

# MV Alina II: judge declares charterparty a fraud



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## Introduction

The MV Alina II suffered serious hull damage at the Saldanha Bay berth in 2009. The vessel's charterer, Prima Shipping Company Limited, brought an application in the Western Cape High Court to set aside an arrest of bunkers aboard the vessel in South Africa as security for contemplated London arbitration proceedings by Kumba Shipping Hong Kong Limited, a subsidiary of Anglo-American plc (one of the world's largest mining companies). Applications of this nature are usually decided on the basis of affidavits filed by both parties, followed by argument.

This case is noteworthy in that the initial hearing on the papers led to a referral of the matter to oral evidence in order to determine whether there was sufficient evidence to demonstrate that the arrestor was entitled, on a balance of probabilities, to maintain the arrest. Referrals to oral evidence are a rarity in South African arrest applications and it is significant that in the first round of the hearing the judge found that Kumba's version "could not be described as fanciful or untenable and in fact had persuasive value".

As often happens with bunker arrests, the case turned on whether Kumba could prove that Prima owned the bunkers on the strength of the underlying charter arrangements among the parties in the contractual chain. If not, the arrest would fall to be set aside.

## Facts

The ship's registered owner, Pompey Shipping Corp, had chartered the MV Alina II to Prima, which in turn had sub-chartered her to Kumba for the carriage of iron ore on a voyage basis from Saldanha Bay to China. Prima was described in the sub-charterparty as the disponent owner and, taking this to mean that Prima had the ship on demise or time charter, Kumba arrested her bunkers in Saldanha Bay on the grounds that ownership vested in Prima. The crux of Prima's defence was that it had, on the contrary, chartered the ship on a voyage basis and that the bunkers had been stemmed by the managers (Polembros) on behalf of Pompey.

The judge observed that the categorisation of the type of charterparty between Prima and Pompey was critical to Kumba's case, since the ownership of the bunkers would generally follow from that categorisation.

Against this background, both parties adduced oral evidence before Judge Gamble. In Prima's case, the judge took a dim view of testimony given on its behalf by Polembros' in-house counsel and its operations manager. While the witnesses sought to justify the unusual voyage charter arrangements on the grounds that they had been concluded on a back-to-back basis for tax purposes, it became apparent during cross-examination that the document presented to the court as evidence of the Pompey/Prima charter had been drawn up and signed in Polembros' offices only after Kumba's lawyers had asked for proof of its existence. It was conceded in oral testimony that there had never been a contemporaneous written fixture, and that the document tendered on affidavit had in fact been backdated and was simply a 'cut and paste' from the Kumba charter.

### **Decision**

Highlighting the stark contrast between allegations advanced on paper and oral evidence given in court, the judge stated:

*"I consider Mr. Gare's evidence [in-house counsel for Polembros], firstly, in light of his demeanour in the witness box. I found him to be a smug witness who was most economical in the use of language. My overall impression was that, as a seasoned maritime lawyer, he was pointedly cautious with his answers, so much so that I have to agree with Mr. Gordon SC's complaint in argument that Mr. Gare was singularly lacking in candour.*

*"The Pompey/Prima charterparty, as a document that was sent out into the world as evidence of a written agreement having been concluded and signed on 21 September 2009 [after the arrest] is nothing but a fraud. It is a fraud into which Prima's local attorneys, no doubt unwittingly, were inveigled when they were instructed by Mr. Gare to put up the document as a genuine instrument in the founding affidavit in the set aside application."*

On the probabilities, the judge rejected Prima's version of events and upheld the arrest.

### **Comment**

It remains to be seen whether this case will persuade charterers to think twice about submitting questionable evidence in response to future bunker arrests in South Africa.

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