COMMENT

PERSONAL LIABILITY AND THE ADMIRALTY ACTION IN REM

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The ability to proceed in the Admiralty Court directly against a ship has been the main distinguishing feature of Admiralty jurisdiction.

The action *in rem* being against a *res* (i.e. the ship), is distinct from an action *in personam* which leads to judgment against the person of the defendant.

A maritime lien is the foundation of an action *in rem*.[1] However, statutory rights existing independently of a maritime lien have enlarged the Admiralty jurisdiction.[2] A claim for necessaries is a well known example of a statutory action *in rem*.[3]

The principle underlying the requirement that personal liability on the part of the owner must exist before an action *in rem* can be brought is known as the procedural theory. According to the procedural theory the maritime lien grew out of the process of arrest of the vessel in order to compel the owner to appear. Under this theory the proceeding *in rem* is, in substance, an action against the owner of the vessel. The action *in rem* is instituted to compel the appearance of the owner. The vessel is not liable unless the owner is personally liable.[4]

Over the years there has been considerable controversy in England concerning the precise nature of the requirement that there must be liability *in personam* for an action *in rem* to exist.

It is now settled in Australia that, in Admiralty, the general rule is that an action *in rem* cannot be maintained when there is no personal liability on the part of the shipowner.[5]

However, it is still an open question whether the liability of a person temporarily in control of a vessel (but who is not the "owner" within the generally accepted meaning of the term) will be sufficient to ground an action *in rem*.

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1 "The Bold Buccleugh" (1851) 7 Moo. P.C. 267

2 D. R. Thomas, *Maritime Liens* (1980), para. 43.

3 Dalgety and Co. Ltd v. Aitchison; The Rose Pearl (1957) 2 F.L.R. 219.

4 G. Price, *The Law of Maritime Liens* (1940) at 4-13; F. L. Wiswall, *The Development of Admiralty Jurisdiction Practice since 1800* (1970) at 155 et seq.

5 Rosenfeld Hillas & Co. Pty Ltd v. The "Fort Laramie" (1922) 31 C.L.R. 56 at 63; Shell Oil Co. v. The Ship "Lastrigoni" (1974) 131 C.L.R. 1 at 5.

The line of cases begins with what Wiswall[6] terms a "judicial pirouette" by the well known Admiralty judge, Dr Lushington. In 1842, in *The Druid*[7] Dr Lushington held that there could be no proceedings against the vessel where there could be no proceedings against the owner.

However, in 1857 he expressed a contrary view in *The Ticonderoga.*[8] This case concerned a vessel under a charterparty by which the charterers had the exclusive control of the vessel. Dr Lushington held that an action *in rem* could be instituted against the vessel for damage done by the charterers' servants, even though there was no libaility on the part of the owners.

The Ticonderoga was followed by *The Lemington*[9] in which Sir Robert Phillimore based his decision on the ground that a vessel placed by its owners wholly in the hands of demise charterers is held by the charterers as *pro hac* owners. He held that the liability of charterers was sufficient for the maintenance of an action *in rem*. Sir Robert Phillimore's reasoning was the same as that of Dr Lushington in *The Ticonderoga*; namely that charterers, who are temporarily in control of the vessel, should be regarded as being owners.

It should be borne in mind that a demise charter is, as the term indicates, a demise of the vessel in much the same way as a lease of an unfurnished house is a demise of real property. At the inception of the period of the charter, the shipowner surrenders possession of his vessel to the charterer, who mans, victuals and supplies her and is in control of the vessel during the term of the charter.[10]

The idea underlying the reasoning in *The Ticonderoga* and *The Lemington* is therefore that damage caused by the vessel whilst in possession of the charterers is damage done by the owners or their servants, although those owners may only be temporary.

In *The Parlement Belge,*[11] the Court of Appeal appears to have come to a different conclusion. Brett L.J., who delivered the judgment of the court, said:[12]

> Though the ship has been in collision and has caused injury by reason of the negligence or want of skill of those in charge of her,

6 Supra n. 4 at 148.
7 I.W.R. 391.
8 (1857) Swab. 215.
9 2 Asp. M.L.C. 475.
10 N. Healy and D. Sharpe *Admiralty Cases and Materials* (1974) 404. *Scrutton on Charterparties* 18th ed. (1974) at 45-48.
11 (1880) 5 P.D. 197.
12 At 218.

> yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner.[13]

By "owner" Brett L.J. appears to have meant the permanent owner as he says[13] that the owner has a right to notice to show cause "why his property should not be liable to answer to the complainant."

All the above cases were collision damage cases. However the next case, *The Turgot*,[14] was different. It concerned a charterparty whereby the owners had undertaken to pay for provisions and wages and the charterer for coals and other expenses. The Master, with notice of the charterparty, ordered and made himself liable for necessary provisions and coals for the vessel at a foreign port. He then sued the vessel relying on a maritime lien for Master's disbursements. Sir Joseph Hannen, who did not refer to *The Parlement Belge* or any of the other preceding cases, said:

> But I am of opinion that the captain is not entitled to recover in respect of the coals, as by the terms of the charterparty he had no authority to pledge the owner's credit in respect of them.[15]

The Tasmania[16] followed *The Turgot*. It, too, involved a charterparty, but was concerned with collision damage. Sir Joseph Hannen again presided. Again he did not mention *The Parlement Belge* but this time referred to both *The Druid* and *The Ticonderoga*. He in fact followed *The Ticonderoga*, and said:

> By the maritime law, charterers, in whom the control of the ship has been vested by the owners, are deemed to have derived the authority from the owners, so as to make the ship liable for the negligence of the charterers, who are, *pro hac vice*, owners.[17]

The state of the law as at 1890 was, accordingly, in a state of uncertainty. This is relevant as the law applied by the Australian courts of Admiralty is stabilised as at the commencement of the *Colonial Courts of Admiralty Act* 1890 (U.K.) and the jurisdiction conferred on the Australian courts is the jurisdiction possessed by the High Court of England in 1890.[18]

The decisions of later cases having a bearing on the Admiralty law applied by the English High Court as at 1890, are, nevertheless, relevant in determining the law to be applied by the Australian Admiralty

[13] Id.
[14] (1886) 11 P.D. 21.
[15] At 23.
[16] (1888) 13 P.D. 110.
[17] At 118.
[18] McIlwraith McEachern Ltd v. The Shell Company (1945) 70 C.L.R. 175; China Shipping Co. v. South Australia (1979) 54 A.L.J.R. 57.

courts. It is accordingly of assistance to trace the subsequent changes in judicial attitude as to the effect of liability on the part of demise charterers.

In 1893 came the landmark case of *The Castlegate*.[19] In this case the House of Lords is said to have established the procedural theory.[20]

In *The Castlegate* time charterers (it is relevant to note that they were not demise charterers) were to furnish coal, while the Master, although appointed by the owners, was to be under the direction of the charterers. To pay for coal the Master, who knew the terms of the charterparty, drew bills upon the charterers, and when the latter failed the Master brought an action claiming a lien for his disbursements. The House of Lords decided that the Master had no lien and approved the principles laid down in *The Parlement Belge* and *The Turgot*.

In an oft-quoted passage Lord Watson said:

> Inasmuch as every proceeding *in rem* is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability[21]

and again:

> No liability capable of carrying a lien on ship can be properly incurred by a master on account of ship in the absence of express or implied authority from the owner.[22]

Therefore, as the charterer was bound to pay for the coal, and the owner was not personally liable, the Master had no lien on the ship.

It is important to note that in the course of his judgment Lord Watson said:

> It was argued that the case of lien for damages by collision furnishes another exception to the general rule and there are decisions and dicta which point in that direction; but these authorities are hardly reconcileable with the judgment of Dr Lushington in *The Druid*, or with the law laid down by the Appeal Court in *The Parlement Belge*.[23]

The authorities to which Lord Watson was referring, were *The Ticonderoga*, *The Lemington* and *The Tasmania*. These were all referred to in argument. Lord Watson, in the passage cited, therefore disapproved of the principles laid down in those cases. This should have

19 [1893] A.C. 39.
20 Price, supra n. 4, at 18.
21 [1893] A.C. 30 at 52.
22 Id. at 53.
23 Id. at 52.

been the end of significance being attached to owners *pro hac vice*, but as will be seen, this was not to be.

Nevertheless, for a while there was judicial unanimity as, in the same year as *The Castlegate* was reported, the Privy Council, in *The Utopia*,[24] also endorsed the procedural theory. Sir Francis Jeune said:

> But the foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence, and the ship is no more liable than any other property which the owners at the time of the collision may have possessed. In the recent case of *The Castlegate*, in the House of Lords, language used by the present Master of the Rolls in the case of *The Parlement Belge*, which expresses the above view, was quoted with an approval which their lordships desire to repeat.[25]

By 1893 therefore, it seems to have been established clearly in England that unless the owners (i.e. within the generally accepted meaning of the term) were liable *in personam* no maritime lien could result.

The Castlegate and *The Utopia* are weighty authorities, particularly in Australia where they have been followed by the High Court.[26]

In the light of the pronouncements of both the House of Lords and the Privy Council, it is surprising to note that in 1897 occurred what has been described as "the next 180° turn".[27] This took place in *The Ripon City*.[28]

The Ripon City concerned a claim by a Master for a disbursement lien. An arrangement had been made between registered owners and a Glasgow firm for the eventual acquisition of the vessel. The Master, who was employed by the Glasgow firm, ordered and paid for coal for the vessel. He was unaware of the arrangement between the owners and his employers. He believed his employers were the owners. Gorell Barnes J., after examining all the authorities, concluded that, notwithstanding the absence of personal liability on the part of the true owners, the Master possessed a valid maritime lien.

Gorell Barnes J. attempted to reconcile the various authorities, namely *The Turgot*, *The Parlement Belge*, *The Castlegate* and *The Utopia* with *The Ticonderoga*, *The Lemington* and *The Tasmania* by holding that the concept of "owners" included persons put in possession of the vessel by the owners in their place. He said:

24 [1893] A.C. 492.
25 At 499.
26 See authorities cited at n. 5.
27 Wiswall, supra n. 4, at 148.
28 [1897] P. 226.

> As maritime liens are recognised by law, persons who are allowed by those interested in a vessel to have possession of her for the purpose of using or employing her in the ordinary manner, must be deemed to have received authority from those interested in her to subject the vessel to claims in respect of which maritime liens may attach to her arising out of matters occurring in the ordinary course of her use or employment unless the parties have so acted towards each other that the party asserting the lien is not entitled to rely on such presumed authority.[29]

This is a somewhat illogical conception of the law of agency. If the servants of the possessor of the vessel may be agents of the owner so as to create a maritime lien, it is difficult to understand why they may not also be agents for the purpose of imposing personal liability on the owner[30]—which, generally speaking, they are not.

It is also noteworthy that Gorell Barnes J. did not refer to the disapproval expressed by Lord Watson in *The Castlegate* as regards the authorities which "are hardly reconcileable with the judgment of Dr Lushington in *The Druid* or with the law laid down by the Appeal Court in *The Parlement Belge*".[31]

Thomas[32] suggests that, although *The Ripon City* was not precisely reasoned in terms of estoppel, it is explicable on the basis of that equitable principle. He points out that the distinction between *The Ripon City* and *The Castlegate* is that in *The Ripon City* the Master was ignorant of the fact that his authority did not derive from the true owners, whereas in *The Castlegate* the Master knew of the limitatic ı which the charterparty imposed on his authority. He accordingly argues that:

> Where the owner of a ship allows another to assume possession of the ship and to represent himself as owner and with all the authority of an owner, and in consequence a Master, who is unaware of the true position, is induced to defray expenses or incur a liability in the faith that the ship will stand security; the owner is thereafter estopped from defeating the disbursement lien by pleading the agreement between himself and the owner of the ship. In such a situation, the ship is charged with a lien notwithstanding that the shipowner is not personally liable for the disbursement.[33]

Whether the rule propounded by Thomas will be followed remains to be seen. The fact is that, although the facts of *The Ripon City* may fit an estoppel, estoppel was not the basis of the judgment. Indeed, *The*

29 At 244.
30 See Price, supra n. 4, at 20.
31 [1893] A.C. 492.
32 Supra n. 2 at para. 357.
33 Id.

Ripon City has itself been doubted.[34] However, before those doubts were expressed, it was approved by the Court of Appeal in *The Tervaete*,[35] where Bankes L.J. said that:

> a proper maritime lien must have its root in the personal liability of the owner, or of the person for this purpose in the position of the owner.[36]

Nevertheless, a year later, in *The Sylvan Arrow*, Hill J. expressed doubt whether the principles laid down in *The Lemington*, *The Ticonderoga*, *The Tasmania* and *The Ripon City* were correct. Hill J. pointed out[37] that in *The Castlegate* Lord Watson had impliedly disapproved of *The Lemington* and *The Ticonderoga* and said[38] that these decisions:

> . . . will have to be considered by a higher court in the light of the principles so clearly laid down by the Court of Appeal in *The Parlement Belge*, by the House of Lords in *The Castlegate* and the Privy Council in *The Utopia*.

The next case to which reference should be made is *The St. Merriel*.[39] The plaintiffs who had done repairs to the vessel sued the owners for the cost thereof. At the relevant time the vessel had been chartered by demise. Arrangements concerning repairs had been conducted between agents of the charterers and the plaintiffs. The plaintiffs issued a writ of summons against the owners. The owners applied to set the writ aside on the grounds that they were not the persons who would be liable on the claim in an action *in personam*. Hewson J. held that a repairer did not have a maritime lien upon a ship. However he went on to say that even if he were wrong (and a maritime lien was available to a repairer) the plaintiffs would still fail because there was no contract between them and the ship owners. The learned judge re-affirmed that the basis of a maritime lien is the personal liability of the owner. He said:

> I am well aware that in regard to maritime liens there are authorities for the proposition that damage by collision is an exception to the rule. This matter was considered by Hill J. in *The Sylvan Arrow*. In view of Hill J.'s comments on those authorities . . . I would not be prepared in this case, even if I had found it to have been a charge, to enlarge the area of exceptions. It is a fundamental rule that the basis of maritime liens lies in the personal liability of the owner.[40]

34 The Sylvan Arrow (1923) P.D. 220.
35 (1922) P.D. 259.
36 At 264.
37 At 225.
38 At 224.
39 [1963] 1 All E.R. 537.
40 At 543.

It is apparent therefore that Hewson J. was inclined to agree with Hill J.'s criticism of *The Ripon City* and at that stage *The Sylvan Arrow* and *The St. Merriel* had probably caused the judicial seesaw to tip in favour of a strict application of the procedural theory.

However, Brandon J., in *The Andrea Ursula*[41], did not follow *The St. Merriel* and joined the lists on the side of Gorell Barnes J., of whose judgment in *The Ripon City* he expressly approved. *The Andrea Ursula* was not a collision damage case, but concerned an action *in rem* brought by the repairers of the vessel. Brandon J. said:[42]

> It was decided in four of the cases to which I have referred, i.e. *The Ruby Queen*, *The Lemington*, *The Tasmania* and *The Ripon City*, that the personal liability of parties other than the legal owner in possession and control of the ship gave rise to a maritime lien on the ship and could be enforced by an action *in rem* against her. The correctness of these cases in this respect, despite the authority and experience of the judges who decided them, was doubted in *The Sylvan Arrow*, on the ground that the cases were not consistent with the principles laid down by higher courts in *The Parlement Belge*, *The Castlegate* and *The Utopia*.
>
> My provisional view on this point is that there is not necessarily any inconsistency between the two groups of cases. The latter group of cases established clearly the rule that a maritime lien could only be created if there was personal liability of the person who was the owner of the ship at the time when the cause of action said to give rise to the lien arose. The cases did not however decide, because the point never arose for a decision in them, that for the purposes of that rule owner meant only the legal owner and did not include the owner *pro hac vice* or the temporary owner. As to this see the judgment of Gorell Barnes J. in *The Ripon City* where the matter is discussed at length.

Brandon J. was dealing with the interpretation of a section in the Administration of Justice Acts 1956 (U.K.) which provides for the invoking of an action *in rem* in certain circumstances against a ship, if at the time when the action is brought, it is beneficially owned by the person who would be liable on the claim in an action *in personam* and who was, when the cause of action arose, the owner or charter of or in possession or in control of the ship. Influenced by his view of the earlier liability of charterers *pro hac vice* the owner Brandon J. held that under the Act the expression "beneficially owned" included charterers. It is significant that Brandon J. did not base his judgment on estoppel. The foundation

41 [1971] 1 All E.R. 821.
42 At 824.

of his judgment was that "owner" includes owner *pro hac vice*. He, unlike Hewson J. in *The St. Merriel*, was prepared to extend *The Ticonderoga* and *The Lemington* principle to ship repairers.

The catalogue of judicial disagreement continues with *Il Congreso del Partido*.[43] In this case Robert Goff J. disapproved of Brandon J.'s interpretation of "owner". After referring to cases such as *The Tasmania* and *The Lemington*, in which, as he pointed out, the demise charterer was referred to as "owner" *pro hac vice*. Robert Goff J. nevertheless held that the expression "beneficially owned" does not cover a demise charterer as the latter is not an owner of a vessel "in the ordinary sense of the word". He therefore agreed with Hewson J. in *The St. Merriel*.

After examining the abovementioned cases one can only agree with Wiswall's comment that[44] "the entire subject of maritime liens seems to be a source of great confusion in English Admiralty at the present time".

However, it is clear that generally speaking, the rule is that, as regards a maritime lien, there can be no action *in rem* unless there is liability in the owners (and not the demise charterers).

There may well be an exception to the rule as regards the damage maritime lien where, notwithstanding *The Castlegate* and *The Utopia*, the principles laid down in *The Ticonderoga* and *The Lemington* have been approved in *The Tervaete*[45] (as well as in *The Ripon City*).

It is unlikely that the views of Brandon J. in *The Andrea Ursula*, where he extended the collision damage exception to ship repairers, will be followed. It is significant that the parties who appealed against part of the judgment of Robert Goff J. in *Il Congreso del Partido* accepted the meaning he gave to "owner".[46]

It is, however, possible that there may be a further exception to the rule in cases relating to liens where the circumstances could give rise to an estoppel against the owner *pro hac vice*.

As mentioned above, the most important statutory rights *in rem* relate to necessaries. These are conferred by the Admiralty Court Acts (U.K.) of 1840 and 1861.[47]

It is now settled in Australia that a necessaries man only has an action *in rem* if the owner is liable personally.[48]

43 [1978] Q.B. 500.
44 Supra n. at 171.
45 See also The Father Thames [1979] 2 Lloyds Rep. 364; Thomas, supra n. 2, at 130.
46 [1980] 1 Lloyds Rep. 23; [1981] 3 W.L.R. 328.
47 See the authorities cited in n. 3 and n. 5.
48 Id.

However, it is submitted that the question as to who is the owner must be decided in accordance with the rules applicable to maritime liens.[49] It remains to be seen whether the courts will facilitate claims by necessaries men applying the principles of estoppel to necessaries supplied to a charterer.

[49] Cf. Scrutton, supra n. 10, at 469.