

Hanjin fallout: Supreme Court of Appeal rules on protective writs in South Africa

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The litigation following the collapse of Hanjin Shipping and coming off the back of the Supreme Court of Appeal judgment handed down in January 2019 is ongoing in South African courts (for further details please see "[Hanjin fallout: end of protective writs in South Africa?](#)" and "[Hanjin fallout – part two: High Court refuses time extension for writs of arrest *in rem*](#)").

Facts

When Hanjin filed for bankruptcy in South Korea, certain creditors (principally Mare Tracer Schiffahrts and Mare Traveller Schiffahrts) had issued writs of arrest *in rem*, citing more than 70 vessels in the Hanjin fleet. They did so with the expectation that the writs would preserve the claims against the vessels, notwithstanding the later change of ownership following an inevitable sale of the fleet.

The claims were premised on breaches of charterparties which had been concluded between the claimants (as head owners) and certain Hanjin-owned charterers. In order to cast the net of possible target vessels as wide as possible, the arrest papers cited the Hanjin fleet as 'associated ships' based on the allegation that the chartered vessels and the arrest targets had been beneficially owned or controlled by the same owner (ie, Hanjin Shipping) at the material time. For the purposes of the associated ship arrest, the claimants had to establish that Hanjin Shipping had been the beneficial owner of the associated ship (ie, the target of the arrest) when the action had been commenced.

Issue in contention

The case hinged on whether, for the purposes of timing, the mere issuing of a writ of arrest was sufficient to commence an admiralty action (having the effect of protecting against a change of ownership) or whether physical service of the writ on the vessel was necessary.

The time of commencement of an action *in rem* has been a point of contention for academics and practitioners alike since the introduction of the applicable legislation in 1992. Under Section 1(2)(a) of the Admiralty Jurisdiction Regulation Act 1983:

- (a) *An admiralty action shall for any relevant purpose commence –*
- (i) *by the **service** of any process by which that action is instituted;*
 - (ii) ...
 - (iii) *by the **issue** of any process for the institution of an action *in rem*;*
 - (iv) ...
- (Emphasis added.)

Western Cape High Court decision

It was not until the matter came before the Western Cape High Court in Cape Town that the court was called on to express a definitive view. The court held that:

- on a proper interpretation of the legislation, the position under English law (as espoused in *m v*

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Monica S) does not apply in South Africa; and

- the issuing of a protective writ at court without service of the papers on the property is insufficient to protect against changes in ownership of a defendant vessel where the sale is conducted on a legitimate arm's-length basis.

As a result, the applicant succeeded in having its newly purchased vessel (Hanjin Cape Lambert named Mount Meru) struck out of the Cape Town writ before the vessel's actual arrest in South Africa.

KwaZulu-Natal High Court's conflicting judgment

A second case soon followed. This time the proceedings came before the Kwazulu-Natal High Court in Durban, prosecuted by the same creditors under a similar writ to that which had been issued by the Cape Town High Court. The only significant factual difference was that in *Durban*, the vessel in question (mv Seaspans Grouse) had been arrested.

Under the rules of precedent in South Africa, decisions from different South African divisions of the High Court are not binding on one another, but have a persuasive effect only. Therefore, the *Durban* judge could reach a different conclusion, and did exactly that.

The judge focused on the view that an arrest was merely a means to give utility and effectiveness to the judgment sought by the claimant, but that it is the issuing of the writ which commences an action *in rem*. If the position were otherwise, the writ would have no legal effect until the arrest, which could never have been the Admiralty Act's intention.

The court concluded that the Admiralty Act's plain language should be given this ordinary meaning without resorting to any linguistic gymnastics, and that this approach supported the proposition that an action *in rem* is commenced by the issue of the process.

These findings, among others, led the court to conclude that the action in question had been validly commenced on the issue of the summons and that a later change of ownership on an arm's-length basis did not alter the claimant's right to proceed with the action.

Supreme Court of Appeal settles issue

Given the unsatisfactory state of affairs brought about by the conflicting judgments in two different divisions of the High Court, it was inevitable that the matter would find its way to the Supreme Court of Appeal, where a uniformly binding decision could be made.

On appeal, the judges carefully analysed the issues to formulate a comprehensive judgment.

The immediate question to be determined by the court was whether:

- the relevant section of the Admiralty Act fixes a single commencement date for every admiralty action (ie, on the service of any process by which that action has been instituted);
or
- there is a choice of commencement date, depending on the purpose for which the commencement date of the action is relevant.

The court held that whenever more than one date may apply, there is a choice to be made. It found that the proper view is to apply a flexible standard for determining when an action commences, depending on the relevant purpose for which the enquiry must be made. Against this background, the judges held that, textually and contextually, the approach advanced by Seaspans (the third-party owners of the arrested vessel) was to be preferred. Its position was founded on the following arguments:

- The correct approach to Section 1(2)(a) of the Admiralty Act was first to identify why it was necessary to determine when the admiralty action had commenced.
- One of the relevant purposes in the present case was a situation involving the arrest of an associated ship. In relation to an associated ship arrest, Section 3(7)(a) of the Admiralty Act requires the ship which has been arrested to have been owned by the then beneficial owner when the action was commenced.
- The concept of associated ships is unique to South Africa; therefore, it is necessary to pay close attention to the principles underlining the act to determine whether a vessel is an associated ship. There is little point in considering English law as to the nature and effective issuing a writ in proceedings *in rem*, when a South African statute materially differs from its English counterpart.
- The underlying purpose of an associated ship arrest is that liability should be imposed where it properly lies by virtue of common ownership or control. Accepting that the purchaser of a vessel may be unaware of the existence of a maritime lien, it was inappropriate to extend the

potential liabilities of purchasers to statutory rights *in rem* arising from a lengthy and indeterminate list of maritime claims, going considerably beyond those identified in the Arrest Convention.

Finally, the court favoured the submissions by Seaspans counsel that Section 39(2) of the Constitution requires the court to construe the Admiralty Act in a manner that best promotes the spirit, purport and objects of the Bill of Rights. A construction of the act that permitted the arrest of vessels as associated ships, even though there was no connection between the person liable for the claim and the ship being arrested, was not the interpretation that best promoted the spirit, purport and objects of the Bill of Rights and – in particular, Section 25 thereof which safeguards the right against arbitrary deprivation of property.

The Supreme Court held that the arrest provisions of the Admiralty Act are incompatible with the decision in *Monica S*; therefore, that judgment cannot apply in South Africa admiralty law, whether in relation to the arrest of the ship concerned or an associated ship. This does not mean that protective writs cannot be issued in South Africa and served when the vessel comes within the jurisdiction. It merely means that such a writ gives no protection to a claimant seeking to intervene in a genuine change of ownership.

For further information on this topic please contact [Jeremy Prain](mailto:j.prain@bowman.co.za) at Bowmans by telephone (+27 21 480 7800) or email (j.prain@bowman.co.za). The Bowmans website can be accessed at www.bowman.co.za.

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