

Case Comment

**SILENT AND INDESTRUCTIBLE: THE SIGNIFICANCE
OF A DAMAGE MARITIME LIEN ON THE
IDENTIFICATION OF THE *IN PERSONAM* DEFENDANT
IN AN *IN REM* ACTION**

The Echo Star ex Gas Infinity [2020] 5 SLR 1025

[2021] SAL Prac 2

In a claim arising from a damage maritime lien, the identification of the proper *in personam* defendant refers to the owner of the wrongdoing ship at the time of the collision and not at the time an *in rem* writ is issued. This article considers the three crucial features of a maritime lien which justify this reference point.

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I. Introduction

1 The legal questions at the heart of this dispute before the court can be found in the very name of the vessel as reflected in title of the action: *Echo Star ex Gas Infinity*. The dispute in *The Echo Star ex Gas Infinity*¹ (“*The Echo Star*”) therefore concerned the impact of a change of ownership of a vessel *after* the time of collision but *before* the commencement of an *in rem* action.

2 A maritime lien has long been defined as a “claim or privilege [which] travels with the thing, into whosoever possession it may come. It is inchoate from the moment the

1 [2020] 5 SLR 1025.

claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached”.² It is peculiar in that it is a privilege that attaches to and attaches secretly with a *res* but at the same time, takes priority over other claims against the *res*. As Tetley described it, a maritime lien is a product of evolution of custom, statute and judicial decisions.³ Maritime liens arise from the following claims:

- (a) damage done by a vessel;
- (b) crew wages;
- (c) salvage; and
- (d) bottomry.

3 In particular, in a claim arising from a *damage* maritime lien, the identification of the proper *in personam* defendant refers to the owner of the wrongdoing ship at the time of the collision and not at the time an *in rem* writ is issued. This reference point is premised on three crucial features of a maritime lien, as referred to by S Mohan JC in the recent case of *The Echo Star* as the:

- (a) procedural aspect;
- (b) crystallisation aspect; and
- (c) fault aspect.

4 These three fundamental features of a maritime lien hold true, notwithstanding a change in ownership between the date of collision and the date the writ was issued.

II. Facts

5 On 7 April 2019, two vessels *Royal Arsenal* and *Gas Infinity* collided with each other in the Straits of Hormuz. At the time of the collision, *Gas Infinity* (the “Vessel”) was under the registered ownership of Sea Dolphin Co Ltd (“Sea Dolphin”).

2 *The Bold Buccleugh* (1851) 7 Moo PC 267 at 284.

3 William Tetley, *Maritime Liens and Claims* (Wildy & Sons Ltd, 2nd Ed, 1998) at pp 59–60.

6 Thereafter, three months later on 28 July 2019, Sea Dolphin sold the Vessel and transferred ownership of the same to Cepheus Ltd (“Cepheus”) by way of a memorandum of agreement dated 25 June 2019 (as amended by the Norwegian Saleform 2012). Cepheus then took delivery of the Vessel on the same day and she was later renamed *Echo Star*. It is undisputed that Cepheus was a stranger to the collision.

7 However, three months after the sale and transfer of the Vessel, the owner of *Royal Arsenal* commenced an *in rem* action against the Vessel on 6 November 2019 to claim for its losses. As per the Rules of Court,⁴ the defendant named in the action was “Owners and/or Demise Charterers of the vessel *Echo Star* (ex-*Gas Infinity*) (IMO No 9134294)”.

8 Thus, at the time of the collision, the Vessel was owned by Sea Dolphin and at the time of the issuance of the writ (canvassed below), the Vessel was owned by Cepheus. Following from this, a key issue therefore arose as to the proper defendant who had entered into appearance in the action.

9 First, on 15 November 2019, Rajah & Tann LLP (in their capacity as solicitors for Cepheus) filed an appearance on behalf of Cepheus, naming it as the defendant in the action. Cepheus also furnished security for the plaintiff’s claim, interest and costs in the sum of US\$6,796,354.00 into court on 20 December 2019 so as to release the Vessel from arrest.

10 Then, on 20 January 2020, Rajah & Tann filed a further memorandum of appearance on behalf of Sea Dolphin, also naming it as defendant in the action. Sea Dolphin filed its list of electronic track data the next day.

11 Subsequently, on 31 January 2020, Rajah & Tann wrote to the plaintiff’s solicitors, requesting that the plaintiff consent to:

- (a) Cepheus being granted leave to withdraw its memorandum of appearance filed on 15 November 2019; and

4 Cap 322, R5, 2014 Rev Ed.

(b) Cepheus being given leave to join the *in rem* action as an intervener instead.

12 As the plaintiff's lawyers objected to this request, Cepheus filed an application, seeking the following orders from the court:

(a) leave to withdraw its memorandum of appearance dated 15 November 2019 pursuant to O 21 r 1 of the Rules of Court;

(b) leave to intervene in Admiralty action *in rem* No 143 of 2019 ("ADM 143") pursuant to O 70 r 16 of the Rules of Court; and

(c) liberty to enter an appearance in ADM 143 as an intervener within eight days of the order made in Summons No 1187 of 2020 ("SUM 1187").

13 The application was heard before and granted by the assistant registrar on 12 June 2020. The plaintiff appealed and the matter was re-argued before S Mohan JC (the "Judge").

III. High Court decision on appeal

14 On appeal, the Judge identified two key issues which had to be determined:

(a) first, the threshold issue of who was the proper party to enter appearance as the defendant in the circumstances of this case; and

(b) second, whether leave ought to be granted to Cepheus to withdraw its appearance as defendant, and to intervene in ADM 143.

15 At the outset, the Judge proceeded on the premise that the plaintiff's claim gave rise to a damage maritime lien. This was not disputed given the well-established legal principles.

A. Issue one: identifying the proper defendant in the in rem action

16 Given the dearth of case authority on this threshold issue, the Judge fell back on first principles and examined the critical legal characteristics of a maritime lien. In doing so, the Judge identified three core aspects.

(1) Procedural aspect

17 First, the Judge reiterated the nature of a maritime lien in that it travels secretly and unconditionally with the property and continues to encumber the property even if subsequently purchased by a *bona fide* purchaser without notice. The ship can therefore be arrested by a plaintiff to obtain security to enforce its claim despite a transfer of ownership and to compel appearance by the wrongdoer.⁵

(2) Crystallisation aspect

18 Moving on to the time at which a maritime lien accrues and is enforced, the Judge highlighted that it accrued at the time the cause of action arose but lay inchoate until an *in rem* action was started to enforce it. Referring to *The Halcyon Isle*⁶ at [24], the Judge astutely summarised the crystallisation aspect: “When the *in rem* action is commenced, the maritime lien crystallises and relates back to the period when it first arose.”⁷

(3) Fault aspect

19 Lastly, the Judge focused on the fault-based nature of the damage maritime lien, namely that it was based on or arose as a result of the fault and/or negligence of the offending ship’s owners, servants or agents. In doing so, the Judge emphasised that “the personal liability of the shipowner is a necessary requirement for the accrual of the damage lien”.⁸

5 *The Echo Star ex Gas Infinity* [2020] 5 SLR 1025 at [28(a)].

6 [1979–1980] SLR(R) 538.

7 *The Echo Star ex Gas Infinity* [2020] 5 SLR 1025 at [28(b)].

8 *The Echo Star ex Gas Infinity* [2020] 5 SLR 1025 at [29].

20 Tying in with the above three aspects, the Judge held that the proper reference point of identification was the owner of the Vessel at the time of the collision, notwithstanding the transfer of ownership prior to the issuance of the writ.

21 First, Sea Dolphin was the party at fault at the time of the collision, not Cepheus.

22 More critically, given the fault aspect, it was incorrect to make the *bona fide* purchaser of the offending ship the defendant in the action *per se*. Brought to its logical conclusion, this would erroneously make the new *bona fide* owner personally liable for a collision which it was not involved in or may not have been aware of.

23 As the Judge found, this incorrect position is exacerbated by the fact that there exists a clear distinction between the *in rem* and *in personam* aspect of an admiralty claim: *in rem* proceedings are against the ship itself and in the absence of a defendant, the judgment is enforced against the ship only; if, however, the defendant enters an appearance, the defendant makes himself personally liable and in such an event, the judgment may be enforced against both the ship and defendant. Therefore, given that the accrual of a damage maritime lien requires fault or negligence and that there is no requirement for the defendant to personally enter appearance in an *in rem* action, the Judge agreed with Cepheus' argument that it would be illogical to force a *bona fide* purchaser like Cepheus to make itself personally liable for a damage maritime lien.

24 Second, the purpose of the procedural aspect was to, *inter alia*, compel the wrongdoer to appear to answer the claim even if there was a change in ownership after the collision. Given that the wrongdoer was quite clearly Sea Dolphin (applying the fault aspect), Cepheus would not be identified as the *in personam* defendant.

25 Third, given that the maritime lien (a) comes into existence when the cause of action arises; (b) lies inchoate until it crystallises when *in rem* proceedings start; and (c) also relates

back to the time it first attached; the proper *in personam* defendant could only be the wrongdoer at the time the ships collided.

26 On a final note, the Judge astutely observed that the plaintiff's case (that Cepheus as the new owner and stranger to the collision would be the proper *in personam* defendant) was fundamentally flawed and unsustainable. This is because if such a course of action had been proceeded with, the plaintiff would ultimately have its claim dismissed because the court would have found no fault or negligence attributable to Cepheus or its servants or agents.

B. Issue two: whether leave should be granted to Cepheus to withdraw appearance

27 As the Judge found that the proper *in personam* defendant was Sea Dolphin and not Cepheus, the Judge exercised his discretion in granting Cepheus leave to withdraw its memorandum of appearance and join instead as intervener in the action. The Judge exercised his discretion, *inter alia*, on the following grounds.

28 First, Cepheus' entry of appearance was a mistake and was not deliberate. The Judge found this to be supported by the fact that it had maintained that the filing of the memorandum of appearance was misconceived and therefore continuing as defendant was against its interests.

29 Second, the mere fact that Cepheus had paid security into court was not relevant. Cepheus had done so in order to release the Vessel under arrest and as a matter of ordinary procedure, was required to file a summons.

30 Third, the Judge found that on the facts there was no undue delay between Cepheus' entry of appearance and application to withdraw its memorandum of appearance. This was because Cepheus had taken firm steps since 31 January 2020 to rectify its mistake.

31 Fourth, the Judge dismissed the plaintiff's contention that it will suffer prejudice because Sea Dolphin would potentially have a counterclaim against it whereas Cepheus as a stranger to the collision did not. The Judge said this argument was a non-starter as he had already determined that Cepheus was the wrong *in personam* defendant. The Judge further observed that it would be wrong to allow the plaintiff to benefit from Cepheus' erroneous entry of appearance and be allowed to prosecute its claim without facing a counterclaim.

32 Accordingly, the Judge dismissed the plaintiff's registrar's appeal and affirmed the assistant registrar's decision to allow Cepheus' application to withdraw its appearance in the *in rem* action and participate as intervener instead.

IV. Comments

33 The following principles and observations may be drawn in *The Echo Star*.

A. Overarching nature of damage maritime lien is fault-based

34 Although the nature of the maritime lien is that it attaches to the *res* and survives a change of ownership, a damage maritime lien is essentially fault-based. This means that whilst a maritime lien may encumber a vessel such that any party with an interest in the vessel may be bound by it, the wrongdoing is traced back to the owner of the ship at the time of collision.

35 This therefore means that even if the ship changes ownership in the period after the collision and before the *in rem* writ is issued, the maritime lien remains undefeated and the proper *in personam* defendant who will have to answer to the claim will be the owner at the time the ship was involved in the collision. As the Judge found at [31] of the *The Echo Star*:

... it was in my view, intuitively wrong that the damage lien could have the effect of making a subsequent *bona fide* purchaser of the wrongdoing ship, a defendant in the true sense of the word.

B. In personam liability in an in rem action

36 While a *bona fide* purchaser as a party with an interest in the ship may be bound by a maritime lien, this does not make the purchaser the correct *in personam* defendant in the *in rem* action.

37 In this regard, the Judge helpfully emphasised the role of *in personam* liability in an *in rem* proceeding:⁹

It is hornbook admiralty law that an action in rem commenced against a ship is an action against the ship itself. If the defendant does not enter an appearance and judgment is obtained, the judgment is enforceable only against the ship, to the extent of its realisable value via a judicial sale. In contrast, if the defendant enters an appearance, he submits himself personally to the jurisdiction of the court, and renders himself liable *in personam* such that if judgment is obtained by the plaintiff, it may be enforced *in rem* against the ship and *in personam* against the defendant (*The Soeraya Emas* [1991] 2 SLR(R) 479 at [28]–[30]; *The Fierbinti* [1994] 3 SLR(R) 574 at [12]).

C. Indemnity clause in sale and purchase agreement of ship does not make bona fide purchaser the proper in personam defendant

38 Lastly, *The Echo Star* is a timely reminder that the indemnity clause in a standard ship sale and purchase agreement contract – which requires the previous owner to indemnify the new owner for claims (including maritime liens) which accrued before delivery or transfer of ownership – does not necessarily make the *bona fide* purchaser the proper or correct *in personam* defendant in an *in rem* proceeding.

39 In *The Echo Star*, the plaintiff had sought to argue that the standard indemnity clause (found at cl 9 of the Norwegian Saleform 2012) implied that Cepheus as the owner of the Vessel at the time the writ was issued was the proper *in personam* defendant.

9 *The Echo Star ex Gas Infinity* [2020] 5 SLR 1025 at [32].

40 Clause 9 of the Norwegian Saleform 2012 states as follows:

9. Encumbrances

The Sellers warrant that the Vessel, at the time of delivery, is free from all charters, encumbrances, mortgages and maritime liens or any other debts whatsoever, and is not subject to Port State or other administrative detentions. The Sellers hereby undertake to indemnify the Buyers against all consequences of claims made against the Vessel which have been incurred prior to the time of delivery.

41 In reliance on the above clause, the plaintiff contended that Cepheus as the new owner had accepted that it would first need to defend the claims and thereafter indemnify Sea Dolphin.

42 The Judge, however, found this argument to be irrelevant to the threshold issue of identifying the proper *in personam* defendant. The obligation to indemnify depended on the specific terms of a sale and purchase agreement.

43 Quite rightly, the indemnity clause only relates to the obligation on the seller to indemnify the buyer against consequences of claims or charges against the vessel which accrued when the seller was still the owner of the ship. Yet, indemnity does not “transfer” the fault or liability to the new owner, hence the Judge’s emphasis on the fault aspect of a damage maritime lien. In fact, the indemnity provided by the seller arguably is rooted in an understanding and acknowledgment that the seller as previous owner remains liable for disputes and claims brought for incidents which occurred at the time it still owned the ship, and thus its provision of an indemnity to the buyer who is taking over ownership of the vessel.

44 Again, as a caveat by the Judge, this will depend on the specific wording of the indemnity clause. In this regard, it is noted that the Judge was careful not to rule out all indemnity clauses as always being un-determinative of the identity of the proper *in personam* defendant.

V. Conclusion

45 *The Echo Star* is a timely reminder of the principles relating to collision damage liens and maritime liens generally. It will also serve as a point of reference for future cases touching on the identification of the proper *in personam* defendant where there is a change of ownership arising after the incident but before the commencement of *in rem* proceedings.