Published on 27 August 2021

Case Comment

RECONCILING THE TENSION BETWEEN INSOLVENCY LAW AND ADMIRALTY *IN REM* CLAIMS

The Ocean Winner [2021] 4 SLR 526

[2021] SAL Prac 25

The right of a claimant with a statutory right of action *in rem* (conveniently known as a statutory lien) to bring admiralty *in rem* proceedings has been fraught with difficulty where a company (the person who would be liable *in personam*) enters judicial management or insolvency-related administration. This article considers the impact of the decision in *The Ocean Winner* [2021] 4 SLR 526 on the rights of such claimants.

TAN Siew Chi
LLB (National University of Singapore);
Advocate and Solicitor (Singapore); *Solicitor (Senior Courts of England and Wales)*;
Accredited Specialist in Maritime and Shipping Law;
Partner, Ang & Partners.

KOH Thiam Kwee
LLB (Hons) (University of Tasmania), LLM (National University of Singapore);
Advocate and Solicitor (Singapore); *Lawyer (Western Australia)*;
Associate, Ang & Partners.

I. Introduction

1 The tension between how maritime law relating to admiralty *in rem* claims and insolvency law relating to its mechanisms such as liquidation, judicial management, and schemes of arrangement deal with creditors' rights is not new.[1]

1 Justice Steven Chong, "When Worlds Collide: The Interaction between Insolvency and Maritime Law", keynote address at the 2nd meeting of
(cont'd on the next page)

In particular, unlike a maritime lienee who the law treats as having security over the *res*,[2] albeit imperfect, the right of a claimant to pursue his statutory right of action *in rem* ("SRAR") does not crystallise until the admiralty *in rem* writ is filed. This affects an SRAR claimant's right to recourse when shipowners or demise charterers are placed into liquidation, judicial management, or other insolvency proceedings as a statutory moratorium against legal proceedings comes into force.[3]

2 In *The Ocean Winner*[4] ("*Ocean Winner*"), the Singapore High Court decided that the prohibition under s 211B(8) of the Companies Act[5] ("CA s 211B") (which has since been repealed and re-enacted as s 64(8) of the Insolvency, Restructuring and Dissolution Act 2018[6] ("IRDA")) against the commencement of:

> (a) any proceedings against an applicant company during a 30-day automatic moratorium period that subsisted in favour of the company; and
>
> (b) any execution, distress, or other legal processes against the property of the company during the automatic moratorium period,

without leave of court and subject to such terms as imposed by the court, did not prevent admiralty *in rem* actions from being commenced.

---

the Judicial Insolvency Network (22 September 2018); Justice Belinda Ang, "Arrest and Insolvency, the Legal Tensions between Two Regimes – the Singapore Experience with Cross-border Insolvency", speech at NUS Centre for Maritime Law Arrest Conventions Colloquium (29 November 2016) <https://www.supremecourt.gov.sg/Data/Editor/Documents/Arrest%20and%20Insolvency%20Paper%2020%20Nov%202016%20with%20non-circulation%20notation%20submitted%2021Nov%20amended%209Decamlatest.pdf> (accessed 21 February 2021); Justice Belinda Ang, "Waking Up from the Shipowners' Nightmare!", speech at the Maritime Law Conference 2017 (12 October 2017).

2 *The Bold Buccleugh* [1851] 7 Moo PC 267.

3 See, *eg*, *Lim Bok Lai v Selco (Singapore) Pte Ltd* [1987] SLR(R) 466, *The Hull 308* [1991] 2 SLR(R) 643 and *Re Aro* [1980] Ch 196.

4 [2021] 4 SLR 526.

5 Cap 50, 2006 Rev Ed.

6 Act 40 of 2018.

3 The authors' view is that while *Ocean Winner* attempts to address the maritime–insolvency law tension in a manner that fairly balances the interests of the maritime *in rem* claimant and the insolvent company, the reasoning goes too far against the plain wording of the Rules of Court[7] and the intent behind CA s 211B, highlighting the need for clarity on the rights of maritime claimants.

II. *The Ocean Winner*

A. Facts

4 The facts surrounding *Ocean Winner* are not complex. The case arises from the collapse of Hin Leong Trading (Pte) Ltd, one of Asia's largest oil trading firms, owned by the Lim family. Four vessels, namely the "Ocean Winner", "Chao Hu", "Ocean Goby" and "Ocean Jack" (the "Vessels") were bareboat chartered by their registered owners to Ocean Tankers (Pte) Ltd ("OTPL"), a company also owned by the Lim family.

5 The plaintiff, Petrochina International (Singapore) Pte Ltd ("Petrochina"), was the "owner of and/or shipper and/or consignee and/or lawful holder" of certain bills of lading issued in respect of cargo shipped onboard the Vessels.

6 On 17 April 2020, OTPL filed its application under CA s 211B for moratorium relief. As foreshadowed above, upon the s 211B application being made, CA s 211B(8) imposes a 30-day automatic moratorium period during which, among other things:[8]

> (c) no *proceedings* (other than proceedings under this section or section 210, 211D, 211G, 211H or 212) may be commenced or continued *against the company*, except with the leave of the Court and subject to such terms as the Court imposes; and
>
> …

7 Cap 322, R 5, 2014 Rev Ed.

8 Companies Act (Cap 50, 2006 Rev Ed) ss 211B(8)(*c*) and 211B(8)(*d*) (repealed by the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) with effect from 30 July 2020). See also *The Ocean Winner* [2021] 4 SLR 526 at [41] and [72].

> (d) no *execution, distress or other legal process* may be commenced, continued or levied against any *property of the company*, except with the leave of the Court and subject to such terms as the Court imposes.
>
> [emphasis added]

7 Petrochina filed admiralty *in rem* writs against the Vessels on 22 April 2020 for misdelivery claims (the "Writs"). The Writs, which named the defendants as the "Owner and/or Demise Charterer" of the respective Vessels, were not served.

8 OTPL eventually withdrew the moratorium application under CA s 211B in favour of applying for judicial management. However, the question remained: was leave of court required for the Writs to be filed during the automatic moratorium period valid? OTPL's judicial managers entered an appearance in the respective Writ actions and applied to set aside or strike out the Writs on the ground that they were filed without leave of court.

B. Decision

9 Ang Cheng Hock J held that CA ss 211B(8)(*c*) and 211B(8)(*d*) did not require Petrochina to obtain leave of court before filing the Writs. Therefore, there was no basis to set aside or strike out the Writs. His Honour's reasons are summarised below:

> (a) The filing of the Writs were not "proceedings" which CA s 211B(8)(*c*) was intended to prevent. While the purpose of the automatic moratorium period under CA s 211B(8) was to give time or "breathing space" to allow a company to devise or refine an acceptable restructuring plan, it was not intended to prevent a plaintiff's security interest from being created or crystallised.[9] In other words, "the moratorium under s 211B of the CA was never intended to defeat or deny the creation of substantive legal rights".[10] If admiralty *in rem* writs could not be filed to crystallise an SRAR, the rights of plaintiffs such as Petrochina could potentially be destroyed if the provisions

9 *The Ocean Winner* [2021] 4 SLR 526 at [57] and [61].
10 *The Ocean Winner* [2021] 4 SLR 526 at [61].

of s 4(4) of the High Court (Admiralty Jurisdiction) Act[11] ("HCAJA") could not be satisfied after the expiry of the s 211B moratorium.[12] Therefore, the filing of the Writs, which merely crystallised Petrochina's SRAR without invoking the court's admiralty jurisdiction or denying OTPL any "breathing space", were not "proceedings" under CA s 211B(8)(c).[13]

(b) Even if the filing of the Writs constituted "proceedings commenced" within the meaning of CA s 211B(8)(*c*), the Writs were not prohibited as they were not proceedings "against the company". This is because an admiralty action *in rem* is against the *res*, not the owner or demise charterer of a vessel.[14] Although an admiralty action *in rem* transforms into a mixed action *in rem* and *in personam* after the shipowner or demise charterer enters an appearance, the Writs were not "against the company" at the time proceedings were commenced.[15] In other words, if no appearance is entered by the owner or demise charterer, the action *in rem* remains against the *res* only.[16]

(c) Although OTPL's interest as bareboat charterer is OTPL's "property" under CA s 211B(8)(*d*),[17] the filing of the Writs did not fall within the meaning of "execution, distress or other legal process" commenced against OTPL's property. In relation to "execution", the Writs are not writs of execution to enforce a judgment or order of court.[18] As to "distress", the Writs are not for the purpose of distraining movable property to realise unpaid rent.[19] Based on the purpose of CA s 211B and read *ejusdem generis*, "other legal process" must refer to enforcement processes of similar nature to "execution" and "distress",

11 Cap 123, 2001 Rev Ed.
12 *The Ocean Winner* [2021] 4 SLR 526 at [59]–[61].
13 *The Ocean Winner* [2021] 4 SLR 526 at [65].
14 *The Ocean Winner* [2021] 4 SLR 526 at [68].
15 *The Ocean Winner* [2021] 4 SLR 526 at [68]–[69].
16 *The Ocean Winner* [2021] 4 SLR 526 at [69].
17 *The Ocean Winner* [2021] 4 SLR 526 at [92].
18 *The Ocean Winner* [2021] 4 SLR 526 at [73].
19 *The Ocean Winner* [2021] 4 SLR 526 at [73].

ie, to seize the money or property of a company.[20] In wishing to give the s 211B applicant automatic "breathing space", Parliament must have intended that an applicant company should not spend time to prevent company assets from being seized instead of focusing on coming up with an acceptable compromise or scheme to be proposed to creditors.[21] Therefore, the filing of Writs to create Petrochina's SRAR and security interest was not prohibited by s 211B(8)(*d*).

10 Ang J also agreed in *obiter* that the filing of the Writs did not fall foul of s 211B(8)(*e*) which prohibits any step "taken to enforce any security over any property of the company, … except with the leave of the Court and subject to such terms as the Court imposes".[22] Petrochina was not enforcing any security interest as it is only on the filing of the admiralty *in rem* writ that the security interest is created.[23]

III. The outcome is fair

11 *Ocean Winner*'s ultimate outcome is fair and prevents an SRAR claim from being extinguished. It balances the interests and objectives of insolvency law to prevent company assets from being dissipated and of maritime law to allow creditors to secure their claims against the vessel connected with their claims.[24] However, as will be discussed below, the reasons are open to debate.

A. "Commencement of proceedings"

12 The High Court's interpretation in *Ocean Winner* that the filing of the admiralty *in rem* Writs did not constitute the commencement of proceedings is difficult to understand. Except

20 *The Ocean Winner* [2021] 4 SLR 526 at [76]–[79].
21 *The Ocean Winner* [2021] 4 SLR 526 at [76] and [78].
22 *The Ocean Winner* [2021] 4 SLR 526 at [95].
23 *The Ocean Winner* [2021] 4 SLR 526 at [95].
24 Justice Steven Chong, "When Worlds Collide: The Interaction between Insolvency and Maritime Law", keynote address at the 2nd meeting of the Judicial Insolvency Network (22 September 2018) at para 2.

for express carve-outs under ss 210, 211D, 211G, 211H and 212 of the Companies Act, there is no further qualification to what are considered "proceedings" for the purposes of a moratorium under CA s 211(8)(*c*).

13 Order 70 r 2(1) of the Rules of Court provides that an action *in rem* must be begun by writ in Form 159. When read with O 5 r 1 of the Rules of Court which provides that the mode of beginning civil proceedings "[e]xcept in the case of proceedings which by these Rules or by or under any written law are required to be begun by any specified mode of commencement, proceedings may be begun either by writ or by originating summons", it is apparent that the issuance of an admiralty *in rem* writ begins proceedings for an action *in rem*.

14 Given the Rules of Court, it is unclear how the filing of the *in rem* writ would only create a statutory lien but not at the same time commence *in rem* proceedings. If the *Ocean Winner* interpretation is correct and the filing of an *in rem* writ only creates an SRAR, when then are *in rem* proceedings actually commenced? If the filing of an *in rem* writ commences *in rem* proceedings, it must surely fall within the meaning of the prohibited "proceedings" under CA s 211(8)(*c*).

15 The decision does not appear to fully reflect the intentions of the draftsmen of the Companies Act's moratorium provisions. Although the High Court took into account the parliamentary debates on 10 March 2017 in respect of the Companies (Amendment) Bill 2017[25] which introduced the CA s 211B moratorium, it appears that the court did not have the opportunity to consider the Ministry of Law's "Supplementary Response to Feedback Received on Companies (Amendment) Act 2017 to Strengthen Singapore as an International Centre for Debt Restructuring"[26] ("MinLaw Response").

25 Bill No 13 of 2017.

26 Ministry of Law, "Supplementary Response to Feedback Received on Companies (Amendment) Act 2017 to Strengthen Singapore as an International Centre for Debt Restructuring" (22 May 2017).

16 In the MinLaw Response, it was expressly stated that:

> 2.3.4 MinLaw wishes to highlight at the outset that the principle underlying the Scheme Moratorium and the existing judicial management provisions is not to prevent the bringing of claims per se (including admiralty and maritime claims) but rather that *such claims should only be brought or, if already brought allowed to proceed, with leave of Court*. This provides the companies in distress a measure of respite while giving them, their creditors and the Court time to consider whether and if so how they can be restructured and resuscitated.
>
> 2.3.5 *The Scheme Moratorium does no more than to add the additional requirement for leave. The decision as to whether or not leave should be granted is placed in the hands of the Court*. There is established case law as to when leave will be granted in winding up and judicial management situations. The granting of leave in a Scheme Moratorium mirrors the position for granting of leave in a judicial management situation. The Model Law moratorium cross-refers to the winding up and judicial management moratoriums and similar principles of granting of leave would apply.
>
> [emphasis added]

17 The MinLaw Response leaves no doubt that leave of court was an intended prerequisite to bring admiralty *in rem* proceedings when a company is under a CA s 211B moratorium. It appears that the draftsmen's intent was not taken into account as the court did not have the benefit of this material before it.

18 It also bears highlighting that, after CA s 211B was repealed, it was re-enacted as s 64 of the IRDA. Section 64(12)(*b*) of the IRDA read with reg 4 of the Insolvency, Restructuring and Dissolution (Prescribed Arrangements and Proceedings) Regulations 2020[27] now provides that admiralty proceedings[28] can be commenced notwithstanding a moratorium order under s 64(1) of the IRDA nor the automatic moratorium period under s 64(8) of the IRDA.

---

27 S 615/2020.

28 "[A]dmiralty proceedings" is defined to mean "any proceedings in which the admiralty jurisdiction of the General Division of the High Court under section 3 of the High Court (Admiralty Jurisdiction) Act (Cap. 123) is invoked by an action in rem brought against a ship under section 4(2), (3) or (4) of that Act".

19 If Parliament had intended for admiralty *in rem* proceedings to be commenced without leave of court despite a CA s 211B moratorium being in force, Parliament could and would have specifically provided for it in the same way it now has under the IRDA. Seen another way, if Parliament had considered that no leave of court is required, it would not have been necessary to carve out an express exception for admiralty proceedings under the IRDA.

B. "Against the company"

20 Moving away from the purposive approach taken in construing the meaning of the word "proceedings", the court held that admiralty *in rem* actions are not caught by CA s 211B(8) as these are actions against the *res* and not "against the company".

21 While this construction is consistent with the plain meaning of the statute, there is still an issue of whether it accords with parliamentary intent as discussed above. If an admiralty *in rem* action is commenced and the company does not enter an appearance, by logical extension, the *in rem* proceedings can also be continued and an *in rem* judgment be obtained against the *res*. At the enforcement stage, however, would further steps to enforce the judgment against the *res* or the proceeds of sale in court representing the *res* be precluded under CA s 211B?

22 It has been said that "the object of commencing an action *in rem* against the ship was to coerce the defendant shipowner as the person alleged to be liable to appear and defend the action, and meet or refute the liability alleged".[29] Should a company which decided not to enter an appearance when the action was commenced be permitted, at a belated stage, to object to enforcement of the *in rem* judgment against its property? If a belated objection is brought, would the *in rem* proceedings not have to be stayed arising from the company's "appearance" pending leave being obtained to retrospectively commence and continue the proceedings as the *in rem* action would then also proceed *in personam* against the company? In the circumstances,

29 *The Bunga Melati 5* [2011] 4 SLR 1017 at [114].

it may be neater to require leave to issue an *in rem* writ to avoid difficulties arising further down the line.

C. "Execution, distress or other legal process"

23 In deciding that the commencement of admiralty *in rem* proceedings was not "execution, distress or other legal process" against the property of the company, the court stopped short of expressing a view on whether an arrest would fall within the scope of CA s 211(B)(8).

24 In a speech by Belinda Ang J in 2017,[30] the learned judge highlighted that:

> The words 'other legal process' read in *eusdem generis* could refer to similar legal processes like garnishee proceedings. If *The Daien Maru No 18* [1983–1984] SLR(R) 787 is not distinguishable today, an arrest would fall outside the scope of these processes. Thean J there explained that an execution proceeding is to enforce a monetary judgment *in personam*. In contrast, a judgment *in rem* is against the *res* and such a judgment can be enforced against the *res* by a remedy *in rem*. In that case, the arrest of the ship was to obtain security for the judgment.

25 On the other hand, the High Court has held that an arrest is equivalent to "sequestration" which, under s 260 of the Companies Act (before its repeal and re-enactment as s 130(2) of the IRDA), would be void, together with other actions such as attachment, distress or execution, if put in force after the commencement of winding up.[31] If "sequestration" is considered to be in the same category of enforcement actions as "distress or execution", an arrest which is equivalent to it would, by logical extension, fall under such "other legal process".

IV. Conclusion

26 While the outcome in *Ocean Winner* addresses some of the tensions between insolvency and admiralty law and preserves the

30 Justice Belinda Ang, "Waking Up from the Shipowners' Nightmare!", speech at the Maritime Law Conference 2017 (12 October 2017) at para 41.

31 *The Capricorn* [1998] 3 SLR(R) 822.

rights of an SRAR claimant while balancing against the objectives of a restructuring moratorium, the court had to stretch the plain meaning of the Rules of Court to achieve this outcome under the Companies Act.

27 With the enactment of the IRDA, there is now no prohibition against admiralty *in rem* writs being filed and issued even while moratoriums for schemes of arrangement to be proposed or presented to creditors under s 64 of the IRDA are in force. However, the exception for admiralty *in rem* claims does not extend to the "continuation" of proceedings commenced, unlike the possible outcome in *Ocean Winner* if the company had not entered an appearance.

28 It is submitted that the better approach is to accept that Parliament intended for admiralty claims to be brought (under the Companies Act), or if already brought to be allowed to proceed, only with the leave of court. This would give effect to the plain meaning of the statute and to the draftsmen's intent.

29 As to whether leave should be granted for a maritime claimant to commence admiralty *in rem* claims under the Companies Act, the authors submit that the answer is yes. Apart from the aforesaid exception under the IRDA, there are no other amendments to the Companies Act to amend the state of the law with respect to maritime claims in liquidation and judicial management situations. Speaking extra-judicially, Ang J summarised that:[32]

> Under Singapore law, *in rem* creditors like maritime lien holders and others whose *in rem* rights are derived from the High Court Admiralty Jurisdiction Act and have taken steps to file their *in rem* writs early enough are essentially distinguishable from the company's general body of creditors. They are regarded as secured claimants in admiralty proceedings. Where an *in rem* writ was filed and issued but not served *before* commencement of winding up, the plaintiff was considered a secured creditor and the court would ordinarily exercise its discretion to grant leave to proceed with the action under s 262(3) of the Companies

32 Justice Belinda Ang, "Waking Up from the Shipowners' Nightmare!", speech at the Maritime Law Conference 2017 (12 October 2017) at para 43.

> Act: *Lim Bock Lai v Selco (Singapore) Pte Ltd* [1987] SLR (R) 466 referring to in *Re Aro Co Ltd* [1980] Ch 196. [emphasis in original]

30 By following the plain words of the statute and the existing case law, a balance could be struck between the competing interests of admiralty claimants and the general body of creditors of an insolvent company.