Published on 17 December 2021

Case Comment

A SINGAPORE PERSPECTIVE OF THE SINGLE LIABILITY PRINCIPLE AND WHY IT DOES NOT APPLY TO TIME-BARRED CLAIMS

The Caraka Jaya Niaga-III-11 [2021] 4 SLR 611

[2021] SAL Prac 33

The Singapore court held in *The Caraka Jaya Niaga-III-11* [2021] 4 SLR 611 that it would not be possible for counterclaims and cross claims arising out of maritime collisions to be taken into account when determining the end net liability if such claims are time-barred. This departs from the single liability principle first established by the English courts in *The Khedive* (1882) 7 App Cas 795, and has significant implications for the owners and insurers of vessels on what they should do to protect their interests following any maritime collision. This article explores the history of the single liability principle as established by *The Khedive*, the basis for the decision in *The Caraka Jaya Niaga-III-11*, and the implications going forward for admiralty law practitioners.

Boaz **CHAN**
LLB (National University of Singapore);
Advocate and Solicitor (Singapore); *Solicitor (England and Wales)*;
Director and Head of Admiralty, Incisive Law LLC.

I. Introduction

1 For many years, admiralty practitioners all around the world have operated on a premise that there exists only a single liability between two vessels, which are both to blame for a collision, for the difference between the respective portions of their claim. It is the difference between these two portions that the net payor is liable to pay to the net payee.

2 On this basis, it was widely thought that in the event a claim is made by one vessel against another, the second vessel could include its claim as a cross-claim or counterclaim in the first vessel's action, regardless of whether its claim was time-barred or not.

3 The Singapore court has, however, decided in *The Caraka Jaya Niaga III-11*[1] ("*The Caraka Jaya Niaga*") that the true essence of the single liability principle is, in reality, a rule of procedure. Mohan JC clarified that the single liability principle was not a principle grounded in equity and did not constitute a set-off. The critical point when applying the single liability principle is the requirement of valid or maintainable claims and cross-claims or counterclaims. It therefore cannot be applied in a situation where a counterclaim is time-barred and is no longer valid or maintainable.

II. *The Caraka Jaya Niaga-III-11*

A. The facts

4 The first plaintiff in *The Caraka Jaya Niaga* is the registered owner of the vessel Grand Ace12 and the second plaintiff is its demise charterer. The defendant is the demise charterer of the vessel Caraka Jaya Niaga III-11.

5 A collision occurred between the vessels and both parties claimed to have suffered loss and damage as a result. Consequently, the plaintiffs issued an *in rem* writ against the defendant in ADM 48/2019 ("ADM 48") and served it on Caraka Jaya Niaga III-11. Similarly, the defendant issued an *in rem* writ against the plaintiffs in ADM 64 but did not serve the writ on Grand Ace12 and the writ subsequently lapsed. The defendant sought an extension of time to maintain a counterclaim against the plaintiffs in ADM 48 notwithstanding that the counterclaim

1 [2021] 4 SLR 611.

was by then time-barred under s 8(1) of the Maritime Convention Act 1911[2] (the "MCA 1911"), but was unsuccessful.

6 By a judgment entered into by consent, parties agreed that the liability for the collision would be apportioned between the Grand Ace12 and the Caraka Jaya Niaga III-11 at 60%-40%, with the Grand Ace12 bearing the greater burden of blame. The judgment by consent was entered into without prejudice to the defendant's reliance on the single liability principle and without prejudice to the plaintiffs' right to challenge the defendant's reliance on the same.

7 Consequently, the defendant made an application (the "Application") for the Singapore court to determine the following preliminary question of law or issue pursuant to O 33 r 2 of the Rules of Court:[3]

> Whether the defendant is able, on the basis of the agreed facts … to rely on or raise the 'single liability principle' (as referred to in Annex B to this Order[4]), in diminution and/or reduction of the Plaintiff's claim in this action in circumstances where the Defendant's counterclaim against the Plaintiff is time-barred.

8 The Application then went before Mohan JC for determination.

B. The parties' arguments

9 The defendant argued that the fact that its counterclaim was time-barred was "irrelevant" because it was merely seeking to defend itself against the plaintiffs' claim by relying on the single liability principle as applied in *The Khedive*[5] and was not seeking to bring any proceedings against the plaintiffs. As liability for the collision had been apportioned by consent in the proportion of

2 Cap IA3, 2004 Rev Ed.

3 Cap 322, R 5, 2014 Rev Ed. See also *The Caraka Jaya Niaga III-11* [2021] 4 SLR 611 at [4].

4 Annex B states that "the 'single liability principle' is a reference to the principle as applied in *The Khedive* (1882) 7 App Cas 795". *The Khedive* is the decision in which the single liability principle was established. See *The Caraka Jaya Niaga III-11* [2021] 4 SLR 611 at [29].

5 (1882) 7 App Cas 795.

60%–40% in favour of the plaintiffs, the defendant argued that it should be entitled to set off 40% of its claim against 60% of the plaintiffs' claim, with net liability being the final liability due from the defendant to the plaintiffs.

10 To support its case, the defendant cited the decision by Teare J in the English High Court case of *MIOM 1 Ltd v Sea Echo ENE (No 2)*[6] ("*The Sea Echo*"). In particular, Teare J said at [78] and [79]:

> 78 … However, where he expects to be the net payor, he may not wish to commence proceedings but only, if sued by the other shipowner, to rely upon the principle established by The Khedive to ensure that any judgment obtained against him takes account of the damage suffered by him. In that event he is merely defending himself by relying upon the limitation imposed by the rule in Admiralty on the sum in respect of which the defendant is liable to the claimant. He is not bringing proceedings.
>
> 79 … It follows that, whether or not the court may properly grant the defendant an extension of time, the defendant remains entitled to rely upon that principle.

11 It was therefore submitted by the defendant that, in Teare J's opinion, the time bar under s 190 of the UK Merchant Shipping Act[7] (which is *in pari materia* with s 8 of the MCA 1911) does not affect the application of the single liability principle – a defendant shipowner remains entitled to rely upon that principle regardless of whether or not a court may grant the shipowner who was out of time an extension of time.

12 The defendant also contended that "the essence of the single liability principle is based on equity and fairness in that one party should not be made to pay more than it should when the other party was also partly to blame for the collision".[8]

13 The plaintiffs argued that applying the single liability principle as put forth by the defendant would be allowing a backdoor route for parties to circumvent the time bar under s 8

6 [2012] 1 Lloyd's Law Reports 140.
7 c 21.
8 *The Caraka Jaya Niaga III-11* [2021] 4 SLR 611 at [48].

of the MCA 1911. The plaintiffs further argued that *The Sea Echo* "should not apply to the present case as it can be distinguished on the facts and is, in any event, unsound and should not be followed".[9]

C. The decision

(1) Preliminary points

14 In his decision, Mohan JC considered it necessary to first deal with two preliminary points.

15 First, Mohan JC highlighted that Teare J's statements in *The Sea Echo* on the single liability principle and its interplay with s 190 of the UK Merchant Shipping Act were *obiter dicta*. Liability in *The Sea Echo* was apportioned only after a full trial, and in the absence of any objections, arguments or pleadings that the defendant's claims were time-barred. Consequently, Mohan JC did not consider *The Sea Echo* to be authority for the application of the single liability principle to a time-barred counterclaim.

16 Second, Mohan JC drew attention to the nature and effect of the time bar under s 8 of the MCA 1911, specifically stating that the time bar "prevents the defendant from seeking any remedy for its counterclaim but does not extinguish the underlying rights which gave rise to the counterclaim".[10]

(2) The Khedive

17 Mohan JC then turned to consider what the single liability principle as decided and applied in *The Khedive* was, and the reasons and context for the same.

18 In *The Khedive*, two vessels, the Voorwaarts and the Khedive, were involved in a collision. The Voorwaarts suffered greater damage than the Khedive, and each vessel made claims against the other for the damage suffered. Both vessels were

9 *The Caraka Jaya Niaga III-11* [2021] 4 SLR 611 at [19].
10 *The Caraka Jaya Niaga III-11* [2021] 4 SLR 611 at [27].

subsequently held to be equally to blame for the collision. The owners of the Khedive then commenced a limitation action and set up a limitation fund to limit their liability. The fund in court was insufficient to satisfy all the claims for which the owners of the Khedive were liable.

19 The House of Lords was asked to consider whether the tonnage limit of liability of the Khedive applied only after each ship's respective claims had been taken into account and a single liability had been determined, and answered in the affirmative.

20 In his analysis of *The Khedive*, Mohan JC considered Lord Selborne LC's judgment in *The Khedive*, highlighting at [37] in particular Lord Selborne's summary on the genesis and workings of the single liability principle:

> 37 … At the hearing, whether of one such suit only, or of two such suits, heard separately, or conjoined, the Court, **when it determined that both ships were to blame, usually pronounced in each suit a separate decree.** It cannot be denied that the more common and recent form of such decree seems (prima facie, at all events) favourable to the contention of the respondents. In each suit there was (as I have said) a separate decree, declaring that both ships were in fault; 'and that the damage arising therefrom ought to be borne equally' by the owners of both ships; and afterwards proceeding to 'condemn' the defendants and their bail in a moiety of the damages proceeded for by the plaintiffs; and referring it to the Registrar, assisted by merchants, to assess the amount of such damages (with or without costs, as the Court might think fit). **Under every such decree, the Registrar made a report, finding that a moiety of the damages sustained by the plaintiffs amounted to so much, and (ordinarily) computing interest thereon from the date of the decree. A moiety of the damages sustained by the other party (if plaintiff in a cross suit) was in like manner found (also with interest) sometimes by the same, and sometimes by a separate report. It does not appear that, on the face of the reports made under this form of decree, any balance was ever struck**; but, unless the parties, by a voluntary settlement, rendered further resort to the Court unnecessary, **the proper course would have been for that plaintiff, to whom a balance was due, to apply to the Court for a monition requiring the other party to pay it. A monition was seldom issued in practice; indeed, Mr. Butt, in his argument for the respondents, stated that he had been unable to find one on the records of the Court. <u>But there cannot,</u>**

> **I think, be any doubt, that, if issued, it would have been in favour of one plaintiff only and that for the balance representing one moiety of the excess of the aggregate loss beyond equality, and the interest thereon, and the costs (if any) to which the plaintiff might be entitled.** [emphasis in original]

21 Mohan JC discerned from Lord Selborne's summary that the single liability principle was one that arose out of the procedure applied in the English Court of Admiralty in the 1800s, and that the application of the single liability principle assumes that both ships were at fault, both ships suffered damage and both shipowners had valid claims and counterclaims or cross-claims. In such a case, "separate decrees on liability were issued in favour of each shipowner and, if a 'monition' was issued by the English Admiralty Registrar, it would be issued in favour of one party only for the balance representing one moiety of the excess of the aggregate beyond equality".[11] The single liability principle established by *The Kheldive* therefore only applies when the claims and cross-claims or counterclaims are valid, maintainable, and not time-barred.

22 Finally, Mohan JC observed that although the outcome of applying the single liability principle and set-off might be the same, it was clear from *The Khedive* and subsequent cases that the single liability principle did not pertain to or constitute a form of set-off. In the premises, Mohan JC disagreed "with Teare J's view that 'the principle in *The Khedive* is a form of set-off long recognised in Admiralty law'".[12]

23 For the foregoing reasons, Mohan JC held that the defendant was not able to rely on the single liability principle when its claim was time-barred.

III. Conclusion

24 The implications of *The Caraka Jaya Niaga* are clear – in a maritime collision, a shipowner should within the limitation

11 *The Caraka Jaya Niaga III-11* [2021] 4 SLR 611 at [38].
12 *The Caraka Jaya Niaga III-11* [2021] 4 SLR 611 at [57].

period issue a writ for his claim in any court which may potentially seize jurisdiction for that collision.

25 With the provision of professional claim-handling services by P&I Clubs and Hull Insurers, this may not be a big issue as collision jurisdiction agreements are commonly negotiated between two colliding vessels shortly after any collision. However, not all negotiations result in an agreement, and there are instances where jurisdiction cannot be agreed on.

26 In instances where no agreement on jurisdiction is reached, it is common practice for one vessel involved in a collision to issue and serve *in rem* writs against the other colliding vessel in ports which the latter is likely to call at and in jurisdictions which the former is willing to have the dispute litigated in. The other colliding vessel is likely to do the same. The court which eventually seizes jurisdiction would be the one from which a writ is first served. Prior to *The Caraka Jaya Niaga*, it was believed that even if a writ was not issued in that jurisdiction before time for commencing proceedings expired, a counterclaim could be issued under the action which was commenced within time.

27 This practice would now evidently have to change.

28 While *The Caraka Jaya Niaga* is for now only the position in Singapore, there is a possibility that other jurisdictions may follow it and adopt similar positions in due course if their courts are asked to consider the same question.

29 It would therefore only be prudent for a shipowner, whose vessel is involved in a collision and has a claim against the other colliding vessel, to consider issuing writs at ports in jurisdictions at which both vessels are likely to call. This would avoid the issue in *The Caraka Jaya Niaga* where cross claims or counterclaims which are time-barred would not be taken into account under the single liability principle.

30 It is evident that taking such measures are impractical – multiple writs may need to be issued in multiple jurisdictions, resulting in additional costs and efforts. If shipowners consider such costs and efforts to be undesirable, then they would be well

advised to conclude collision jurisdiction agreements as soon as possible following any collision.