[17] Mr. **Shaw** did not (indeed, he could not) rely on the disputed oral agreement alleged in paragraph 50 of Mr. Reddy's affidavit quoted above; for even assuming, as I do, that the Bank bears the onus of proof in the dismissal application it is not a heavy onus, and paragraph 50 of Mr. Reddy's affidavit is expressly denied by the Bank. All that is required of the Bank in relation to its cause of action for the arrest is that there should be "evidence which, if accepted, will show a cause of action". (per Steyn J in **Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd** 1953(3) SA 529 (W) at 533 D; approved in **Cargo Laden & Lately Laden On Board The m v "Thalassini Avgi" v m v "Dimitris** 1989(3) SA 820 (A) at 832 B). I can therefore accept, at least *prima facie,* that I need not take account of the oral agreement alleged in paragraph 50 of Mr. Reddy's affidavit.

[18] I accept for present purposes that Mr. **Shaw**'s main submission on this issue is correct. I must therefore decide whether, *as a matter of law,* Annexure TR7 necessarily excludes any liability in terms of the original loan agreement. In my view it does not because :

(a) The second paragraph of Annexure TR7 expressly provides that even if the drawdown date is postponed until after 30 April 2003, the Company was obliged to pay the amount of USD 459 803.39 (being the amount of the first instalment provided in the new loan agreement) on 30 April 2003.

(b) That amount was not paid.

(c) It was only if the drawdown date was postponed beyond 30 April 2003

"due to the fact that prior to drawdown the Turkish Treasury will have to give its consent" that the concession contained in Annexure TR7 was to take effect.

(d) There is at least *prima facie* , albeit hearsay, evidence before me that the Company and the other members of the Group deliberately failed to make any application to the Turkish Treasury for the relevant consent or at least considerably and deliberately delayed such application.

(e) There is therefore at least *prima facie* evidence that the Company and the Group repudiated the new loan agreement which thereby resuscitated (if resuscitation were necessary) the original loan agreement, which had, in any event, never been cancelled. The case made in the founding affidavit justifies, even though that may not have been expressly stated, a conclusion that the Bank had accepted such repudiation.

(f) In any event Annexure TR14 (quoted in paragraph [15](g) **supra**) demanded payment of the amount made up of the first instalment payable under the new loan agreement from which had been deducted payments which had been made in the interim under the old agreement.

(g) Even if Mr. **Shaw's** argument is legally sound it is premised on the existence of negotiations. As I understand the position negotiations had ceased and a contract had been concluded. And the mere fact that it might have operated harshly on the Company and the Group because of the short time between signature and "Commitment Termination Date" (30

April 2003) does not give the court the power to vary the agreement made by the parties (cf. **Paddock Motors v Igesund** 1976(3) SA 16 (A)). And Annexure TR7 made it clear what amount was required to be paid on 30 April 2003.

(h) Furthermore, carried to its logical conclusion, Mr. **Shaw's** argument means that there was no obligation on the Company to pay anything to the Bank because the old loan agreement had been superseded by the new loan agreement, which, in its turn, was not operative because certain suspensive conditions contained in Clause 4 thereof had not been fulfilled. That is such a commercially improbable and unacceptable consequence of the submission that it simply cannot be correct.

[19] I accordingly conclude that the Bank has established, at least *prima facie*, that at the date of the arrest its claim was due and payable and that therefore there was good cause for the arrest.

THE SALE APPLICATION.

[20] On 19 June 2003 this Court acting in terms of section 9(1) of the Act issued a *rule nisi* relating to the sale of the vessel. The Company opposes the confirmation of the *rule nisi.*

[21] The court has a wide discretion to order the sale of a ship which has been arrested but that discretion will be sparingly exercised while the action which was initiated by the arrest is still pending and where there is a reasonable prospect that the owner will be able to show that the ground of the arrest is not a good cause of

action. **(MT Argun : Sheriff of Cape Town v MT Argun, her owners and all persons interested in her & others** 2001(3) SA 1230 (SCA) at 1245, para [34].).

[22] Mr. **Shaw** submitted that there is a substantial dispute between the Bank and the Company with regard to the Bank's rights. Hence, argued Mr. **Shaw**, pending the resolution of that dispute, it was "entirely inappropriate that the Company's asset should be sold". That is certainly a weighty consideration but it is not decisive. **(M T Argun, supra cit)**. Indeed, in the unreported judgment in this Division of **Dias Compania Naviera SA v M V "Al Kaziemah" & others** (Duran and Coast Local Division - Case No. A77/89) Thirion J granted an order for the sale of a vessel notwithstanding that the *lis* in that case actually related to the ownership of the vessel in question.

[23] In my view there are various factors which are relevant to the exercise of my discretion in this case namely :-

(a) It has been held that the court should attempt, so far as is possible, to attempt to preserve the security which is accorded a plaintiff with a maritime claim by its arrest of the ship. **(Unicorn Lines (Pty) Ltd v MV Michalis S** 1990(3) SA 817 (D) at 821 G-H).

(b) A material factor is whether the value of the ship it is proposed to sell substantially exceeds the amount of its indebtedness. **(Unicorn Lines, supra** at 821 H). In the instant case, although the matter is in dispute, it seems to me as a matter of probability that there is little, if any, margin between the value of the vessel and the amount owing by the Company to

the Bank and secured by its mortgage.

(c) The Bank as the arresting creditor is liable to pay the costs incurred by the Sheriff in maintaining and preserving the vessel (**MT Argun, supra,** at 1244 I, para [31]).

(d) It follows, therefore, that the extent of the Bank's security is being materially reduced by the amount it is required to pay the Sheriff (**MT Tigr v Bouygues Offshore & another** 1998(4) SA 206 (C) at 210 F-H).

[24] It seems to me that all these factors taken together substantially outweigh the potential prejudice to the Company which might be caused by the sale of the vessel. A well-advertised auction sale is, after all, recognised as the best way of assessing the true value of what is offered for sale. If the price realised at such sale is less than the amount of the Company's proved indebtedness to the Bank that fact will establish that the continuation of the mortgage will have been of no benefit either to the Company or the Bank. On the other hand, if the price realised for the vessel exceeds the amount owing by the Company to the Bank and the additional expenses incurred by the Bank every day the vessel is under arrest (which, as Mr. **Wallis** pointed out, the Company has not tendered to pay) the Company will be entitled to that excess, if any. It follows that in my view the *rule nisi* relating to the sale of the vessel should be confirmed.

[25] **Costs.**

The costs of the dismissal action must follow the result. I did not understand Mr. **Shaw** to challenge the briefing of two counsel on behalf of the Bank and I am

satisfied that it was appropriate. The question of the costs of the sale application appears to be dealt with in paragraph 1.3.3.2 of the *rule nisi*. The introduction to that paragraph, however, reads "in the event of the sale not proceeding", and I may therefore be wrong in thinking that the mere confirmation of the *rule nisi* will adequately deal with the matter of costs. I therefore propose to add a rider to the order in regard to the rule which will, I believe, adequately protect the interests of the parties.

[26] **The Orders.**

I make the following orders :

Case No. A108/2003

The application is dismissed with costs, including the costs consequent upon the employment of two counsel.

Case No. A114/2003

1. The *rule nisi* dated 19 June 2003 is confirmed.
2. Either party may, on not less than 3 days notice to the other apply for the variation of the order as to costs, provided that such application is launched within 10 days of the delivery of this judgment.