

Beyond the Name on the Contract: *Unmasking the True Debtor to Secure an Arrest*



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It is a common scenario in the maritime industry that a supply or repair contract is signed with one company, but the vessel is owned by another. When the bill goes unpaid, is the vessel liable to answer? A High Court ruling concerning the barge “*November*” provides a vital answer, affirming that courts can and will unmask the true debtor by analysing the commercial sense of the deal and applying the principle of undisclosed agency.

A claim in respect of supply of goods or materials to a ship for her operation or maintenance falls within the admiralty jurisdiction of the High Court under s 20(2)(m) of the Senior Courts Act 1981 (“the Act”). Likewise, a claim in respect of the construction, repair or equipping of a ship or in respect of dry dock charges or dues falls within the Admiralty jurisdiction under s 20(2)(n) of the Act.

In those cases, the person asserting the claim may arrest the ship or a [sister ship](#) provided that two conditions in s 21(4) of the Act are satisfied. The [first condition](#) is that the person who would be liable for the claim *in personam* in respect of the claim – referred to as the “relevant person” – was, at the time the cause of action arose, the owner **or** [charterer \(of any kind\)](#) of the ship, or was in possession or control of her. The second condition is as follows: (i) if the ship sought to be arrested is the ship referred to in the first condition, the relevant person must be the beneficial owner **or demise charterer** of the ship at the time the action in rem is commenced; or (ii) if the ship sought to be arrested is a different ship, the relevant person

must be the beneficial owner of that ship at the time the action in rem is commenced.

It is very common for ships to be owned by one-ship companies forming part of a group, where each company owns a single vessel or merely serve administrative functions, including acting as a “holding company”. This corporate structure can frustrate “sister-ship” arrest under English law and in jurisdictions that follow English law or adopt a similar approach. However, in some jurisdictions – such as South Africa – the right to arrest extends to ships owed by “associated companies”, which is a broader concept than the “sister-ship” rule under English law.

A natural consequence of the common structure described above is that orders for supplies to, or repairs of, a ship may be placed by a company within the group that is not the ship’s owner. What happens if that company is impecunious and fails to pay? Can the supplier or repairer arrest the “ship”? While the claim would undoubtedly fall within section 20(2)(m) or (n) of the Act, the hurdle lies in satisfying the first condition of s 21(4) of the Act.

The company in question would not be the owner or charterer of the ship, nor would it be in possession or control of her, at the time the supply or repair was carried out. On the face of it, therefore, the first condition in s 21(4) would not be satisfied.

However, that is not the end of the matter. The key question to ask is whether the company placed the order on its own behalf or on behalf of the owner or charterer. Where the company is not the owner or charterer of the ship and has no other interest in the ship or the transaction, there may be no legal or commercial sense in the company placing the order, except as the agent for the owner or charterer. If the company acted as such an agent, then the order is

treated as having been placed by the owner or charterer, who, as principal, would be the person liable *in personam*, even if the existence of the principal was not disclosed at the time. If that is the case, the first condition in s 21(4) of the Act will be satisfied, and the subject ship – or any other ship owned by that owner or charterer – may be arrested.

This principle was illustrated in the recent case of *The November* [2020] EWHC 661 (Admlty). The “November”, a 1940s barge, was owned by two individuals, Mr Fitzsimons (O1) and Mr Otero (O2), who planned to convert it into an educational conference centre. They intended to use their company, Clean Marine Limited (CML) – of which they were the sole shareholders and directors – as the corporate vehicle for the project. There was an intention to transfer the barge to CML in October 2017, but that never took place. In December 2017, a conversion works contract was awarded to Turks Shipyard Ltd, in which CML was identified as the “client”. The work was subsequently completed, but the yard’s invoices were not paid.

The yard arrested the barge. O2, but not O1, filed and served an acknowledgment of service. Hence, the action was considered both an *in rem* claim against the barge and an *in personam* claim against O2 (following the principle established in cases such as *The Gemma* [1899] P 285 at [291] – [292]). The claim was proved in a sum exceeding £103,000. The barge was judicially sold, but realised only £30,000. Hence, the yard sought to enforce judgment for the balance of the judgment sum against O2 personally.

O2 challenged the exercise of *in rem* jurisdiction. He contended that the person liable on the claim was CML, and that, as CML was not the owner, charterer, or in possession or control of the barge, the first condition in s 21(4) was not satisfied. He further argued there was no evidence that the owners had authorised CML to enter into

a contact with the yard on their behalf. He stressed that the burden was on the yard to rebut the description of CML as the contracting party in the contract document. The yard countered that CML had entered into the contract with the yard on behalf of the owners – O1 and O2 – who were the undisclosed principals. The basis of this counter was that CML had no possessory or proprietary or other interest in the barge, nor any agreement for use of the barge; hence there was no legal or commercial sense in CML entering into the contract with the yard except as an agent for the owners.

Teare J rejected O2's contentions except for the point that the burden was on the yard to rebut the description of CML as the contacting party in the contract document.

The judge accepted the yard's argument that, there being no contract between the owners and CML for the use of the barge, no obligation on CML to repair the barge, and CML having no proprietary or possessory interest in it, there was no sound reason for them to accept sole liability under the repairing contract. This was the case despite the intention to use CML as the corporate vehicle, especially as the intended transfer of ownership had not been effected. Instead, the judge found it was the owners who had the interest in the barge being repaired and converted. He held that the circumstances were "only consistent with CML acting as agent for the owners". Accordingly, he held that the yard was entitled to enforce its claim *in rem*, and the *in rem* jurisdiction was rightly exercised.

When reading the facts of the case, one might wonder what role possessory lien could play. The judge noted, in passing, that a difficulty in relying on the "self-help" remedy of a possessory lien was that it does not confer a right of sale.

This case serves as a reminder of the significance of considering the commercial reality of a transaction and of the principle of undisclosed agency, when determining the question whether the first condition in s 21(4) of the Act is satisfied.

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