IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AD NO. 294
ADMIRALTY ACTION IN REM

BETWEEN MARINE EXPEDITIONS INC

Plaintiff

A N D THE SHIP "AKADEMIK SHOKALSKIY"

Defendant

JUDGMENT OF DOOGUE J

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BETWEEN MARINE EXPEDITIONS INC

Plaintiff

A N D THE SHIP "AKADEMIK SHOKALSKIY"

Defendant

Hearing: 20 March 1995

Counsel: A.D. Ford with B.R. Piper for plaintiff
A.D. MacKenzie with A.J. Horne for Far-Eastern Region Hydrometeorological Research Institute, Vladivostok

Judgment: 21 March 1995

JUDGMENT OF DOOGUE J

INTRODUCTION

The plaintiff has issued proceedings against and obtained a writ of arrest against the defendant ship. The Far-Eastern Region Hydrometeorological Research Institute, Vladivostok ("the applicant") applies for orders first that the proceedings be stayed, secondly the writ of arrest issued with respect to the defendant ship be set aside, and thirdly that a release be issued with respect to that ship.

The application is brought upon the grounds that either the defendant ship is not a sister ship of the "Akademik Shuleykin", to which the claim of the plaintiff relates, and is therefore not properly the subject-matter of an action in rem, or the proceedings relate to a claim which is the

subject of arbitration in London and the proceedings should be stayed under s. 4 of the Arbitration (Foreign Agreements and Awards) Act 1982 and the vessel released from arrest in consequence of that stay. The plaintiff disputes these grounds of application.

BACKGROUND

The plaintiff is a Canadian company which by a time charter dated 2 May 1994 chartered the "Academik Shuleykin" for the period 5 June 1994 to 1 May 1995 from the Arctic and Antarctic Research Institute ("AARI") and the Russian Federal Service for Hydrometeorology and Environmental Monitoring ("ROSHYDROMET"). The plaintiff chartered the "Akademik Shuleykin" to carry out tourist voyages in the northern hemisphere during 1994 and to Antarctica during 1994-1995.

On 15 June 1994 AARI and ROSHYDROMET delivered a letter to the plaintiff cancelling the charter. The plaintiff says that this was an unlawful cancellation of the charter and that, as a result of that and the failure to perform, the plaintiff has suffered loss and damage in the sum of $NZ1,387,165.

Following the cancellation of the charter the plaintiff took steps to have the dispute between the parties referred to arbitration in London. If the plaintiff's evidence is correct, AARI denies the existence of a valid charter-party or arbitration agreement, and the plaintiff's solicitors have had no response from ROSHYDROMET. The plaintiff has unsuccessfully endeavoured to obtain security from those two

organisations for the amount claimed in the arbitration proceedings.

On 11 November 1994 the plaintiff took out a writ of summons in rem in this Court against the "Akademik Shuleykin" and that vessel's alleged sister ships named therein, which included the defendant ship.

On 10 January 1995 the plaintiff says it arrested a further sister ship in Capetown, South Africa, but that that vessel was subsequently released by order of the court. The plaintiff has sought to put information before the Court as to that proceeding. The applicant objects to that information being treated as evidence as it is hearsay. I ignore the material put before this Court as to what occurred in respect of the South African proceedings.

On 28 February 1995 the plaintiff obtained a warrant of arrest out of this Court against the defendant ship in its capacity as a sister ship of the "Akademik Shuleykin" That warrant was executed the same day. At that time the vessel was under subcharter from a head charterer. By agreement and a subsequent order of this Court of 3 March 1995 the vessel was allowed to continue to Wellington, where it arrived on 7 March 1995, when the writ of arrest again became effective.

The applicant claims that it is the owner of the defendant vessel. It filed its application, which has led to the present hearing and decision, on 8 March 1995. An amended application was filed on 10 March 1995. The parties have subsequently filed their affidavits in support and opposition.

FIRST ISSUE: SISTER SHIP ISSUE

The plaintiff's claim is brought in reliance on ss 4(1)(h) and 5(2) of the Admiralty Act 1973. In particular, the plaintiff relies on proviso (b)(ii) of s. 5(2) of that Act, the so-called "sister ship provision". Those statutory provisions provide:

> "4(1) The Court shall have jurisdiction in respect of the following questions or claims:
>
> ....
>
> (h) Any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship:
>
> ...."
>
> "5(2) In addition to the rights conferred by subsection (1) of this section, the admiralty jurisdiction of the High Court may be invoked by an action in rem in respect of all questions and claims specified in subsection (1) of section 4 of this Act (except claims specified in paragraph (n) of that subsection):
>
> Provided that -
>
> (a) ...
> (b) In questions and claims specified in paragraphs (d) to (r) (except paragraph (n)) of subsection (1) of section 4 of this Act arising in connection with a ship where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the jurisdiction of the High Court may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against -
>
> (i) That ship if, at the time when the action is brought, it is beneficially owned as respects all the shares therein by, or is on charter by demise to, that person; or

(ii) Any other ship which, at the time when the action is brought, is beneficially owned or on charter by demise as aforesaid."

The jurisdiction provided by proviso (b)(ii) to s. 5(2) extends the previous jurisdiction of the Court in certain cases to any ship in which the beneficial ownership is the same as the ship in respect of which the claim arises.

The first question is the threshold question of the onus and standard of proof on this application. In this proceeding the answer to that question effectively determines the first issue. There are two views as to the onus of proof:

1. It is for a defendant (or applicant) to make out that the plaintiff does not have an arguable case on liability.

Four decisions support this view. They are: The St Elefterio [1957] P. 179 (Willmer J); The "Moschanthy" [1971] 1 Lloyd's Rep 37 (Brandon J)(where the reasoning in The St Elefterio was adopted and applied); The "Gulf Venture" [1984] 2 Lloyd's Rep 445 (Sheen J)(where the language of Brandon J in The "Moschanthy" was adopted and applied); Reef Shipping Co Ltd v The Ship "Fua Kavenga" [1987] 1 NZLR 550 (Smellie J)(where the cases just mentioned were relied upon by agreement of the parties). It appears that neither of the decisions taking a contrary view, including one of Sheen J himself, were drawn to that Judge during the course of The "Gulf Venture" hearing or to Smellie J in Reef Shipping. In that case

Smellie J was not obliged to make the decision which I have to make in these proceedings.

2. It is for the plaintiff to establish his case on the balance of probabilities.

Two decisions support this approach: The "Aventicum" [1978] 1 Lloyd's Rep 184 (Slynn J)(where it appears The St Elefterio and The "Moschanthy" decisions were not referred to the learned Judge); and The "Maritime Trader" [1981] 2 Lloyd's Rep 153 (Sheen J)(where in obiter dicta The "Aventicum" was followed but in the absence of reference to The St Elefterio and The "Moschanthy" decisions).

Mr MacKenzie for the applicant understandably submits I should follow the latter line of authority, accepting, however, that he must concede for present purposes that the claim in personam by the plaintiff can be made out. Equally understandably, Mr Ford for the plaintiff submits I should follow the former line of authorities, supported, as it is, in particular, by the judgment of Smellie J in the Reef Shipping case. It is certainly understandable the plaintiff should proceed on the basis that that case correctly states the law of New Zealand.

As already indicated, this issue is virtually determinative in this case because, however viewed, the evidence before the Court raises an arguable case by the plaintiff in respect of the defendant ship, but it is hardly sufficient to prove that case on a balance of probabilities.

I prefer the line of authorities which make it incumbent upon the defendant to show the plaintiff has no arguable case. As already noted, the proviso in question to s. 5(2) of the Act enlarged the Admiralty jurisdiction of the Court. A plaintiff's substantive rights can hardly expect to be determined on an application of the present sort. In brief, these are the justifications for the views underlying the former line of authorities. Slynn J in The "Aventicum" did not have the benefit of the earlier authorities. His proposition to the contrary is without supporting reasoning or authority. Mr MacKenzie says a sister ship is in a different position from the original ship giving rise to the claim. The statute recognises no such difference. Mr Justice Sheen's comments in The "Maritime Trader" were obiter. He merely followed what had been said in The "Aventicum" without considering the more reasoned approach adopted in the other line of authority. He chose to take that more reasoned approach in his later decision in The "Gulf Venture".

I accordingly look at the issue as one of whether the applicant has established the plaintiff has no arguable case. None of the authorities refers to the appropriate standard of arguable case. I bear in mind that the plaintiff seeks to maintain the arrest of a vessel other than the one in respect of which its claim lies. For myself, in applying the test of whether there is an arguable case, I view the situation as more akin to that arising on applications for Mareva injunctions (the need for a good arguable case) or an Anton Piller order (an extremely strong

prima facie case) than the situation which arises on the standard interim or interlocutory injunction (a serious question to be tried). The Court has to balance the rights of the party bringing its claim in reliance upon the sister ship provision with the rights of the parties with an interest in the particular ship to have it free from arrest unless the plaintiff has got an arguable case.

The plaintiff in its proceedings has to prove:

1. The party which would be liable on its claim in its action in personam.

   The evidence before the Court is that that is AARI and ROSHYDROMET. The plaintiff claims that this is effectively the Government of the Russian Federation. There is some evidence that ROSHYDROMET is an arm of the Government of the Russian Federation, whatever the position of AARI. Certainly upon the evidence before the Court, in particular the evidence of a Russian lawyer, Alexander Golubnichy, the plaintiff has established an arguable case, however viewed, that ROSHYDROMET is an arm of the Government of the Russian Federation and that it has a case against it in personam.

2. The Government of the Russian Federation was at the time when the cause of action arose the owner or in possession or control of the vessel in connection with which the plaintiff's claim arose, the "Akademik Shuleykin".

Given that the charter was in part by ROSHYDROMET, the evidence of the same Russian lawyer that, if the

vessel is owned by either AARI or ROSHYDROMET, the Government of the Russian Federation is the true and ultimate owner of the vessel, the plaintiff has again established that it has an arguable case, however viewed, in respect of this matter. There is also other evidence to which the plaintiff points in respect of this matter, which I do not find it necessary to traverse.

3. The defendant ship was at the time when the action was brought by the plaintiff on 11 November 1994 beneficially owned by the Government of the Russian Federation.

The vessel is in New Zealand by virtue of a charter between the applicant and others. It was shown in the Lloyd's Register as being owned by the Government of the Republic of Russia through ROSHYDROMET until the end of 1994. There is evidence from the same Russian lawyer that the mere fact that a ship's certificate has been issued in the name of the applicant is not conclusive of ownership and that this vessel, like the "Akademik Shuleykin", comes within a definition of "objects of state property". It is said for the applicant that it has a separate legal existence and that beneficial ownership of the vessel rests in it and any interest the Government of the Russian Federation may have in the applicant cannot affect that. This is in reliance upon an affidavit from the applicant's own Russian lawyer, which is perhaps more to be noted for what it does not [illegible]

for what it says. There is evidence from Mr Golubnichy that the Government of the Russian Federation has an interest as owner in the defendant ship. The substance of his evidence is such that in terms of New Zealand law that would be treated as a beneficial interest as owner. There is, however viewed, an arguable case the Government of the Russian Federation has a beneficial interest as owner in the defendant ship.

Thus the plaintiff has put before the Court evidence which establishes to my satisfaction that it has an arguable case to the standard already identified that the defendant ship is a sister ship of the ship in respect of which its claim arises and that that ship is either owned by or in the possession or control of the party against which its claim in personam arises. Certainly the applicant has not established that the plaintiff does not have an arguable case in accordance with the line of authority already cited.

SECOND ISSUE - STAY OF PROCEEDINGS

For the purposes of this argument, but not otherwise, the applicant concedes the plaintiff can establish the party liable on the plaintiff's claim in personam is the Government of the Russian Federation and that both vessels in issue are beneficially owned by that Government. This issue arises under s. 4 of the Arbitration (Foreign Agreements and Awards) Act 1982. That section provides:

"4(1) If any party to an arbitration agreement to which this section applies (or any person claiming through or under that person)

commences any legal proceedings in any Court against any other party to that arbitration agreement (or any person claiming through or under that other party) in respect of any matter in dispute between the parties which the parties have agreed to refer to arbitration pursuant to that arbitration agreement, any party to those proceedings may at any time apply to the Court to stay those proceedings; and the Court shall, unless the arbitration agreement is null and void, inoperative, or incapable of being performed, make an order staying the proceedings.

(2) The Court may, in addition to any order made under subsection (1) of this section, make such other orders in relation to any property which is or may be the subject-matter of the dispute between the parties to the arbitration agreement as it thinks fit.

(3) Any order under subsection (1) or subsection (2) of this section may be made subject to such conditions as the Court thinks fit.

(4) This section applies to every arbitration agreement which provides, expressly or by implication, for arbitration in any country other than New Zealand.

(5) Section 5 of the Arbitration Act 1908 shall not apply to any arbitration agreement to which this section applies."

The applicant says that it is entitled as of right to a stay of the proceedings as, when the plaintiff seeks to enforce the arbitration agreement in its charter, it cannot be heard to argue that the agreement is null and void, inoperative or incapable of being performed. Thus the applicant says that on its face it can make out that the present position is within the terms of s. 4(1) of the relevant Act.

The plaintiff says first that the application is misconceived, as the applicant is not a party to the arbitration proceeding and has no right to apply to this Court to stay these proceedings. However, s. 4(1) refers to

a party to these proceedings and not the arbitration proceeding. There is no authority that the applicant must also be a party to the arbitration proceeding. The language in s. 4(1) is very different from that of s. 5 of the Arbitration Act 1908, which specifically does not apply to any arbitration agreement to which s. 4 of the 1982 Act in question applies by virtue of the provisions of s. 4(5) of that latter Act. Thus the authorities cited on behalf of the plaintiff under s. 5 of the Arbitration Act 1908 are of no relevance in the present circumstances.

The issue still arises whether the applicant is a party to these present proceedings. That point has not been argued before me, and I leave it open. Plainly the applicant claims to be a party to the present proceedings and has made an application in the course of those proceedings. Whether the applicant is such a party is not, however, determined by this judgment.

The plaintiff then says there is an onus on the applicant to establish the arbitration agreement is not null and void, inoperative or incapable of being performed in terms of s. 4(1) of the 1982 relevant Act. Thus it is said that the applicant is not entitled to a stay. I find it difficult to accede to that argument. The plaintiff seeks to enforce the arbitration agreement and can hardly be heard to argue that it is for the applicant to establish these matters or that it cannot be so established.

There is, however, clear evidence before the Court that the plaintiff's attempts to enforce the arbitration agreement have been nullified by the failure of the other

parties to respond to the plaintiff's actions to enforce it or to accept that it is applicable to them.

The applicant in the present case may therefore be entitled to a stay on the proceedings under the provisions of s. 4(1) of the Arbitration (Foreign Agreements and Awards) Act 1982, but I would not grant such a stay simpliciter but would make it subject to conditions under s. 4(3) of that Act. I have heard no argument as to conditions. Given the evidence before the Court, I would consider imposing conditions that either the arrest of the defendant ship continue unless security for the sum in issue in the arbitration is made or that security for that sum be made. I note that the applicant is not a party to the arbitration and the plaintiff has no remedies directly vis-à-vis the applicant.

THIRD ISSUE: IF THE PROCEEDINGS ARE STAYED, MUST THE ARREST BE SET ASIDE?

The United Kingdom law is clear, namely that there is jurisdiction to keep the defendant vessel under arrest as security for the action in rem: The "Cap Bon" [1967] 1 Lloyd's Rep 543 (Brandon J); The "Golden Trader" [1974] 1 Lloyd's Rep 378, [1975] QB 348 (Brandon J); The "Rena K" [1978] 1 Lloyd's Rep 454, [1979] QB 377 (Brandon J); The "Vasso" (formerly "Andria") [1984] 1 Lloyd's Rep 235, [1984] QB 477 (Court of Appeal); The Tuyuti [1984] 1 QB 838 (Court of Appeal).

There are different views expressed in those decisions as to whether a writ of arrest can be maintained for the purpose of obtaining security in an arbitration, but for

present purposes, given the effect of all the decisions, that is an academic question rather than a real question.

The applicant argues that these authorities do not apply in New Zealand because of a suggested difference between the New Zealand and United Kingdom statutes. Section 1 of the Arbitration Act 1975 (UK) provides:

> "1(1) If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.
>
> (2) This section applies to any arbitration agreement which is not a domestic arbitration agreement; and neither section 4(1) of the Arbitration Act 1950 nor section 4 of the Arbitration Act (Northern Ireland) 1937 shall apply to an arbitration agreement to which this section applies.
>
> (3) In the application of this section to Scotland, for the references to staying proceedings there shall be substituted references to sisting proceedings.
>
> (4) In this section 'domestic arbitration agreement' means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a State other than the United Kingdom and to which neither -
>
> (a) an individual who is a national of, or habitually resident in, any State other than the United Kingdom, nor
>
> (b) a body corporate which is incorporated in, or whose central management and

> control is exercised in, any State other than the United Kingdom;
>
> is a party at the time the proceedings are commenced."

I can see no basis for distinguishing the provisions of the New Zealand statute from those of the United Kingdom statute. I can see no basis for distinguishing the decisions already cited. If anything, the position in New Zealand in respect of the powers of the Court is stronger than that in the United Kingdom, given the provisions of s. 4(3) of the Arbitration (Foreign Agreements and Awards) Act 1982 enabling the New Zealand Court to attach conditions to any stay, there being no such corresponding provision in the United Kingdom statute.

FOURTH ISSUE: SHOULD THE ARREST OF THE DEFENDANT SHIP CONTINUE?

I am satisfied, on the basis of the English authorities, and, in particular, the "Rena K" and Tuvuti decisions, that the issue is a discretionary one depending on the circumstances in each particular case.

In the present case any stay of the proceedings is unlikely to be final, given the inactivity of AARI and ROSHYDROMET in respect of the arbitration proceedings by the plaintiff. I am also satisfied that there may well be a judgment in the present proceedings to be satisfied. There must, at the very least, be doubt whether the parties to the arbitration agreement, AARI and ROSHYDROMET, are in a position to meet any judgment or would do so in the absence of security. On the present application the plaintiff has

shown an openness in the material put before the Court by it which has not been matched by that of the applicant.

The applicant has asked me not to draw any conclusion that the Government of the Russian Federation would not meet its financial obligations. I draw no such conclusion. The Government of the Russian Federation is not a party to these proceedings or to the arbitration proceedings. The applicant has emphasised it does not speak for that Government. I emphasise I make no findings of any kind in respect of that Government.

The plaintiff may claim that Government is the beneficial owner of the ships in question, but that has not yet been determined. Nor has it been determined that that Government is necessarily a party to the charter which gives rise to the plaintiff's claim. The parties to the arbitration agreement are AARI and ROSHYDROMET, and not the Government of the Russian Federation. There is nothing before me to show any likelihood that they will meet any award in the arbitration, or indeed participate in it. In these circumstances the likelihood of any stay of the present proceedings being final is slight.

I advert to what I said in relation to the conditions if a stay is imposed. I would exercise my discretion against releasing the defendant ship until proper security is given for the sum in dispute in the arbitration which may ultimately be the subject-matter of a judgment in rem in the present proceedings.

CONCLUSIONS

The result is:

1. The writ of arrest issued by the plaintiff in respect of the defendant ship is not set aside and the release in respect of it is not ordered.

2. The application for a stay of the proceedings is adjourned to enable the parties to agree on conditions. If conditions can be agreed, an order can be made by consent. If the parties cannot agree, either party may apply for the matter to be reinstated before me.

COSTS

The plaintiff is entitled to its costs. Given the complexity and urgency of the matter and the multi-national nature of the proceeding, I fix such costs in the sum of $5,000 together with disbursements to be fixed by the Registrar under Item 34 of the Second Schedule to the High Court Rules in the event of any disagreement as to disbursements. That order is against the applicant. The costs are to be paid within 14 days. Unless the costs are paid, the applicant is debarred from taking further steps in respect of the proceeding.

I was invited to make the costs costs in the proceedings. I have no knowledge of who is the true owner of the defendant ship. The applicant claims to have an interest in it. Whether that claim will ultimately be upheld only time will tell. I thus order as indicated.

Solicitors for plaintiff:
Bell Gully Buddle Weir, Wellington

Solicitors for Far-Eastern Region Hydrometeorological Research Institute, Vladivostok:
Rudd Watts & Stone, Wellington

YBXL / NYC / New Zealand 3 / 1996

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Marine Expeditions Inc v The ship Akademik Shokalskiy

High Court (in Admiralty), Wellington

1995 2 NZLR 743

HEARING-DATES: 20, 21 March 1995

21 March 1995

CATCHWORDS:

Admiralty -- Sister ship jurisdiction -- Ship arrested in New Zealand as sister ship of ship alleged to be in control or possession of defendants to arbitration in London -- Party claiming to be owner of ship applying in New Zealand to set aside writ of arrest -- Onus of proof -- Whether jurisdiction to arrest ship -- Admiralty Act 1973, ss 4(1)(h), 5(2).

Arbitration -- International arbitration agreements -- Arbitration in London against shipowners for breach of charter-party -- Shipowners not providing security -- Sister ship arrested in New Zealand -- Whether shipowner entitled to stay of proceedings -- Whether Court able to direct security to be paid as condition of stay -- Arbitration (Foreign Agreements and Awards) Act 1982, s 4.

HEADNOTE:

The plaintiff commenced an arbitration in London against the shipowners Arctic and Antarctic Research Institute (AARI) and the Russian Federal Service for Hydrometeorology and Environmental Monitoring (ROSHYDROMET) for unlawful cancellation of the plaintiff's charter of a ship (the London ship). As the plaintiff was unable to obtain security for the claim, it arrested the defendant ship in New Zealand as a sister ship to the London ship. Jurisdiction in rem was claimed under ss 4(1)(h) and, in particular, 5(2)(b)(ii) of the Admiralty Act 1973, which referred to any other ship beneficially owned by the same person liable on an action in personam in respect of a ship over which the Court had jurisdiction in rem. Lloyd's Register of ships showed the government of the Russian Federation as the owner of the New Zealand ship. The Far-Eastern Region Hydrometeorological Research Institute of Vladivostok (the applicant), claiming as owner of the defendant ship, applied (a) to set aside the writ and release the ship from arrest on the ground it was not a sister ship within s 5(2)(b)(ii), or (b) for a stay under s 4 of the Arbitration (Foreign Agreements and Awards) Act 1982, which provided for a stay of legal proceedings also subject to a foreign arbitration.

Held: 1 An applicant to set aside a writ of arrest had the onus of proving the plaintiff had no arguable case on liability. The standard or arguable case was a good arguable case or strong prima facie case rather than a serious question to be tried since the Court had to balance the plaintiff's rights against those with an interest in the ship being free from arrest. The plaintiff had an arguable case as to the defendant ship since it was arguable that (a) it had an action in personam against ROSHYDROMET as part of the Government of the Russian Federation and being the owner or in possession or control of the London ship when the cause of action arose, and (b) the defendant ship was beneficially owned by the Government of the Russian Federation at the time of the present action (see p 747 line 8, p 748 line 9).

Schwarz & Co (Grain) Ltd v St Elefterio ex Arion (Owners) The St Elefterio [1957] P 179; [1957] 2 All ER 374, The Moschanthy [1971] 1 Lloyd's Rep 37, The Gulf Venture [1984] 2 Lloyd's Rep 445 and Reef Shipping Co Ltd v The ship Fua Kavenga [1987] 1 NZLR 550 followed.

The Aventicum [1978] 1 Lloyd's Rep 184 and The Maritime Trader [1981] 2 Lloyd's Rep 153 not followed.

2 Although the applicant was not a party to the arbitration, it was entitled to a stay of proceedings since s 4(1) of the 1982 Act permitted a party to these proceedings to apply. However, the application would be adjourned to consider making a stay subject to conditions under s 4(3) of the Act either that the arrest continue unless security for the claim was made or that security be made as the other parties had nullified the plaintiff's attempts to enforce the arbitration agreement. Further, the Court had a discretion to keep a defendant ship under arrest as security for an action in rem, which in this case, without security, would be exercised against release since a stay was unlikely to be final and there was doubt that AARI or ROSHYDROMET and no evidence that the Russian Federation would meet an award in the arbitration (see p 748 line 51, p 749 line 22).

The Rena K [1979] QB 377; [1979] 1 All ER 397 and The Tuyuti [1984] QB 838; [1984] 2 All ER 545 (CA) applied.

Application to set aside writ of arrest and release ship from arrest dismissed: application for stay of proceedings adjourned.

CASES-REF-TO:
Andria now renamed Vasso, The [1984] QB 477; [1984] 1 All ER 1126 (CA).
Cap Bon, The [1967] 1 Lloyd's Rep 543.
Golden Trader, The [1975] QB 348; [1974] 2 All ER 686.

INTRODUCTION:
Application This was an application for a stay of admiralty proceedings, to set aside a writ of arrest and for release of a ship from arrest or for a stay of proceedings.

COUNSEL:
AD Ford and BR Piper for the plaintiff; AD MacKenzie and AJ Horne for the Far-Eastern Region Hydrometeorological Research Institute, owner of the defendant ship (Vladivostok).

JUDGMENT-READ:
Cur adv vult

PANEL: Doogue J

JUDGMENTBY-1: DOOGUE J

JUDGMENT-1:
DOOGUE J: The plaintiff has issued proceedings against and obtained a writ of arrest against the defendant ship. The Far-Eastern Region Hydrometeorological Research Institute, Vladivostok (the applicant) applies for orders first that the proceedings be stayed, secondly the writ of arrest issued with respect to the defendant ship be set aside, and thirdly that a release be issued with

respect to that ship.

The application is brought upon the grounds that either the defendant ship is not a sister ship of the Akademik Shuleykin, to which the claim of the plaintiff relates, and is therefore not properly the subject-matter of an action in rem, or the proceedings relate to a claim which is the subject of arbitration in London and the proceedings should be stayed under s 4 of the Arbitration (Foreign Agreements and Awards) Act 1982 and the vessel released from arrest in consequence of that stay. The plaintiff disputes these grounds of application.

Background

The plaintiff is a Canadian company which by a time charter dated 2 May 1994 chartered the Akademik Shuleykin for the period 5 June 1994 to 1 May 1995 {745} from the Arctic and Antarctic Research Institute (AARI) and the Russian Federal Service for Hydrometeorology and Environmental Monitoring (ROSHYDROMET). The plaintiff chartered the Akademik Shuleykin to carry out tourist voyages in the northern hemisphere during 1994 and to Antarctica during 1994-95.

On 15 June 1994 AARI and ROSHYDROMET delivered a letter to the plaintiff cancelling the charter. The plaintiff says that this was an unlawful cancellation of the charter and that, as a result of that and the failure to perform, the plaintiff has suffered loss and damage in the sum of NZ$1,387,165.

Following the cancellation of the charter the plaintiff took steps to have the dispute between the parties referred to arbitration in London. If the plaintiff's evidence is correct, AARI denies the existence of a valid charter-party or arbitration agreement, and the plaintiff's solicitors have had no response from ROSHYDROMET. The plaintiff has unsuccessfully endeavoured to obtain security from those two organisations for the amount claimed in the arbitration proceedings.

On 11 November 1994 the plaintiff took out a writ of summons in rem in this Court against the Akademik Shuleykin and that vessel's alleged sister ships named therein, which included the defendant ship.

On 10 January 1995 the plaintiff says it arrested a further sister ship in Capetown, South Africa, but that that vessel was subsequently released by order of the Court. The plaintiff has sought to put information before the Court as to that proceeding. The applicant objects to that information being treated as evidence as it is hearsay. I ignore the material put before this Court as to what occurred in respect of the South African proceedings.

On 28 February 1995 the plaintiff obtained a warrant of arrest out of this Court against the defendant ship in its capacity as a sister ship of the Akademik Shuleykin. That warrant was executed the same day. At that time the vessel was under subcharter from a head charterer. By agreement and a subsequent order of this Court of 3 March 1995 the vessel was allowed to continue to Wellington, where it arrived on 7 March 1995, when the writ of arrest again became effective.

The applicant claims that it is the owner of the defendant vessel. It filed its application, which has led to the present hearing and decision, on 8 March 1995. An amended application was filed on 10 March 1995. The parties have subsequently filed their affidavits in support and opposition.

First issue: sister ship issue

The plaintiff's claim is brought in reliance on ss 4(1)(h) and 5(2) of the Admiralty Act 1973. In particular, the plaintiff relies on proviso (b)(ii) of s 5(2) of that Act, the so-called "sister-ship provision". Those statutory provisions provide:

4. Extent of admiralty jurisdiction -- (1) The Court shall have jurisdiction in respect of the following questions or claims:

...

(h) Any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship:

...

(2) In addition to the rights conferred by subsection (1) of this section, the admiralty jurisdiction of the High Court may be invoked by an action in rem in respect of all questions and claims specified in subsection (1) of section 4 of this Act (except claims specified in paragraph (n) of that subsection):

Provided that --

...

(b) In questions and claims specified in paragraphs (d) to (r) (except paragraph (n)) of subsection (1) of section 4 of this Act arising in {746} connection with a ship where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the jurisdiction of the High Court may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against --

(i) That ship if, at the time when the action is brought, it is beneficially owned as respects all the shares therein by, or is on charter by demise to, that person; or

(ii) Any other ship which, at the time when the action is brought, is beneficially owned or on charter by demise as aforesaid."

The jurisdiction provided by proviso (b)(ii) to s 5(2) extends the previous jurisdiction of the Court in certain cases to any ship in which the beneficial ownership is the same as the ship in respect of which the claim arises.

The first question is the threshold question of the onus and standard of proof on this application. In this proceeding the answer to that question effectively determines the first issue. There are two views as to the onus of proof:

1. It is for a defendant (or applicant) to make out that the plaintiff does not have an arguable case on liability.

Four decisions support this view. They are: The St Elefterio [1957] P 179 (Willmer J): The "Moschanthy" [1971] 1 Lloyd's Rep 37 (Brandon J) (where the

reasoning in The St Elefierio was adopted and applied); The "Gulf Venture" [1984] 2 Lloyd's Rep 445 (Sheen J) (where the language of Brandon J in The "Moschanthy" was adopted and applied); Reef Shipping Co Ltd v The ship "Fua Kavenga" [1987] 1 NZLR 550 (Smellie J) (where the cases just mentioned were relied upon by agreement of the parties). It appears that neither of the decisions taking a contrary view, including one of Sheen J himself, were cited to that Judge during the course of The "Gulf Venture" hearing or to Smellie J in Reef Shipping. In that case Smellie J was not obliged to make the decision which I have to make in these proceedings.

2. It is for the plaintiff to establish his case on the balance of probabilities.

Two decisions support this approach: The "Aventicum" [1978] 1 Lloyd's Rep 184 (Slynn J) (where it appears The St Elefterio and The "Moschanthy" decisions were not referred to the learned Judge); and The "Maritime Trader" [1981] 2 Lloyd's Rep 153 (Sheen J) (where in obiter dicta The "Aventicum" was followed but in the absence of reference to The St Elefterio and The "Moschanthy" decisions).

Mr MacKenzie for the applicant understandably submits I should follow the latter line of authority, accepting, however, that he must concede for present purposes that the claim in personam by the plaintiff can be made out. Equally understandably, Mr Ford for the plaintiff submits I should follow the former line of authorities, supported, as it is, in particular, by the judgment of Smellie J in the Reef Shipping case. It is certainly understandable the plaintiff should proceed on the basis that that case correctly states the law of New Zealand.

As already indicated, this issue is virtually determinative in this case because, however viewed, the evidence before the Court raises an arguable case by the plaintiff in respect of the defendant ship, but it is hardly sufficient to prove that case on a balance of probabilities.

I prefer the line of authorities which make it incumbent upon the defendant to show the plaintiff has no arguable case. As already noted, the proviso in question to s 5(2) of the Act enlarged the admiralty jurisdiction of the Court. A plaintiff's substantive rights can hardly expect to be determined on an application of the present sort. In brief, these are the justifications for the views underlying the former line of authorities. Slynn J in The "Aventicum" did not have the benefit of the {747} earlier authorities. His proposition to the contrary is without supporting reasoning or authority. Mr MacKenzie says a sister ship is in a different position from the original ship giving rise to the claim. The statute recognises no such difference. Mr Justice Sheen's comments in The "Maritime Trader" were obiter. He merely followed what had been said in The "Aventicum" without considering the more reasoned approach adopted in the other line of authority. He chose to take that more reasoned approach in his later decision in The "Gulf Venture".

I accordingly look at the issue as one of whether the applicant has established the plaintiff has no arguable case. None of the authorities refers to the appropriate standard of arguable case. I bear in mind that the plaintiff seeks to maintain the arrest of a vessel other than the one in respect of which its claim lies. For myself, in applying the test of whether there is an arguable case, I view the situation as more akin to that arising on applications for Mareva injunctions (the need for a good arguable case) or an Anton Piller

order (an extremely strong prima facie case) than the situation which arises on the standard interim or interlocutory injunction (a serious question to be tried). The Court has to balance the rights of the party bringing its claim in reliance upon the sister ship provision with the rights of the parties with an interest in the particular ship to have it free from arrest unless the plaintiff has got an arguable case.

The plaintiff in its proceedings has to prove:

1. The party which would be liable on its claim in its action in personam.

The evidence before the Court is that that is AARI and ROSHYDROMET. The plaintiff claims that this is effectively the Government of the Russian Federation. There is some evidence that ROSHYDROMET is an arm of the Government of the Russian Federation, whatever the position of AARI. Certainly upon the evidence before the Court, in particular the evidence of a Russian lawyer, Alexander Golubnichy, the plaintiff has established an arguable case, however viewed, that ROSHYDROMET is an arm of the Government of the Russian Federation and that it has a case against it in personam.

2. The Government of the Russian Federation was at the time when the cause of action arose the owner or in possession or control of the vessel in connection with which the plaintiff's claim arose, the Akademik Shuleykin.

Given that the charter was in part by ROSHYDROMET, the evidence of the same Russian lawyer that, if the vessel is owned by either AARI or ROSHYDROMET, the Government of the Russian Federation is the true and ultimate owner of the vessel, the plaintiff has again established that it has an arguable case, however viewed, in respect of this matter. There is also other evidence to which the plaintiff points in respect of this matter, which I do not find it necessary to traverse.

3. The defendant ship was at the time when the action was brought by the plaintiff on 11 November 1994 beneficially owned by the Government of the Russian Federation.

The vessel is in New Zealand by virtue of a charter between the applicant and others. It was shown in the Lloyd's Register as being owned by the Government of the Republic of Russia through ROSHYDROMET until the end of 1994. There is evidence from the same Russian lawyer that the mere fact that a ship's certificate has been issued in the name of the applicant is not conclusive of ownership and that this vessel, like the Akademik Shuleykin, comes within a definition of "objects of state property". It is said for the applicant that it has a separate legal existence and that beneficial ownership of the vessel rests in it and any interest the Government of the Russian Federation may have in the applicant cannot affect that. This is in reliance upon an affidavit from the applicant's own Russian lawyer, which {748} is perhaps more to be noted for what it does not say than for what it says. There is evidence from Mr Golubnichy that the Government of the Russian Federation has an interest as owner in the defendant ship. The substance of his evidence is such that in terms of New Zealand law that would be treated as a beneficial interest as owner. There is, however viewed, an arguable case the Government of the Russian Federation has a beneficial interest as owner in the defendant ship.

Thus the plaintiff has put before the Court evidence which establishes to my satisfaction that it has an arguable case to the standard already identified that the defendant ship is a sister ship of the ship in respect of which its claim arises and that that ship is either owned by or in the possession or control of the party against which its claim in personam arises. Certainly the applicant has not established that the plaintiff does not have an arguable case in accordance with the line of authority already cited.

Second issue -- stay of proceedings

For the purposes of this argument, but not otherwise, the applicant concedes the plaintiff can establish the party liable on the plaintiff's claim in personam is the Government of the Russian Federation and that both vessels in issue are beneficially owned by that government. This issue arises under s 4 of the Arbitration (Foreign Agreements and Awards) Act 1982. That section provides:

4. Power of Court to stay Court proceedings in respect of matters subject to an arbitration agreement -- (1) If any party to an arbitration agreement to which this section applies (or any person claiming through or under that person) commences any legal proceedings in any Court against any other party to that arbitration agreement (or any person claiming through or under that other party) in respect of any matter in dispute between the parties which the parties have agreed to refer to arbitration pursuant to that arbitration agreement, any party to those proceedings may at any time apply to the Court to stay those proceedings; and the Court shall, unless the arbitration agreement is null and void, inoperative, or incapable of being performed, make an order staying the proceedings.

(2) The Court may, in addition to any order made under subsection (1) of this section, make such other orders in relation to any property which is or may be the subject-matter of the dispute between the parties to the arbitration agreement as it thinks fit.

(3) Any order under subsection (1) or subsection (2) of this section may be made subject to such conditions as the Court thinks fit.

(4) This section applies to every arbitration agreement which provides, expressly or by implication, for arbitration in any country other than New Zealand.

(5) Section 5 of the Arbitration Act 1908 shall not apply to any arbitration agreement to which this section applies.

The applicant says that it is entitled as of right to a stay of the proceedings as, when the plaintiff seeks to enforce the arbitration agreement in its charter, it cannot be heard to argue that the agreement is null and void, inoperative or incapable of being performed. Thus the applicant says that on its face it can make out that the present position is within the terms of s 4(1) of the relevant Act.

The plaintiff says first that the application is misconceived, as the applicant is not a party to the arbitration proceeding and has no right to apply to this Court to stay these proceedings. However, s 4(1) refers to a party to these proceedings and not the arbitration proceeding. There is no authority

that the applicant must also be a party to the arbitration proceeding. The language in s 4(1) is very different {749} from that of s 5 of the Arbitration Act 1908, which specifically does not apply to any arbitration agreement to which s 4 of the 1982 Act in question applies by virtue of the provisions of s 4(5) of that latter Act. Thus the authorities cited on behalf of the plaintiff under s 5 of the Arbitration Act 1908 are of no relevance in the present circumstances.

The issue still arises whether the applicant is a party to these present proceedings. That point has not been argued before me, and I leave it open. Plainly the applicant claims to be a party to the present proceedings and has made an application in the course of those proceedings. Whether the applicant is such a party is not, however, determined by this judgment.

The plaintiff then says there is an onus on the applicant to establish the arbitration agreement is not null and void, inoperative or incapable of being performed in terms of s 4(1) of the 1982 relevant Act. Thus it is said that the applicant is not entitled to a stay. I find it difficult to accede to that argument. The plaintiff seeks to enforce the arbitration agreement and can hardly be heard to argue that it is for the applicant to establish these matters or that it cannot be so established.

There is, however, clear evidence before the Court that the plaintiff's attempts to enforce the arbitration agreement have been nullified by the failure of the other parties to respond to the plaintiff's actions to enforce it or to accept that it is applicable to them.

The applicant in the present case may therefore be entitled to a stay on the proceedings under the provisions of s 4(1) of the Arbitration (Foreign Agreements and Awards) Act 1982, but I would not grant such a stay simpliciter but would make it subject to conditions under s 4(3) of that Act. I have heard no argument as to conditions. Given the evidence before the Court, I would consider imposing conditions that either the arrest of the defendant ship continue unless security for the sum in issue in the arbitration is made or that security for that sum be made. I note that the applicant is not a party to the arbitration and the plaintiff has no remedies directly vis-a-vis the applicant.

Third issue: if the proceedings are stayed, must the arrest be set aside?

The United Kingdom law is clear, namely that there is jurisdiction to keep the defendant vessel under arrest as security for the action in rem: The "Cap Bon" [1967] 1 Lloyd's Rep 543 (Brandon J); The "Golden Trader" [1975] QB 348 (Brandon J); The "Rena K" [1979] QB 377 (Brandon J); The Andria now renamed Vasso [1984] QB 477 (CA); The Tuyuti [1984] QB 838 (CA).

There are different views expressed in those decisions as to whether a writ of arrest can be maintained for the purpose of obtaining security in an arbitration, but for present purposes, given the effect of all the decisions, that is an academic question rather than a real question.

The applicant argues that these authorities do not apply in New Zealand because of a suggested difference between the New Zealand and United Kingdom statutes. Section 1 of the Arbitration Act 1975 (UK) provides:

(1) If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

{750} (2) This section applies to any arbitration agreement which is not a domestic arbitration agreement; and neither section 4(1) of the Arbitration Act 1950 nor section 4 of the Arbitration Act (Northern Ireland) 1937 shall apply to an arbitration agreement to which this section applies.

(3) In the application of this section to Scotland, for the references to staying proceedings there shall be substituted references to sisting proceedings.

(4) In this section "domestic arbitration agreement" means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a State other than the United Kingdom and to which neither --

(a) an individual who is a national of, or habitually resident in, any State other than the United Kingdom; nor

(b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than the United Kingdom;

is a party at the time the proceedings are commenced.

I can see no basis for distinguishing the provisions of the New Zealand statute from those of the United Kingdom statute. I can see no basis for distinguishing the decisions already cited. If anything, the position in New Zealand in respect of the powers of the Court is stronger than that in the United Kingdom, given the provisions of s 4(3) of the Arbitration (Foreign Agreements and Awards) Act 1982 enabling the New Zealand Court to attach conditions to any stay, there being no such corresponding provision in the United Kingdom statute.

Fourth issue: should the arrest of the defendant ship continue?

I am satisfied, on the basis of the English authorities, and, in particular, the "Rena K" and Tuyuti decisions, that the issue is a discretionary one depending on the circumstances in each particular case.

In the present case any stay of the proceedings is unlikely to be final, given the inactivity of AARI and ROSHYDROMET in respect of the arbitration proceedings by the plaintiff. I am also satisfied that there may well be a judgment in the present proceedings to be satisfied. There must, at the very least, be doubt whether the parties to the arbitration agreement, AARI and ROSHYDROMET, are in a position to meet any judgment or would do so in the absence of security. On the present application the plaintiff has shown an openness in the material put before the Court by it which has not been matched

by that of the applicant.

The applicant has asked me not to draw any conclusion that the Government of the Russian Federation would not meet its financial obligations. I draw no such conclusion. The Government of the Russian Federation is not a party to these proceedings or to the arbitration proceedings. The applicant has emphasised it does not speak for that government. I emphasise I make no findings of any kind in respect of that government.

The plaintiff may claim that government is the beneficial owner of the ships in question, but that has not yet been determined. Nor has it been determined that that government is necessarily a party to the charter which gives rise to the plaintiff's claim. The parties to the arbitration agreement are AARI and ROSHYDROMET, and not the Government of the Russian Federation. There is nothing before me to show any likelihood that they will meet any award in the arbitration, or indeed participate in it. In these circumstances the likelihood of any stay of the present proceedings being final is slight.

I advert to what I said in relation to the conditions if a stay is imposed. I would exercise my discretion against releasing the defendant ship until proper security is given for the sum in dispute in the arbitration which may ultimately be the subject-matter of a judgment in rem in the present proceedings.

{751} Conclusions

The result is:

1. The writ of arrest issued by the plaintiff in respect of the defendant ship is not set aside and the release in respect of it is not ordered.

2. The application for a stay of the proceedings is adjourned to enable the parties to agree on conditions. If conditions can be agreed, an order can be made by consent. If the parties cannot agree, either party may apply for the matter to be reinstated before me.

Costs

The plaintiff is entitled to its costs. Given the complexity and urgency of the matter and the multinational nature of the proceeding, I fix such costs in the sum of $5000 together with disbursements to be fixed by the Registrar under Item 34 of the Second Schedule to the High Court Rules in the event of any disagreement as to disbursements. That order is against the applicant. The costs are to be paid within 14 days. Unless the costs are paid, the applicant is debarred from taking further steps in respect of the proceeding.

I was invited to make the costs costs in the proceedings. I have no knowledge of who is the true owner of the defendant ship. The applicant claims to have an interest in it. Whether that claim will ultimately be upheld only time will tell. I thus order as indicated.

DISPOSITION:

Application to set aside writ of arrest and release ship from arrest dismissed: application for stay of proceedings adjourned.

SOLICITORS:

Solicitors for the appellant: Bell Gully Buddle Weir (Wellington); Solicitors for the Far-Eastern Region Hydrometeorological Research Institute (Vladivostok): Rudd Watts & Stone (Wellington).

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

1996

AD NO. 241
ADMIRALTY ACTION IN REM

BETWEEN MARINE EXPEDITIONS INC

Plaintiff

A N D THE SHIP "AKADEMIK SHOKALSKIY"

Defendant

JUDGMENT OF DOOGUE J

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AD NO. 294
ADMIRALTY ACTION IN REM

BETWEEN MARINE EXPEDITIONS INC

Plaintiff

A N D THE SHIP "AKADEMIK SHOKALSKIY"

Defendant

Hearing: 20 March 1995

Counsel: A.D. Ford with B.R. Piper for plaintiff
A.D. MacKenzie with A.J. Horne for Far-Eastern Region Hydrometeorological Research Institute, Vladivostok

Judgment: 21 March 1995

JUDGMENT OF DOOGUE J

INTRODUCTION

The plaintiff has issued proceedings against and obtained a writ of arrest against the defendant ship. The Far-Eastern Region Hydrometeorological Research Institute, Vladivostok ("the applicant") applies for orders first that the proceedings be stayed, secondly the writ of arrest issued with respect to the defendant ship be set aside, and thirdly that a release be issued with respect to that ship.

The application is brought upon the grounds that either the defendant ship is not a sister ship of the "Akademik Shuleykin", to which the claim of the plaintiff relates, and is therefore not properly the subject-matter of an action in rem, or the proceedings relate to a claim which is the

subject of arbitration in London and the proceedings should be stayed under s. 4 of the Arbitration (Foreign Agreements and Awards) Act 1982 and the vessel released from arrest in consequence of that stay. The plaintiff disputes these grounds of application.

BACKGROUND

The plaintiff is a Canadian company which by a time charter dated 2 May 1994 chartered the "Academik Shuleykin" for the period 5 June 1994 to 1 May 1995 from the Arctic and Antarctic Research Institute ("AARI") and the Russian Federal Service for Hydrometeorology and Environmental Monitoring ("ROSHYDROMET"). The plaintiff chartered the "Akademik Shuleykin" to carry out tourist voyages in the northern hemisphere during 1994 and to Antarctica during 1994-1995.

On 15 June 1994 AARI and ROSHYDROMET delivered a letter to the plaintiff cancelling the charter. The plaintiff says that this was an unlawful cancellation of the charter and that, as a result of that and the failure to perform, the plaintiff has suffered loss and damage in the sum of $NZ1,387,165.

Following the cancellation of the charter the plaintiff took steps to have the dispute between the parties referred to arbitration in London. If the plaintiff's evidence is correct, AARI denies the existence of a valid charter-party or arbitration agreement, and the plaintiff's solicitors have had no response from ROSHYDROMET. The plaintiff has unsuccessfully endeavoured to obtain security from those two organisations for the amount claimed in the arbitration proceedings.

On 11 November 1994 the plaintiff took out a writ of summons in rem in this Court against the "Akademik Shuleykin" and that vessel's alleged sister ships named therein, which included the defendant ship.

On 10 January 1995 the plaintiff says it arrested a further sister ship in Capetown, South Africa, but that that vessel was subsequently released by order of the court. The plaintiff has sought to put information before the Court as to that proceeding. The applicant objects to that information being treated as evidence as it is hearsay. I ignore the material put before this Court as to what occurred in respect of the South African proceedings.

On 28 February 1995 the plaintiff obtained a warrant of arrest out of this Court against the defendant ship in its capacity as a sister ship of the "Akademik Shuleykin" That warrant was executed the same day. At that time the vessel was under subcharter from a head charterer. By agreement and a subsequent order of this Court of 3 March 1995 the vessel was allowed to continue to Wellington, where it arrived on 7 March 1995, when the writ of arrest again became effective.

The applicant claims that it is the owner of the defendant vessel. It filed its application, which has led to the present hearing and decision, on 8 March 1995. An amended application was filed on 10 March 1995. The parties have subsequently filed their affidavits in support and opposition.

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FIRST ISSUE: SISTER SHIP ISSUE

The plaintiff's claim is brought in reliance on ss 4(1)(h) and 5(2) of the Admiralty Act 1973. In particular, the plaintiff relies on proviso (b)(ii) of s. 5(2) of that Act, the so-called "sister ship provision". Those statutory provisions provide:

> "4(1) The Court shall have jurisdiction in respect of the following questions or claims:
>
> ....
>
> (h) Any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship:
>
> ...."
>
> "5(2) In addition to the rights conferred by subsection (1) of this section, the admiralty jurisdiction of the High Court may be invoked by an action in rem in respect of all questions and claims specified in subsection (1) of section 4 of this Act (except claims specified in paragraph (n) of that subsection):
>
> Provided that -
>
> (a) ...
> (b) In questions and claims specified in paragraphs (d) to (r) (except paragraph (n)) of subsection (1) of section 4 of this Act arising in connection with a ship where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the jurisdiction of the High Court may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against -
>
> (i) That ship if, at the time when the action is brought, it is beneficially owned as respects all the shares therein by, or is on charter by demise to, that person; or

> (ii) Any other ship which, at the time when the action is brought, is beneficially owned or on charter by demise as aforesaid."

The jurisdiction provided by proviso (b)(ii) to s. 5(2) extends the previous jurisdiction of the Court in certain cases to any ship in which the beneficial ownership is the same as the ship in respect of which the claim arises.

The first question is the threshold question of the onus and standard of proof on this application. In this proceeding the answer to that question effectively determines the first issue. There are two views as to the onus of proof:

1. It is for a defendant (or applicant) to make out that the plaintiff does not have an arguable case on liability.

Four decisions support this view. They are: The St Elefterio [1957] P. 179 (Willmer J); The "Moschanthy" [1971] 1 Lloyd's Rep 37 (Brandon J)(where the reasoning in The St Elefterio was adopted and applied); The "Gulf Venture" [1984] 2 Lloyd's Rep 445 (Sheen J)(where the language of Brandon J in The "Moschanthy" was adopted and applied); Reef Shipping Co Ltd v The Ship "Fua Kavenga" [1987] 1 NZLR 550 (Smellie J)(where the cases just mentioned were relied upon by agreement of the parties). It appears that neither of the decisions taking a contrary view, including one of Sheen J himself, were cited to that Judge during the course of The "Gulf Venture" hearing or to Smellie J in Reef Shipping. In that case

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Smellie J was not obliged to make the decision which I have to make in these proceedings.

2. It is for the plaintiff to establish his case on the balance of probabilities.

Two decisions support this approach: The "Aventicum" [1978] 1 Lloyd's Rep 184 (Slynn J)(where it appears The St Elefterio and The "Moschanthy" decisions were not referred to the learned Judge); and The "Maritime Trader" [1981] 2 Lloyd's Rep 153 (Sheen J)(where in obiter dicta The "Aventicum" was followed but in the absence of reference to The St Elefterio and The "Moschanthy" decisions).

Mr MacKenzie for the applicant understandably submits I should follow the latter line of authority, accepting, however, that he must concede for present purposes that the claim in personam by the plaintiff can be made out. Equally understandably, Mr Ford for the plaintiff submits I should follow the former line of authorities, supported, as it is, in particular, by the judgment of Smellie J in the Reef Shipping case. It is certainly understandable the plaintiff should proceed on the basis that that case correctly states the law of New Zealand.

As already indicated, this issue is virtually determinative in this case because, however viewed, the evidence before the Court raises an arguable case by the plaintiff in respect of the defendant ship, but it is hardly sufficient to prove that case on a balance of probabilities.

I prefer the line of authorities which make it incumbent upon the defendant to show the plaintiff has no arguable case. As already noted, the proviso in question to s. 5(2) of the Act enlarged the Admiralty jurisdiction of the Court. A plaintiff's substantive rights can hardly expect to be determined on an application of the present sort. In brief, these are the justifications for the views underlying the former line of authorities. Slynn J in The "Aventicum" did not have the benefit of the earlier authorities. His proposition to the contrary is without supporting reasoning or authority. Mr MacKenzie says a sister ship is in a different position from the original ship giving rise to the claim. The statute recognises no such difference. Mr Justice Sheen's comments in The "Maritime Trader" were obiter. He merely followed what had been said in The "Aventicum" without considering the more reasoned approach adopted in the other line of authority. He chose to take that more reasoned approach in his later decision in The "Gulf Venture".

I accordingly look at the issue as one of whether the applicant has established the plaintiff has no arguable case. None of the authorities refers to the appropriate standard of arguable case. I bear in mind that the plaintiff seeks to maintain the arrest of a vessel other than the one in respect of which its claim lies. For myself, in applying the test of whether there is an arguable case, I view the situation as more akin to that arising on applications for Mareva injunctions (the need for a good arguable case) or an Anton Piller order (an extremely strong

prima facie case) than the situation which arises on the standard interim or interlocutory injunction (a serious question to be tried). The Court has to balance the rights of the party bringing its claim in reliance upon the sister ship provision with the rights of the parties with an interest in the particular ship to have it free from arrest unless the plaintiff has got an arguable case.

The plaintiff in its proceedings has to prove:

1. The party which would be liable on its claim in its action in personam.

The evidence before the Court is that that is AARI and ROSHYDROMET. The plaintiff claims that this is effectively the Government of the Russian Federation. There is some evidence that ROSHYDROMET is an arm of the Government of the Russian Federation, whatever the position of AARI. Certainly upon the evidence before the Court, in particular the evidence of a Russian lawyer, Alexander Golubnichy, the plaintiff has established an arguable case, however viewed, that ROSHYDROMET is an arm of the Government of the Russian Federation and that it has a case against it in personam.

2. The Government of the Russian Federation was at the time when the cause of action arose the owner or in possession or control of the vessel in connection with which the plaintiff's claim arose, the "Akademik Shuleykin".

Given that the charter was in part by ROSHYDROMET, the evidence of the same Russian lawyer that, if the

vessel is owned by either AARI or ROSHYDROMET, the Government of the Russian Federation is the true and ultimate owner of the vessel, the plaintiff has again established that it has an arguable case, however viewed, in respect of this matter. There is also other evidence to which the plaintiff points in respect of this matter, which I do not find it necessary to traverse.

3. The defendant ship was at the time when the action was brought by the plaintiff on 11 November 1994 beneficially owned by the Government of the Russian Federation.

The vessel is in New Zealand by virtue of a charter between the applicant and others. It was shown in the Lloyd's Register as being owned by the Government of the Republic of Russia through ROSHYDROMET until the end of 1994. There is evidence from the same Russian lawyer that the mere fact that a ship's certificate has been issued in the name of the applicant is not conclusive of ownership and that this vessel, like the "Akademik Shuleykin", comes within a definition of "objects of state property". It is said for the applicant that it has a separate legal existance and that beneficial ownership of the vessel rests in it and any interest the Government of the Russian Federation may have in the applicant cannot affect that. This is in reliance upon an affidavit from the applicant's own Russian lawyer, which is perhaps more to be noted for what it does not say than

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for what it says. There is evidence from Mr Golubnichy that the Government of the Russian Federation has an interest as owner in the defendant ship. The substance of his evidence is such that in terms of New Zealand law that would be treated as a beneficial interest as owner. There is, however viewed, an arguable case the Government of the Russian Federation has a beneficial interest as owner in the defendant ship.

Thus the plaintiff has put before the Court evidence which establishes to my satisfaction that it has an arguable case to the standard already identified that the defendant ship is a sister ship of the ship in respect of which its claim arises and that that ship is either owned by or in the possession or control of the party against which its claim in personam arises. Certainly the applicant has not established that the plaintiff does not have an arguable case in accordance with the line of authority already cited.

SECOND ISSUE - STAY OF PROCEEDINGS

For the purposes of this argument, but not otherwise, the applicant concedes the plaintiff can establish the party liable on the plaintiff's claim in personam is the Government of the Russian Federation and that both vessels in issue are beneficially owned by that Government. This issue arises under s. 4 of the Arbitration (Foreign Agreements and Awards) Act 1982. That section provides:

"4(1) If any party to an arbitration agreement to which this section applies (or any person claiming through or under that person) commences any legal proceedings in any Court against any other party to that arbitration agreement (or any person claiming through or under that other party) in respect of any matter in dispute between the parties which the parties have agreed to refer to arbitration pursuant to that arbitration agreement, any party to those proceedings may at any time apply to the Court to stay those proceedings; and the Court shall, unless the arbitration agreement is null and void, inoperative, or incapable of being performed, make an order staying the proceedings.

(2) The Court may, in addition to any order made under subsection (1) of this section, make such other orders in relation to any property which is or may be the subject-matter of the dispute between the parties to the arbitration agreement as it thinks fit.

(3) Any order under subsection (1) or subsection (2) of this section may be made subject to such conditions as the Court thinks fit.

(4) This section applies to every arbitration agreement which provides, expressly or by implication, for arbitration in any country other than New Zealand.

(5) Section 5 of the Arbitration Act 1908 shall not apply to any arbitration agreement to which this section applies."

The applicant says that it is entitled as of right to a stay of the proceedings as, when the plaintiff seeks to enforce the arbitration agreement in its charter, it cannot be heard to argue that the agreement is null and void, inoperative or incapable of being performed. Thus the applicant says that on its face it can make out that the present position is within the terms of s. 4(1) of the relevant Act.

The plaintiff says first that the application is misconceived, as the applicant is not a party to the arbitration proceeding and has no right to apply to this Court to stay these proceedings. However, s. 4(1) refers to

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a party to these proceedings and not the arbitration proceeding. There is no authority that the applicant must also be a party to the arbitration proceeding. The language in s. 4(1) is very different from that of s. 5 of the Arbitration Act 1908, which specifically does not apply to any arbitration agreement to which s. 4 of the 1982 Act in question applies by virtue of the provisions of s. 4(5) of that latter Act. Thus the authorities cited on behalf of the plaintiff under s. 5 of the Arbitration Act 1908 are of no relevance in the present circumstances.

The issue still arises whether the applicant is a party to these present proceedings. That point has not been argued before me, and I leave it open. Plainly the applicant claims to be a party to the present proceedings and has made an application in the course of those proceedings. Whether the applicant is such a party is not, however, determined by this judgment.

The plaintiff then says there is an onus on the applicant to establish the arbitration agreement is not null and void, inoperative or incapable of being performed in terms of s. 4(1) of the 1982 relevant Act. Thus it is said that the applicant is not entitled to a stay. I find it difficult to accede to that argument. The plaintiff seeks to enforce the arbitration agreement and can hardly be heard to argue that it is for the applicant to establish these matters or that it cannot be so established.

There is, however, clear evidence before the Court that the plaintiff's attempts to enforce the arbitration agreement have been nullified by the failure of the other

parties to respond to the plaintiff's actions to enforce it or to accept that it is applicable to them.

The applicant in the present case may therefore be entitled to a stay on the proceedings under the provisions of s. 4(1) of the Arbitration (Foreign Agreements and Awards) Act 1982, but I would not grant such a stay simpliciter but would make it subject to conditions under s. 4(3) of that Act. I have heard no argument as to conditions. Given the evidence before the Court, I would consider imposing conditions that either the arrest of the defendant ship continue unless security for the sum in issue in the arbitration is made or that security for that sum be made. I note that the applicant is not a party to the arbitration and the plaintiff has no remedies directly vis-à-vis the applicant.

THIRD ISSUE: IF THE PROCEEDINGS ARE STAYED, MUST THE ARREST BE SET ASIDE?

The United Kingdom law is clear, namely that there is jurisdiction to keep the defendant vessel under arrest as security for the action in rem: The "Cap Bon" [1967] 1 Lloyd's Rep 543 (Brandon J); The "Golden Trader" [1974] 1 Lloyd's Rep 378, [1975] QB 348 (Brandon J); The "Rena K" [1978] 1 Lloyd's Rep 454, [1979] QB 377 (Brandon J); The "Vasso" (formerly "Andria") [1984] 1 Lloyd's Rep 235, [1984] QB 477 (Court of Appeal); The Tuvuti [1984] 1 QB 838 (Court of Appeal).

There are different views expressed in those decisions as to whether a writ of arrest can be maintained for the purpose of obtaining security in an arbitration, but for

present purposes, given the effect of all the decisions, that is an academic question rather than a real question.

The applicant argues that these authorities do not apply in New Zealand because of a suggested difference between the New Zealand and United Kingdom statutes. Section 1 of the Arbitration Act 1975 (UK) provides:

> "1(1) If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.
>
> (2) This section applies to any arbitration agreement which is not a domestic arbitration agreement; and neither section 4(1) of the Arbitration Act 1950 nor section 4 of the Arbitration Act (Northern Ireland) 1937 shall apply to an arbitration agreement to which this section applies.
>
> (3) In the application of this section to Scotland, for the references to staying proceedings there shall be substituted references to sisting proceedings.
>
> (4) In this section 'domestic arbitration agreement' means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a State other than the United Kingdom and to which neither -
>
> (a) an individual who is a national of, or habitually resident in, any State other than the United Kingdom; nor
>
> (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than the United Kingdom;
>
> is a party at the time the proceedings are commenced."

I can see no basis for distinguishing the provisions of the New Zealand statute from those of the United Kingdom statute. I can see no basis for distinguishing the decisions already cited. If anything, the position in New Zealand in respect of the powers of the Court is stronger than that in the United Kingdom, given the provisions of s. 4(3) of the Arbitration (Foreign Agreements and Awards) Act 1982 enabling the New Zealand Court to attach conditions to any stay, there being no such corresponding provision in the United Kingdom statute.

FOURTH ISSUE: SHOULD THE ARREST OF THE DEFENDANT SHIP CONTINUE?

I am satisfied, on the basis of the English authorities, and, in particular, the "Rena K" and Tuvuti decisions, that the issue is a discretionary one depending on the circumstances in each particular case.

In the present case any stay of the proceedings is unlikely to be final, given the inactivity of AARI and ROSHYDROMET in respect of the arbitration proceedings by the plaintiff. I am also satisfied that there may well be a judgment in the present proceedings to be satisfied. There must, at the very least, be doubt whether the parties to the arbitration agreement, AARI and ROSHYDROMET, are in a position to meet any judgment or would do so in the absence of security. On the present application the plaintiff has

shown an openness in the material put before the Court by it which has not been matched by that of the applicant.

The applicant has asked me not to draw any conclusion that the Government of the Russian Federation would not meet its financial obligations. I draw no such conclusion. The Government of the Russian Federation is not a party to these proceedings or to the arbitration proceedings. The applicant has emphasised it does not speak for that Government. I emphasise I make no findings of any kind in respect of that Government.

The plaintiff may claim that Government is the beneficial owner of the ships in question, but that has not yet been determined. Nor has it been determined that that Government is necessarily a party to the charter which gives rise to the plaintiff's claim. The parties to the arbitration agreement are AARI and ROSHYDROMET, and not the Government of the Russian Federation. There is nothing before me to show any likelihood that they will meet any award in the arbitration, or indeed participate in it. In these circumstances the likelihood of any stay of the present proceedings being final is slight.

I advert to what I said in relation to the conditions if a stay is imposed. I would exercise my discretion against releasing the defendant ship until proper security is given for the sum in dispute in the arbitration which may ultimately be the subject-matter of a judgment in rem in the present proceedings.

CONCLUSIONS

The result is:

1. The writ of arrest issued by the plaintiff in respect of the defendant ship is not set aside and the release in respect of it is not ordered.
2. The application for a stay of the proceedings is adjourned to enable the parties to agree on conditions. If conditions can be agreed, an order can be made by consent. If the parties cannot agree, either party may apply for the matter to be reinstated before me.

COSTS

The plaintiff is entitled to its costs. Given the complexity and urgency of the matter and the multi-national nature of the proceeding, I fix such costs in the sum of $5,000 together with disbursements to be fixed by the Registrar under Item 34 of the Second Schedule to the High Court Rules in the event of any disagreement as to disbursements. That order is against the applicant. The costs are to be paid within 14 days. Unless the costs are paid, the applicant is debarred from taking further steps in respect of the proceeding.

I was invited to make the costs costs in the proceedings. I have no knowledge of who is the true owner of the defendant ship. The applicant claims to have an interest in it. Whether that claim will ultimately be upheld only time will tell. I thus order as indicated.

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