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*We trust that you will find the content of this email flyer to be of interest.*

## **1. The dilemma: seeking delivery of cargo where the straight bill of lading has been lost**

We recently acted for an ocean carrier who was faced with a demand by the cargo receiver for delivery of cargo without presentation of the bill of lading.

It was a straight bill of lading, that is to say, a bill of lading made out to a named consignee and not marked "to order".

In terms of the UK COGSA 1992 delivery of cargo under a straight bill of lading appears to be dealt with in much the same way as delivery under a sea waybill.

The position in South Africa is different. Section 6(1) of the Admiralty Jurisdiction Regulation Act no. 105 of 1983 provides:

*"Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall-*

- (a) *with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;*

(b) *with regard to any other matter, apply the Roman-Dutch law applicable in the Republic."*

Since our courts will apply a combination of English law as it read prior to 1983, and as developed under South African law since 1983, the UK COGSA 1992 would not be taken into account.

In terms of section 1(4) of the UK COGSA 1972, it was established law that cargo could not be released without production of "the bill of lading ... or similar documents of title".

In the case of the "Rafaela S" the English court of appeal indicated that non-negotiable bills of lading are, nevertheless, documents of title. Although it was not the main issue, Lord Bingham held obiter that the production of a straight bill of lading is a precondition of delivery, even where there is no express provision to that effect.

One would have hoped that the South African position would be made clearer by the Sea Transport Documents Act no. 65 of 2000. Section 3 of the Sea Transport Documents Act provides that the named consignee in a bill of lading must be regarded as being in possession if the original document has been lost. Bizarrely, section 2 then provides that sections 3,4,5 and 6 of the Sea Transport Documents Act only applies to sea transport documents that are transferable or negotiable.

A straight bill of lading, while being a document of title, is not negotiable; therefore these sections would not apply. This then seems to negate the provisions of section 3(2)(b), which provides that the named consignee of a lost bill of lading, be regarded as the holder of the document.

Section 7 of the Sea Transport Documents Act deals with the right to delivery of cargo. Although this section at a glance seems to come to the assistance of a party that has lost the bill of lading, on closer inspection it is questionable whether it in fact does so.

The wording of section 7 provides that this section only applies where a person presents a sea transport document. Section 7(3) provides that a carrier may require any person presenting a sea transport document in respect of any goods to establish a right to delivery. Any person required to establish his or her right to delivery may do so either by application to Court or by any other means acceptable to the carrier. If a right to delivery is established by means other than an application to court, the carrier bears the risk that the person has no right to delivery and consequently the carrier may require an indemnity acceptable to the carrier in respect of the delivery.

It is odd that section 7 does not make provision for an instance where a bill of lading has been lost, especially where one has regard to the provisions of section 3 which provides for the event of lost bills. Perhaps one must read into the Act that if you are deemed to be in possession, then equally so you may be deemed to present the sea transport document. It, however, remains to be seen how a court would interpret this section.

It seems inconceivable that a carrier can insist on the person in possession of a bill establishing their right to delivery, but that the carrier does not have that right where

the bill of lading has been lost. Surely the carrier should not be in a more onerous position if the bill of lading has been lost.

Clearly the legislation should be amended to clarify the position.

**Quintus van der Merwe**

## **2. A genuine and reasonable need for security: of course?**

One of the requirements that a claimant or applicant has to establish to obtain an arrest of a vessel (either the vessel concerned or an associated ship), or other maritime property, to provide security for foreign legal or arbitration proceedings in terms of the Admiralty Jurisdiction Regulation Act, is that the Applicant has a "genuine and reasonable need for security". At first blush it seems obvious that a claimant will not want to go to the trouble and expense of commencing and prosecuting a claim through to a final judgement or award, unless it is sure that if successful it will be able to execute or recover the amount from the respondent.

There has however been some uncertainty regarding the exact requirements for establishing a genuine and reasonable need for security. In the matter of the *Rizcun Trader* (4) 2000 (3) SA 776 (C) the Cape court expressed the view that in order to demonstrate a genuine and reasonable need for security on a balance of probabilities a claimant must show that the defendant is in a financially precarious position and would not otherwise be able to meet any judgment or award obtained. The court was of the view that it would not be sufficient for a claimant to show that the corporation did not have assets within the jurisdiction where the claim was to be enforced, if it had sufficient assets outside the jurisdiction to meet the claim.

However, Davis J in the same division had appeared to come to the aid of claimants with a different and indeed conflicting, approach. In the *Peregrine III* 1999 SCOSA B73 (3), he had held that the present financial position of a corporate defendant cannot be the overriding factor to determine whether an applicant has made out a case for a genuine and reasonable need for security. The financial status of the respondent at the time of the arrest did not detract from the ordinary principle that the applicant should be furnished with security in an amount equivalent to its claim properly established, said Davis. He made the point, which appears self evident, that a company which exhibits financial strength in year one may disappear by year three or its controlling company may restructure it. "The shipping business is a notoriously volatile enterprise" noted the Judge.

For these reasons, it was held, there was not an overriding principle that the present financial status of the respondent should be a material factor to be taken into account in determining whether or not security should be furnished. Prima facie therefore there were conflicting decisions in the Cape Division of the High Court.

The sentiment and approach of Davis J found favour with the Durban Division in the matter of the "*Gladiator*" 2007 (2) SA 401 (D) where the court stated that; "*it may also be true that even companies of apparently good standing and prosperous circumstances may well get into financial difficulties and be unable to meet their commitments, and that the shipping industry is notoriously a hazardous business.*"

The Durban court also took into account that any award which the claimants in that matter obtained in London arbitration proceedings would, if no security had been provided in respect of those proceedings, have to be enforced in South Korea where the defendant had its principle place of business or against the assets of the defendant (in that case a single vessel said to be worth \$42,000,000.00). Although the facts are in some respects distinguishable, the Durban judgment can be seen as support for the views expressed by the Cape judge in the "Peregrine III".

Then comes along the Cape court in the "The Wisdom C" (the judgement was handed down in March 2007 at about the same time as the Durban courts decision in the "Gladiator") and in a yet further conflicting approach within the Cape division, appears to have turned the matter on its head again, so to speak. The court in this matter reverted back to the position expressed in the "Rizcun Trader", once again placing emphasis on the Respondent's financial position at the time of applying for a security arrest in order to determine whether or not the Applicant had a genuine and reasonable need for security.

The "Wisdom C" decision of the Cape High Court came up on appeal earlier this year before the Supreme Court of Appeal ("SCA") and their judgement was handed down very recently. The SCA upheld the court *a quo's* judgment in this regard. A judgement of the SCA is binding on all High Court Divisions (only itself and the Constitutional Court can vary or over turn its judgements). Its pronouncements are THE LAW.

In summary, it would appear that the financial position of the Respondent at the time of the arrest being sought, is once again and now in all divisions, the determinative factor in establishing whether one has a genuine and reasonable need for security.

**Shane Dwyer**

### **3. MV "Snow Crystal"**

#### **SUPREME COURT OF APPEAL**

The owners of the *Snow Crystal* sued the National Ports Authority ("NPA") for damages arising from the failure of the NPA to ensure the availability of the Sturrock dry dock during 1 -14 December 2002. The Cape High Court as per Davis J upheld the owner's claim for damages and the NPA appealed.

The issues on appeal were whether a contract existed between the parties and if so: it's nature and scope, terms, whether there was a supervening impossibility and the owner's entitlement to damages.

Arrangements were made for the vessel to be dry docked via Quay Maritime Services ("QMS") who had been engaged to carry out the steel and pipe repairs to the vessel. In June 2002, an official application form was submitted for the use of the dry dock. The form erroneously referred to Regulation 60 of the Harbour Regulations when in fact it ought to have referred to Regulation 61(1), which provides as follows:

*Before a ship is admitted to dry dock in a harbour the name and full particulars of the ship shall be entered in a book to be kept for that purpose at*

*the port office of the harbour, and the owner, master or agent of the ship shall sign an agreement acknowledging himself to be bound by the following conditions and undertaking to pay the applicable charges...*

Regulations 61(2) – (19) comprised the terms of the agreement contemplated above.

The *Snow Crystal* arrived in Cape Town on 16 October 2002 and internal repair work commenced. On 26 November 2002, the owner's technical superintendent arrived in Cape Town to oversee the dry docking of the vessel.

At the time, the *Gulf Fleet 29* was in the dry dock. The vessel had entered the dry dock 6 days late but the owners assured the dock master that the work would be completed in 14 days. Two days later, the repair manager advised that they were behind schedule. The dock master contemplated issuing a Regulation 61(10) notice to the *Gulf* which makes provision for 24 hours notice to be given to a ship that fails to leave the dry dock. The manager of the *Gulf* immediately became hostile and said that the vessel could not be moved because her hull was 'open'.

An offer by the dock master that the *Gulf* be moved to the Robinson dry dock (which would have accommodated the *Gulf* but not the *Snow Crystal*) was not well received as it was considered risky to move the *Gulf* across the harbour while she was floating on her tank tops.

Both experts who testified in the court *a quo* agreed that it would have been possible to close the hull opening to enable the *Gulf* to be floated. The owners of the *Snow Crystal* also made an offer to pay the expenses for moving the *Gulf* – the repair manager then announced that surveyors had condemned the keel coolers and this was a reason for further delay until 6 December. On 4 December, the repair manager advised that as it had been raining, the *Gulf* would only leave the dry dock on 9 December.

On 10 December, the *Snow Crystal* cancelled its dry dock booking as the vessel was due to be on hire from 14 December 2002. The vessel was then dry docked from 15 November – 1 December 2003 in Bulgaria.

The court on appeal found that there was a contract in existence between the parties as contemplated in Regulation 61(1) subject to a degree of flexibility. The owners of the *Snow Crystal* had made allowances for delay however the *Gulf* only left the dry dock on 10 December 2002 and it would only have been available to the *Snow Crystal* two days later. It was a term of the agreement that time was of the essence – for that reason, the NPA was in *mora* from at least 4 December 2002.

The NPA alleged that the supervening impossibility preventing performance was the physical presence of the *Gulf* in the dry dock. The dock master failed to give notice in terms of Regulation 61(10) for the *Gulf* to leave the dock for the reason that the notice would go unheeded and would upset the contractors who had adopted an uncooperative attitude early on.

The owners of the *Snow Crystal* expected the dock master to enforce Regulation 61(10) as it was part of the agreement they entered into. The Robinson dry dock was available and with a minimum of work, the vessel could have been floated to that dock. The court was unpersuaded that the NPA's obligation was rendered impossible.

The court *a quo* awarded damages as follows:

- The first head of damages related to the temporary work to remove the accumulated underwater growth and was granted on the basis that the work was demonstrated to be necessary.
- The second head related to the costs of painting the vessel in Cape Town while she was afloat in order for the vessel to be presentable to the charterers. This painting had to be redone in Bulgaria.
- The third head related to loss of charter hire during the period 15 November – 1 December 2003 when the vessel was dry docked in Bulgaria in the amount of US\$ 156 424,63.

The NPA attacked the damages claimed on the basis that none of the damages flowed naturally from the breach and were to be regarded as special damages.

The court on appeal held that ships operate on tight schedules and to delay a ship or disrupt its schedule can and usually does have far – reaching commercial consequences. In this case, the Snow Crystal was to be dry docked for 14 days for general repairs and surveying for classification purposes. The vessel's managers would have planned a schedule around the period the vessel would be dry docked and during which the vessel would necessarily be off hire or otherwise out of commission – in this case, the period had been agreed to six months in advance.

The last minute failure of the NPA to make the dry dock available meant that the vessel would have to go off – hire or be out of commission again in the near future and was in the court's view clearly foreseeable as a natural consequence of the breach and its foreseeability was not dependant on the existence of special circumstances.

The appeal was dismissed with costs.

**Anisa Govender**

#### **4. Bank guarantees**

It is standard practice for ocean carriers and their Protection and Indemnity Clubs to require that letters of indemnity, counter signed by a bank, be furnished in circumstances where the ocean carrier is requested by cargo interests to do something that may give rise to liability.

For instance, the carrier may be requested to release cargo without presentation of the bill of lading or to issue bills of lading in a particular form to comply with requirements of a letter of credit.

In the past, it was common practice for a vessel or its agent to require that the person requesting such a concession from the carrier, to furnish a letter of indemnity in a standard form for an **indefinite amount** and **indefinite period**, to cover any potential liability the carrier may incur as a result of its complying with the request. The carrier usually insists that such a letter of indemnity be countersigned by a bank.

In recent months it has become apparent that the first class banks in South Africa will only countersign a letter of indemnity where it is for a fixed amount and a defined period of time. The banks argue that an indemnity equal to twice the value of the cargo, together with a provision for legal costs, is adequate security and the insistence of the provision for an indefinite amount is both unreasonable and makes it impossible for the bank to manage its risk.

The banks have also now started arguing, no doubt on the advice of lawyers acting for cargo interests, that any claim under a charter party or bill of lading must be brought within a defined time period. The banks, therefore, argue that any indemnity must be for the same time period within which any cargo claims must be brought.

It must be remembered that the letters of indemnity or bank guarantees referred to above differ significantly from any form of bank guarantee that may be furnished in respect of the provisions of security for legal proceedings in the Republic of South Africa or elsewhere, or as security for the release of a vessel under arrest. Such guarantees obviously merit different consideration.

**Quintus van der Merwe**

## **5. SARS requires notice of judicial sales**

A South African company purchased two new trawlers, which were financed through the IDC. Approximately a year later the company was in serious financial difficulty and a host of creditors arrested the two vessels in connection with claims arising from services rendered or goods supplied to the vessels. Most of the creditors were small to medium sized businesses that could not afford to lose substantial amounts of money.

We successfully obtained an interim order for the sale of the vessel, but prior to it being made final, the South African Revenue Service ("SARS") intervened, saying that the company had failed to pay VAT on importation of the two vessels. By agreement with SARS, the vessels were sold by judicial auction, but the proceeds were not paid out, pending a claim by SARS that it was entitled to forfeiture of the vessels in lieu of payment of the VAT in terms of the Customs and Excise Act. They also alleged that their claim trumped the creditors' claims that were to be brought in terms of section 11 of the Admiralty Jurisdiction Regulation Act.

Two prominent senior Counsel, who have vast experience in shipping matters, advised that the claim by SARS would prevail if contested in court. Instead Shepstone & Wylie, on behalf of the body of creditors, made representations for settlement of the matter on the basis that any VAT paid to SARS would in the ordinary course be claimed back by the shipping company as an input credit. We tendered payment of the VAT amount, plus interest, and requested that penalties and forfeiture be waived. Sadly, and in our view wrongly, SARS insisted on payment of the full proceeds of the sale to SARS in lieu of forfeiture of the vessels.

Shortly after finalisation of this matter, a new provision appeared in the Customs and Excise Act. Section 96 of the Customs and Excise Act now requires that the State be given one month's prior notice of any action to be instituted against the State or in

respect of which the State has an interest in terms of the Customs Act and Excise Act.

Section 96(3) provides that:

*"Notwithstanding the provisions of the Admiralty Jurisdiction Regulation Act, 1983 (Act no. 105 of 1983), when any person applies to the High Court for an order for the sale of any arrested property, such person shall deliver a notice of such an application at the place prescribed in the Rules."*

The Rules provide that such notice must be given to the Manager, Litigation (Customs) in Pretoria.

Customs will argue that this amendment had nothing to do with them benefiting from the judicial sale of the two vessels. They point out that any arrest of property, which is still subject to Customs control (in other words, which has not yet been duly entered for home consumption), if sold at a juridical auction, will have customs duty and VAT consequences. It is for this reason that Customs must be told of any such sale so that they can ensure that any duty and VAT is paid to the revenue authorities.

**Quintus van der Merwe**

## 6. News & Events

### Good Byes

As we believe many of our clients and friends will be aware, one of our partners in the Cape Town office, **James Mackenzie**, has decided to have a change of scenery and take up new challenges by going to the bar as an Advocate (the South African equivalent of a Barrister in the United Kingdom), specialising in Court appearances and chamber opinions, not restricted to the maritime area of the law. He is currently serving his pupillage at the Cape Bar, which is a type of on-the-job practical training under the supervision of a senior advocate, before having to write the Bar entrance examinations. We will miss James very much, but wish him well in his new career.

### Party Time

That time has arrived yet again for our annual European visit in May, when we try to get to visit the various P&I Clubs who we represent at South African ports, our solicitor friends who (thankfully) continue to support us with instructions and of course our clients and friends. **Shane Dwyer, Krish Reddy, Quintus van der Merwe** and **Edmund Greiner** will be travelling to England, Western Europe and Greece (for the pre-Posidonia week) at slightly different staggered periods, but overlapping in London for the Shepstone & Wylie semi-annual London Solicitor and Club Party on Thursday 22<sup>nd</sup> May 2008. We will be sending out invitations, but if any of our clients or friends do not receive their invitation through an oversight, please do come along. You will all be very welcome. Unfortunately we are still awaiting confirmation from various alternate venues in the City that they can have us that evening, so we will have to leave it on the basis that if you do want to join us and no invitation makes it way through the ether in time, please contact Megan for the details on [pennefather@wylie.co.za](mailto:pennefather@wylie.co.za).

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