

Arrest of charterer's ship for hire, freight, etc arrears? “*Arrest beyond sister ship*”

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Introduction

The admiralty jurisdiction of the High Court includes the jurisdiction to hear and determine claims “*arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.*” (s 20(2)(h) Senior Courts Act 1981 [“SCA 1981”]). The jurisdiction may be invoked in rem to arrest a ship (s 21(4) SCA 1981).

Section 21(4) SCA 1981 provides:

In the case of any such claim as is mentioned in section 20(2)(e) to (r), where-

- (a) the claim arises in connection with a ship, and*
- (b) the person who would be liable on the claim in an action in personam (“the relevant person”) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship.*

An action in rem may ... be brought ... against-

- (i) *that ship ...*
- (ii) *any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.*

It will often be a straightforward case to arrest a ship that was directly involved in the incident giving rise to the claim, such as a ship involved in a collision (s 20(2)(e)) or a ship that caused a loss of life or personal injury (s 20(2)(f)) or a ship that damaged the cargo carried on board her (s 20(2)(g)) or a ship to which salvage, towage or pilotage services were provided (ss 20(2)(j)-(l)) or a ship to which goods and services were supplied for her operation or maintenance (s 20(2)(m)) or a ship to which repair or docking services were provided (s 20(2)(n)) or a ship that owes wages to her crew members (s 20(2)(o)) or a ship on whose account the master or a few others made disbursements (s 20(2)(p)) or a ship in respect of which a general average claim arises (s 20(2)(q)).

By an extension to the arrest of the ship directly concerned in incident giving rise to the claim, it is often equally straightforward, that her true sister ship may be arrested, that is a ship in the same ownership as the ship directly concerned in the incident (s 21(4)): *The Eschershelm* (1976) 1 WLR 436 decided by the House of Lords.

However, it has been thought not so straightforward to arrest a ship other than that directly concerned and her

sister ship. That is the subject of this paper, that is arrest beyond sister ships.

The question often arises in the context of an *owner* asking if he could arrest a ship belonging to his charterer when the charterer did not pay the hire, freight, demurrage, etc in connection with the *owner's* ship. Plainly, when the charterer's ship is arrested, it is neither the ship concerned in the incident giving rise to the hire, etc, nor a sister of the concerned ship. But can the owner still arrest? The cases discussed below, presented in chronological order of the respective decisions, will answer this question.

Summary

Section 21(4) has been widely interpreted in England so that an owner may arrest a ship (A) belonging to the charterer on a claim by the owner against the charterer in connection with a ship (B) that the owner chartered to the charterer: *The Span Terza* [1982] Lloyd's Rep 225 (decided by the Court of Appeal) and *The Tychy* [1999] 2 Lloyd's Rep 11 (decided by the Court of Appeal). For this, the ship to be arrested ship (A) must be "owned" by the charterer. It will be insufficient that the ship intended to be arrested (A) is bareboat chartered by the charterer.

The same is the position in many commonwealth jurisdictions: *The Permina* 108 [1977] 1 MLJ 49 (decided by the Singapore Court of Appeal); *The Djatianom* [1982] HKLR 427 (decided by the Hong

Kong High Court) and *The Fua Kavenga* [1987] 1 NZLR 550 (decided by the New Zealand High Court).

The Permina 108 (Singapore, CA 1976)

In *The Permina 108*, the plaintiff gave a time charter of their vessel *The Ibnu* to the owners of *The Permina 108* (the defendant). The plaintiff had a claim against the defendant for hire in respect of *The Ibnu* charterparty. To secure the claim, the plaintiff arrested *The Permina 108* belonging to the defendant under s 3(1) of the Singapore High Court (Admiralty Jurisdiction) Act (Cap 6), which is materially similar to s 20(2)(h) of the SCA 1981. The defendant applied to set aside the writ in rem and the warrant of arrest on the ground that the court lacked admiralty jurisdiction pursuant to s 4(4) of the Singapore Act, which is materially similar to s 21(4) of the UK Act. Choor Singh J refused the application. The defendant appealed to the Court of Appeal.

The defendant's argument was twofold. First was that the in rem jurisdiction of the court under s 4(4) did not extend beyond sister ship. Second was that the reference to "charterer" in s 4(4) was to a "charterer by demise".

As to the first argument, the court rejected it and considered that s 4(4), in its "*plain and ordinary meaning*", was "*free from any ambiguity and [were] not capable of more than one meaning*" and would permit the arrest of *The Permina 108* for the hire owed by her

owners to the plaintiff on The Ibnu charterparty. The defendant relied on a passage in the speech of Lord Diplock in *The Eschersheim*, where Lord Diplock said that the ship to be arrested must be “*the ship in connection with which the claim made in the action arose (or a sister of that ship)*” when dealing with s 3(4) of the then AJA 1956, which was materially similar to the present s 21(4) of the SCA 1981 and s 4(4) of the Singapore Act. court found themselves “*unable to agree with the construction which Lord Diplock has given*” to the provision.

As to the second argument, the court rejected it, holding that “*such a construction would cut down considerably the ordinary meaning of the word ‘charterer’*” and that had the Parliament intended to limit the meaning of “charterer” there to “demise charterer” only the Parliament “*would have expressly added the word ‘by demise’ after the word ‘charterer’*”.

Accordingly, the court dismissed the appeal and upheld the decision of Choor Singh J refusing the application of the plaintiff to set aside the writ in rem and the warrant of arrest.

The Span Terza (time charter case, CA 1981)

In *The Span Terza*, the owners of The Neptunia (the plaintiff) gave a time charter of her to the owners of The Span Terza (the defendant). The plaintiff had a claim for damages and charges pursuant to the time charterparty.

The plaintiff applied to the Admiralty registrar for a warrant of arrest against *The Span Terza*. The registrar refused it on the ground that *The Span Terza* is not a sister ship of *The Neptunia*. The plaintiff appealed to the judge, who dismissed the appeal, but gave leave to appeal to the Court of Appeal. Within half an hour, the Court of Appeal heard the appeal.

At that time, the provision in force equivalent to s 21(4) SCA 1981 was s 3(1) Administration of Justice Act 1956 (“**AJA 1956**”). The two were materially similar. Likewise, s 1(1)(h) of the AJA 1956 was the corresponding provision to s 20(2)(h) SCA 1981.

Sir David Cairns, at the Court of Appeal, found that, if s 3(4) is literally interpreted, there was no doubt that the requirements there were met by the plaintiff. He further found that the only way to escape this conclusion would be to interpret the word “charterer” there narrowly to mean only a “demise charterer”. He considered if it may so be interpreted narrowly. He observed that if only a demise charter was intended by the Parliament, then the Parliament would either have added the word “demise” before the word “charterer” or omit the word “charterer” altogether because the reference to the person “in possession or control” would necessarily include a demise charterer.

The judge did not agree that this issue arose or considered otherwise in *The Eschersheim*. Similarly, he considered that *The Maritime Trader* (1981) 2 Lloyd’s Rep 154 was rather decided on a different point than the

one here. He found it “impossible” to construe s 3(4) narrowly and concluded that The Span Terza may be arrested in this claim.

Stephenson LJ agreed with Sir David Cairns. Donaldson LJ disagreed with Sir David Cairns and Stephenson LJ and considered that the word “charterer” was confined to “demise charterer”. Accordingly, the decision of the Court of Appeal, by majority, was that The Span Terza may be arrested to secure the plaintiff’s claim against the owners of The Span Terza arising from The Neptunia charterparty.

The Djatianom (or The Djatisari) [Hong Kong, HC 1982]

In *The Djatianom* (or *The Djatisari*), the plaintiff was a cargo owner who loaded their cargo on board the vessel The Riau. The owners of The Djatisari (the defendant) were the time-charterers of The Riau. The plaintiff (as cargo owners) had a claim against the defendant (as time charterers) for damages in respect of loading, handling, custody, care and discharge of the cargo carried by The Riau. The plaintiff arrested The Djatisari belonging to the defendant.

The defendant applied to set aside the writ and all proceedings on the ground that the court lacked jurisdiction under s 3(4) of the AJA 1956, which applied in Hong Kong. The basis of the contention was twofold. First, the reference to “charterer” in s 3(4) was to “demise charterer” only (the “interpretation point”), relying on the

Hong Kong case of *The Ledesco Uno* [1978] 2 Lloyd's Rep 99. Second, s 3(4) did not permit exercise of the in rem jurisdiction beyond "sister" ship, relying on the speech of Lord Diplock in *The Eschersheim* and on *The Maritime Trader* and *The Ledesco Uno* (the "sister ship point").

As to the interpretation point, Power J rejected the defendant's argument and held that the reference to "charterer" there was not confined to "demise charterer". He refused to follow *The Ledesco Uno*, in which the Hong Kong court held that the word "charterer" in the section should be confined to "demise charterer" by reference to Art. 3 of the International Convention Relating to the Arrest of Seagoing Ships (Brussels, 10 May 1952) [the "Convention"]. Instead, he followed *The Permina 108* on this point. He said:

- (i) *If any word in the Act is an ordinary English word with a clear meaning which is not affected by the context, then it cannot, no matter what may be contained in the Convention, be said to be capable of bearing any other meaning.*
- (ii) [The court found] *it impossible to construe the words in that way [that the defendant argued]. If only a demise charterer were meant, one would, of course, have expected the word 'demise' to have been inserted before the word 'charterer'. Or alternatively, the word 'charterer' could have been omitted*

altogether because a demise charterer would be included in the words, 'a person in possession or control.

As to the sister ship point, the judge again rejected the defendant's argument and held that the jurisdiction in s 3(4) was not confined to the ship involved in the incident and her sister ships. He found that context in which Lord Diplock said obiter in *The Eschersheim* that an arrest was limited to "*ship in connection with which the claim made in the action arose (or a sister ship of that ship)*" was different, and in that case, *The Eschersheim* was a sister ship of the ship involved in the incident and the issue in the present case did not arise there.

The judge refused to follow *The Maritime Trader*, observing that the court in that case held, with hesitation, that the in rem jurisdiction did not extend beyond sister ship arrest following *The Eschersheim*, but that was not the correct interpretation of *The Eschersheim*. He also refused to follow *The Ledesco Uno*, in which it was held that the in rem jurisdiction was limited to the ship involved in the incident and her sister ships by reference Art 3. of the Convention. The judge in the present case held that such a reference to the Convention was not permissible when the language of the applicable statute was clear and not affected by the context. Instead, the judge followed *The Permina 108* and *The Span Terza* on this point.

Accordingly, the judge held that the arrest of *The Djatisari* for the hire claim arising from The Riau charterparty was permissible, and dismissed the defendant's application.

***The Fua Kavenga* [New Zealand, HC 1987]**

In *The Fua Kavenga*, Reef Shipping Co Ltd (Reef) gave a bareboat charter of their vessel Ha'amotaha to Pacific Navigation Co Ltd (PNCL). The government of Tonga guaranteed all the payments and performance of the obligations by PNCL to Reef. It was Reef's case that the government was at least "in possession or control" of The Ha'amotaha. The vessel suffered damage in the course of the charter, for which Reef had a claim against PNCL. Reef arrested *The Fua Kavenga* belonging to the government of Tonga in New Zealand under s 4(1)(e) and (h) of the New Zealand Admiralty Act 1973, which were materially similar to s 20(d) and (h) respectively of the SCA 1981, that is a "*claim for damage received by the ship*" and a claim "*arising out of any agreement relating to ... the use or hire of a ship*". Section 5(2) of the New Zealand Act was materially similar to s 21(4) of the SCA 1981.

The government obtained the release of the vessel by furnishing security, and applied to set aside the writ in rem and strike out the action. Many issues including sovereign immunity, time bar and res judicata arose, none of which was held to prevent the exercise of the in rem jurisdiction against *The Fua Kavenga*. It is beyond the

scope of this article to discuss all the issues save for two issues discussed below.

First, whether a claim founded on the guarantee was one falling within the scope of s 4(1)(h), that is whether the claim upon the guarantee was one “relating to the use or hire of a ship.”

In answering the question, Smellie J was guided by a passage of Lord Keith in *The Sandrina* [1985] 1 Lloyd’s Rep 181, where his Lordship observed that the words “*in relation to*” the carriage of goods in a ship or the use or hire of a ship was wider than “*for*” such carriage, use or hire, and said that to meet what was required by the words “*in relation to*” the carriage, use or hire, there must “*be some reasonably direct connection with such activities*”.

Smellie J found, on the terms of the guarantee in question, there was “*a sufficiently direct connection*” between the guarantee by the government and use or hire of the ship by PNCL, hence an arrest upon the guarantee falling within s 4(1)(h). However, the judge was cautious to say that “*It will not necessary follow that a guarantee of a charterparty always qualifies by on the facts of this case in my judgment this one does*”.

Second, whether the words “*in possession or in control of a ship*” in s 5(2) should be narrowly interpreted to mean only a “demise charterer”. The judge preferred a wider interpretation of the section, following *The Permina 108* and *The Span Terza*. In arriving at this conclusion, the judge considered *The Eschersheim*, and

refused to follow *The Maritime Trader*, and *The Ledesco Uno*. Seemingly, the judge accepted that the government was in possession or control of *The Ha,amotaha* and the person who “would be” (and not necessarily “is”) liable in an action in personam for the damage, in view of the guarantee.

Accordingly, the judge held that the arrest was within the jurisdiction and dismissed the government’s application.

***The Tychy* (slot charter case, CA 1999)**

In *The Tychy*, MSC were operators of certain container ships. POL were container operators, who slot chartered who chartered space for their containers in the MSC operated ships. POL fell into arrears of payments to be made to MSC. Parties entered into a few agreements for the settlement of the arrears, pursuant to which POL agreed to sell their vessel *The Tychy* to raise funds to settle the arrears. POL failed to do so. MSC instituted in rem claim against and arrested *The Tychy* to secure MSC’s claim against POL for the arrears. POL challenged the Admiralty jurisdiction of the court and applied to release the vessel.

Mr Gross QC, sitting as a deputy judge of the Admiralty court refused the application, but gave leave to POL to appeal. POL appealed to the Court of Appeal. The Court of Appeal observed that if the word “charterer” in s 21(4)(b) was intended to mean a “demise

charterer”, then the Parliament would have added the word “demise” the as it did in the case of s 21(4)(i). Accordingly, court held that the word “charterer” in s 21(4)(b) SCA 1981 included a time charterer, voyage charterer, a charterer of part of the vessel and a slot charterer, and dismissed the appeal, following *The Span Terza*.

Conclusion

It is a settle law that s 21(4) would be widely interpreted so that an arrest is not confined to the ship involved in the incident or her sister ship, and there is no barrier for an *owner* to arrest a ship fully beneficially belonging to the charterer to secure the *owner*’s claim for hire, freight, demurrage, etc arrears, and other claims of the *owner* against the charterer falling within ss 20(2)(e)-(r). However, the ship to be arrested must beneficially belong to the charterer, hence it is not sufficient that the ship to be arrested is merely bareboat chartered by the charterer.

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