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Case Note: *The Owners of the Motor Vessel "IRAN AMANAT" and Others v KMP Coastal Oil PTE Limited*

by Sarah C Derrington[1]

{1} On 13 February 1998 the High Court of Australia granted special leave to appeal from the decision of the Full Federal Court of Australia in *The Owners of the Motor Vessel "Iran Amanat" and the 84 other vessels as set out in the schedule attached hereto v KMP Coastal Oil Pte Limited*[2] delivered on 5 June 1997.

{2} The essential question for determination by the High Court is the correct interpretation of the term "relevant person" as defined in s 3 of the *Admiralty Act* (Cth) 1988 ("the Act") and as applied in s 19 of the Act for the purposes of establishing jurisdiction in rem.

{3} Section 19 of the Act provides:

A proceeding on a general maritime claim concerning a ship may be commenced as an action in rem against some other ship if:

(a) a relevant person in relation to the claim was, when the cause of action arose, the owner or charterer of, or in possession or control of, the first-mentioned ship; and

(b) that person is, when the proceeding is commenced, the owner of the second-mentioned ship.

{4} The phrase "relevant person" is defined in s 3 of the Act to mean:

A person who would be liable on the claim in a proceeding commenced as an action in personam.

{5} The purpose of s 19 of the Act is to enable the arrest of a ship other than the actual "wrong doing" ship. The enactment of s 19 was a deliberate enlargement of Admiralty jurisdiction.[3] In Australia, this is known as the arrest of a surrogate ship. In other jurisdictions it is known as sister ship[4] or associated ship arrest[5] and is a response to the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships 1952 ("the Arrest Convention").[6]

{6} Section 19 of the Act and the defined phrase "a relevant person" accord with s 21(4) of the *Supreme Court Act* 1981 (UK) which confers similar jurisdiction in the United Kingdom. That section provides:

(4) In the case of any claim as is mentioned in s 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 (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against-

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or

(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.

{7} The South African provision namely s 3(4) of the *Admiralty Jurisdiction Regulation Act* of 1983 (Act 105 of 1983) is also in similar terms providing that a maritime claim may be enforced by an action in rem:

(a) if the claimant has a maritime lien over the property to be arrested; or

(b) if the owner of the property to be arrested would be liable to the claimant in an action in personam in respect of the cause of action concerned.

{8} There has been relatively little judicial discussion in any of the three jurisdictions as to the precise meaning of the definition of a relevant person. At first instance, the defendant/owner argued that it was not liable for the bunker fuel supplied to its vessels by the plaintiff. Rather the defendant argued that the time charterer was the person liable to pay for the bunker fuel and therefore the defendant could not be a "relevant person". Justice Tamberlin accepted this submission and released the vessel from arrest on the ground of want of jurisdiction.

{9} His Honour agreed that the plaintiff must make out its case for jurisdiction on the balance of probabilities. The standard of proof for the establishment of jurisdiction was discussed by the High Court in the case of *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co*[7] albeit in relation to a proprietary rather than a general maritime claim. There the Court said:

"Where jurisdiction depends on particular facts or a particular state of affairs, a challenge to jurisdiction can only be resisted by establishing the facts on which it depends. And, of course, they must be established on the balance of probabilities in the light of all the evidence advanced in the proceedings held to determine whether there is jurisdiction." [8]

{10} However, in *The Shin Kobe Maru*, the Court did not find it necessary to consider the balance of probabilities in relation to the claims arising in that case. In any event, were it necessary for the Court to have come to a conclusion on the balance of probabilities, the matter it would have been asked to consider was whether as a matter of fact, facts had been established which gave rise to a relationship which is recognised in law as co-ownership. This is not the same question that the Court will be asked to consider in the present case.

{11} The English approach to the definition of the "relevant person" is apparent from the judgment of Willmer J in *The St Elefterio*:

"In my judgment the purpose of the words... 'the person who would be liable on the claim in an action in personam', is to identify the person or persons whose ship or ships may be arrested in relation to this new right (if I may so express it) of arresting a sister ship. The words used, it will be observed, are 'the person who would be liable' not 'the person who is liable', and it seems to me, bearing in mind the purpose of the Act, that the natural construction of those quite simple words is that they mean the person who would be liable on the assumption that the action succeeds. This action might or might not succeed if it were brought in personam; that would depend upon the view which the court ultimately took of the various contentions raised by Mr Roskill. But clearly, if the action did succeed, the person or persons who would be liable would be the owner or owners of the steamship *St Elefterio*. In such circumstances, in the absence of any suggestion that the action is a frivolous or vexatious action, I am satisfied that the Plaintiffs are entitled to bring it and to have it tried, and that, whether or not their claim turns out to be a good one, they are entitled to assert that claim by proceeding in rem." [9]

{12} This view found favour with Goff J (as he then was) in *The I Congresso Del Partido*[10] where his Honour expressed the view[11] that the wording indicated an

intention to refer to the person who would be liable, on the assumption that the action succeeded. It did not indicate an intention to refer to a person who is liable - that is, presently shown to be liable - in personam.

{13} The observations made by Willmer J in the *St Eleferio*[12] were referred to with approval in *The St Merriel*[13] although, with respect, it appears that Hewson J went on to embark upon an impermissible investigation of the evidence in much the same way as Justice Tamberlin approached the matter at first instance in the present case.

{14} The Full Court of the Supreme Court of Queensland has followed the approach of the English Courts in *Ocean Industries Pty Ltd v The Owners of the Ship MV "Steven C"*,[14] where McPherson ACJ said:

"The decisions thus show that the function of the expression 'person who would be liable' in a context like this is to identify someone having a sufficient connection with the ship as to render him or her personally, and consequently the ship herself, responsible for goods, materials or supplies for its operation or maintenance. It is concerned not with the question whether in the particular case the defendant in an action *in personam* (which is assumed by the definition in s 3(1) as its hypothesis) is liable in fact and in law; but whether it can be predicated that the necessary relation exists between the defendant *in rem* as owner or otherwise and the ship in question."
[15]

{15} The precise wording of the definition has been recently considered by the South African Court in *The Tau Men v Degueldre*. [16] In that case the plaintiff brought an action in rem against a vessel claiming the return of the vessel which had been sold and delivered to another on the grounds that the agreement was null and void *ab initio*. On the application for release of the vessel, after referring to s 3(4) of Act 105 of 1983, Foxcroft J said:

"In my view, Jones' unnamed principal, who states that he is presently the owner of the *Tau Men*, would certainly be liable to the claimant in an action *in personam* in respect of the cause of action before me if the allegations of fraudulent misrepresentation are ultimately proved." [17]

{16} This approach accords with that which has been expressed by the English and Australian Courts. His Honour went on to discuss the burden of proof:

"Mr Hodes submitted that in order to sustain the arrest the respondent need do no more than establish a *prima facie* case and this was not an issue. The respondent's claim is based on the allegation of fraudulent misrepresentation. I was referred to certain authorities in regard to the standard of proof. Instructive are the remarks of Steyn J in *Bradbury Gretorex Co (Colonial) Limited v Standard Trading Co (Pty) Limited* 1953 (3) SA 529 at 533 C-E as follows:-

"The authorities and considerations to which I have referred seem to justify the conclusion that the requirement of a *prima facie* cause of action, in relation to an attachment to find jurisdiction, be satisfied where there is evidence which, if accepted, will show a cause of action. The mere fact that such evidence is contradicted would not disentitle the applicant to a remedy. Even where the probabilities are against him, the requirement would still be satisfied. It is only where it is quite clear that he has no action, or cannot succeed, that an attachment should be refused or discharged on the ground here in question'." [18]

{17} This approach was also adopted in the case of *The Cargo Laden and Lately on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 at 832B.

{18} The differences between the English and South African approaches appears to be little more than semantic but they do suggest that the standard of proof adopted in both jurisdictions on this issue is somewhat lower than that which the obiter dicta of the High Court in *Shin Kobe Maru* would indicate was appropriate in Australia. However, it is

suggested that it is inconsistent with the purpose of the provision allowing for sister-ship arrest that, in order to establish jurisdiction, the plaintiff must establish on the balance of probabilities that it has a successful claim *in personam* against the defendant.

{19} An interlocutory hearing for the release of a vessel from arrest is not the appropriate stage at which to examine all the evidence said to support the cause of action. Indeed the Full Federal Court said:

"It would be curious if the question whether the owner is liable to KMP for the price of the bunker fuel had to be considered on an interlocutory and urgent basis, in circumstances where there was no opportunity for the parties to avail themselves of procedures such as discovery and interrogatories which might assist in determining the facts. That issue will not need to be determined until the final hearing, undertaken after completion of the usual preparation. It is not necessary to determine it in order to establish jurisdiction." [19]

{20} The approach to the definition of a "relevant person" in a provision allowing the arrest of a sister ship, in all jurisdictions which have specifically considered the point, has been essentially the same. Such a provision was enacted as an enlargement of admiralty jurisdiction and therefore should not be given an unduly narrow construction.

{21} The appropriate question to ask is not whether the defendant is liable for the bunker fuel but rather, if the action succeeds, is the defendant the person who would be liable *in personam*. The plaintiff may well be able to establish after discovery and interrogatories sufficient evidence entitling it to succeed against the defendant *in personam*. Given that there is no dispute that the defendant was the owner of the vessels to which the bunker fuel was supplied, it is suggested that a court would be satisfied, on the balance of probabilities, that were the plaintiff to succeed in its claim against the defendant for the supply of the bunker fuel, the defendant would be liable *in personam* and thus there is jurisdiction *in rem*.

Endnotes:

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2. No S74 of 1997.
3. Australian Law Reform Commission Report on Civil Admiralty Jurisdiction No 33.
4. e.g. the United Kingdom.
5. e.g. South Africa.
6. Australia is not a party to the Arrest Convention but has nevertheless enacted s 19 of the Act to accord with the principles of sister-ship arrest. Canada has neither ratified the Arrest Convention nor enacted similar legislation.
7. (1994) 181 CLR 404.
8. Ibid at 426.
9. [1957] P 179 at 186.
10. [1978] QB 500.
11. Ibid at 536.
12. [1957] P 179.
13. [1963] P 247 at 257-258.
14. [1994] 1 Qd R 69.
15. Ibid at 74.
16. 1996 (1) SA 559. In a case rather more directly on point, *Transol Bunker BV v. MV Andrico Unity: Grecian Mar SRL v MV Andrico Unity* 1987 (3) SA 794, the issue of whether Transol's claim for bunkers supplied to the vessel was enforceable in rem in terms of s 4(3)(b) was abandoned at the hearing.
17. 1996 (1) SA 559 at 565B.
18. Ibid at 566E.
19. No. NG130 of 1997, Reasons for Judgment, p.14.