

SOUTH AFRICA / JUDGMENT

Nadella Corporation v Mv Falcon Traveller and Another (A74/2015) [2015]

ZAKZDHC 90 (23 December 2015)

[2015] ZAKZDHC 90

COURT

Kwazulu-Natal High Court, Durban

CASE / FILE NUMBER

A74/2015

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL – DIVISION, DURBAN

(Exercising its admiralty jurisdiction)

Case No: A74/2015

DATE: 23 DECEMBER 2015

Name of ship: mv 'Falcon Traveller'

In the matter between:

Nadella Corporation.....Applicant

And

Mv 'Falcon Traveller'.....First Respondent

Newbrook Shipping Corporation.....Second Respondent

Judgment

- [1] On the 16th September 2015, and in chambers, I granted an ex parte order for the arrest of the mv 'Falcon Traveller'. The arrest was for the purpose of providing security for claims which the applicant, Nadella Corporation ('Nadella'), intends to advance in arbitration proceedings in Singapore against Falcon Shipping Limited ('Falcon') for US\$5 247 358,56 plus interest and costs.
- [2] The arrest was granted pursuant to the provisions of s 5(3)(a) of the Admiralty Jurisdiction Regulation Act, 1983 ('the Act') which provides :

‘A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action in personam against the owner of the property concerned or an action in rem against such property or which would be so enforceable but for any such arbitration or proceedings.’

[3] The history of the dispute may be summarised as follows :

(a) On the 1st November 2013 Falcon sold the mv ‘Falcon Carrier’ to Nadella for a purchase price of US\$ 5 601 114,24;

(b) Clause 9 of the sale agreement provided :

‘The Sellers warrant that the Vessel [the Falcon Carrier], at the time of delivery, is free from all charters, encumbrances, mortgages and maritime liens, or any other debts whatsoever. The Sellers hereby undertake to indemnify the Buyers against all consequences of claims made against the Vessel which have been incurred prior to the time of delivery.’

(c) Clause 16 of the sale agreement provided for the resolution of disputes by way of arbitration in Singapore.

(d) On the 5th November 2013 the agents of Nadella received a notice from solicitors acting on behalf of Samchira CC (‘Samchira’),

the erstwhile charterer of the mv ‘Falcon Carrier’.

(e) In the notice Samchira recorded charter claims which it had against Falcon arising out of a previous charter of the mv ‘Falcon

Carrier’. Nadella was then placed on notice to satisfy the claims in the sum of US\$ 420 515,49, including

compound interest and costs of £68 500.

(f) As a result of this threat, on the 11th November 2013 Nadella concluded an addendum to the sale agreement, which was signed by Mr Nico Poons, a director of Falcon. The amendment was in the form of a certificate from Falcon certifying that on the 11th November 2013 the mv ‘Falcon Carrier’ was free of all encumbrances, maritime liens and other debts and liabilities of any description whatsoever, and further indemnified Nadella against the consequences of any claims which had been incurred prior to the delivery of the ship.

(g) The mv ‘Falcon Carrier’ was then delivered to Nadella on the 11th November 2013.

(h) On the 17th December 2013 Nadella sold the mv ‘Falcon Carrier’ to PHP Ship Broking & Recycling Industries Ltd (‘PHP’), and the ship was sold free from liens and encumbrances.

- (i) The mv 'Falcon Carrier' then sailed for Chittagong where she arrived on the 28th December 2013 to await delivery to PHP.
- (j) On the 31st December 2013 Samchira instituted arrest proceedings in the Supreme Court of Bangladesh for the arrest of the mv 'Falcon Carrier' in an action against the ship, Falcon, her master and others for the recovery of the equivalent of US\$ 368 563,56.
- (k) Nadella brought an urgent application in the Supreme Court of Bangladesh on the 31st December 2013 to set aside the arrest of the mv 'Falcon Carrier'. Nadella also urgently requested the assistance of Falcon by providing documentation and information regarding the claim made by Samchira.
- (l) Despite various attempts by Nadella to avoid the arrest of the mv 'Falcon Carrier', it was eventually arrested on the 3rd March 2014. Nadella could then not comply with its obligations in terms of the PHP agreement, and Nadella cancelled the agreement with PHP, which was terminated without liability.
- (m) On the 11th March 2014 PHP commenced proceedings in the Bangladesh High Court against the mv 'Falcon Carrier' and her owners seeking damages and specific performance against Nadella.
- (n) As the actions of PHP were in direct breach of an arbitration clause in the PHP agreement, on the 12th September 2014 Nadella obtained an order from the English High Court restraining PHP from continuing with its action in the Bangladesh High Court, and directing PHP forthwith to release the mv 'Falcon Carrier' from arrest. The dispute between Nadella and PHP was subsequently settled.
- (o) Nadella unsuccessfully sought to set aside the arrest of the mv 'Falcon Carrier' by Samchira, and on the 18th November 2014 was obliged to tender security for Samchira's claim to procure the release of the ship from arrest. In

addition an order had to be obtained from the Appellate Division of the Supreme Court of Bangladesh on the 31st May 2015 directing that the ship be released. That was necessary because Samchira had alleged that it had a maritime claim without notifying the court that ownership of the ship had changed.

- (p) The mv 'Falcon Carrier' is in the process of being scrapped.
- (q) Nadella sought the arrest of the mv 'Falcon Traveller' in this Court on the basis that it was an associated ship of the mv 'Falcon Carrier' in terms of the provisions of s 3(6) and
- (7) of the Act. Nadella claims that it has suffered damages as a result of the breach by Falcon of the warranty provision in Clause 9 of the sale agreement. Those damages are in the sum of US\$ 5 247 358,56, and are :
- (i) Loss on the sale of the mv 'Falcon Carrier' – US\$ 1 808 202,50

(ii) Claims of PHP paid by Nadella – US\$

209 007,90

(iii) A guarantee provided by Nadella to Samchira US\$

368 564,00

(iv) Interest on the capital sums above at eight per cent per annum – US\$

950 286,53

(v) Legal expenses

US\$ 158 181,79

(vi) All expenses incurred with respect

to the ship – US\$ 1 753 115,84

Total damages to be claimed in the arbitration : US\$ 5 247 358,56

[4] In addition, Nadella sought security for interest of US\$ 950 286,53 (to date, calculated at five per cent per annum), and costs in the sum of US\$ 450 000, totalling US\$ 6 647 645,09.

[5] The second respondent, Newbrook Shipping Corporation ('Newbrook') is a corporation registered in the Netherlands, and is the registered owner of the mv 'Falcon Traveller'. Newbrook opposes the arrest and affidavits to set aside the arrest order granted by me on the 16th September 2015, are currently being finalised.

[6] In the meantime, and on the 16th October 2015 Newbrook delivered an application seeking security for a counter-claim in terms of s 5(2) of the Act. It also seeks security for its costs. The security for its counter-claim is stated in the application to be in the sum of US\$ 1 247 573, and security for costs is sought in the sum of R900 000. The application for security for its counter-claim is brought in terms of the provisions of s 5(4) of the Act which provides :

'Any person who makes an excessive claim or requires excessive security or without reasonable and probable cause obtains the arrest of property or an order of court, shall be liable to any person suffering loss or damage as a result thereof for that loss and damage.'

In addition, s 5(2) of the Act provides :

'A court may in the exercise of its admiralty jurisdiction –

...

(b) order any person to give security for costs or for any claim.'

[7] Mr Harpur SC who appeared for Newbrook submitted that a constitutionally compliant interpretation of the Act, as applied to the present facts,

offends the notion of equality if Newbrook is not to be afforded counter-security. He points out that the counter-security

would, after all, be a fraction of the security Newbrook is obliged to provide to Nadella to secure the release of the mv 'Falcon

Traveller'. Mr Harpur submits that Nadella's arrest was without any notice to the respondents in circumstances where the arrest of a ship remains a serious matter, as referred to by Didcott J in *Katagum Wholesale Commodities Co Ltd v The mv Paz* 1984 (3) SA 261 (N) at 268 H – I.

- [8] Mr Harpur submitted that the reliance by Nadella on the provisions of Clause 9 is misplaced. This is because upon a proper interpretation of Clause 9 it comprises two parts, firstly a warranty, and secondly an indemnity. He submitted that, *ex facie* the arrest application, Nadella relied upon the warranty contained in the first part of Clause 9. That much is stated in paragraph 10 of the founding affidavit in the arrest application.
- [9] The provisions of Clause 9 of the sale agreement have been the subject of judicial comment. I was referred to *Athens Cape Naviera SA v Deutsche Dampfschiffahrtsgesellschaft "Hansa" Aktiengesellschaft* and another [1985] 1 Lloyd's Rep 528 (CA), referred to as 'the Barenbels'. The appellants had sold the mv 'Barenbels' and the buyers continued to trade using the ship. She was arrested in Qatar by a local agent who had previously acted for the sellers, and who were owed a considerable sum of money by the sellers. The sale agreement, which had been on the Norwegian Sale Form, contained Clause 9 which was in almost identical terms to Clause 9 of the sale agreement between the parties in this matter. An arbitration had held that the seller was under no obligation to the buyer for the debts of the agent. The arbitration panel rejected the buyer's claim for damages for breach of the guarantee (the warranty in this case) contained in the first sentence of Clause 9. The arbitration panel had held that the buyers could not bring their case within the second sentence of Clause 9 because they could not show that the claim was one against the ship itself, because the claim was against the sellers.
- [10] The buyers appealed to Sheen J in the Queen's Bench Commercial Court, who held that the owners of the ship were the buyers, and as they were not indebted to the agents, a claim in *personam* against them must fail. In Qatar, however, the agents were entitled to proceed against any ship which was owned by the debtor at the time when the debt arose. In those circumstances the sellers were in breach of Clause 9 and liable to indemnify the buyers against all consequences of the claims made against the ship.
- [11] The sellers then appealed to the court of appeal, which held that they were concerned only with the construction of Clause
9. The court of appeal held that there were two different concepts contained in Clause 9. The first was concerned with a guarantee (or warranty) relating to the vessel at the time of delivery. The second sentence contains an indemnity in respect of claims made against the ship, and refers to claims made after the delivery of the ship, even though they were

incurred prior to the delivery thereof. As the debts owed to the agent at Qatar were clearly neither an encumbrance nor a maritime lien, the court had to consider whether it fell within the ambit of 'any other debts whatsoever'. An interpretation that that phrase intended to refer to debts incurred by the seller in respect of the ship which is the subject matter of the agreement, was dismissed by the court of appeal because it could lead to the extravagant result that a seller who owned a fleet of ships, and who sold one of them in terms of Clause 9, would be in breach of his obligations under the first sentence of the clause if any debts were owed to any sister ship. The court held that the words 'free from ... any other debts whatsoever' should be read as relating to any other debts which, at the time of delivery, have given rise to actual existing rights affecting the property in, or the use of, the ship. They do not include debts which were capable of rendering the ship liable to be arrested in the future. That, the court held, is legislated for in the second sentence of the clause.

[12] The Court of Appeal then considered whether the claim of the Qatar agent was wide enough to be included in the second sentence of Clause 9 – the indemnity. The Court of Appeal was satisfied that the claim of the Qatar agent was indeed a claim against the ship. The whole purpose of the proceedings in Qatar was to force the buyers to provide security for the agent's claim against the sellers. If security was not provided, the agents could seek to have the ship sold in Qatar. The Court of Appeal concluded that even though the sellers committed no breach of the guarantee in the first sentence of the clause, they were obliged to indemnify the buyers under the second sentence.

[13] Clause 9 of the Norwegian Sale Form again became the focus of the attention of the court of appeal in *Rank Enterprises Ltd and Others v Gerard* [2000] 1 Lloyd's Rep 403 (CA). Here the court of appeal held that the second sentence of Clause 9 addressed claims made, which stemmed from pre-delivery events, whether the liability asserted by those claims might prove to exist or not. The buyers would be entitled to be indemnified against all consequences of those claims, and under the guarantee, to recover any loss, expense or damage, sustained, arising out of, or in connection with the claims. The demand or assertion of a claim as referred to in the second sentence of Clause 9 had to be a claim or assertion made against the ship, but did not mean that the ship actually had to have been arrested.

[14] For any such claim there must be a demand which carried with it a 'real and present threat of seizure of the vessel'.

The ordinary consequences for the buyers are that they would have to respond to a claim or demand arising from pre-delivery events, and involving a real and present threat of seizure of the ship, as would have to be done by way of procedural or formal steps. If, in responding, the buyer sustained adverse consequences there was no reason in logic why he should not be indemnified for those under Clause 9.

[15] Mr Harpur submitted that it was not open to Nadella to sue on the indemnity, and at the same time to aver that it was under no obligation to pay the claim of Samchira. Any such claim would be premature. What Nadella had to do was to pay Samchira, and then claim an indemnity from Falcon. No claim under the indemnity has yet fallen due, because Nadella has not paid the claim, and it can only sue once it has done so. In those circumstances there was no reasonable and probable cause for the arrest of the mv 'Falcon Traveller'. Mr Harpur submitted that in the circumstances Newbrook has a prima facie case for damages for wrongful arrest based upon a lack of reasonable and probable cause.

[16] Mr Harpur submitted that the claim based on the association between the mv 'Falcon Carrier' and the mv 'Falcon Traveller'

was devoid of any direct evidence and relied solely on conjecture and speculation. He submitted that Nadella relied upon hearsay information contained in trade journals and the information relied upon was equivocal. He submitted that the principal reliance of Nadella was on the existence of cross-mortgages between the two ships, a fact which was readily admitted by Newbrook.

Newbrook's explanation for the cross-mortgages has nothing to do with common ownership or control, but for commercial reasons, and the recognition of a previously good relationship which had existed between the owners of those two ships, prior to their relationship

breaking down. They had in fact been a father and son team. Mr Harpur submitted that in order to establish reasonable and probable cause, Nadella was obliged to have put up more information which would have established association.

[17] Mr Harpur submitted that the assumptions made by Nadella are tantamount to allegations of a presumption of fraud on the part of Newbrook, and that had the representative of Newbrook bothered to make preliminary enquiries from Newbrook, the true position could have been ascertained without the need for an arrest. The position which would have been disclosed by Newbrook would have satisfied Nadella that the ships were not in fact associated. In this regard Mr Harpur referred to the constitutional presumption of innocence and the right of parties to civil proceedings to have a fair public hearing.

This, he submitted, has been denied by the ex parte application and the arrest order which I granted on the 16th September 2015.

[18] Mr Harpur submitted that in any event Newbrook is able to establish that Nadella had made an excessive claim or required excessive security at the time that the order was taken. This is because an amount of US\$950 286,53 has been claimed as the 'cost of capital' and as interest on the capital sum owed, awaiting the outcome of the arbitration.

[19] In addition, Nadella had claimed the sum of US\$ 577 571,90 in respect of its settlement with PHP. This amount had not in fact been paid to PHP but a guarantee had merely been provided. That settlement amount did not arise as a consequence of the claim by Samchira, but rather out of negotiations between PHP and Nadella in circumstances where, on

Nadella's own version, it was entitled to cancel the PHP agreement without liability. The amount referred to by Mr Harpur appears to be both the sum of US\$ 209 007,90 paid to PHP, and the guarantee of US\$ 368 564, provided to Samchira.

- [20] With regard to the amount claimed of US\$ 1 808 202,50 for the loss realised on the sale to PHP, this was an election made by Nadella not to accept specific performance, and had nothing to do with the arrest of the mv 'Falcon Carrier'.
- [21] Mr Harpur also submitted that the claim for US\$ 1 753 115, 84, allegedly expenses whilst the ship was under arrest, were in fact

expenses incurred because Nadella had failed promptly to provide a guarantee of only US\$ 368 564. He submitted that it would have been far less financially onerous had Nadella merely provided a guarantee than to incur and pay an amount in excess of US\$ 1.7M for ongoing expenses.

- [22] Mr Harpur also submitted that the claims of Nadella for legal expenses in the sum of US\$ 158 181,79 far exceed the rand amount claimed by Newbrook as counter-security for costs. Mr Harpur submitted that Newbrook has demonstrated a prima facie basis for contending that those legal expenses claimed were excessive and that counter-security should be awarded in favour of Newbrook.
- [23] Mr Mullins SC, who appeared for Nadella, submitted that it is incumbent upon an applicant for counter-security in terms of s 5(2) of the Act for an alleged claim in terms of sub-s 5(4) to satisfy the court that :
- (a) it has a prima facie case in respect of its alleged s 5(4) claim sought to be secured; and
 - (b) on a balance of probabilities, that it has a 'genuine and reasonable need' for security.
- [24] Mr Mullins submitted that although those requirements must be met for an order in terms of sub-s 5(2), a court retains a discretion to decline an order for counter-security. Demonstrating the necessary requirements required that Newbrook show that there was evidence which, if accepted, would establish that Nadella did not have sufficient information to lead a reasonable person to conclude that it had met the requirements for a security arrest of the mv 'Falcon Traveller'. Newbrook therefore had to establish that Nadella had no prima facie case in respect of its claim against Falcon, that its claim could not be enforced against the mv 'Falcon Traveller' as an associated ship, and that it had a genuine and reasonable need for security.
- [25] As the basis for Nadella's claim, Mr Mullins pointed out that Samchira had, prior to the delivery of the ship to Nadella, advanced claims in arbitration, and asserted that the claims would be registered against the ship, in respect of arrest proceedings which had been instituted. This is why the addendum to the sale agreement had been completed and a certificate issued by Falcon. Evidence that this was so is to be found in the fact that the mv 'Falcon Carrier' was arrested in rem at Chittagong, and Nadella's claim is for expenses and

losses incurred as a result of that arrest.

[26] Mr Mullins submitted that Nadella's claim is clearly covered by the indemnity in Clause 9, and in the certificate provided where Falcon

contractually indemnifies Nadella against 'all consequences' of the claim. Mr Mullins submitted that it was unrealistic to suggest that the reference to 'warranty' in the founding affidavit to lead the arrest of the mv 'Falcon Traveller' indicated unequivocally that Nadella only wished to rely upon the first half of Clause 9 – i.e. the warranty provision, and placed no reliance on the indemnity provision. What was clearly being relied upon was the provisions of the sale agreement, and in particular Clause 9 thereof. The reference to 'warranty' in the affidavit was no more than the loose use of a term in circumstances where the affidavit made it abundantly clear that Nadella intended to rely upon Clause 9 in its entirety.

[27] Mr Mullins referred to the reliance of Newbrook on *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 1 All ER 577 (CA) for the proposition that the right to an indemnification requires that the third party's claim be one in respect of which the validity of the claim has been finally established in court, and that the claim had actually been paid. Mr Mullins submits that this is an incorrect interpretation of *Post Office* because it dealt with the interpretation of a clause which read :

'The [defendants] will indemnify the insured against all sums which the insured shall become legally liable to pay as compensation in respect of loss of or damage to property.'

Mr Mullins submitted that this interpretation is inconsistent with the judgment of the court of appeal in *Rank*. It was made clear in *Rank* that the obligation to indemnify arises even where the claim made proves to be a spurious one. Mr Mullins submitted that the claims made by Nadella are ones which have already been established. The suggestion that losses could have been mitigated by Nadella does not detract from the requirement for the establishment of a *prima facie* case.

[28] With regard to the matter of association of the two ships, Mr Mullins submitted that there is, in these cases, inevitably little or no direct evidence of the control which is required to establish

association. The evidence relied upon by Nadella justifies the conclusion that the owners of the mv 'Falcon Carrier' and the mv 'Falcon Traveller' were controlled by the same person at the relevant times. He relied to a large extent on the cross-mortgaging of the two ships. He submitted that the cross-mortgaging alone provided justification for the conclusion of the requisite common control.

[29] With regard to the suggestion that Nadella should have given Newbrook prior notice of the fact that it intended to arrest the mv *Falcon Traveller*, Mr Mullins dismissed this as being unrealistic. Almost all security arrests are brought on an *ex parte* basis, and the reason for doing

that is that it is all too simple for a ship owner, who has advance notice of a pending arrest, to re-direct the direction of travel of the ship sought to be arrested.

[30] In response to the suggestion that the claims by Nadella are excessive, and that excessive security was requested, Mr Mullins submitted that Nadella was entitled to be secured to the extent of its best arguable case. Mr Mullins pointed out that Newbrook has confused the claim for security for costs which Nadella sought (which was for the legal costs of the pending arbitration proceedings) with the South African costs of litigation. That is not what Nadella sought to secure.

[31] Mr Mullins pointed to the fact that Newbrook had now conceded that it had overstated part of the quantum of its claim. Mr Mullins submitted that if the mv 'Falcon Traveller' was to be chartered out at less than its running costs as suggested by

Newbrook, then it is the charter rate only which is lost, which, together with fuel costs, could be claimed.

[32] Mr Mullins submitted that Newbrook had not established a genuine and reasonable need for counter-security, and that this was not dealt with by Newbrook in its founding papers. Mr Mullins submitted that it was impermissible for Newbrook to attempt to do so in its replying affidavits. The establishment of a genuine and reasonable need was the only issue to be decided in Newbrook's claim for security for costs. In this regard it was appropriate that the Registrar determine the amount of security to be awarded.

[33] In reply Mr Harpur submitted that a more equitable approach to arrests in a post-constitutional era is required. Mr Harpur submitted that unless Nadella objectively and subjectively considered that it had a claim under the warranty in Clause 9, then it had no reasonable and probable cause to arrest the mv 'Falcon Traveller'.

[34] Mr Harpur submitted that in assessing the relative claims of the parties, the version of the respondents should be accepted as it forms the basis of the claim for security.

[35] With regard to the value of the ship, Mr Harpur submitted that at no stage has Nadella indicated that a lesser amount than the security which it originally demanded would be acceptable.

The damages which are being suffered by Newbrook are the costs of maintaining the ship under arrest, of approximately R100 000 per day. The offer of security which was recently made by Newbrook (in the amount of US\$ 368 564,00) remains one that was rejected by Nadella.

[36] Finally Mr Harpur submitted that the applicant had to establish the association of the mv 'Falcon Carrier' and the mv 'Falcon Traveller'

on a balance of probabilities. Viewing the facts on the basis as alleged by Newbrook, it is entitled to security on the basis that there was no reasonable and probable cause established for the association.

[37] I now turn to consider whether Newbrook has established a basis for me to make a finding that it has satisfied the three requirements for counter-security, namely :

- (a) a prima facie case in respect of the claim to be secured;
- (b) that I have jurisdiction for that purpose; and
- (c) Newbrook has a genuine and reasonable need for security.

[38] I do not accept that the submission by Mr Harpur that a more equitable approach to ship arrests in a constitutional era is required, which would lead to the conclusion that Newbrook was entitled to security, simply because Nadella had forced it in turn to put up security if it wished to obtain the release of its ship. I am aware of the approach of Wallis JA in *Imperial Marine Co v Deilemar Compagnia di Navigazione Spa (the mv 'Pasquale Della Gatta')* 2012 (1) SA 58 (SCA) at paragraph 22 where Wallis JA indicated that there is much to be said, in deciding whether an applicant has established a prima facie case, for taking into account facts in the opposing affidavit that are not contradicted by the applicant. As he stated, disregarding such evidence seems inconsistent with the constitutional requirement that both parties are entitled to a fair hearing, and it may confer an unjustifiable advantage on the arresting party.

[39] I do not understand that judgment to be authority for the proposition that simply because a security arrest has been granted to an arresting applicant, that a respondent who wishes to obtain counter-security should also be granted such security. One is not, as I understand it, a quid pro quo for the other. What is required is that each party establishes the facts necessary to entitle it to the legal relief which it claims.

[40] At paragraph 56 of the *Pasquale Della Gatta*, Wallis JA dealt with counter-security as follows :

‘The parties approached the application for counter-security on the basis that an applicant for such security must satisfy the same

requirements as an applicant for an arrest, namely a prima facie case in respect of the claim to be secured; that the tribunal before which the claim is to be debated has jurisdiction for that purpose; and that the applicant for counter-security must show a genuine and reasonable need for such security. This is in accordance with what was said by this court in *MV Wisdom C : United Enterprises Corporation v STX Pan Ocean Co Ltd* [2008] ZASCA 21; 2008

(3) SA 585 (SCA) para 26.’

Wallis JA then went on to deal with the function of the court in making such an order at paragraph 58 where he stated :

‘In determining the quantum of any counter-security the court may also have to exercise a discretion. A litigant is entitled to security in an amount determined on the basis of its reasonably arguable best case. That requires the existence of the claim to be established on a prima facie basis and the quantum of security to be determined on the basis of the amount representing the

reasonably arguable best case in respect of that claim. The need for security in the amounts claimed must be established on a balance of probabilities. However, the computation of those amounts may not always be straightforward and may require the court to exercise a discretion in determining the quantum of the counter-security to which the litigant is entitled.'

(Footnotes omitted.)

[41] With regard to the submission by Mr Harpur that Nadella sought only to rely upon the first part of Clause 9, I am not persuaded that that is a correct analysis of its case.

In my view it is clear that Nadella sought to rely on Clause 9 in its entirety and that it would be an altogether too narrow

interpretation of Nadella's case to hold that I should consider only the warranty portion of the clause. It is clear from the history of the matter that prior to delivery of the mv 'Falcon Carrier', claims had been made by Samchira, coupled with a threat that those claims would be against the ship. It was on that basis that the further addendum was concluded between Nadella and Falcon. In my view Nadella was entitled to, and purports to rely upon the provisions of Clause 9 and the certificate, albeit that it may loosely have referred to the 'warranty' in the affidavit to lead the arrest, when in fact it should really have referred to the 'indemnity' contained in Clause 9.

[42] I have considered the reliance by Mr Harpur on the judgment in Post Office for the proposition that where a right to indemnification is claimed, it is necessary for the validity of the claim to be firstly and finally established by a court and actually paid. That case concerned an action by a third person against an insurer, in circumstances where the insured was allegedly liable for the claim, but had gone into liquidation, and the third party sought to recover directly against the insurance company. It was a claim in terms of the Insurance Act, 1930. The Court of Appeal held that the claim could only be made against the insurance company once the liability of the insolvent company had been established together with the amount due.

[43] Mr Harpur submitted that similarly, in this application, Nadella's claim was premature insofar as it relied on an indemnity, which it could only enforce once judgment had been granted against it. Mr Harpur submitted that Nadella could not claim not to be liable for the charterer's claim and refuse to pay it on the one hand, and on the other hand, to sue Falcon for security in order to enable that claim to be paid.

[44] Mr Mullins referred to the judgment in Rank and submitted that it is clear from that judgment that an indemnity may be sought in terms of Clause 9 even if the claims ultimately turn out to be spurious. The claim for an indemnity in respect of Samchira's claim against Nadella is the only part of Nadella's claims which have not already been suffered.

[45] Mr Mullins pointed out that having put up security for the release of the mv 'Falcon Carrier' for the debts of Samchira, it had no knowledge the merits of the charter and was unable to defend the claim.

- [46] I am by no means persuaded that Newbrook has established, even at a prima facie level, that the mv 'Falcon Traveller' was arrested without reasonable and probable cause. The long standing dispute between the parties regarding the agreement of the sale of the mv 'Falcon Carrier' evidences that Nadella has a subjectively honest belief that it was entitled to arrest the ship as security for its claim.
- [47] That, however, is not the end of the enquiry. What also falls to be considered is whether the security claimed by Nadella was excessive.
- [48] In my view the authority relied upon by Mr Harpur in Post Office is distinguishable because the decision was based upon the relevant legislative provision, and depended upon an interpretation of that provision for the decision reached by the court.
- [49] With regard to the evidence of association, I am satisfied that Mr Mullin's reliance upon the cross-mortgaging of the ships is evidence which may be viewed as strongly indicating association. The whole concept of the formation of single ship companies was intended by the business world to protect assets within a defined corporate entity, and to prevent the debts of a 'bad egg' in a fleet of ships, from contaminating the others. To cross-mortgage ships in such a structure undermines the whole concept. Accordingly it is reasonable to believe that companies doing so are probably under common control.
- [50] The reasons advanced by Mr Harpur that there had previously been a strong bond between father and son which induced the cross-mortgaging strengthens the argument, rather than watering it down. This is more particularly so where the relationship has now allegedly soured between father and son, but they may not yet have had time to undo their relationship.
- [51] With regard to the apparently duplicated amounts of US\$378 680,71 (cost of capital and interest) by Nadella, Mr Mullins submitted that one was for past interest, and one for future interest until the arbitration is decided. The interest claimed by Nadella on the capital sum is for three years at five per cent per annum, compounded quarterly. Is it a coincidence then, that the 'cost of capital' incurred by Nadella on its expenses is in exactly the same amount? That cost is approximately 18.11 per cent of the capital claim. As the sale agreement was concluded on the 1st November 2013, and as expenses started being incurred thereafter, the figure seems too much of a coincidence and appears to be a duplication by Nadella. No details are provided in the founding papers as to how the 'cost of capital' was calculated.
- [52] In addition, how the settlement between Nadella and PHP on a 'without liability' basis was achieved, seems somewhat unclear. The suggestion of an indemnity having been provided also makes the obligation to pay PHP somewhat unclear.
- [53] In the circumstances I am of the view that Newbrook has established a prima facie case that excessive security was requested.

[54] No point has been taken regarding the jurisdiction of this Court to grant counter-security or to hear the counter-claim under s 5(4). I am satisfied that I have jurisdiction.

[55] I have also borne in mind what was stated by Hurt J in *The Yu Long Shan : Guangzhou Maritime Group Co v Dry Bulk SA* 1997 (2) SA 454 (D) at 463 B – D where the learned judge dealt with the suggestion that security should only be granted to a peregrinus sparingly stated :

‘In my view where there is a counterclaim, in circumstances where a defendant has effectively been forced to litigate in South African

Courts because of the procedure of attachment or arrest, the requirement that the plaintiff give security against the event that

he or she might be unsuccessful as to the claim, and have a judgment granted against him or her in the counterclaim, is a healthy one and enforces the principle of effectiveness.’

[56] With regard to the need for a ‘genuine and reasonable need’ for security is concerned, Hurt J continued at page 463 E :

‘As long as a defendant and prospective plaintiff-in-reconvention satisfied the Court that he has a prima facie claim on which he could not execute if successful, it seems to me that the need for security in respect of a peregrine plaintiff is established and follows as a matter of course.’

[57] I am in respectful agreement with the approach of Hurt J In the *Yu Long Shan* that once a prima facie case is established upon which the counter-applicant cannot execute, the need for security is established. That Newbrook attempted to establish the need for security in reply then, is of no importance. Nadella is a peregrinus with no known assets within the Republic of South Africa, and Newbrook has established a prima facie case for counter-security.

The fact that Newbrook may have had to amend the amount of counter-security is also, in my view, of no moment. Obvious

errors made in the calculations necessitated such amendments. No prejudice results to Nadella as a result of such amendments.

[58] In setting out the prima facie case of Newbrook for counter-security, Mr Harpur submitted that the security required was :

(a) Operating costs whilst under arrest : US\$ 669 330

Less difference in hire : US\$ 17 480

Sub-total : US\$ 651 850

Plus :

(b) Interest for three years @ 9 % per annum : US\$ 175 999

(c) Costs : US\$ 90 000

Total counter-security : US\$ 917 849

[59] This amount is somewhat less than that previously sought by Newbrook in the sum of US\$ 1 247 573. With regard to the costs of this application, the application stands independently of the arrest itself and any proposed action for damages by Newbrook. The costs should, accordingly, follow the result.

[60] In the circumstances I make the following order :

- (a) the applicant is directed to provide security for the claims by the second respondent in the sum of US\$ 827 849;
- (b) the Registrar of this Court is directed to determine the amount of security for legal costs appropriate for the second respondent's

defence of the applicant's application under case number A74/2015;

- (c) the applicant is directed to provide security to the satisfaction of the Registrar of this Court, for the amounts referred to above, within seven days of this order or such determination;
- (d) the costs of this application for counter-security are to be paid by the applicant, including the costs of senior counsel.

Date of hearing : 18th November 2015.

Date of judgment : 23rd December 2015.

Counsel for the Applicant : S R Mullins SC (instructed by Clyde & Co).

Counsel for the Second Respondent : G D Harpur SC (instructed by Norton Rose Fulbright South Africa Inc).

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