

SOUTH AFRICA / JUDGMENT

Owner of MV "Maritime Prosperity" v Owner of MV "Lash Atlantico" (42/94) [1995] ZASCA 98; 1996 (1) SA 22 (SCA); (15 September 1995) [1995] ZASCA 98

COURT

Supreme Court of Appeal

BEFORE

Corbett, Smalberger, Nestadt, Marais, Scott

CASE / FILE NUMBER

42/94

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CASE NO 42/94

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE
DIVISION)

In the matter between:

THE OWNER OF THE

M V "MARITIME PROSPERITY" Appellant and THE OWNER OF
THEM V LASH ATLANTICO' Respondent

CORAM: CORBETT CJ, SMALBERGER, NESTADT, MARAIS JJA, et SCOTT AJA.

DATE OF HEARING: 17 August 1995

DATE OF JUDGMENT: 15 September 1995

JUDGMENT

/CORBETT CJ

2 CORBETT CJ:

On 16 October 1990 and off Port Said, Egypt, a collision took place between the motor vessel "Maritime Prosperity" and the motor vessel "Lash Atlantico". Strange to relate, shortly thereafter on either 23 October or 28 October 1990 a second collision took place between the same vessels in the same locality. The uncertainty about the date of the second collision is not material, but for convenience I shall take it to have occurred on 28 October 1990. The collisions caused damage to both vessels. At all material times the "Maritime Prosperity" was owned by the Rosario Navigation Company Inc ("Rosario"), a company incorporated under the laws of Panama; while the "Lash Atlantico" was owned by the Coastal Barge Corporation ("Coastal"), a corporation organized under the laws of the United States of America, which has its registered office in Florida, USA and

carries on business in Maryland, USA. Both Rosario and Coastal are thus peregrini as far as the courts of this country are concerned. The "Maritime Prosperity" sails under the Panamanian flag, whereas the "Lash Atlantico" is registered in New York. On 14 October 1992 Rosario, in pursuance of an action in rem, caused a summons and a warrant of arrest to issue in the Durban and Coast Local

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Division (in the exercise of its admiralty jurisdiction) against the "Lash Atlantico",

claiming damages in respect of the damage caused to the "Maritime Prosperity" by the collisions off Port Said. The warrant was executed and the "Lash Atlantico" arrested at Durban on 10 November 1992. Subsequently she was released on the strength of a letter of undertaking given by the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd on behalf of Coastal.

On 20 August 1993 Coastal made an urgent application (without notice to Rosario) to the Durban and Coast Local Division (exercising its admiralty jurisdiction) for a rule nisi, having the effect (pending the return day) of an interim order, in which the main relief claimed was:

- (1) an order, in terms of sec 344(3) of the Merchant Shipping Act 57 of 1951, whereby the prescriptive period of two years, as provided for in sec 344 (1) of that Act, be extended (in respect of a claim for damages against the "Maritime Prosperity" for the damage sustained by the "Lash Atlantico" in the two aforementioned collisions) until 27 October 1993; and
- (2) an order that the deputy sheriff of the Court be authorized and directed to arrest the "Maritime Prosperity" in terms of sec 5(3)(a) of the Admiralty

4 Jurisdiction Regulation Act 105 of 1983 ("the Admiralty Act") for the

purpose of providing security for a claim-in-reconvention which Coastal intended to file in the action instituted by Rosario on 14 October 1992 and in which Coastal proposed to counterclaim for damages and ancillary relief in respect of damage sustained by the "Lash Atlantico" in the aforesaid collisions.

In its founding affidavit (deposed to by Mr M W H Posemann,

Coastal's attorney of record) the background facts as recounted above, are set ,

forth. In addition, it is alleged that the collisions were caused by the negligence of the servants or agents of Rosario in various (specified) respects. Details are also given of the damage sustained by the "Lash Atlantico" and of the claim for damages, which is computed in an amount of US\$490 226.06. In the affidavit it is accepted that the two-year prescriptive period, laid down by sec 344(1) of the Merchant Shipping Act, is applicable and that this period terminated, in regard to the two collisions, on 15 October 1992 and 27 October 1992 respectively. The claim by Rosario, as set forth in its action in rem instituted by the arrest of the "Lash Atlantico" on 10 November 1992, is denied by Coastal and it is stated that Coastal wishes to counterclaim in that action for damages (in the

amount

5 aforementioned) suffered by its vessel, "Lash Atlantico", which damages are in excess of the damages claimed by Rosario.

The affidavit then proceeds to explain why Coastal did not previously (and prior to the lapse of the two-year prescriptive period) take action against the "Maritime Prosperity", or Rosario, in order to recover the aforementioned damages; and to seek to lay a factual foundation for an extension of the period of prescription in terms of sec 344(3) of the Merchant Shipping Act.

For reasons which will later emerge it is not necessary to go into the details of this aspect of the matter.

The application came before Shearer J on 20 August 1993. He

granted an order in the form prayed. On 7 September 1993 Rosario's attorneys filed notice of an intention to oppose the confirmation of the rule nisi; on the return day. An answering affidavit, deposed to by Mr A J Pike (Rosario's attorney of record), was filed in which (i) the collisions are admitted, but the alleged negligence of Rosario's servants or agents in both collisions is denied; (ii) it is alleged that any claim against the owners of either the "Lash Atlantico" or the "Maritime Prosperity" became prescribed on 15 October 1992 and 27

October 1992; (iii) it is admitted that Rosario and Coastal are peregrini; and

6 (iv) Coastal's case for the extension of the prescriptive period in terms of sec 344(3) of the Merchant Shipping Act is canvassed generally.

To this a replying affidavit (deposed to by Mr Posemann) was filed. This deals mainly with the case for the extension of the period of prescription in terms of sec 344(3) of the Merchant Shipping Act and need not be referred to in any detail. On the return day (19 November 1993) the matter was heard by Thirion J. He reserved judgment and then (on 10 December 1993) made an order (a) dismissing the application for the extension of the period of prescription in terms of sec 344 (3) of the Merchant Shipping Act and discharging the rule nisi in so far as it related to such extension; and (b) confirming that portion of the rule nisi relating to the arrest of the "Maritime Prosperity" in terms of sec 5(3)(a) of the Admiralty Act "in so far as it relates to an action in personam by the applicant (Coastal) against the respondent (Rosario)". Apart from directing that the applicant (Coastal) should pay respondent's (Rosario's) costs in respect of an appearance on 3 December 1993, he made no order as to the costs of the application. The judgment of Thirion J has been reported (see *Owner of the M V Lash Atlantico v Owner of the M V Maritime Prosperity* 1994 (3) SA 157 (D)).

7 With leave of the Court a quo Rosario now appeals to this Court against that

portion of the order of Thirion J which I have summarized under (b) above (see the reported judgment at p 167 A) and against the order as to costs. There is no cross-appeal against the dismissal by Thirion J of the application for the extension of the prescriptive period.

Consequently that question is no longer in issue. At the hearing of the appeal application was made by Coastal for the condonation of its failure to file the required power of attorney in accordance with the time limits prescribed by AD Rule 5(3)(c). The application was not opposed and this Court granted the necessary condonation, subject to the costs of the application being borne by Coastal. It must be emphasized at the outset that we are here concerned with a security arrest in terms of sec 5(3)(a) of the Admiralty Act. This subsection, as amended by sec 4(d) of Act 87 of 1992, provides as follows:

"A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an

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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."

Sec 5(3)(aA) goes on to provide that any property so arrested or any security for, or the proceeds of, any such property shall be held as security for any such claim or pending the outcome of any such arbitration or proceedings.

An applicant for an order for the arrest of a ship in terms of sec 5(3)(a) must satisfy the Court (I leave out of account associated ships, since that contingency does not arise here) -

- (a) that he has a claim enforceable by an action in rem against the ship or by an action in personam against the owner of the ship;
- (b) that he has a prima facie case in respect of such claim;
- (c) that the claim is prima facie enforceable in the forum (or forums) in which the applicant contemplates bringing proceedings for the enforcement of such claim; and
- (d) that he has a genuine and reasonable need for security in respect of the claim.

(See *Cargo Laden and Lately Laden on Board The M V Thalassini Avgi v M V*

9 Dimitris 1989 (3) SA 820 (A), at 831 E- 833 A; *Bocimar N V v Kotor Overseas*

Shipping Ltd [1994] ZASCA 5; 1994 (2) SA 563 (A), at 578 G - 579 D.) In order to establish the prima facie case referred to in (b) and (c) above all that the applicant need show

is that there is evidence which, if accepted, would establish a cause of action. As

was emphasized in the cases quoted, an application under sec 5(3)(a) is not the appropriate vehicle for obtaining rulings or decisions on issues that would have to be adjudicated upon by the court hearing the main proceedings (see Bocimar

case, supra, at 579 E - 580 B). This does not, however, apply to requirements

(a) and (d) above (see Bocimar case, supra at 580 B - 581 I). In the present case it is not disputed that Coastal's application for the security arrest of the "Maritime Prosperity" satisfies requirements (a), (c) and (d) above. Rosario contends, however, that by reason of extinctive prescription Coastal has failed to establish requirement (b), i.e. that it has a prima facie claim against Rosario in respect of the damages caused to the "Lash Atlantico" by the collisions off Port Said. In determining the validity of this contention, I will bear in mind the standard of proof required for the establishment of a prima facie case as to cause of action.

The appeal hinges largely on the interpretation to be placed on sec

10 344 of the Merchant Shipping Act. The relevant portion of this section reads as follows:

"344. (1) The period of extinctive prescription in respect of legal proceedings to enforce any claim or lien against a ship or her owners in respect of any damage to or loss of another ship, her cargo or freight, or any goods on board her, or damage for loss of life or personal injury suffered by any person on board her, caused by the fault of the former ship, whether such ship be wholly or partly in fault, or in respect of any salvage services shall be two years and shall begin to run on the date when the damage or loss or injury was caused or the salvage services were rendered.

(2) The period of extinctive prescription in respect of legal proceedings under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injury shall be one year and shall begin to run on the date of payment.

(3) Any court having jurisdiction to try proceedings referred to in sub-section

(1) or (2) shall, before or after the expiry of such period, if it is satisfied that owing to the absence of the defendant ship from the Republic and its territorial waters and from the country to which the plaintiff's ship belongs or in which the plaintiff resides or carries on business and its territorial waters, the plaintiff has not during such period had a reasonable opportunity of arresting the defendant ship, extend such period sufficiently

11 to give him such reasonable opportunity.

(4) ..."

The provisions as to extinctive prescription contained in this section must be read together with the general law relating to prescription as set forth in chapter III of the Prescription Act 68 of 1969. Sec 16(1), as amended, of this Act (which is to be found in chapter HI) provides that:

"Subject to the provisions of subsection (2)(b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act."

It is common cause that the provisions of sec 344(1) of the Merchant Shipping Act which lay down a two-year prescriptive period as regards legal proceedings to enforce any claim or lien against a ship or her owners in respect of inter alia damage to another ship caused by the fault of the former ship are inconsistent with, and therefore in terms of sec 16(1) of the Prescription Act supplant, contrary provisions as to prescriptive periods which are to be found in

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the Prescription Act. Moreover it is clear from what I have already stated that periods of two years have run since the damage to the "Lash Atlantico" was caused by the collisions giving rise to Coastal's claims against the "Maritime Prosperity" and/or Rosario. Coastal contends nevertheless that sec 13(1)(b) of the Prescription Act of 1969 applies to these claims and that this provision saves them from prescriptive extinction. Sec 13(1) provides that

"If -

- (a) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1) ; or (b) the debtor is outside the Republic; or (c) the creditor and debtor are married to each other; or (d) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or (e) the creditor is a juristic person and the debtor is a member of the governing body of such juristic

13 person; or

- (f) the debt is the object of a dispute subjected to arbitration; or (g) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966 (Act No 28 of 1966); or
- (h) the creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed; and
- (i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)."

Rosario's counter to this is that sec 13(1)(b) is inconsistent with sec 344 (3), read with sec 344 (1), of the Merchant Shipping Act and that accordingly reliance thereon is precluded by sec 16(1) of the Prescription Act. Coastal's answer to this contention is a two-fold one: firstly, that sec 344(3) applies only to actions in rem and that, since Coastal's counterclaim will be in personam, there

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will not be any scope for inconsistency; and, secondly, that in any event even if

sec 344(3) applies to both actions in rem and actions in personam, there is in fact no inconsistency between sec 344 (3) and sec 13(1)(b).

The first issue produced by these rival contentions relates to the scope of sec 344(3), and more specifically to the question whether the power to extend the prescriptive period conferred by it on the court applies to both actions in rem and actions in personam or only to the former. In terms of our law of admiralty (currently the Admiralty Act) there are two procedures whereby a maritime claim may be enforced in a provincial or local division exercising its admiralty jurisdiction. These are the action in rem and the action in personam. The former is instituted by the arrest of property falling within one or more of the various categories listed in sec 3(5) of the Admiralty Act. (For convenience I shall henceforth refer only to the property usually so arrested, viz the ship against or in respect of which the claim lies.) This remedy is available where the claimant has a maritime lien over the ship to be arrested or where the owner of the ship to be arrested would be liable to the claimant in an action in personam in respect of the cause of action concerned (sec 3(4)). The action in rem is, in a sense, a proceeding against the ship in question.

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And the primary purpose of this arrest is to give the action utility and effectiveness by affording the plaintiff pre-judgment security. (See *M V Jute Express v Owners of the Cargo Lately Laden on Board the M V Jute Express* 1992 (3) SA 9 (A), at 17 J - 18 B.) The action in personam, on the other hand, is brought by the service of a summons on the defendant in accordance with Rule 5(3) of the Admiralty Proceedings Rules. There are certain jurisdictional requirements which limit the persons against whom the action may be brought. These include (see sec 3(2) of the Admiralty Act): (i) residence or the carrying on of business by the defendant in the Republic; (ii) the attachment of property of the defendant within the area of the court's jurisdiction in order to found or confirm jurisdiction; (iii) the consent of, or the submission by, the defendant to the jurisdiction of the court; and (iv) in the case of a defendant company the fact that it has its registered office in the Republic. The property which may be attached to found or confirm jurisdiction includes, but is not limited to, the ship against or in respect of which the claim lies. Although in describing these actions I have referred to the provisions of the Admiralty Act, which came into operation on 1 November 1983, and although certain legislative changes were introduced by that Act, the action

16 in rem and the action in personam were part of the law of admiralty administered

by the courts of admiralty in this country at the time when the Merchant Shipping

Act was passed and the general distinction between them was then known and

observed. (See *The Owners. Master and Crew of the SS "Humber" v The*

Owners and Master of the SS "Answald" 1912 AD 546, 556-7; *Beaver Marine*

(Pty) Ltd v Wuest 1978 (4) SA 263 (A), at 274 H - 275 C.) In the Court below it was apparently common cause by the conclusion of the argument in the application that sec 344(3) deals only with a claim in rem (see the reported judgment at 164 G-H). Before us counsel for Rosario resiled from this concession and reverted to the contention that the subsection covers both forms of action. For the reasons which follow I am of the opinion that this contention is ill-founded. Firstly, the wording of sec 344(3) is indicative of an intention to confine the ambit of the subsection to actions in rem. The subsection speaks in , two places of "the defendant ship" (Afrikaans: "die verweerder-skip"). This wording, which is very unusual, is appropriate only to an action in rem on the basis that, as I have indicated, such an action is regarded as being, in a sense, an action against the ship in respect of which the cause of action lies. The wording

17 is quite inappropriate to an action in personam against the owner of the ship. ,

Moreover, it is clear that this wording is not unintended or fortuitous. This

appears from sec 344(1) which draws the same distinction between actions in rem

and actions in personam when referring to -

". . . legal proceedings to enforce any claim or lien against a ship or her owners . . .".

The legal proceedings "against a ship" clearly refer to an action in rem; whereas legal proceedings "against . . . her owners" refer equally clearly to an action in personam. This distinction is pursued in sec 344(3); and there is, in my view, plainly a correlation between proceedings "against a ship" and "the defendant ship". The fact that sec 344(3) speaks only of the defendant ship is, therefore, a strong indication that sec 344(3) was intended to deal only with actions in rem. Secondly, the grounds upon which an extension shall be granted under sec 344(3) point in the same direction. They are that owing to the absence of the defendant ship from the Republic of South Africa and its territorial waters and the absence of the defendant ship from the country to which the plaintiffs ship belongs or in which the plaintiff resides or carries on business and its territorial waters, the plaintiff has not during the prescriptive period had a

18 reasonable opportunity of "arresting the defendant ship". These grounds are

peculiarly pertinent to an action in rem which depends upon the arrest of the

defendant ship, or the ship in respect of which the claim lies, and which would be

frustrated by the ship's absence from these countries and their respective territorial

waters; but they are wholly inapposite to an action in personam which does not

require the arrest of the ship in respect of which the claim lies. Indeed, it is difficult to see why a plaintiff bringing, or wishing to bring, an action in personam should qualify for the benefit of an extension of the prescriptive period on the grounds provided for in sec 344(3), especially where during the two-year prescriptive period there would have been no practical or legal impediment to prevent him doing so. Thirdly, the relief which is granted when a good case has been made out under sec 344(3) is an extension of the period of prescription "sufficiently" in order to give the plaintiff a reasonable opportunity to arrest the defendant ship. Again this points unmistakably to an action in rem, and to an action in rem only. In support of his argument that sec 344(3) applied also to actions in personam, counsel for Rosario referred to an English statutory provision, viz sec

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8 of the Maritime Conventions Act, 1911, and to the English decision of *The Espanoleto* [1920] P 223. This Act was passed in order to give effect to two conventions signed at the Brussels Conference of 1910 dealing respectively with collisions between vessels and with salvage. It is required to be "construed as one" with the Merchant Shipping Acts, 1894 to 1907 (sec 10). Sec 8 of the Act reads as follows:

"No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of any salvage services, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered, and an action shall not be maintainable under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment:

Provided that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period, to such extent and on such conditions as it thinks fit, and shall, if

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satisfied that there had not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity."

It will be noted that the section resembles sec 344(1), (2) and (3) of our Merchant Shipping Act. The first 10 lines (down to the words ". . . services were rendered . . .") correspond to sec 344(1); the next 5 lines (down to ". . . date of payment . . .") to sec 344(2); and the proviso to sec 344(3). There is, however, a significant difference between the proviso to sec 8 and sec 344(3): the former contains, in addition to the mandatory extension of the prescriptive period provided that certain facts are established (in terms similar to sec 344(3)), provision for a discretionary power of extension to such extent and on such conditions as the court may think fit. Patently sec 344(3) contains no such discretionary power. The case of *The Espanoleto*, supra, related to a collision between the vessels "Artisan" and "Espanoleto" on 20 February 1917, as a result of which the plaintiff's husband, the master of the "Artisan", lost his life. Plaintiff issued

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a writ in rem on 13 December 1918. It was not served because by that time the "Espanoleto" had left the jurisdiction, and no warrant of arrest was applied for. On 19 March 1920, the "Espanoleto" having by that time come within the jurisdiction and the writ not having been served within the required period of 12 months, the plaintiff applied to court ex parte for leave to renew the writ. She obtained that leave and caused the warrant of arrest to issue. On the following day conditional appearance was entered and an undertaking to put in bail given by the defendant, the owner of the "Espanoleto". Defendant then applied to set aside the writ, the renewal thereof and the warrant of arrest and to discharge the undertaking. Various grounds were advanced in support of the defendant's application. One contention was that the plaintiff had failed to commence proceedings within two years, as required by sec 8, since that section contemplated that proceedings should be commenced not by issuing a writ but by arrest. Hill J who heard the application said in this regard (at 225):

"I do not agree. Sect 8 relates to proceedings in personam as well as to proceedings in rem. It is an English statute, and in English law it is well understood that proceedings are commenced by the issue of a writ. Order I., r. 1, and

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Order II., r. 1, of the Rules of the Supreme Court, show that an action in the Admiralty Division, like an action in any other Division, is commenced by the issue of a writ, and I can see no reason at all for giving a different meaning to the commencement of proceedings under s. 8 from that which obtains in every other action."

The point here considered concerns the meaning of the words "proceedings . . . are commenced" in that part of sec 8 which corresponds to sec 344 (1) of our Act. The observation that sec 8 relates to proceedings in personam as well as proceedings in rem, which is clearly correct in a general sense with reference to this part of sec 8 (as it would be with regard to sec 344(1)), does not touch the question of the ambit of the mandatory power of extension contained in that portion of the proviso to sec 8 which corresponds to sec 344 (3). Consequently, this observation, which was heavily relied upon by counsel for Rosario, does not advance its case. After stating what is quoted above, Hill J went on to deal with what he described as "the real point in the case", viz a renewal

of the original writ which had been issued within the two-year period but had not been timeously renewed. The judgment proceeds (at 226-7):

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"In general the Court must not by renewal deprive a defendant of an existing right to the benefit of a statute of limitations. But s 8 of the Maritime Conventions Act is a limitation section of a very peculiar kind, for it contains a proviso unknown to any other statute of limitations; in one event - namely, if there has not been any reasonable opportunity of arresting the defendant vessel within the period - it directs the extension of the limited period of two years, and further gives the Court power to extend it on any other sufficient grounds.

In my judgment, when an application to extend the time for the renewal of a writ in an action which comes within s 8 is made, the matter is not to be disposed of merely by saying that the two years have elapsed and the claim is statute barred and no renewal can be granted. The application to renew must be considered on its merits, and the Court must inquire whether the circumstances are such that the Court would give leave to issue a writ, notwithstanding that the time had expired."

Having canvassed the facts of the case the Court expressed the view that it might fall within the "obligatory part of the proviso", but preferred to exercise the discretion provided for in the other part of the proviso in favour of the plaintiff. An order extending the period for the renewal of the writ and dismissing defendant's application was accordingly granted.

In all the circumstances I do not think that *The Espanoleto* provides

24 support for the argument of counsel for Rosario. Moreover, it seems to me that

there is an important distinction between the provisions of the proviso to sec 8 of

the Maritime Conventions Act and sec 344(3) of the Merchant Shipping Act, viz

the presence in the former, but not in the latter, of a discretionary power of

extension in the widest possible terms. No doubt this power relates to both

actions in rem and in personam. But it does not follow that sec 344(3), which

contains no such discretionary power and the wording of which refers so

pertinently to actions in rem only, likewise applies as well to actions in personam. In the course of my researches I have come across two other English cases which at first blush might appear to be relevant, viz *The "Arraiz"*

[1924] 19 LI L Rep 235 (AD), [1925] 132 LT Rep 715 (CA); and *The Master and Crew of Steam Tug "William Gray" v Owners of Steamship "Llandoverly Castle"* (1920) 2 LI L Rep 273 (CA).

However, they both dealt with instances of the exercise of the discretionary portion of the proviso to sec 8 and, for the reasons already indicated, I do not find them to be of any real assistance in the interpretation of sec 344(3). For these reasons I hold that sec 344(3) must

be construed as being confined in its application to actions in rem. Counsel for appellant conceded that,

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in the event of this Court making such a finding, the appeal had to fail. This

concession was correctly made. If sec 344(3) applies only to actions in rem then there can be no inconsistency between that subsection and sec 13(l)(b) of the Prescription Act as far as actions in personam are concerned. It was common cause that Coastal's contemplated claim-in-reconvention would constitute a , proceeding in personam. Ergo there is no legal obstacle to Coastal's reliance upon sec 13(l)(b) to overcome the consequences of the running of the two-year prescriptive period. Prima facie, therefore, Rosario's objection to the security arrest of the "Maritime Prosperity" on the grounds of extinctive prescription is not well founded. Consequently the Court a quo correctly confirmed the arrest in so far as it relates to an action in personam. I should perhaps add that in the circumstances it is not necessary to decide the question whether, assuming sec 344(3) to apply to actions in personam as well, there is necessarily an inconsistency between sec 13(l)(b) and sec 344(3), read with sec 344(1). Nor is it necessary to pronounce finally on the applicability of sec 13(l)(b) to the facts of this case. Both questions are left

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open.

The appeal is dismissed with costs, including the costs of two counsel.

M M CORBETT

SMALBERGER JA) NESTADT JA) MARAIS JA) CONCURSCOTT AJA)

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