VOSTOCK SHIPPING CO LTD V CONFEDERATION LTD (CA)

IN THE COURT OF APPEAL OF NEW ZEALAND

CA244/98

BETWEEN

VOSTOK SHIPPING CO LIMITED

Appellant

AND

CONFEDERATION LIMITED

Respondent

Coram: Richardson P, Gault J, Blanchard J

Hearing: 16 September 1999

Counsel: T J Broadmore for Appellant

P W David and A N Tetley for Respondent

Judgment date: 7 October 1999

RICHARDSON P AND BLANCHARD J (DELIVERED BY BLANCHARD J)

Introduction

1. The appellant, Vostok Shipping Co Ltd (Vostok), a company incorporated in South Korea, brought an in personam claim against Primorskay Rybopromyshlennaya Kompaniya Orka ("Orka"), a Russian company carrying on business at the port of Nakhodka, Russia for the price of goods and services supplied by Vostok to Orka in respect of the ship Kapitan Lomaev (the ship) and a sister vessel from 1996 to 1998. In the same proceeding, commenced on 19 June 1998 while the ship was berthed at Lyttelton, Vostok brought a claim in rem against the ship, which was arrested at Vostok's behest the same day.

2. The respondent, Confederation Ltd, entered a conditional appearance in the High Court at Auckland and applied to have the proceeding in rem set aside, alleging it was the beneficial owner of the ship at the relevant time.

3. The High Court's jurisdiction is to be found in the Admiralty Act 1973, as follows:

4. Extent of admiralty jurisdiction-

(1) The Court shall have jurisdiction in respect of the following questions or claims:

. . .

(l) Any claim in respect of goods, materials, or services (including stevedoring and lighterage services) supplied or to be supplied to a ship in its operation or maintenance:

5. Actions in rem-

. . .

(2) . . . the admiralty jurisdiction of the High Court may be invoked by an action in rem in respect of all questions and claims specified in subsection (1) of section 4 of this Act . . .

Provided that-

. . .

(b) In questions and claims specified in paragraphs (d) to (r) of subsection (1) of section 4 of this Act arising in connection with a ship where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the jurisdiction of the High Court may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against-

(i) That ship if, at the time when the action is brought, it is beneficially owned as respects all the shares therein by, or is on charter by demise to, that person; or

(ii) Any other ship which, at the time when the action is brought, is beneficially owned or on charter by demise as aforesaid.

4. It is not in dispute that Vostok's claim in rem was a claim coming within s 4(1)(l) but Confederation put in issue the jurisdiction under s 5(2)(b), saying that at the time when the action was brought the ship was not "beneficially owned as respects all the shares therein" by the "person who would be liable on the claim in an action in personam", ie by Orka.

5. Confederation said that by that time it had become the beneficial owner. In this Court there is an agreed chronology. The facts do not appear to be in dispute, the question being their significance in relation to the issue of the High Court's Admiralty jurisdiction. The vessel was registered on the Russian shipping registry at Nakhodka in the name of Orka. Orka appears to have been in financial difficulties. It was indebted to Prok Bank, which is incorporated in Vanuatu. On 16 March 1998 Orka and Prok Bank had reached oral agreement for the settlement of Orka's indebtedness by Orka selling the ship to Prok Bank's nominee, Confederation. The transfer of the ship to Confederation was to be in full settlement of the debt to the bank. (Confederation, also incorporated in Vanuatu, is apparently a subsidiary of Prok Bank.) At this time the ship was on the high seas. On 2 or 3 April 1998 a written agreement to this effect was signed. It provided for disputes to be determined by reference to New Zealand law. On 1 May 1998 physical possession of the vessel passed to Confederation. The vessel remained on the high seas. On 13 May the ship was provisionally registered on the Belize registry. Permanent registration was subject to production of, inter alia, a bill of sale and a deletion or exclusion certificate (a document evidencing the fact that the registration on the Russian registry had been cancelled and the vessel removed from that register).

6. Some two weeks later, on 27 May, the vessel arrived in Lyttelton and the next day Orka executed a bill of sale which was notarised. However, it appears that no step had been taken by 19 June, the date of arrest, to terminate the Russian registration in the name of Orka. That was not done until 21 August when a deletion certificate was issued by the Registrar at Nakhodka. The provisional registration continued on the Belize register and the ship did not become fully registered there, the conditions having been satisfied, until a day after the hearing in the High Court at Auckland.

7. The threshold issue on which Laurenson J heard argument in the High Court concerned the onus and standard of proof. Was there an onus on Vostok to show that Orka remained the beneficial owner of the ship when the action was brought or did the onus fall on Confederation to show that Orka was not? Either way, what was the appropriate standard of proof? And a further threshold issue emerged - was it necessary for the Court to determine these points in advance or could they be left for determination at trial?

8. Once these threshold matters had been disposed of, the Court then faced the need to choose the law by which it should determine whether Orka or Confederation was the beneficial owner of all the shares in the ship at the time when the action was brought. As will be seen, it was contended that under the lex situs, Russian law, Orka remained the entire owner until the Russian registration was deleted. Counsel for Vostok argued that Russian law had no such concept as beneficial ownership which, he said, is something known only to the common law. On the other hand, counsel for Confederation submitted that the question of beneficial ownership was to be determined in accordance with the lex fori, New Zealand law. If this were right, it was common ground that Confederation had become the beneficial owner before the action was brought, and in that case Orka's claim in rem would have been brought too late to invoke ss 4(1)(l) and 5(2)(b) and the arrest must be set aside, which would leave Vostok dependent on its in personam claim against an apparently insolvent Orka.

High Court judgment

9. On the questions of onus and burden of proof Laurensen J referred to the decision of this Court in *Baltic Shipping Co Ltd v Pegasus Lines SA* [1996] 3 NZLR 641 and the view expressed in the High Court by the late Giles J in *Mobil Oil NZ Ltd v The Ship Rangiora* (unreported, AD No877, Auckland Registry, 14 July 1998) that *Baltic Shipping* governed the position concerning subject matter jurisdiction (s 4) but that, in relation to issues of jurisdictional fact (where the beneficial ownership resided),*Baltic Shipping* had not determined the approach. That case was concerned with s 4 only and expressions of views on s 5 were obiter dicta. Laurenson J agreed with Giles J's conclusion that the burden of proof lay on the applicant (Confederation) which had to show that the plaintiff (Vostok) had no reasonable case. Giles J had also said that if that were wrong and the plaintiff carried the onus, then it would be enough to demonstrate that there was an arguable case entitling the plaintiff to an ultimate day in Court.

10. The Judge then considered whether Confederation had been able to show that Vostok had no arguable case for its contention that the ship was beneficially owned by Orka when the in rem proceeding was commenced. Was any element of Russian law to be taken into account? Laurenson J referred to the affidavit evidence from Professor Reznichenko, a professor of law at the Far East State University at Vladivostok, sworn on behalf of Vostok, and of Mr Leontenko, a Russian lawyer and for seven years a judge of the Nakhodka Municipal Court, sworn on behalf of Confederation. Professor Reznichenko deposed that under Russian law ships are regarded as real property (immovables) and an alienation requires registration which, in turn, requires the presentation of certain documents, including a notarised agreement for sale. The agreement in this case had not been notarised. Professor Reznichenko also said that the bill of sale later executed was a document unknown to Russian law. By reason of these defects the contract was void according to Russian law. As the bill of sale was void under Russian legislation Orka would never be able to remove the ship from the register on the basis of that document.

11. Laurensen J said that the force of this opinion lost some impact in the light of the filing on 1 September 1998 of a certificate of exclusion of the ship from the shipping register of the Russian Federation. He found this not surprising given the evidence of Mr Leontenko. That deponent had agreed that under Russian law a ship was an immovable but said that there was no requirement that the agreement for sale be notarised and that a bill of sale was something known to Russian law. Mr Leontenko had also said that all necessary conditions of contract regarding the transfer of the ship had been fulfilled by the parties and hence the agreement was not null and void under Russian law. He considered that title arose on the basis of the contract for sale and purchase and that under the Russian Civil Code the parties to a transaction were free to choose the conditions of the agreement, including the right to choose the law of the country which was to regulate their relations. If the parties had selected New Zealand law, then the validity or otherwise of their contract would be determined by that law and not by the law of Russia. Mr Leontenko had concluded that, according to Russian legislation, the prior removal of a ship from the Russian register was not a necessary condition for the transfer of title to that ship from the vendor to the purchaser, and that the question of title should be decided according to the terms of the settlement agreement or other documents which might evidence the transfer of title. Title was not dependent on deletion of the vessel from the Russian register.

12. Laurenson J concluded that by reason of the production of the certificate of exclusion Professor Reznichenko could not be correct in his principal view and that the production of that document seemed to imply that in fact the formalities required by Russian law for the transfer of ownership of the ship were completed by 21 August 1998.

13. The Judge referred to a statement in Dicey & Morris, *The Conflict of Laws* 12 ed p 941, that the proper law of a contract was in general, though not necessarily, the law of the country where the immovable was situated. He said that in this case the lex situs is New Zealand for the purposes of s 5, the parties having chosen New Zealand law as the proper law for the interpretation of the agreement. According to Mr Leontenko, Russian law allowed for this choice. Laurenson J therefore concluded that when considering s 5 he was entitled to determine the issue of beneficial ownership on the basis of New Zealand law, at the same time accepting that the vessel had been validly transferred according to Russian law by 21 August 1998. It was clear that equitable interests in ships were recognised by English law.

14. Relating these matters to the situation prevailing at Lyttelton, the Judge said that, notwithstanding that the vessel was still registered in the name of Orka, it was in the possession of Confederation pursuant to the agreement made on 16 March, a bill of sale had been executed in favour of Confederation when the vessel was in New Zealand on 28 May, the "Transfer/Registration requirements of Russian law" had all been completed with the exception of the production of the certificate of exclusion, the contract had in all other respects been executed and as at 19 June 1998 (the date of commencement of the proceeding) the only formality required to perfect title to the vessel in Confederation was the production of the certificate of exclusion. The Judge also mentioned that Confederation had already expended some $200,000 on refurbishing and provisioning the vessel.

15. In these circumstances it seemed to Laurenson J that as between Orka and Confederation there was no room to dispute that as at 19 June 1998 Confederation was the equitable owner of the ship. He said that whilst it might be the case that neither title nor equitable ownership passed under Russian law until production of the certificate of exclusion, the nature of the agreement and what was effected pursuant to it left no doubt in his mind that viewed under New Zealand law Confederation was the equitable owner of the vessel. Confederation had therefore discharged the onus of satisfying the Judge that Vostok had no arguable case to support its pleading that Orka was the beneficial owner as at the date of arrest. Confederation's application for an order to set aside the arrest was therefore granted.

Onus, standard of proof and urgency

16. Mr Broadmore, for the appellant, submitted that where in an admiralty proceeding there is a challenge prior to trial on the ground of lack of jurisdiction of the High Court that matter must be dealt with "on the same footing as any other peremptory attack on the plaintiff's case", such as a strike-out application. The applicant must, he said, show that the plaintiff has no arguable case on the jurisdictional issue. Counsel criticised certain first instance decisions in England, to which reference will shortly be made, as having wrongly construed provisions equivalent to s 5(2) of the Admiralty Act, saying that the various matters required to be made out under the Admiralty Act in order to engage the

jurisdiction of the Court in rem are nothing more nor less than matters which the plaintiff must make out, along with all other elements of the cause of action, in order to succeed. Questions of onus do not arise in determining whether the claim comes within some paragraph of s 4(1), said Mr Broadmore, citing *Baltic Shipping*. The issues of whether the person liable *in personam* was an owner of the ship at the time the cause of action arose and whether that person was the beneficial owner at the time the proceeding was issued are to be determined at this stage of the litigation by asking whether the plaintiff has no arguable case and putting the onus onto the applicant.

17. Counsel supported this argument by saying that it is burdensome for a plaintiff to have to deal with objections to jurisdiction on an urgent basis. Evidence, including expert evidence on foreign law perhaps not available from anyone in this country, has to be assembled under pressure of time and when the facts are not clear. A plaintiff is not in a position to know about the ownership arrangements for a vessel other than as disclosed by a ship register, whereas an applicant in the position of Confederation in this case does have that knowledge. The decision on jurisdiction will often be decisive of the case overall when the maintaining of an arrest in a "satisfactory forum" may be an unpaid creditor's only prospect of securing payment. Mr Broadmore accepted that an early decision on ownership may save much time and expense but argued that it can best be done by trial of the point as a preliminary issue under r 418, when the plaintiff will have had a fair opportunity through discovery, interrogatories, cross-examination and marshalling of foreign and domestic law to test the other side's assertions as to ownership.

18. Mr David, for the respondent, urged the Court to confirm its approach in *Baltic Shipping* which was the same as has been taken in England, Australia and Singapore - an established international approach in an area where international comity is very important. The policy reasons support the placing of the onus on the plaintiff, counsel submitted. The effect of establishing jurisdiction in rem is to allow the plaintiff to arrest and detain the ship, without any requirement for an undertaking in damages. There is no real protection for the other party against such a claim which later proves ill founded. Urgency is required. Counsel also pointed out that factual issues under s 5(2) go to jurisdiction only, having no relevance to the substance of the claim. They are not defences and should therefore be decided at the outset.

19. We accept Mr David's arguments. The practice is well established in the jurisdictions to which he referred of requiring a plaintiff on an application to set aside an arrest to prove on balance of probabilities that the proceeding is within the in rem jurisdiction of the Court. That was the view taken in *Baltic Shipping* (per McKay and Henry JJ at p 650 and per McGechan J at p 655) and, now that the point is directly in issue, we would confirm that position. We reject Mr Broadmore's criticisms of the construction given to the English equivalent of s (5)(2) by Willmer J in *The St Elefterio* [1957] 2 All ER 374 and by Robert Goff J in *I Congreso del Partido* [1978] 1 All ER 1169 at 1199. In *The Iran Amanat v*

KMP Coastal Oil Pte Ltd [1999] HCA 11 (24 March 1999) the High Court of Australia approved the reasoning of Willmer J and said that it should be applied to the Australian legislation. The practice is now firmly entrenched in England (see, for example, *The "Aventicum*" [1978] 1 Lloyd's Rep 184 (Slynn J) and the *The "Nazym Khikmet*" [1996] 2 Lloyd's Rep 362 (Clarke J and the Court of Appeal)) and Singapore (*The Andres Bonifacio* [1993] 3 SLR 521) and accepted in the High Court of Australia (*The Owners Of The Ship "Shin Kobe Maru" v Empire Shipping Co. Inc* (1994) 181 CLR 404 at 426) and should be followed in this country.

20. In *I Congreso del Partido* Robert Goff J decided that the question of jurisdiction had to be determined on the motion to set aside the writ and could not be dealt with as an issue in the substantive proceeding. He rejected an argument that if the plaintiff showed a reasonably arguable case that the applicant was the beneficial owner, the matter should go to full trial. We are in respectful agreement with the following observation of Robert Goff J

. . . it cannot be right for the decision on [jurisdiction] to be allowed to depend on the decision of some issue to be tried in the actions. If there is no jurisdiction as against [the party disputing ownership], they should not be troubled with the actions at all; indeed it cannot be decided whether the actions can be allowed to proceed until the question of jurisdiction has been determined. (p 1199)

21. But, though holding that the matter of jurisdiction had to be dealt with on the motion, Robert Goff J said that evidence would be admitted for the purpose of the ruling on jurisdiction and there could be oral evidence, for example, by cross-examination of deponents of affidavits. In *Baltic Shipping* this Court said that ownership must, if in issue, be decided on the motion to set aside and must be decided on evidence and not merely on pleadings. It seems to us that, even allowing for the urgency of the matter, there is no reason why the High Court should not allow an adjournment of the application to set aside the proceeding to give time for the assembling of the necessary evidence and, if necessary, for deponents to be brought to this country for cross-examination so that the important question of ownership, or any other factual issue arising under s 5 as a matter going to jurisdiction, can be determined without undue haste and consequent prejudice to a party which perhaps may not have immediate access to all relevant factual materials. If the application to set aside is heard in this manner it will be little different from a r 418 hearing.

22. Nor do we see it as being unfair that the onus should fall on the party seeking to establish that the New Zealand Court has jurisdiction. It is true that it may not have knowledge of arrangements concerning ownership which have not been placed on the shipping register but it can point to the register and the evidential onus will then shift to the other party requiring it to prove its contrary assertions about ownership, and if it does not do so the register will provide sufficient proof for the

plaintiff on the balance of probability. The disadvantage to the plaintiff of having the onus of proof is in this respect more apparent than real.

23. It was therefore for Vostok to establish that its claim was within jurisdiction - that Orka remained both the legal and the beneficial owner at the time of the issue of the proceeding in the High Court - and to do so on the balance of probability on the evidence put before the Court by the parties.

Beneficial ownership

24. What Mr Broadmore described as being at the core of Vostok's case was that the situs of the ship when the critical events occurred was Russia because at those times, or at whichever of them was the decisive moment for purposes of choice of law, the ship was on the high seas. Counsel said that the situs of a ship at sea is its port of registry (Dicey & Morris at p 915-6). Before the ship came into New Zealand waters and berthed at Lyttelton a written agreement existed for its sale between Orka and Confederation, value had passed from Prok Bank to Orka in the form of the extinguishment of Orka's indebtedness to the bank and possession of the ship had been taken by Confederation. Under Russian law the ship was treated as if it were Russian land. Russian law did not recognise the agreement or any rights arising under it. It was the evidence of Professor Reznichenko that until and unless registration of the purchaser on the Russian ship register had occurred, which would require a notarised agreement for sale, or removal of the ship from the register (which did not occur until after commencement of Vostok's proceeding), all title to the ship continued to be vested in Orka. Registration was conclusive as to ownership. Russian law accordingly did not recognise any beneficial ownership of Confederation.

25. Rejecting that submission, Mr David argued that any question of jurisdiction of the New Zealand Court under the Admiralty Act has to be determined by reference to the lex fori, New Zealand law, under which it is common ground that Confederation would have been regarded as the equitable or beneficial owner of the ship before it arrived in New Zealand. Mr David said that when a dispute is properly characterised as relating to the jurisdictional requirements to bring an action, then choice of law rules are not relevant. The argument for the appellant had therefore wrongly characterised the issue between the parties. Counsel cited the advice of the majority of the Privy Council in *Bankers Trust International Limited v Todd Shipyards Corp, The Halcyon Isle* [1981] AC 221 at 235 where Lord Diplock said that any question as to who is entitled to bring a particular kind of proceeding in an English Court is a question of jurisdiction and that, in principle, the question as to the right to proceed in rem against a ship falls to be determined by the lex fori as if the events which gave rise to the claim had occurred in that country. Mr David also drew attention to the decision of the Court of Appeal of Singapore in *The Andres Bonifacio* where that Court had considered and dismissed an argument similar to that advanced for the appellant as "irrelevant." Counsel argued that the proper approach in determining beneficial ownership is

to look at the facts in issue and ask whether those facts show that the appellant has established that Orka was still the beneficial owner as that concept is understood under New Zealand law.

26. On the facts of this case and the view of Russian law which emerges from the affidavits before the Court, it does not appear to us that it will make any difference whichever way this question is approached. We consider, however, that Mr David is correct and that, as the issue of ownership goes to a condition precedent to the jurisdiction of the New Zealand Court, it falls to be determined under New Zealand law. That issue does not arise in the substantive proceeding, if and when jurisdiction is established. A question of the right to invoke jurisdiction can also be seen as a matter of procedure and as such governed by the lex fori. New Zealand law necessarily has to look to the Russian register as a means of beginning the process of determining the ownership of the ship, for the register is the root of title. The proper approach, it seems to us, is broadly that which was followed by the English Court of Appeal in *The "Nazym Kykmet"* which asked whether under the law to which a company operating the ship was subject (Ukrainian law) it was what English law would regard or recognise as the beneficial owner of all the shares in the vessel.

27. In that case the plaintiffs had arrested a Ukrainian ship at a port in Wales and argued that it was in the beneficial ownership of a Ukrainian corporation, BLASCO. The Court of Appeal held that title to the vessel belonged to the State of Ukraine, with BLASCO having merely a right to exploit the vessel for the ultimate benefit of the public. Even if in practice BLASCO enjoyed a wide measure of commercial discretion in relation to the operation of the ship, it did not have what English law would recognise as the rights of an equitable owner. The Court seems to have looked at the relationship between the State and BLASCO to see if it could discern something analogous to a beneficial ownership - whether in English law terms the relationship was like that between legal and beneficial owners of the same asset.

28. The common law recognises equitable interests in ships, as is apparent from s 5(2) itself, from case law (for example,*Hart v Herwig* (1873) 8 ChApp 860 and *The "Nazym Kykmet"*) and general principle. An equitable interest is created under an agreement for sale of real or personal property if and so far as the Court in its equitable jurisdiction will protect the rights of the purchaser under the agreement by the affording to the purchaser of a specific remedy or protection. The equitable interest is commensurate with the availability in a given case of that protection (see the authorities reviewed and applied in this Court in *Bevin v Smith* [1994] 3 NZLR 648 at 660-665). Thus, if and so long as the purchaser is entitled to seek specific performance of the contract or other specific protection available from a court of equity, an equitable interest exists in the purchaser. Because every parcel of land or interest therein is considered to be unique, specific performance is generally available for the enforcement of a purchaser's right under an agreement for sale and purchase of land. In the case of goods or other things which are not land or an interest in land, equity will not lend its aid by way of specific enforcement or injunction

unless an element of uniqueness is present in the subject matter. Therefore a specific remedy is not obtainable for a purchaser of goods which are fungible, but such a remedy will ordinarily be available where the purchase is of a work of art or an antique or a valuable intellectual right or some other asset which cannot be obtained from another source. A ship like the Kapitan Lomaev has sufficient distinctiveness from any other ship that specific performance would normally be available to enforce the rights of someone to whom the owner had agreed to sell it. As at 19 June 1998 it would seem that Confederation could have obtained specific performance requiring delivery of the title of the ship pursuant to its agreement for sale and purchase with Orka. New Zealand law would therefore recognise Orka as the equitable or beneficial owner.

29. Laurenson J had before him conflicting opinions from Russian experts and was entitled to prefer the view of Mr Leontenko which he rightly considered to have been strengthened by the fact that Confederation was actually able to obtain deletion of the ship from the Russian register, which Professor Reznichenko had seemed to believe it would not be able to do. Mr Leontenko had been a judge of the Nakhoda Court. He opined that under Russian law title arose for a purchaser of a registered ship on the basis of an agreement for sale and purchase and that removal of the ship from the register was not a necessary condition for the transfer of title to the purchaser.

30. The evidence was sketchy and it would have assisted the Court to have seen the deponents cross-examined, which neither party requested, but, if the matter fell to be determined under Russian law, Laurenson J's preference for Mr Leontenko's evidence could not be said to be against the weight of the affidavit material. Both witnesses referred to sections of the Russian Civil Code, but unfortunately not all those sections were available to the Judge. He had to do his best with what he had before him and in my view cannot be said to have erred in his assessment that under the lex situs (assuming that to be Russian law) when the proceeding in rem was commenced Confederation had rights which were akin to beneficial ownership, that is, a contractual right to delivery of the ship and an ability to enforce that right against the seller by a means which would obtain the vesting of full title in it, as shortly afterwards occurred.

31. In our view Laurenson J was right to conclude that at the time of commencement of Vostok's proceeding Orka was no longer the beneficial owner of all the shares in the Kapitan Lomaev and that consequently, in terms of s 5, the jurisdiction of the High Court could not be invoked by an action *in rem* against the ship because it was not at that time beneficially owned by the person who would be liable on Vostok's *in personam* claim for the price of the goods and services it had supplied.

Result

32. The Court being unanimous, the appeal is dismissed. The appellant is to pay costs of the appeal of $5000 together with the respondent's reasonable disbursements, including travel and accommodation costs of counsel, as fixed by the Registrar.

GAULT J

33. This appeal is against the judgment of Laurenson J delivered in the High Court at Auckland on 10 September 1998. He held that the appellant's proceeding in rem against the ship "Kapitan Lomaev" could not succeed for want of jurisdiction and set aside the arrest of the vessel which had been effected at Lyttelton on 19 June 1998.

34. I have read in draft the judgment to be delivered as the judgment of the other members of the Court by Blanchard J in which the proceeding and the evidence are fully summarised. I am in agreement with them, substantially for the reasons they give, that the conclusion reached by Laurenson J was correct.

35. It is common ground that under s 5(2) of the Admiralty Act 1973 the High Court has jurisdiction to entertain the proceeding in rem against this ship if at the time the proceeding was brought (19 June 1998) it was beneficially owned as respects all the shares therein by Primorskaya Rybopromyshlennaya Kompaniya Orka ("Orka"), the Russian company against which an in personam claim is available in respect of goods and services supplied to the Kapitan Lomaev and another ship.

36. The respondent, Confederation Ltd (Confederation), claims that it was the beneficial owner as respects all shares in the ship at the relevant date. Prior to the date the proceeding was commenced Orka had agreed to transfer ownership of the ship of Confederation as the nominee of a creditor, and in consideration for discharge of indebtedness. Possession had been given and taken, while the ship was on the high seas, but the register in the port of Nakhodka in Russia still showed Orka as owner.

37. It is common ground that under New Zealand law Confederation would be regarded as having had beneficial ownership at the relevant date and that such concept is unknown as such in Russian law. We heard complex arguments about the law by which jurisdiction is to be determined and the onus of proof to be applied on Confederation's application to set aside the notice of proceeding.

38. The issue in dispute is whether the New Zealand court has jurisdiction. That is a matter of determining the applicability of the New Zealand statutory provision. That is for the domestic law. In order to resolve that issue it is necessary to address the matter of ownership both with respect to the material facts and their legal significance. That necessarily involves the law of Russia where the ship's ownership is registered.

39. The correct approach appears from the English cases decided on substantially the same statutory provision. The issue of ownership, being essential to jurisdiction, must be decided at the outset on the application: *I Congreso del Partido* [1978] QB 500, 535. Notwithstanding that the matter is brought

before the Court on the application of Confederation, the onus of showing the Court has jurisdiction, which includes establishing the necessary underlying facts, must fall upon the plaintiff and the standard is the balance of probabilities. This follows from the decision of this Court in *Baltic Shipping Co Ltd v Pegasus Lines SA* [1996] 3 NZLR 641. As the other members of the Court have demonstrated, it is widely established to the point where it was common ground in *The Nazym Khikmet* [1996] 2 Lloyd's Rep 362.

40. I agree also that in determining whether Orka was the beneficial owner at the relevant date the correct approach is that adopted in *The Nazym Khikmet* (p 371). It is necessary to inquire whether, when the proceeding was brought, Orka was under the law to which it was subject (Russian law), what New Zealand law would regard as the beneficial owner as respects all the shares in the ship.

41. In this Court Mr Broadmore for the appellant resiled from the stance that had been taken by counsel then acting before Laurenson J and accepted that under Russian law the written agreement for sale, which was entered into before the proceeding was commenced, was not a nullity and would have "some effect". I would be surprised indeed by any contention that written contracts could not be enforced under the laws of Russia. When that is accepted, the conclusion is inevitable that New Zealand law would regard the interest of the purchaser as beneficial ownership so that the beneficial owner at the material time was Confederation and not Orka.

42. I would dismiss the appeal with the result indicated in the judgment of the President and Blanchard J.

Solicitors

Chapman Tripp Sheffield Young, Auckland, for Appellant

Russell McVeagh McKenzie Bartlett and Co, Auckland, for Respondent