

RIGHTS OF A NON-DEFENDANT PARTY WHO FURNISHED SECURITY TO SECURE THE RELEASE OF THE VESSEL

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It is trite that third parties with interests in a vessel under arrest have *locus standi* to intervene in admiralty proceedings by invoking the court's admiralty jurisdiction via O 70 r 16 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) or the court's inherent jurisdiction. This article will examine the cases on the security provider's interest to intervene in the action *in rem*, and on the intervener's rights to (a) to set aside the warrant of arrest and (b) to file a defence and counterclaim for damages arising from wrongful arrest, in the event where the defendant shipowner is actively defending the arrest.

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I. Introduction

1 It is trite that third parties with interests in a vessel under arrest have *locus standi* to intervene in admiralty proceedings. This may be in the form of invoking the court's admiralty jurisdiction via O 70 r 16 of the Rules of Court¹ or the court's inherent jurisdiction. This article will re-examine the cases

1 Rules of Court (Cap 322, 2014 Rev Ed).

which invoked the court's jurisdiction under both grounds, in the light of the court's recent pronouncement on the third party's right to intervention in the event where not only has it provided security to secure the release of the vessel from arrest, but the defendant shipowners also appear to be actively defending the action, as in the case of *The Miracle Hope*² ("MH 1").

2 Four decisions addressed the issue of the security provider's rights to intervene in the action and powers of such an intervener, in particular (a) to set aside the warrant of arrest and (b) to file a defence and counterclaim for damages arising from wrongful arrest. The assistant registrar's decision on the intervener's rights to set aside the warrant of arrest was released in the *MH 1* judgment. On appeal, the High Court, in an unreported decision, affirmed the decision of the assistant registrar in *MH 1* ("MH 1A"). The other two decisions on the intervener's rights to file a defence and counterclaim for damages arising from wrongful arrest are unreported. Both the assistant registrar's decision and the judge's decision ("MH 2" and "MH 2A", respectively) on this matter will be discussed in this article.

II. General principles of intervention in admiralty proceedings

3 The general principles of intervention are well settled. As summarised in *The Engedi*,³ the purpose of the procedure for intervention is to "enable a party, who is not already a party to the *in rem* action but with an interest either in the property under arrest or the sale proceedings in court representing the property arrested or whose interest may be affected by any order made in the *in rem* action, to intervene in the action for the purpose of protecting his own interest".⁴

2 [2020] SGHCR 3.

3 [2010] 3 SLR 409.

4 *The Engedi* [2010] 3 SLR 409 at [21], citing *Singapore Court Practice 2009* (Jeffrey Pinsler gen ed) (LexisNexis, 2009) at para 70/16/2.

A. Right to intervene under Order 70 rule 16

4 Intervention in admiralty *in rem* proceedings is governed by O 70 r 16(1):

Where property against which an action in rem is brought is under arrest or money representing the proceeds of sale of that property is in Court, a person who has an interest in that property or money but who is not a defendant to the action may, with the leave of the Court, intervene in the action.

5 The object of O 70 r 16 is “to enable a person who has a substantial interest in the *res* to intervene, if this interest may be injuriously affected by the action against the *res* and to protect its interest”.⁵ The plain wording of O 70 r 16(1) suggests that a person with interests in the arrested vessel itself and/or the proceeds of sale of the arrested vessel, but who is not a defendant to the action, may intervene in the action as long as the leave of court is obtained.

B. Right to intervene under the inherent jurisdiction of the court

6 Nevertheless, the court may still allow the intervention of third parties where O 70 r 16(1) is not met, by invoking the court’s inherent jurisdiction. In these situations, the proposed intervener would not have interests in the arrested vessel and/or interests in the proceeds in the judicial sale of the vessel, as required under O 70 r 16(1). However, the cases indicate that the court’s inherent jurisdiction can be invoked if the effect of the arrest will cause it “serious hardship or difficulty or danger”.⁶

7 In *The Mardina Merchant*,⁷ the port authority whose port was used to berth the arrested ship applied to intervene in the action as the vessel’s continued presence was causing serious inconvenience to the port operations and subsequent financial loss to the port authority. The port authority sought to intervene

5 *Singapore Civil Procedure 2020* vol 1 (Justice Chua Lee Ming editor-in-chief; Paul Quan gen ed) (Sweet & Maxwell, 2020) at para 70/16/1.

6 *The Mardina Merchant* [1975] 1 WLR 147 at 149.

7 [1975] 1 WLR 147.

in the action to move the ship. The Registrar refused the port authority's application to intervene in the action as the English equivalent of O 70 r 16(1) was not satisfied. On appeal, the English court recognised that the inherent jurisdiction of the court should remain available to proposed interveners to be allowed to intervene in an action even if they do not fall within the plain meaning of the words in the English equivalent of O 70 r 16, making it clear that the rule is not exhaustive of the powers of the court to justice:⁸

[O 70 r 16(1) RSC] covers and covers only, I think, cases where the person who seeks to intervene has an interest in the property arrested or in the money which represents it. I do not think it could be said that the port authority has an interest within the meaning of that rule, and, as I have mentioned, there are passages in textbooks which seem to suggest that the right to intervene is dependent upon the proposed intervener having an interest of that kind.

The view which I take, however, is that the rule is not exhaustive of the powers of the Court to do justice in particular cases. I am of the opinion that there must be an inherent jurisdiction in the Court to allow a party to intervene if the effect of an arrest is to cause that party serious hardship or difficulty or danger.... In all such cases it seems to me that the Court must have power to allow the party who is affected by the working of the system of law used in Admiralty actions in rem to apply to the Court for some mitigation of the hardship or the difficulty or the danger. If it were not so, then there would be no remedy available for such persons at all.

8 The above principle was applied by the Singapore Court of Appeal in *The Nagasaki Spirit* where the court granted the shipyard leave to intervene in the action to have the costs of maintaining the vessel rank as sheriff's expenses.⁹ It was not disputed that the shipyard had no interest in the arrested vessel or in the proceeds of sale of the arrested vessel.

9 It is not difficult to appreciate the court's position on invoking its inherent jurisdiction in the above cases as a remedy should be afforded to parties to protect their interests when

8 *The Mardina Merchant* [1975] 1 WLR 147 at 149.

9 *The Nagasaki Spirit* [1994] 2 SLR(R) 165 at [13]–[14].

their interests are adversely affected by a vessel's arrest, or they would have no statutory recourse. The guiding principle for the court's inherent jurisdiction is one of doing justice, and a recognition that O 70 r 16 is not sufficient to cover all situations where intervention may be appropriate. In *The Regina del Mare*, Dr Lushington allowed the owners' underwriters to intervene to defend the action even though the underwriters had no right, title or interest in the ship, pronouncing that "it was always within the power of the Court to accommodate the practice to the justice of the case".¹⁰

10 Nonetheless, the courts have pronounced that the exercise of their inherent jurisdiction under O 92 r 4 of the Rules of Court is to be underpinned by necessity and that there must be "reasonably strong or compelling reasons" for the jurisdiction to be invoked.¹¹

III. Right to intervene as a security provider

11 In *The Echo Star ex Gas Infinity*¹² (*The Echo Star*), the new owner, who had furnished security to secure the release of the vessel, sought leave to withdraw its appearance as defendant and to intervene in the action. It was recognised that if the plaintiff succeeded in proving its claim at trial, any judgment obtained by it could be enforced against the security furnished by the proposed intervener. In the light of the facts that the proposed intervener was the current owner of the vessel and also the party who had furnished security in respect of the plaintiff's claim to release the ship from arrest, the Singapore High Court found that the proposed intervener was "plainly a party with an

10 *The Regina del Mare* (1864) 167 ER 381 at 382: "I think it right, therefore, to declare that whenever there is a substantial interest which may be prejudiced by the plaintiff proceeding to judgment, it will be the disposition of the Court to admit the interested party to protect his interest."

11 *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 at [29]–[30]. See also *Roberto Building Material Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2003] 2 SLR(R) 353 at [17]: "[The court's] inherent jurisdiction should only be invoked in exceptional circumstances where there is a clear need for it and the justice of the case so demands. The circumstances must be special."

12 [2020] 5 SLR 1025.

interest in the Ship as contemplated by O 70 r 16(1) of the ROC”.¹³ Accordingly, the decision to grant leave to intervene in the action was reaffirmed.

12 The facts of *MH 1*¹⁴ are somewhat similar in the sense that the second intervener in the action furnished security of slightly over US\$76m by way of payment into court in order to secure the release of the vessel. In *MH 1*, a chain of indemnities was allegedly provided up the charterparty chain¹⁵ by the voyage charterer of the vessel, who gave discharge instructions to discharge the cargo without the provision of bills of lading. This led to the English High Court deciding that it was necessary to compel the voyage charterer, the second intervener, to put up security on behalf of the defendant shipowners by way of an injunction against the second intervener. It was suggested by the plaintiff that since the second intervener was only compelled by an injunction to furnish security for the release of the *res* pursuant to a contractual indemnity, it arose from a contractual regime different from the cause of action relied on by the plaintiff in the arrest against the defendant shipowners in the action. As such, the plaintiff argued that the intervener’s interests in the action were limited only to issues pertaining to the provision of security and that the second intervener had no interests in the vessel and/or its proceeds of the sale as required under O 70 r 16(1). The plaintiff further suggested that the second intervener had no interest or claim against the *res* which might be affected by any order made by the court in the action.

13 On the contrary, the second intervener sought to argue that the security provided and paid into court would satisfy the requirement under O 70 r 16(1) as “the money which represented the arrested vessel”. The purpose of an arrest, primarily, is to hold the vessel as security for its claim so that any judgment could be satisfied.¹⁶ If no security is provided, the vessel is

13 *The Echo Star ex Gas Infinity* [2020] 5 SLR 1025 at [56].

14 The facts surrounding the second intervener’s intervention are summarised in *The Miracle Hope* [2020] SGHCR 3.

15 The existence of back-to-back indemnities in the charterparty chain is disputed on its merits in the English courts.

16 *The Daien Maru No 18* [1983–1984] SLR (R) 787 at [16].

generally sold *pendente lite*, and the proceeds of the sale would be held in court. If alternative security is provided, the substitute security represents the vessel. The latter scenario occurs in cases where security to release the vessel from arrest had been provided by third parties. As distinctly pronounced by Fry LJ in *The Christiansborg*,¹⁷ “the bail is the equivalent of the *res*”.¹⁸

14 Rejecting the above submissions made by the plaintiff, the learned assistant registrar in *MH 1* held that the second intervener had an interest in the vessel as it was the voyage charterer of the vessel at the material time. Further, the assistant registrar found that the second intervener’s interests were not limited to the provision of security and that such a distinction of the rights of interveners would “unnecessarily fetter the rights of interveners to protect their interests”.¹⁹

15 Nonetheless, the first finding (*ie*, that the intervener had an interest in the vessel) was treated differently in the later unreported decision in *MH 2* which observed that, on a plain reading of O 70 r 16(1), the only persons who may intervene under that provision are (a) persons who have an interest in the property against which an action *in rem* is brought (*ie*, the arrested vessel) and (b) persons who have an interest in the money representing the proceeds of the judicial sale of the arrested vessel. It was held in *MH 2* that O 70 r 16(1) does not encompass mere security providers, as in the case of the second intervener in *MH 1*. Nevertheless, the assistant registrar in *MH 2* allowed the intervention of the security provider under the court’s inherent jurisdiction as the arrest had led to the security provider suffering “serious hardship or difficulty”, noting that the amount at stake was “objectively high” as a significant sum

17 (1885) LR 10 PD 141 (CA) at 155–156.

18 See also *The Wild Ranger* (1863) 167 ER 310 at 312: “Now bail given for a ship in any action is a substitute for the ship”; and *Naval Consulte Assistencia A Maquinas Maritimas LDA v Owners of the Ship Arctic Star & Another* [1985] Lexis Citation 404, at 2 (Court of Appeal, Civil Division, *The Times* 5 February 1985): “as Dr Lushington put it in the early cases, starting with *The Kalamazoo*, the bail, or its equivalent nowadays in the form of a guarantee, represents the ship ...”

19 *The Miracle Hope* [2020] SGHCR 3 at [29].

of US\$76m was paid into court, excluding withholding taxes amounting to almost US\$27m.²⁰

16 In the same vein as *The Echo Star*, the learned assistant registrar in *MH 1* noted that not only would the back-to-back indemnities in the charterparty chain mean that the second intervener would ultimately be liable if the plaintiff succeeded in its claim against the defendant shipowners in the action,²¹ but that the plaintiff would look to the security paid into court to satisfy any judgment it obtained in its favour.²² Having paid into court security of US\$76m to secure the release of the vessel, the court noted that “on any view, Petrobras [the second intervener] is a person adversely affected by the Arrest”.

IV. General powers of interveners

17 It is trite that an intervener in an admiralty action *in rem* does not prosecute his claim in the action. The claim is not against him but against the *res*. The *Singapore Civil Procedure 2020*, citing *The Lord Strathcona*,²³ recognised that the rights of an intervener are limited to “the protection of his interest in the *res* and [an intervener] has no *locus standi* to raise issues which are not material to this purpose”.²⁴ It is uncontroversial that although interveners can intervene to protect their interests, they are only permitted to “set up such defences which the owners of the ship could have set up had they defended the action”.²⁵ In *The Byzantion*,²⁶ the court likened the position of an intervener to that of an owner who appears under protest.

20 On this finding by the assistant registrar, the judge (on appeal) in *MH 2A* stated that had it been necessary, he would have upheld the decision of the assistant registrar for reasons which were largely consistent with those given by the assistant registrar below.

21 *The Miracle Hope* [2020] SGHCR 3 at [29].

22 *The Miracle Hope* [2020] SGHCR 3 at [30]

23 [1925] P 143.

24 *Singapore Civil Procedure 2020* vol 1 (Justice Chua Lee Ming editor-in-chief; Paul Quan gen ed) (Sweet & Maxwell, 2020) at para 70/16/1, citing *The Lord Strathcona* [1925] P 143.

25 *The Soeraya Emas* [1991] 2 SLR(R) 479 at [36]. See also *The Byzantion* (1922) 16 Asp MLC 19; 127 LT 756.

26 (1922) 16 Asp MLC 19; 127 LT 756.

18 The limits of the interveners' powers were seen in the case of *The Lord Strathcona* where the charterers of the vessel, who intervened in the action, were found to have no *locus standi* to challenge the validity of the mortgage. The charterers were only entitled to be heard on the question of whether the plaintiffs ought to be restrained from exercising their rights in such a way as to interfere with the interveners' contractual rights under the charterparty.

A. Does the power of security providers extend to filing a defence and counterclaim in the admiralty proceedings?

19 In *The San 003*, the court held that an intervener could apply to the court for the release of an arrested vessel but could not apply to set aside a writ of summons.²⁷ Nonetheless, the courts seem to have taken a different approach since that decision:

(a) In *The Century Dawn*,²⁸ pursuant to the intervener's application, the court dismissed the plaintiff's action under the powers contained in O 14 r 12 and O 18 r 19.

(b) In *The Dilmun Fulmar*, the interveners applied successfully to set aside the writ of summons and the warrant of arrest for want of admiralty jurisdiction.²⁹

(c) In *The Mawan*, the interveners successfully applied to set aside the writ and the warrant of arrest on the ground that admiralty jurisdiction was not satisfied.³⁰

Most recently, *MH 1* and the later unreported case of *MH 1A* – which affirmed the decision of the assistant registrar in *MH 1* – recognised that, as intervener, one may not only defend the action, but also take any other steps that a shipowner could take in defence of its position or interests in the case. This includes defending its interests not just in relation to the underlying claim by the plaintiff, but also in relation to any security provided. Accordingly, Petrobras, as the intervener who had

27 *The San 003* [1979–1980] SLR(R) 8 at [8].

28 [1997] 2 SLR(R) 876 at [23].

29 *The Dilmun Fulmar* [2004] 1 SLR(R) 140 at [3].

30 *The Mawan* [1988] 2 Lloyd's Rep 459 at 460–462.

provided security to secure the release of the vessel, could make an application to set aside the warrant of arrest, even when the defendant shipowner had entered an appearance and was actively defending the plaintiff's action against the *res*. On the same facts, the court in *MH 2* and *MH 2A* reaffirmed the position that Petrobras had *locus standi* to file a defence and counterclaim for damages from the wrongful arrest of the vessel.

20 Suggestions that allowing interveners in Petrobras's position to file a defence would open the floodgates for others to do so were unfounded as Petrobras's position in the action was not peripheral. Recognising that the second intervener (*ie*, Petrobras) was essentially the party who was ultimately liable on the claim and considering the substantial amounts that it had paid into court to secure the release of the vessel, the assistant registrar in *MH 2* pointed out that the second intervener had a "significant financial stake in the action" and a "significant interest" which warranted special consideration.

B. Can interveners defend the action when the defendant shipowners appear to be actively participating in the action?

21 An issue that was repeatedly raised by the plaintiff in *MH 1*, *MH 1A*, *MH 2* and *MH 2A* was the fact that the defendant shipowners had not only entered an appearance in the action but appeared to be actively defending the plaintiff's claim. This fact scenario is in contrast with the cases of *The Eagle Prestige*,³¹ *The Mawan*, *The Ruby Star*³² and *The King Darwin*³³ where the defendant shipowners appeared to be uninvolved. In *The Eagle Prestige* and *The Mawan*, the new owners intervened in the action and the defendant shipowners did not enter an appearance in the action. In *The Ruby Star*, the ship was under a demise charter at the material time but the demise charterer did not enter an appearance to defend the action. When the plaintiff sought default judgment in lieu of non-appearance of the defendant demise charterer, the registered owners entered an appearance as interveners to argue

31 [2010] 3 SLR 294.

32 [2014] 5 HKC 190.

33 [2019] SGHC 177.

on the merits of the case. In *The King Darwin*, the intervener, in the position of the defendant's insolvency administrator, was granted leave to intervene in an action to, among others, set aside the warrant of arrest and damages for wrongful arrest of the vessel. In the case of *The Soeraya Emas*,³⁴ even though the defendant owners entered an appearance in an action, they did not file a defence.

22 It is clear from the above cases that the defendant shipowners had not taken steps to enter an appearance, and even if they did, they did not actively participate in the action. This is unlike *MH 1* where the defendant shipowners had filed a defence and a counterclaim for damages for wrongful arrest of the vessel. Nonetheless, the second intervener argued that the positions taken and the conduct of the defendant and itself as the security provider might be inconsistent. As the person ultimately liable on the plaintiff's claim, albeit for a significant sum of US\$76m, this could be prejudicial to interests of the second intervener, as noted by the court in *MH 2*. In *The Ruby Star*, the court recognised that interveners should be allowed the rights to defend the plaintiff's claim even when it was inconsistent with the positions taken by the defendant shipowners.³⁵

23 In *MH 1*, the learned assistant registrar observed that the intervener's rights to protect to protect his interests in admiralty proceedings ought not to be fettered by the conduct of the defendant, even if the defendant was defending the action as "the purpose of the procedure of intervention is to allow non-parties to participate in the admiralty proceedings and protect their interests by defending the action, irrespective of whether the defendant enters an appearance".³⁶

24 It was further held in *MH 2A* by the court that the intervener as a security provider (*ie*, Petrobras) could defend the action and conduct his own defence of the claim separate from that of the defendant, therefore reaffirming the case of *The Ruby Star*.

34 [1991] 2 SLR(R) 479.

35 *The Ruby Star* [2014] 5 HKC 190 at [45], [47] and [48].

36 *The Miracle Hope* [2020] SGHCR 3 at [31].

Further, the judge did not disagree with the assistant registrar's reasoning to expand the exception in *The Ruby Star*, recognising that it would not be efficient for a party in the security provider's position to wait until the defendant shipowners dropped out of the proceedings (whether formally or in substance) before seeking to intervene and file a defence in the action.

V. Conclusion

25 In conclusion, the court appears to be amenable to the position that a security provider who happens to be the person ultimately liable on the claim ought to be able to intervene in admiralty proceedings *in rem*. Such cases could well happen more often than not, in situations where cargo is being discharged without the production of original bills of lading, at the request of charterers who then have to provide an undertaking to the shipowners in respect of consequences of a vessel arrest arising from compliance with the charterer's instructions. Nonetheless, the *MH 1*, *MH 1A*, *MH 2* and *MH 2A* decisions so far suggest that the court will allow the active participation of the security provider in the proceedings due to its interests as the party ultimately liable on the claim, and such interests could be prejudiced if it were not allowed to intervene and defend the action against the *res*.