount has yet to be paid by the Applicant by reason of the pending litigation in Greece. Payment cannot now be made because there is almost no prospect of recovery by the Applicant in the event of the Greek court upholding the applicant's claim. That is because as set out below there is the real risk that the second respondent will be liquidated.'

[30] That statement by the applicant's attorney rings somewhat hollow when one considers that civil proceedings in the Greek courts were instituted in March of 2013. No reason is advanced why Oceantask did not pay the amount of the award promptly upon the handing down of the arbitrators' decision. The reason now seems clear. It did not wish to do so because it did not accept the final decision of the arbitrators. Having no other recourse in English law other than to attack the conduct of the arbitrators (which they could not do) Oceantask then sought to institute proceedings in the Greek courts to claim a right not to pay the arbitration agreement pending the outcome of the decision by the Greek court. In my view, Valentia KG having honoured its undertaking by participating in the London arbitration with the

parties agreeing to be bound by the result, Oceantask should be compelled to do so and not to seek refuge in litigation which has no prospect of success.

[31] I am also mindful of the caution of Wallis J in *Imperial Marine* at page 68, paragraph 13 in relation to ship arrests :

'Nonetheless, the remedy is of an exceptional nature and may have far-reaching consequences for the owner of the property attached. It has accordingly been stressed that the remedy is one that should be applied with care and caution . . .'

[32] In the premises I make the following order :

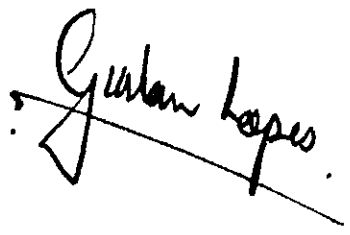
(1) The arrest of the mv 'Venetia' is set aside.

(2) The Registrar of this court is authorised and directed immediately to issue a release warrant and to provide it to the respondent's attorneys.

(3) The Sheriff of this court is authorised and directed to serve the release warrant on the Port Captain, Durban, by telefax.

(4) Service of the release warrant on each of the respondents need not be effected.

(5) The applicant is to pay the respondents' costs, such costs to include those consequent upon the employment of two counsel.



Date of hearing : 20th May 2013

Date of judgment : 27th May 2013

Counsel for the Applicant : D A Gordon SC with PJ Wallis (instructed by Shepstone & Wylie)

Counsel for the Respondents : M J Fitzgerald SC with L M Mills (instructed by van Velden Pike Inc)