THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 223/03

In the matter between:

FAROCEAN MARINE (PTY) LTD Appellant

and

MALACCA HOLDINGS LIMITED First Respondent

EARL ROMANS Second Respondent

Coram: MARAIS, SCOTT, FARLAM, CLOETE JJA *et* PATEL AJA

Date of hearing: 6 MAY 2004

Date of delivery: 28 MAY 2004

Summary: Attachment to found or confirm jurisdiction – nature of prima facie case required against defendant in the alternative – joinder of further defendant in the alternative – section 5(1) of Act 105 of 1983 permitting such a joinder – discretion of court – order in para 19.

JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] The appellant ('Farocean') carries on business as yacht and shipbuilders in Duncan Road, Table Bay Harbour, Cape Town. The respondents are both *peregrini*. The first respondent, Malacca Holdings Limited ('Malacca'), is a company incorporated according to the laws of the Cayman Islands. Its sole shareholder is the second respondent, Mr Earl Romans, a citizen and resident of the United States of America. On 4 November 2002 Farocean sought and obtained *ex parte* an order in the High Court, Cape Town, directing that the motor yacht *Summit One* (and various items of equipment removed from the vessel) be attached to found or confirm the jurisdiction of the court in an action Farocean proposes instituting against the respondents as alternative defendants. An order was also granted in terms of s 5(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act') joining the respondents as defendants in the proposed action 'although one or other one of them might not otherwise be amenable to the jurisdiction of [the] … court'. A rule nisi was issued and served on the respondents' Cape Town attorneys and on Morgan Olsen & Olsen LLP, attorneys of Fort Lauderdale, Florida. The confirmation of the rule was opposed, initially only by Romans, but later also by Malacca. The matter came before Davis J who discharged the rule

and dismissed the application with costs. The judgment is reported *sub nom MV Summit One Farocean Marine (Pty) Ltd v Malacca Holdings Ltd and another* 2003 (6) SA 94 (C). The present appeal is with the leave of the court *a quo*.

[2] In order to understand the issues and the context in which they arise it is necessary to set out as briefly as the circumstances permit the main allegations made in founding papers, the answering affidavits and the replying affidavits. Farocean's cause of action against the respondents was founded upon an agreement, the terms of which were recorded in a letter dated 26 March 2001 addressed by Mr Jendo Ocenasek on behalf of Farocean to Romans. Ocenasek, who is the managing director of Farocean, had previously travelled to Malaysia together with Mr Frederick Farmer, Farocean's technical director, to advise Romans on the feasibility of purchasing and refurbishing the *Summit One*, then named *Sipadan Princess*. Subsequently the vessel sailed to Cape Town where it was removed from the water and transported to Farocean's shipyard. Notwithstanding the absence of any 'formal contract', Farocean commenced stripping the vessel preparatory to its later refurbishment. It was at this stage that the letter of 26 March 2001 was addressed to Romans. It reads in part:

'Until a formal contract is drawn up and signed by both Earl Romans and a Representative of Farocean Marine, this letter, will serve as an abridged interim contract for the rebuild/refit of the vessel "Summit One", presently in the shipyard of Farocean Marine.

Having received verbal instructions from Mr Earl Romans (the Owner) to remove the vessel from the water and to transport the vessel to Farocean Marine's shipyard, and to commence stripping the vessel for refurbishment once the vessel was located in Farocean Marine's buildings, Farocean Marine has started this work, along with the removal of various items, ie propellers, shafts, interior, rudders etc and will invoice the owner only after a sum of R700 000.00 has been reached. (See item "Payments" later.)

The owner has indicated he prefers the contract to be done in local currency ie S A Rands, to be converted to U S Dollars at an exchange rate current on the day of invoice.'

(The letter proceeds to set out details of rates for the repair and refitting of the vessel.) According to Ocenasek these terms were accepted in a subsequent telephone conversation and confirmed by the issuing of instructions from time to time in the form of drawings and specifications by Romans's architect, Mr Douglas Sharp. This much was common cause.

[3] Once work to the value of R700 000.00 had been completed Farocean began invoicing Romans. A dispute arose and the latter failed to pay. On 15 November 2001 Farocean caused the vessel

to be arrested in pursuance of an action *in rem*. But the dispute was resolved and the outstanding amount was paid to Farocean which thereafter continued working on the vessel. According to Ocenasek, Romans once again failed to pay when invoiced and in July 2002 the vessel was again arrested. In September 2002, and in response to Farocean's particulars of claim, a plea was filed in which it was alleged that the vessel was owned by Malacca, which at all material times had been represented by Romans.

[4] Ocenasek contended that until receipt of the plea, Farocean's representatives had always believed that Romans had contracted in his personal capacity and that he was the owner of the vessel. He said this impression had been gained from correspondence with Romans and in particular from an application for registration with the South African Sailing Association signed by Romans on 19 December 2000 in which he had stated that he was the owner. (It appears that the object of the application for registration was to enable the vessel to be insured for the voyage from Malaysia to Cape Town; once she was removed from the water and taken to Farocean's shipyard, the registration was cancelled.) Ocenasek explained that he subsequently obtained further documents which corroborated the allegation made in the

plea that Malacca, and not Romans, was the owner of the vessel. These included a 'Bill of Sale' dated 13 November 2000 and signed by the seller (but not the buyer) reflecting the sale to Malacca of 'sixty four sixty fourths shares' in the vessel; a letter dated 16 November 2000 addressed by Messrs Morgan, Olsen & Olsen LLP (Romans's Fort Lauderdale attorneys) to the sellers of the vessel advising that the 'buyer's agent [Mr Douglas McLoughlin] will be the authorized representative of the buying company (Malacca Holdings Limited), who will receive the original documents, execute a Protocol Delivery of the Vessel, and accept delivery of the vessel for [the] buyer'; and a letter dated 20 November 2000 similarly addressed by Messrs Morgan Olsen & Olsen LLP to the sellers confirming that they had received the money due to the sellers and reiterating that the buyer was Malacca.

[5] On behalf of Farocean, Ocenasek contended that in the circumstances there was 'confusion' as to the identity of the owner of the vessel and the party with whom Farocean had contracted. He argued that the owner and party to the contract was either Romans or Malacca and that Farocean was accordingly entitled to the order it sought. Upon the granting of the order *ex parte* on 4

November 2002 Farocean withdrew the second of the *in rem* proceedings referred to in para 3 above.

[6] In response to the order and before filing answering affidavits Romans's Cape Town attorneys addressed a letter dated 15 November 2002 to Farocean's attorneys agreeing to the confirmation of the rule nisi in relation to Malacca which, it was pointed out, was the owner of the vessel. However, Farocean was not prepared to agree to an order in relation to Malacca only and insisted that the matter proceed. The main answering affidavit subsequently filed on behalf of the respondents was made by their Cape Town attorney, Ms Fiona Stewart. While denying that Malacca was liable she reiterated that Malacca did not oppose the granting of an order against it, being the owner of the vessel and the party against which the claim lay. She confirmed, too, that Romans had at all times represented Malacca in its dealings with Farocean. In support of the averment that Malacca was the owner, she filed, in addition to the Bill of Sale previously referred to, a copy of Malacca's certificate of incorporation dated 17 November 2000 and a 'Protocol of Delivery and Acceptance'. The latter document was signed by both the seller and by McLoughlin on behalf of Malacca as buyer on 21 November 2000 before a notary

public. It recorded that on that day the vessel was delivered to and accepted by Malacca in accordance with the terms of an agreement previously concluded. Stewart denied that Farocean's representatives had been led to believe that Romans was the contracting party and the owner of the vessel, although conceding that McLoughlin and Ocenasek, being laymen, had loosely referred to Romans as the owner from time to time. She insisted that the decision to have the vessel transferred to Malacca and the fact that at all subsequent times Romans acted on behalf of Malacca was well known to Ocenasek. In support of this assertion she annexed a copy of a draft 'final contract' relating to the refurbishment of the vessel proposed by Farocean in June 2001, ie more than a year before the filing of the plea to which Ocenasek refers. The draft, which was sent to Romans's assistant, Ms Carol Levy, on 27 June 2000, describes the parties to the agreement as being Malacca on the one hand and Farocean on the other. A subsequent draft proposed by Malacca in December 2001 similarly records Malacca as being the owner of the vessel and the party to the contract. Yet another document annexed to Stewart's affidavit was a minute of a site meeting dated 6 December 2001 relating to the work on the vessel then in progress and in pursuance of the agreement on which Farocean relies. Significantly, it was headed

'Malacca/FOM Meeting' (FOM presumably being an acronym for Farocean Marine).

[7] It was not denied that Romans had stated that he was the owner of the vessel when applying for registration with the South African Sailing Association. The only explanation proffered for this was that by obtaining registration with this association it was possible to obtain insurance for the vessel without the need to incur the costs associated with obtaining a class certificate from a recognised classification society, and that this method of obtaining insurance had been suggested by Ocenasek himself prior to the purchase of the vessel. However, no reason was given for Romans describing himself as the owner.

[8] The allegations contained in Stewart's affidavit were confirmed by Romans, McLoughlin, Levy and Mr Walter Morgan of Morgan Olsen & Olsen LLP, all of whom made confirmatory affidavits. The latter expressly confirmed that he had acted for Malacca with regard to its purchase of the vessel in Malaysia.

[9] In his replying affidavit Ocenasek did not challenge the authenticity of the Protocol of Delivery and Acceptance or any of the other documents referred to by Stewart in para 6 above.

Nonetheless, he persisted in his assertion that Farocean was uncertain as to whether the vessel was owned by Romans or Malacca. In response to the reference to the proposed refurbishment contract between Malacca and Farocean which the latter had drafted in June 2001 he drew a distinction between the interim agreement of 26 March 2001 and any final agreement that Farocean may have sought to conclude with Malacca. He submitted that it was immaterial who the eventual contracting party might have been as Romans in his personal capacity was the contracting party in terms of the interim agreement upon which Farocean relied. The necessary implication of his submission was, of course, that the contracting party and the owner of the vessel may not have been the same person. This possibility was expressly recognised in the following passage which appeared later in his affidavit.

'In any event, even if it were to be found in due course that [Romans] was not the owner of the vessel it was indeed with [Romans] acting in his personal capacity that the interim agreement of 26 March 2001 was concluded.'

In the light no doubt of these statements Malacca, which had previously not opposed the application, changed its stance and filed a notice of opposition.

[10] In terms of s 3(2) of the Act an action *in personam* may be instituted against a peregrine who has not consented to the jurisdiction of the court only if his property within the court's area of jurisdiction has been attached to found or confirm the jurisdiction of the court, hence the proceedings in the court below. An applicant seeking such an attachment must show (a) that he has a prima facie case against the respondent (as to the requirements for which, see *eg Hülse-Reutter and others v Gödde* 2001 (4) SA 1336 (SCA) at 1343E-J (para 12)) and (b) that the respondent is the owner of the property sought to be attached. The latter requirement is to be established on a balance of probabilities. (*Lendalease Finance (Pty) Limited v Corporacion De Mercadeo Aqricola and others* 1976 (4) SA 464 (A) at 489B-D.)

[11] If an applicant can show on a balance of probabilities that property is owned by one or other of two defendants and that he has a prima facie case against whichever one is found to be the owner, a court might possibly be justified in granting an order for the attachment of the property. In either event, the attachment would be effective. In its founding affidavit Farocean appears to have set out to establish that this was true of the present case; ie that the vessel was owned by either Romans or Malacca and that

whoever was the owner was the debtor. However, in response no doubt to the allegations contained in the answering affidavits, Farocean found itself obliged in its reply to concede, and rightly so, that the debtor may not be the owner of the vessel. The consequence of this concession was to preclude the attachment of the vessel on the premise that it was unnecessary to establish which of the two was the owner. The reason is that to do so could result in the attachment of property not owned by the debtor which, for the purpose of founding jurisdiction, 'would be futile and of no effect'. (See the *Lendalease* case *loc cit*.)

[12] Counsel for the appellant sought to justify the attachment confirming jurisdiction over both respondents on various grounds in the alternative. The ground on which they ultimately relied in this court was shortly this: On the papers before the court it was established on a balance of probabilities that Malacca was the owner of the vessel and that the appellant had a prima facie case in the alternative against both Malacca and Romans; accordingly, Farocean was entitled to an order for the attachment of the vessel to confirm jurisdiction over Malacca in respect of Farocean's prima facie case against that company and, by reason of the appellant's claim against Romans in the alternative, it ought to be permitted to

join Romans as an alternative defendant in terms of s 5(1) of the Act.

Section 5(1) reads as follows:

'A court may in the exercise of its admiralty jurisdiction permit the joinder in proceedings in terms of this Act of any person against whom any party to those proceedings has a claim, whether jointly with, or separately from, any party to those proceedings, or from whom any party to those proceedings is entitled to claim a contribution or an indemnification, or in respect of whom any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between the party and the person to be joined and which should be determined in such a manner as to bind that person, whether or not the claim against the latter is a maritime claim and notwithstanding the fact that he is not otherwise amenable to the jurisdiction of the court, whether by reason of the absence of attachment of his property or otherwise.'

I shall refer to this section in more detail later. In the meantime it is sufficient to point out that in terms of s 1(2)(a)(ii) of the Act an admiralty action 'shall for any relevant purpose commence by the making of an application for the attachment of property to found jurisdiction'. (I do not think there is any significance in the omission of a reference to an attachment to confirm jurisdiction.) It follows that the application for the attachment of the vessel in pursuance

of the appellant's claim against Malacca constitutes 'proceedings in terms of this Act' within the meaning of s 5(1).

[13] Counsel for the respondent contended that it was not open to Farocean to seek an attachment solely in respect of its claim against Malacca coupled with a joinder of Romans as outlined above. It is convenient to deal in turn with each of the grounds relied upon by counsel for this contention.

[14] First, while conceding that it was established on a balance of probabilities that Malacca was the owner of the vessel, he argued that this did not avail Farocean as the latter had contended that Romans was the owner. I do not think there is merit in this submission. As previously observed, Farocean alleged in its founding papers that it was uncertain which of the two was the owner and pointed to correspondence in which Romans had been referred to as the owner and an instance where Romans had described himself as the owner. But this cannot preclude Farocean from relying on the averments in the answering affidavit that Malacca is the owner, particularly when supported by the affidavit of the attorney who acted on behalf of Malacca when purchasing and accepting delivery of the vessel as well as by a copy of the

'Protocol of Delivery and Acceptance' executed in Malaysia on 21 November 2000 before a notary public.

[15] Second, counsel argued that Farocean had not only failed to make out a prima facie case against Malacca in its founding papers but that Ocenasek in his replying affidavit had 'insisted' that Farocean's claim lay against Romans and not Malacca. Accordingly, so the argument went, notwithstanding the respondents' assertion that it was Malacca and not Romans that had contracted with Farocean, the latter was precluded from now contending that it had made out a prima facie case against Malacca. Once again, I do not think counsel's contention is correct. In his founding affidavit Ocenasek set out the terms of the agreement on which Farocean relied and the grounds for his belief that the other contracting party was Romans. However, he annexed to his affidavit the plea filed in the *in rem* proceedings in which it was alleged that Romans had at all times acted as agent for Malacca. In view of the contents of the plea, Ocenasek took up the attitude that there was uncertainty as to the identity of the party against whom the appellant's claim lay and that it was for this reason that the appellant sought to proceed against Malacca and Romans in the alternative. It is unquestionably so that an applicant

is generally speaking obliged to adduce evidence to establish a prima facie case against the party whose property it is sought to be attached and that a mere assertion that it has such a case is not enough. But this requirement must as a matter of common sense be relaxed in appropriate circumstances. Such a relaxation was permitted in *MT Tigr: Owners of the MT Tigr and another v Transnet Ltd t/a Portnet (Bouygues Offshore SA and another intervening*) 1998 (3) SA 861 (SCA). There a defendant sought to attach the property of two *peregrini* from whom it claimed a contribution or indemnity as joint wrongdoers with the defendant in the event of the defendant being found liable. The liability of the *peregrini* to the defendant was dependent on the liability of the defendant to the plaintiff, which the defendant denied. In order to establish a prima facie case in so far as this element of the defendant's claim was concerned, it was held sufficient for the defendant to rely on the allegations contained in the plaintiff's particulars of claim to the effect that the defendant was liable to the plaintiff. Although the particular circumstances in the *Tigr* were somewhat different from those of the present case, in both cases the prima facie case sought to be established and other averments made by the applicant were mutually destructive. In the present case Farocean seeks to sue on a contract and is unsure whether

the other contracting party acted as principal or agent. In these circumstances the reference to the allegations contained in the plea filed in the earlier proceedings is, in my view, sufficient to establish a prima facie case against Malacca as one of two alternative defendants. It is of course somewhat anomalous for the respondents to contend that Farocean has failed to make out a prima facie case against Malacca when they themselves contend that Malacca, and not Romans, was the party to the contract on which the appellant relies.

[16] It is so that in his replying affidavit Ocenasek contended that Romans contracted as principal and not as agent for Malacca. But this was in response to the allegation to the contrary in the answering affidavit. It was at all times Farocean's case that the other contracting party was either Romans or Malacca and that it wished to proceed against them both as alternative defendants. I do not read the replying affidavit as constituting an abandonment of its claim against Malacca in the alternative. It follows that in my view Farocean was entitled to an order for the attachment of the vessel to found or confirm jurisdiction in respect of Farocean's claim against Malacca.

[17] The next question is whether Farocean ought to have been permitted to join Romans as an alternative defendant in the proceedings against Malacca. Once it is acknowledged that Malacca is the owner of the vessel it follows that Romans would not be amenable to the jurisdiction of the court *a quo* in the absence of an order in terms of s 5(1) of the Act (quoted in para 12 above). In terms of Admiralty Rule 24 the application of Uniform Rule 10 dealing with joinder is not excluded in admiralty proceedings. Joinder under the latter rule does not require the leave of the court, but the rule is inapplicable where it is sought to join a person over whom the court has no jurisdiction. It follows that if the joinder of Romans is to be permitted it must be in terms of s 5(1). Two questions arise. The first is whether the section permits the joinder of a defendant in the alternative. Merely because no express reference is made to a defendant in the alternative does not mean that the joinder of such a party is precluded. The language used, I think, is clearly wide enough to include such a party. The section permits, for example, the joinder of a person 'in respect of whom any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between the party [seeking the joinder] and the person to be joined ….' There is furthermore nothing in the section to

indicate an intention to preclude the joinder of a person on the ground that to do so may result in a party over whom the court would not otherwise have had jurisdiction possibly being found to be the only party liable. Given the wide language used, such a result could hardly have been beyond the contemplation of the legislature. In the circumstances, I can see no reason for construing s 5(1) so as not to include the joinder of an alternative defendant. Admittedly, the powers of joinder in terms of the section so construed are far-reaching. But the object of the legislature was clearly to permit all the parties to a dispute to be joined in an action. The absence of such a provision could well result in the undesirable situation of courts in different countries having to adjudicate on the same or substantially the same issues arising out of the same incident or set of facts.

[18] The second question is whether the joinder of Romans is justified in the circumstances of the present case. In my view the word 'may' in s 5(1) is to be understood in its permissive sense and not in the sense of serving what has been described as a 'predictive function'. (*Minister of Environmental Affairs and Tourism and others v Pepper Bay Fishing (Pty) Ltd* 2004 (1) SA 308 (SCA) at 322B-C.) This much, I think, is apparent from the use of the

word ‘permit’ in the phrase ‘the court may … permit’. The court *a quo* accordingly had a discretion to permit or refuse the joinder of Romans. It did not exercise that discretion and this court is now free to do so. It is common cause that the party with whom Farocean contracted was Romans. Farocean’s case is that it is uncertain whether Romans acted as a principal or as agent for Malacca. It therefore wishes to have both before court. Romans is unquestionably the alter ego of Malacca which is the defendant in the ‘proceedings’ within the meaning of s 5(1) and Romans is therefore unlikely to be prejudiced by the joinder. In the circumstances, it is appropriate, in my view, to permit the joinder of Romans as an alternative defendant in the proceedings.

[19] The following order is made:

(A) The appeal is upheld with costs, including the costs occasioned by the employment of two counsel;

(B) The order of the court *a quo* is set aside and replaced by the following:

‘1. The Sheriff of this court is directed and authorized to attach the MY *Summit One* (‘the vessel’) (and the equipment and materials described more fully in annexures ‘U’ and ‘V’ to the founding affidavit of

Johann Willem Ocenasek filed in support of this application) to confirm the jurisdiction of this court in an action to be instituted by the applicant against the first respondent for :

1.1 payment of the amount of US$789 072.10;

1.2 interest thereon at the South African prime rate *a tempore morae* until the date of final payment;

1.3 payment of the amount of R477 139.73;

1.4 interest thereon at the legal rate from 8 October 2002 (being the date of the cancellation of the agreement) until the date of final payment;

1.5 payment of the amount of R1 500.00 per day from 5 July 2002 until the date of removal of the vessel from the premises of the applicant;

1.6 interest on the aforesaid amount of R1 500.00 per day at the South African prime rate *a tempore morae* until the date of final payment;

1.7 payment of the amount of R700 000.00 (alternatively of the amount of US$86 978,46);

1.8 interest thereon at the legal rate calculated from 8 October 2002 until the date of payment;

1.9 alternative relief;

1.10 costs of suit.

2. The second respondent is joined as a defendant in the alternative in the action in terms of section 5(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983.

3. Service of the applicant's particulars of claim shall be effected:

3.1 upon Ms F Stewart at the offices of Fairbridge Arderne & Lawton Inc, 16th Floor, Main Tower, Standard Bank Centre, Heerengracht, Cape Town; and

3.2 by facsimile at telefax number 0954-4633570 or such other telefax number as is confirmed by affidavit to be that of Morgan Olsen & Olsen LLP, attorneys-at-law of 315 NE Third Avenue, Suite 200, Fort Lauderdale, Florida 33301, USA, for attention Walter L Morgan.

4. Costs of this application, including the costs occasioned by the employment of two counsel, shall be borne by first and second respondents jointly and severally , the one paying the other to be absolved.'

C. The appellant is directed to serve its particulars of claim upon the respondents within 30 days of this order.

D G SCOTT
JUDGE OF APPEAL

CONCUR:

MARAIS JA
FARLAM JA
CLOETE JA
PATEL AJA