



# Arresting a bareboat charterer's rights in South Africa



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The Durban Division of the High Court of South Africa has recently handed down a judgment in a matter of legal and practical importance relating to the arrest of maritime property.

### Background

It has long been an open question as to whether a claimant can arrest a bareboat (or demise) charterer's rights in a bareboat charterparty as security for court or arbitration proceedings. The uncertainty stems from a judgment of the South African Supreme Court of Appeal in *mv Snow Delta*, in which the court remarked that a charterer in possession and control of a ship may have a real right in relation to the ship which is capable of being attached where the ship is located.

On the strength of these remarks, there have been arrests in South Africa from time to time of the demise charterer's so-called 'right, title and interest' in and to the ship, but it was not until the recent case of *mt Rio Caroni* that the point was successfully challenged.

### Decision

The judgment analyses the legal nature of a bareboat charterparty and, after considering the authorities, concludes that it is, in essence, a contract of lease. Although a demise charterer enjoys rights of use and possession, it does not step into the shoes of the owner in all respects during the period of the charter. The court concluded that it should not be taken literally when it is said that the charterer "becomes, for the time, the owner of the vessel", and that whatever rights a demise charterer may have in and to the vessel, they are not based on ownership.

Against that background, the court went on to consider what rights the demise charterer has in the ship and where those rights are situated. In the context of a bareboat charter, there are two distinct rights in operation. The first is the right to possess something, which can flow from either a personal right, such as a contract, or from a real right, such as ownership. The second is the entitlement and privileges which flow from the mere fact of being in possession of the property, such as the right not to be dispossessed.

In the case of a bareboat charterparty, the contractual right is located where the debtor resides and not where the ship is located.

As to the legal nature of the second category, the judge was not persuaded that the rights flowing from the fact that the demise charterer is in physical possession of the ship constitutes a real right or property which is capable of being arrested. This conclusion, as far as the court is concerned, accords with the practicalities. For example, that the right merely to possess the ship has no commercial value to anyone; it is not property which can be sold to recover a debt in the event that no alternative security is provided.

The court concluded by saying that:

*"If execution cannot be levied against a property arrested, the only purpose of the arrest would have been to pressurise the charterer or the owner to put up security. I do not believe that this is a legitimate basis for an arrest [as security for a claim]"*.

Accordingly, the court clarified the legal position and set aside the arrest of the demise charterer's right, title and interest in and to the bareboat charterparty and the ship itself.

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