



## Maritime Law Team

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Our Cox Yeats Maritime Team is committed to keeping you informed on pertinent legal issues, as well as developments within our firm.

### UPDATE ON PROTECTIVE WRITS

On 1 February 2019, the Supreme Court of Appeal of South Africa (SCA) delivered a seminal judgment on the topic of protective writs in South African admiralty law. In the majority judgment of the *Seaspan Grouse*, written by Wallis JA and Schippers JJA, it was held that a maritime claimant who has issued a protective writ against a ship, which is an associated ship at the time of the issue of such proceedings, may not lawfully arrest that ship in circumstances where there has been a *bona fide* change of ownership in the ship between issue and arrest. The approach taken by the SCA represents a significant departure from the English case of the *Monica S*.

Historically, protective writs have been regarded as offering two forms of protection, namely; (a) protection against a change of ownership or control in the vessel intended to be arrested and (b) protection against a claim becoming time-barred, in that it enabled service on the vessel after the time-bar date. The SCA judgment in the *Seaspan Grouse* has effectively removed the former protection.

The facts of the *Seaspan Grouse* were that the claimants, two German registered shipowners, had *in personam* claims against Hanjin Shipping Co Ltd (Hanjin Shipping) for unpaid charter hire. On 2 September 2016, the claimants issued protective writs against various vessels alleged to be associated ships, which included the *Seaspan Grouse*, formerly known as the *Hanjin Gdynia*.

On 14 December 2016, the mortgagee of the *Hanjin Gdynia* caused the owner of the vessel, J O O Shipping, to sell the vessel to Seaspan Hold Co 1 Limited (Seaspan) in terms of a Memorandum of Agreement (MOA). On 29 December 2016, the vessel was delivered to Seaspan under the MOA. There was no dispute that the sale of the vessel to Seaspan was a *bona fide* transaction and that Seaspan became the registered owner of the vessel prior to her arrest on 23 August 2017. Accordingly, a legitimate change of ownership had occurred between the issue, and service, of the *in rem* summons.

Seaspan brought an application in the High Court, KwaZulu-Natal Local Division, Durban, exercising its admiralty jurisdiction, for an order setting aside the arrest of the vessel and the return of the security. That application was set aside by the Durban High Court which held that the *Monica S* correctly reflected the position in South African law.

In an earlier decision of the Western Cape High Court in *Tebtale Marine Inc*, the Court had reached a contrary conclusion and set aside the arrest of the *Mount Meru*, finding that the association needed to be established at the time of the arrest. In the premises, it was necessary for the SCA to clarify the correct position in our law.

The starting point for the SCA was a consideration of the associated ship provisions contained in sections 3(6) and (7) of the Admiralty Jurisdiction Regulation Act, 105 of 1983 (AJRA). The important words in these provisions were “*owned, at the time when the action is commenced*”. This meant that the court had to determine whether, in the context of an *in rem* action, such action commenced (a) by the issue of the *in rem* summons or (b) by the service of the *in rem* summons on the vessel, after its issue.

Section 1(2) of AJRA provides:

- “(a) *An admiralty action shall for any relevant purpose commence –*
- (i) *by the service of any process by which that action is instituted;*
  - (ii) *by the making of an application for the attachment of property to found jurisdiction;*
  - (iii) *by the issue of any process for the institution of an action in rem;*
  - (iv) *by the giving of security or an undertaking as contemplated in section 3(10)(a).”*

The SCA noted that it was important to determine whether section 1(2)(a) fixed a single commencement date for every admiralty action or whether there was a choice of commencement date linked to the purpose for which the date of commencement of the action was relevant.

In interpreting this provision, the court placed much reliance on the words “*for any relevant purpose*” in the preamble to section 1(2)(a). The court found that it was necessary to adopt a flexible standard for determining when an action commences, depending upon the relevant purpose leading to the enquiry. In the case of an enquiry relating to the arrest of an associated ship, such as the *Seaspan Grouse*, the court held that the applicable date was the date of the arrest (namely the date of service of the *in rem* summons under section 1(2)(a)(i)) as opposed to the date of issue of the protective writ (namely the issue of process for the institution of an action *in rem* under section 1(2)(a)(iii)).

In reaching its conclusion, the SCA considered material anomalies that would arise in the event of it holding that the date of issue of the *in rem* summons should be preferred to the date of service thereof on the vessel. The court compared *in rem* arrests to other similar proceedings such as attachments to found or confirm jurisdiction or security arrests. In such attachments and security arrests, the law is clear that the time at which ownership of the arrested property or association, in the context of an associated ship arrest, must be established is at the time of attachment or arrest.

The court also considered section 3(5) of AJRA, which provides that: “*An action in rem shall be instituted by the arrest within the jurisdiction of the court of property...*”. It reasoned that this was an important provision in the

interpretation of when an *in rem* action commences and further, that there needed to be consistency between section 3(5) and the relevant sub-sections of section 1(2)(a) of AJRA.

Significantly, the SCA pointed out that the purpose of the associated ship provisions was to enable claimants to arrest vessels by establishing common ownership or common control at the time of the arrest. The intention was not to render liable to arrest a vessel having no connection to the ship against which the maritime claim arose, either by way of common ownership or common control.

In the result, the appeal succeeded and the judgment of the Durban High Court was overturned. The SCA held that the arrest provisions contained in AJRA are incompatible with the English case of the *Monica S* and that the reasoning of the *Monica S* does not apply in South African admiralty law, either in respect of an arrest of the ship concerned or an associated ship.

Importantly, as pointed out by the SCA, the judgment does not mean that protective writs cannot be issued against ships in South Africa and later served when the ship comes within the jurisdiction of a South African High Court exercising its admiralty jurisdiction. The proviso is that at the time of the arrest, that ship must still be owned by the same owner or it must be an associated ship.

It should be pointed out that Makgoka J delivered a dissenting judgment in the SCA. In her view, the preferred approach was to uphold the essence of the judgment in the *Monica S*, namely the policy considerations to protect maritime claimants in the event of a change of ownership in the vessel giving rise to the maritime claim. She regarded the judgment of the majority as a change in the law and expressed the view that the process of issuing protective writs was entrenched within AJRA.

The judgment of the majority of the SCA stands and has clarified the position on this issue in South African law. The important takeaway from the judgment is that parties issuing protective writs, whether against the ship concerned or against associated ships, need to ensure that *at the time of arrest* they have current information regarding ownership or control of the ship that is intended to be arrested. If there has been no change in the factual position in this regard since the issue of the protective writ, the arrest may proceed.

However, if there has been a change of ownership or control, then, absent evidence of *mala fides* (which is usually very difficult to establish), the arrest may not proceed.

In summary, subject to the *caveat* relating to establishing ownership and control *at the time of arrest* – which is an enquiry that prudent admiralty practitioners should conduct in any event – protective writs remain alive and well in South Africa and continue to be an important mechanism to protect the rights of claimants, specifically by interrupting time-bar through the issue thereof and allowing for subsequent service on the ship after the time-bar date.

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