

SOUTH AFRICA / JUDGMENT

Qannas Shipping Company Limited and Another v Bulkship Union S.A. and Another (A74/2006) [2008] ZAKZHC 56 (4 March 2008)

[2008] ZAKZHC 56

COURT

High Courts - Kwazulu Natal

BEFORE

Balton

CASE / FILE NUMBER

A74/2006

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND

COAST LOCAL DIVISION

CASE NO. A74/2006

(Exercising its Admiralty Jurisdiction)

NAME OF SHIP: MV “CAPE COURAGE”

In the matter between:

QANNAS SHIPPING COMPANY LIMITED FIRST APPLICANT
DRY BULK MARITIME LIMITED SECOND APPLICANT
and
BULKSHIP UNION S.A. FIRST RESPONDENT
FIRST RAND BANK LIMITED SECOND RESPONDENT

JUDGMENT

(delivered on 4 March 2008)

BALTON J

This is an application to inter alia set aside an order of court dated 15 June 2006 arresting the mv “CAPE COURAGE” in terms of section 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 as amended (“the Act”) as an associated ship in terms of sections 3(6) and 3(7) of the Act. For the sake of convenience the first applicant will be referred to as “the owner”, the second applicant as “the seller” and the first respondent as “the buyer”.

The arrest was obtained for the purpose of providing security for claims advanced in arbitration proceedings in London by the buyer against the seller, arising out of the purchase by the buyer from the seller of the mv “PEARL OF FUGAIRAH” (“the vessel”). The buyer alleged that the seller owned the vessel when the buyer’s claim arose, and the same person or persons controlled the owner, at the time of the arrest and the seller at the time when the claims arose. On 26 June 2006 the buyer accepted a guarantee issued by the second respondent in a maximum amount of US\$9 955 091.62 as security for its claims and the mv “CAPE COURAGE” was released but deemed to be under arrest in terms of section 3(10) of the Act.

During July 2005 the buyer and seller commenced discussions for the sale of the vessel, during which the seller gave the buyer certain class and other documents relating to the vessel. These included the reports of the ultra-sound readings of the vessel’s cargo holds carried out by North Ship and Ocean Engineering Ltd during October/November 2004 and July 2005.

The buyer’s appointed surveyors Ken Shipping China Service Company, inspected the vessel on 28 July 2005 at Qinghuangdao, China, and reported on their findings to the buyer. The parties concluded the Memorandum of Agreement (“the MOA”) on 7 September 2005 with a 10% deposit being paid on 8 September 2005. The seller signed the bill of sale on 17 October 2005 and served the Notice of Readiness (“the NOR”), along with a draft bill of sale on the buyer at 22h15 local time on 18 October 2005. The sale was completed by the delivery of the vessel and the original bill of sale to the buyer against payment of the purchase price of US\$14 900 000,00 at 19h05 local time at Linayuangang Road, China.

Upon receipt of delivery of the vessel the buyer was dissatisfied with its condition and appointed experts during November 2005 to assist in the identification and rectification of the problems allegedly discovered. The buyer subsequently issued claims for damages in an estimated sum of US\$7 344 249,62 in arbitration proceedings in London against the seller alleging deficiencies in the main engine automation, control systems, the engine room and the shaft alternator; excessive vibration in the main engine and corrosion and diminution of steel thickness in the cargo-holds.

The owner and seller contend that:

None of the buyer’s claims arose prior to it becoming owner of the vessel and accordingly at that time the vessel and the mv “CAPE COURAGE” were owned by companies controlled by different companies or persons.

The vessel and the mv “CAPE COURAGE” are not associated ships as described in section 3(6) read with section 3(7) of the Act and accordingly the buyer had no right to arrest the mv “CAPE COURAGE” as security for its claim against the seller.

The seller further alleges that all the causes of action relied upon by the buyer that are sustainable as a matter of English law, arose after delivery of the vessel had taken place, that is, at a stage when the buyer had already become the owner of the vessel.

The owner and seller do not dispute that for the purposes of this application, that at material times they were controlled by the same persons or entity and that the buyer has shown that there is a genuine and reasonable need for security.

The main issue in dispute is whether the vessel and the mv “CAPE COURAGE” were associated ships at the time when the buyer’s claim arose.

The mv “CAPE COURAGE” was arrested in terms of section 5(3) of the Act which reads 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 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.”

The buyer relied on the provisions of sections 3(6) and 3(7) of the Act for the arrest of the mv “CAPE COURAGE” as an associated ship which reads inter alia as follows:

“(6) Subject to the provisions of subsection (9), an action in rem other than such an action in respect of a maritime claim contemplated in paragraph (d) of the definition of ‘maritime claim’ may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.

(7) (a) For the purpose of subsection (6) an associated ship means a ship other than the ship in respect of which the maritime claim arose.

(iii) owned at the time when the action was commenced by a company which was controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.”

Two dates are accordingly pertinent. The first is the date of arrest of the associated ship and the second is the date when the claims arose.

In *Bocimar NV v Kotor Overseas Shipping*¹ CORBET CJ held that:

“It is clear that an applicant who seeks to arrest an associated ship in terms of s 3(4), read with ss 3(6) and 3(7), is required to establish that the vessel in question is an associated ship on a balance of probabilities ... The same rule as to standard of proof would apply to an application to arrest an associated ship to provide security in terms of s 5(3). Similarly it has been held that in applications for the attachment of property to found or confirm jurisdiction, either under the common law or in terms of s 3(2)(b) of the Act, the onus is upon the applicant to prove on a balance of probabilities that the property to be attached belongs to the respondent ... The same rule would apply to applications to arrest in terms of ss 3(4),

- (5) and (6) and 5(3) of the Act. This was not in dispute. Like the question whether there is a genuine and reasonable need for security, these are matters relating exclusively to whether the applicant has made out a good cause of action for arrest and, in my view, the same rule as to onus should apply to them all.”²

In order to sustain its arrest of the mv “CAPE COURAGE” therefore, the onus is on the buyer to show on a balance of probabilities that the claims which it seek to pursue arose at the time the vessel was owned by the seller and that the mv “CAPE COURAGE” is susceptible to arrest in respect of the buyers claims. Further the buyer must show that it has a prima facie case in respect of such claim.³

It is common cause that ownership and property in the vessel passed to the buyer when physical delivery was effected at China at 19h05 local time on 20 October 2005.

The buyer relies on the following claims in the arbitration proceedings:

Three contractual claims based on breaches of clauses 11 and 18 of the MOA and a breach of an implied term arising from section 14 of the English Sale of Goods Act of 1979 (the “SGA”). Clause 11 of the MOA reads as follows:

“The vessel with everything belonging to her shall be at the sellers risk and expense until she is delivered to the Buyers, but subject to the terms and conditions of this Agreement she shall be delivered and taken over in substantially the same condition as when inspected fair wear and tear excepted.”

Clause 18 reads of the MOA as follows:

“The vessel shall be delivered to the Buyers with her present BV class maintained, free from outstanding recommendations and average damages affecting her present class at the time of delivery.”

A breach of clause 5(a) of the MOA in that on tendering delivery of the NOR the vessel was allegedly not in every respect physically ready for delivery. Clause 5(a) reads inter alia as follows:

“When the vessel is at the place of delivery and in every respect physically and delivery documentation wise ready for delivery in accordance with this Agreement, the Sellers shall give the Buyers a written notice of readiness for delivery.”

Two claims based upon misrepresentations made at the time that the MOA was entered into and as to the condition of the vessel when the NOR was tendered.

It is clear that there are two categories of claims, one based on a breach of contract and the other on misrepresentation. The first category consists of three claims based on alleged breaches of contract that occurred at the time of delivery of the vessel to the buyer, and a claim concerning an alleged breach of clause 5(a) that occurred at the time that the NOR to deliver was tendered. The second category consists of two misrepresentation claims, one of which occurred prior to the conclusion of the MOA, and the other at the time of tendering the NOR.

I will firstly deal with the contractual claims and in this regard the issue of when the claim arose becomes important.

There is a well-recognized distinction in South African Law between a claim coming into existence and a claim being enforceable.

In *Apalamah v Santam Insurance Co Limited*⁴ MULLER J held that:

“Although it is true that in many cases the date upon which a debt “becomes due” might also be the date upon which it “arose”, that is obviously not true of all cases. There is a vital difference in concept between the coming into existence of a debt and the recoverability thereof. There can be little doubt, if any, that the purpose of the Legislature in enacting section 12(1) of the new Prescription Act was to crystallize that difference; thenceforth prescription in terms of that Act began to run not necessarily when the debt arose but only when it became due.”

In the *mv “Forum Victory”: den norske bank ASA v HANS K MADSEN CV AND OTHERS (FUND CONSTITUTING THE PROCEEDS OF THE SALE OF THE MV FORUM VICTORY)*⁵ SCOTT JA held that:

“It follows that, in my view, a reading of s 11(4)(c) together with s 10A(4)(a) strongly suggests that the expression ‘a claim which arose’ in s 11(4)(c) is to be understood as referring to a claim which came into existence, and not to a claim which became enforceable. Such a construction is moreover supported by the recognition in our law of a distinction between a claim coming into existence or, as it is frequently said, a claim arising, on the one hand and a claim which is due and payable on the other.”

In order for a claim to arise, all of the juristic facts necessary for the claim to exist must have occurred, even though the claim might not yet be enforceable because, for example, a suspensive condition has not been fulfilled. As was said in *Cohen v Haywood*⁶ that

“the difference between the question whether a liability exists and whether the date for its performance has arrived is elementary.”

A claim may exist but not yet be enforceable because it is a claim subject to the fulfilment of a suspensive condition or because time to make performance has been given. However, central to the claim's existence is that the elements essential to the existence of a liability are in existence. A claim cannot “exist” when it is uncertain whether there will ever be a claim and what the basis of that claim will be.

In order for a claim to exist it is necessary that the claimant has suffered the damage on which the claim is founded, irrespective of whether the claim is one in contract or delict. It is only when some damage has been suffered that any claim for damages can come into existence.

In *Oslo Land Co v Union Government*⁷ WATERMEYER JA held that:

“ ... It is an action for damages for negligence ... and the right of action in such a case is complete as soon as damage is caused to the plaintiff by reason of the defendant’s negligent act ... By the word damage is meant not the injury to the property injured, but the damnum, that is loss suffered by the plaintiff by reason of the negligent act.”

VAN BLERK JA in *Swart v Van der Vyver*⁸ stated that:

“ ‘Die blote feit dat kontrakbreuk gepleeg is, gee nie noodwending ‘n eis om skadevergoeding nie. Om skadevergoeding te kan verhaal moet bewys word dat skade gely is. Steenkamp v Juriaanse 1970 TS 980 te 986.’ ... ‘Onder die omstandighede, by onstentenis van bewys van werklik gelede skade, bring die feit dat al sou die verweerder wanprestee het, nie vir hom aanspreeklikheid nie.’ “

By taking into account the above cases GOLDSTONE AJ held in *Escom v Stewards and Lloyds SA (Pty) Ltd*⁹ that:

“It seems to follow that once there has been a breach of contract and loss caused thereby, there is a ‘debt’ due.”

In *DrennaN, Maud and Partners v Pennington Town Board*¹⁰ OLIVIER JA reiterated the above principles and concluded that a debt to pay damages becomes due when the loss occurs as a result of a delict or a breach of contract.

In the case of a claim for damages there is accordingly no basis upon which the claim can exist without also being due. The same is true of the position in English law. In *ROTHWELL v CHEMICAL AND INSULATING CO LTD*¹¹ it was held that

“It has always been the law in England and Wales that negligence is not actionable per se, it is only actionably on proof of damage: While such damage need not be substantial it must be more than minimal.”

The question arises as to when did the maritime claims that the buyer wishes to pursue arise? Mr Wallis submits that the buyer must show on a balance of probabilities that the claims arose before the passing of ownership in the vessel to it and not simultaneously with or after delivery.

The parties agree that the meaning of the expression “when the maritime claim arose” is to be determined according to South African law by applying the South African principles of statutory interpretation.

Mr Wallis contends that since the expression “claim arose” is an expression used in a South African statute, the issue is whether the claims put forward as a basis for the security arrest are claims that arose, in the sense given to that expression in South African law, before ownership of the vessel passed to the buyer. He further submits that the arrest must accordingly be set aside because the buyer’s claims did not arise until the vessel had been delivered and ownership had passed. The acceptance of delivery and the suffering of the loss for which compensation is sought are essential elements of a claim.

Legal opinions by English barristers, Mr Karia, on behalf of the owner and seller, and Mr Happé, on behalf of the buyer were submitted to assist the Court in determining the issues in casu.

It is common cause that English law governs the MOA and is the proper law of the arbitration. Mr Karia and Mr Happé agree and it is common cause between the parties that title to the vessel passed from the seller to the buyer upon the completion of the sale by the delivery of the vessel to the buyer against payment of the purchase price at 19h05 local time on 20 October 2005. They further agree that any cause of action for damages for breach of contract based upon alleged deficiencies in the vessel arises immediately after the delivery of and the passing of ownership in the vessel to the buyers against payment of the purchase price.

Mr Karia submits that if the terms of clauses 11 and 18 of the MOA or section 14 of the SGA were breached then the breach would have occurred immediately after delivery on 20 October

2005. He states that it is trite law that a buyer's cause of action for breach of an express or implied term relating to goods sold accrues when the goods are delivered. He referred to Chitty on Contracts¹² and the Vera Cruz¹¹³ wherein the Court held that the buyer had no cause of action until the ship had been delivered to him and that therefore the court had no jurisdiction to grant him the requested relief. That decision was followed in The P14 wherein EVANS J explained that a breach of contract arising from alleged defects in the vessel "does not arise until the ship is delivered in a defective condition".

Mr Happé agrees with the above submissions by Mr Karia, save for the disputed breach of clause 5(a).

Both Mr Karia and Mr Happé agree that any cause of action for damages for breach of contract based upon deficiencies in the vessel arises immediately after delivery. Accordingly they agree that the buyer's three contractual causes of action for damages for breach of clauses 11 and 18 of the MOA and the claim based on breach of the implied term flowing from the Sale of Goods Act would have arisen immediately after the vessel was delivered to the buyer. Accordingly it would follow that the buyer was not entitled to arrest the mv "CAPE COURAGE" as an associated ship on the basis of these claims and is not entitled to security for these claims.

Mr Wallis further submits that this also disposes of the contractual claim regarding the breach of clause 5(a) of the MOA based on the tender of the NOR. That is an action for damages based on deficiencies in the vessel and in principal the English barristers are agreed that it arises only after delivery.

The issue becomes academic because the contractual claim as set out in the amended claim submissions is a claim for the cost of repairs and other expenses or alternatively a claim for reduction in the purchase price. This claim would only arise after delivery.

Both Mr Karia and Mr Happé agree that the cost of repairs and other expenses did not arise until after delivery and that a claim based on the condition of the vessel at the time of delivery would only arise after delivery.

Mr Happè postulates the claim on an entirely different basis to the way in which it had been presented in the arbitration papers. He suggests that:

“Had the Sellers not breached an obligation to tender the NOR only when the vessel was truly ready, it seems very clear that no tender would have been made before the cancelling date; the purchase price would not have been paid; the deposit would have been returned.”¹⁵

Mr Wallis submits that the attempt to formulate the claim for damages on the basis of the difference between the price paid “and the price the buyers would have paid had the true position been known”¹⁶ is speculative and without any support in authority. No such claim is mentioned in the leading text books on the law of contract in England¹⁷.

Mr Karia’s view is that however formulated, this claim is nothing more than a claim for a reduction of the purchase price, which is dependent upon delivery having been taken and accepted. Mr Happè does not challenge this in his further opinion.

Mr Karia is of the view that the buyer has no such of action to recover damages for a breach of contract arising from the NOR. The NOR acts only as a “trigger” to the completion of the sale. Any cause of action for damages arising from the condition of the vessel would only arise from breaches of clauses 11 and/or 18 of the MOA or the term implied by section 14 of the SGA. These causes of action accrue immediately after delivery and transfer of title to the buyer.

Mr Happè expresses the view that the tender of the vessel when it was not ready in all respects for delivery would have been a breach of the MOA. Strictly speaking this is not the issue. The issue is whether any such breach gave rise to a cause of action to recover the damages that the buyer claims in the arbitration and, if so, whether that cause of action arose prior to delivery.

It is thus clear that if the claims in question did not come into existence under English law prior to the passing of ownership then it could not have arisen under South African law prior to that date. The claims are for damages based on the cost of repair and other expense or for a reduction in the purchase price. The importance of this is that the claim is entirely dependent upon the buyer having taken delivery of the vessel and once it became aware of the alleged defects deciding nonetheless to keep the vessel and sue for damages rather than seek to cancel the sale and recover the purchase price.

Mr Wallis submits that no such entitlement could have arisen prior to ownership passing. At that time if the buyer had become aware of the alleged defects it could, as pointed out by Mr Happè, have refused to accept delivery or pay the purchase price and cancelled the sale and claimed the return of its deposit.

The buyer is not entitled to security generally for its claim. It is only entitled to security for such of its claims as arose prior to the passing of ownership of the vessel. It is only in respect of such claim that it can be contended that the mv “CAPE COURAGE” is an associated ship.

Mr Wallis submits this is important because even on Mr Happè's submissions certain of its causes of action did not arise until after ownership had passed and such causes of action could not found an arrest of the mv "CAPE COURAGE" as an associated ship.

It is important to note in regard to these claims that the damages that the buyer claimed in seeking the arrest were its loss after taking delivery of the vessel, in respect of repairs undertaken and to be undertaken to the vessel, loss of profits due to under-performance, claims by charterers and future expenses. These amounts are amounts that could only represent damages suffered by the buyer consequent upon its accepting delivery of the vessel. In other words, none of these damages could have been suffered prior to delivery being taken and ownership passing.

With regard to the buyer's claim for breach of clause 5(a) of the MOA, Mr Happè regards the proper measure of damages as being the difference between the price paid and the price that the buyer would have paid had the true position been known. Mr Happè does however concede, that there is no authority supporting this and somewhat cautiously says it is "a subject fit for argument".

In his second opinion Mr Karia states that he disagrees with Mr Happè's proposed measure of damages, stating that the measure employed by Mr Happè "is wrong in principle, speculative and unworkable in practice". Mr Happè does not take the matter any further in his second opinion.

A straight forward application of South African law indicates that the arrest must be set aside because the claims of the buyer did not arise until the vessel had been delivered and ownership had passed. This view is substantiated by Mr Karia and Mr Happè. The buyer has accordingly failed to satisfy the onus of showing that the claims in respect of the alleged breaches of clauses 5(a), 11 and 18 of the MOA and section 14 of the SGA arose at a time when the mv "CAPE COURAGE" was owned by the seller. The arrest in respect of these claims ought accordingly to be set aside.

As regards the claims for alleged pre-contractual misrepresentation both Mr Karia and Mr Happè differ in their views as to when, in English law, the causes of action to recover damages for alleged pre-contractual misrepresentations or misrepresentations in tendering the NOR would have accrued. Mr Karia submits that any such claim would only have arisen after delivery of and the passing of ownership in the vessel on 20 October 2005.

Mr Karia is of the opinion that the cause of action to recover damages for misrepresentation arose when the claimant first sustained damage in the form of a measurable financial loss. It did not arise when the contract was conducted or the misrepresentation made for the obvious reason that in the absence of measurable loss there was no claim at all. He further states that where the misrepresentation relates to the quality of the goods to be delivered under the contract the cause of action to recover damages accrues only when the goods are delivered, paid for and title in them passed to the buyer. He supports this opinion with two decisions of the House of Lords in the *NYKREDIT PLC v EDWARD ERDMAN LTD* (NO 2)¹⁸; and *LAW SOCIETY v SEPHTON & CO*¹⁹ and by two decisions concerning the supply of defective goods, namely *TOPRAK ENERJI SANAYI AS v SALE TILNEY TECHNOLOGY PLC*²⁰ and *PROCTOR & GAMBLE v CARRIER HOLDINGS*²¹.

Mr Happè distinguishes these authorities on the basis that the goods which were the subject matter of the sales in the latter two cases were not appropriated to the contract until delivery. Mr Wallis submits that the cause of action that Mr Happè then advances on the basis of this distinction is not the cause of action that the buyer advances in the arbitration but a different cause of action entirely. The relevant passage in Mr Happè's opinion is:

*"The misrepresentations as to the vessel's condition were misrepresentations as soon as they were made (if the Buyers are correct): there was no need for their inaccuracy and misleading character to be manifested or given expression on delivery. Had the Buyers known the true condition of the vessel, they could immediately have brought proceedings to rescind the MOA, or to restrain the Sellers by injunction from tendering NOR. In addition they could have rejected the NOR when tendered. This would, inevitably, have led to the cancellation of the MOA, and a potential claim (under clause 14)."*²²

Mr Wallis submits that this is an entirely different cause of action and indeed one that ceased to exist once delivery was accepted and the contract was not thereafter cancelled. He further submits that the fact that it is different is apparent from the following passage from Mr Happè's first opinion:

*"So, the Buyers' claim can be said, without departing materially from the way in which the claim is put, to be that they agree to pay, and then in fact paid, more for the vessel than they would have done had they known the true condition, whether this is assessed by reference to the cost of repairs to be done or the price at the time."*²³

Mr Wallis submits that clearly Mr Happè was well aware that this did indeed depart from the way in which the claim had been put and sought to minimise the difference. However the claim he then formulates is a claim that has its foundation in the act of delivery and the decision to abide by the contract. It is a claim for a reduction of the purchase price based on the alleged defects in the vessel and that claim only arises once the buyer accepts delivery and elects not to cancel the sale. Nowhere is it suggested that the buyer could demand delivery against payment of a reduced purchase price.

Mr Karia's response to Mr Happè's views is that they cause no alteration of stance on his part. Mr Karia submits that the nature of the cause of action is highly relevant to the question of when the claim arises.

In his second opinion, Mr Happè appears to accept that the buyer must demonstrate that it sustained actual damage before a cause of action in tort for damages arising from a misrepresentation can be said to have arisen. He suggests that there is the loss of the right to rescind the MOA and that the damage flows from this but that is not the damage that is being claimed. Mr Happe fails to grapple with the point that the damage actually suffered and the claim actually being made is entirely dependent upon the buyer taking delivery, electing to abide by the contract and keep the vessel.

Mr Karia, in rejecting this view of Mr Happè, states as follows:

“A loss of chance to exercise a right of rescission can by no stretch of the imagination be regarded as giving rise to actual damage or a loss capable of assessment in money. The loss that arises if the contract is not rescinded is a loss that arises because delivery has been taken and title has passed in goods that are worth less than the price paid for them. It can only arise at that stage and the result is that a claim for damages only arises after the passing of title.”²⁴

Mr Karia's cites authorities to support the propositions advanced by him. Thus the arrest can only stand on these causes of action if the buyer can show on a balance of probabilities that Mr Happè's views are correct. Mr Happè's has however not been able to show in his submissions that the buyer has discharged that burden. Accordingly the arrest cannot be upheld and the security cannot be maintained in respect of the causes of action for misrepresentation.

On the facts of this case the buyer has not been able to show that any of the claims arose prior to the transfer of ownership. The buyer became the owner of the vessel upon delivery when it elected to take transfer of the vessel. Any claim that would have arisen then against the seller by the buyer is in its capacity as owner. The buyer has not been able to discharge the onus of establishing the association.

In light of my findings above the applicants seek an order in terms of paragraphs 2, 3 and 9 of the Notice of Motion in the application to set aside the arrest. The parties have agreed that an order in terms of paragraph 6 would only be made in the event of the application to set aside the arrest being unsuccessful.

The following order in terms of the Notice of Motion is accordingly made:

That the arrest of the mv “CAPE COURAGE” effected by the First Respondent pursuant to an order granted under case no. A74/2006 on 15 June 2006 is hereby set aside.

That the First Respondent be ordered to return the bank guarantee issued by the Second Respondent and dated 26 June 2006, furnished to procure the release of the vessel from arrest, to the Applicant's attorneys for cancellation.

That the First Respondent be directed to pay the Applicants' costs, both in relation to this application and to the proceedings whereby the arrest was granted, such costs to include those consequent upon the employment of two counsel.

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1 [1994] ZASCA 5; 1994

(2) SA 563 (A) at 581 B – F.

2See further: TRANSGROUP SHIPPING SA (PTY) LTD v OWNERS OF MV KYOJU MARU 1984 (4) SA 210 (D & CLD) at 214 H – L.

3See: CARGO LADEN AND LATELY LADEN ON BOARD THE MV THALASSINI AVGI v MV DIMITRIS 1989 (3) SA 820 (A) at page 834 B – H. DOLE FRESH FRUIT INTERNATIONAL LTD v MV KAPETAN LEONIDAS

[1995] ZASCA 33; 1995 (3) SA 112 (A) at p116 C – G.

3See: CARGO LADEN AND LATELY LADEN ON BOARD THE MV THALASSINI AVGI v MV DIMITRIS 1989 (3) SA 820 (A) at page 834 B – H.

DOLE FRESH FRUIT INTERNATIONAL LTD v MV KAPETAN LEONIDAS

[1995] ZASCA 33; 1995 (3) SA 112 (A) at p116 C – G.

4 1975

(2) SA 229 (D) at 232 G – E.

5 2001

(32) SA 529 (SCA) at para [14].

6 6 1948 (3) SA 365 (A) at 371.

7 7 1938 AD 584 at 590.

8 1970

(1) SA 633 (A) at 643 C - D and 650 F – G.

9 1979

(4) SA 905 (W) at 908 G – 909 H.

10 1998

(3) A 200 (SCA) at 211D-F.

11 2006

(4) All ER 1161 (CA) para 19. (See further LAW SOCIETY v SEPHTON & CO

[2006] 3 All ER 401 (HL).)

12 29th Ed 2004 para 28 – 052 P 1591 “In a contract of sale of goods ...the buyers’ right for breach of an express or implied warranty relating to goods accrues when the goods are delivered and not when the defect is discovered or damage ensues.”

12 29th Ed 2004 para 28 – 052 P 1591

“In a contract of sale of goods ...the buyers’ right for breach of an express or implied warranty relating to goods accrues when the goods are delivered and not when the defect is discovered or damage ensues.”

13 (1992) 1 Lloyds Reports 353.

14 (1992) 1 Lloyd’s Reports 470 at 472.

15 Record p 387 para 35.

16 Mr Happè, para 43, p 390

17 Such as: Chitty on Contracts, 29th Ed, Vol1, Chapter 26, sv “Damages”; Treitel, the Law of contract, 11th Ed, pages 926-1013.

18 [1997] UKHL 53; [1998] 1 All ER 305 (HL) at 308f-g.

19 [2006] 3 All ER 401 (HL) at paras [17] and [18], p 407 and paras [71] to [73], p 422.

20 [1994] 1 Lloyd’s Report 303 (QB Com)

21 [2003] 1 BLR 255 at 267 – 268, paras 44 – 47.

22 Record page 382, para 21.

23 Record page 384, para 27.

24 Record page 994 para 12.

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