

CHARACTERISTICS OF THE ADMIRALTY ACTION IN REM: *THE ALINA II*

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Introduction

In September 2011 South Africa's Supreme Court of Appeal, the country's highest court in non-constitutional matters, handed down judgment in *Transnet Ltd v The Owner of the mv Alina II (The Alina II)*.¹ The judgment might have had South Africa coming down on one side or the other of the debate about the soundness and domestic applicability of the reasoning of Lord Steyn in *The Indian Grace* on the nature of the admiralty action in rem.² Courts in New Zealand,³ Australia⁴ and Singapore⁵ have all questioned or differed with *The Indian Grace*, but the South African court avoided the controversy by deciding the case on a narrower basis.

The Alina II is nevertheless an important confirmation for South Africa, in line with other former English admiralty law jurisdictions, of a fundamental aspect of the action in rem. It is that when the owner of a vessel which is the defendant in an action in rem in respect of a claim which asserts the personal liability of that owner (i.e. excluding maritime lien and other claims that are not founded on the personal liability of the present owner) enters an appearance to defend the action in rem, it thereby submits in personam to the jurisdiction of the court.

The Facts

The facts were straightforward. The *Alina II* had entered the port of Saldanha Bay, some 150 km north-west of Cape Town, and loaded approximately 180,000 metric tonnes of Sishen iron ore fines. On being loaded the vessel listed to port and went down by the head. Investigations revealed that the *Alina II* was fractured in the hull and was taking water into a ballast tank. It was nearly five months later before the vessel ultimately left the berth after its cargo had been laboriously transhipped. The port authority, Transnet Ltd, claimed damages of some US\$6m in contract and delict (tort) for the vessel's extended occupation of the berth.

Transnet's claims were initially pursued by the arrest of the vessel in actions in rem. Under that procedure in South Africa, and elsewhere, the plaintiff is entitled to security only up to the value of the vessel even if the claims exceed that amount. Crucially, the owner of the vessel entered appearances to defend those actions.

When it became apparent that Transnet's claims taken together with other claims against the vessel – which were asserted at US\$275m – might exceed its value, Transnet sought to commence an in personam action against the owner of the *Alina II*. Under South Africa's Roman-Dutch common law, such an action against a foreigner can be commenced by the attachment of an asset of the foreigner's to found or confirm the jurisdiction of the court. The plaintiff in the action would then be entitled to security for the full value of its claim before the asset could be released from attachment, even if that exceeded the value of the asset. That is the advantage that Transnet sought to achieve by attaching the vessel in the in personam proceedings.

The Contentions

The owner challenged the attachment on two grounds. The first was that the actions in rem were in substance also actions in personam against the owner, either from the time of service of the writ of arrest (as held in *The*

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¹ *Transnet Ltd v The Owner of the mv Alina II* [2011] ZASCA 129.

² *Republic of India v India Steamship Co (The Indian Grace) (No 2)* [1998] AC 878.

³ *Raukura Moana Fisheries Ltd v The Ship Irina Zharkikh* [2001] NZLR 801.

⁴ *Comandate Marine Corporation v Pan Australia Shipping (Pty) Ltd* (2006) 157 FCR 45 (FCAFC).

⁵ *Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte Ltd* [1995] 3 SLR 721.

Indian Grace)⁶ or from when appearance to defend was entered (as held in *The Dictator*⁷ and the Australian⁸ and Singaporean⁹ authorities referred to above); they were actions between the same parties on the same causes of action. The result, so it was argued, was that the in personam action which was commenced by the attachment of the vessel was an abuse of process and offended against the *lis pendens* rule. To this Transnet contended that under South African admiralty procedure actions in rem and in personam are entirely separate, the former being against the ship and the latter being against the party personally liable. The argument advanced what is referred to as the personification theory of the action in rem.

The second ground of challenge to the attachment was that by having entered an appearance to defend the actions in rem the owner had submitted to the jurisdiction of the court in personam. If there was such a submission, under settled South African authority the subsequent attachment would be impermissible.¹⁰ Success on this ground would not stymie the separate action in personam, but it would defeat the attachment and its consequences. Transnet's argument on this point was essentially the same as on the first point, namely that the action in rem was entirely separate and that entry of an appearance in that action did not constitute a submission to in personam jurisdiction.

The Court's Reasoning

The court decided the case in the owner's favour on the submission point, thus making it unnecessary to decide the abuse of process/*lis pendens* point.

It started by analysing the judgment of Sir Francis Jeune in *The Dictator* and concluded that it is authority for two propositions. First, that the effect of the owner of a ship entering appearance to defend an action in rem where the owner is personally liable on the claim is that the owner submits to the jurisdiction of the court in respect of that claim. Second, any judgment given thereafter is capable of being executed against the owner personally.¹¹ *The Dictator* was confirmed by the Court of Appeal in *The Gemma*¹² and by the Privy Council in *The August 8*.¹³

The English admiralty law as reflected in those cases was the law applicable in South Africa at the time that South Africa's admiralty jurisdiction was first brought under a post-colonial domestic statute, the *Admiralty Jurisdiction Regulation Act 1983* (South Africa).¹⁴ The only remaining question was therefore whether that statute altered the existing law.¹⁵ Transnet's principal argument was based on r 8(3) of the *Admiralty Proceedings Rules 1997* (South Africa), which provides that a person giving notice of intention to defend an action in rem shall not merely by reason thereof incur any liability and shall, in particular, not become liable in personam, save as to costs. The argument was that the effect and intention of the rule was to reverse the *The Dictator* in its entirety.

The court reasoned that r 8(3) deals with liability and not with jurisdiction. It was aimed at making it clear that a person who is not otherwise liable on the underlying claim but who enters an appearance to defend the action in rem did not thereby attract personal liability. Such a person might be an owner in respect of a maritime lien claim that arose when the vessel was under prior ownership or another party having sufficient interest to defend the action but not having any liability on the underlying claim.¹⁶ The rule deals, so it was held, with a misconception of the effect of *The Dictator*, namely that an owner who is not otherwise liable on the underlying claim attracts personal liability on entering appearance to defend.¹⁷

⁶ *Republic of India v India Steamship Co (The Indian Grace) (No 2)* [1998] AC 878, 913.

⁷ *The Dictator* [1892] P. 304, at 319.

⁸ *Comandate Marine Corporation v Pan Australia Shipping (Pty) Ltd* (2006) 157 FCR 45, [109]. (FCAFC)

⁹ *Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte Ltd* [1995] 3 SLR 721, 726.

¹⁰ *Jamieson v Sabingo* (2002) 4 SA 49 (SCA).

¹¹ The judgment at [16] and [29].

¹² *The Gemma* [1899] P. 285 (CA).

¹³ *The August 8* [1983] 2 AC 450 (PC).

¹⁴ *Transnet Ltd v The Owner of the mv Alina II* [2011] ZASCA 129, [24].

¹⁵ *Ibid* [25].

¹⁶ Such other parties are recognised and examples given in *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529, 539 (Gibbs J) and *Comandate Marine Corporation v Pan Australia Shipping (Pty) Ltd* (2006) 157 FCR 45, [118] (Allsop J).

¹⁷ The judgment at [26]-[31].

In reaching that conclusion the court held that dicta to the contrary in two prior South African cases, *Bouygues Offshore v Owner of the MT Tigr*¹⁸ and *MT Argun: MT Argun v Master & Crew of the MT Argun*,¹⁹ are incorrect.²⁰

The result was therefore that by entering appearances to defend the actions in rem, the owner of the *Alina II* submitted to the jurisdiction of the court in respect of the in personam claim against it which underlay the action in rem. The attachment was therefore impermissible and the appeal was dismissed.

The practical result is that although Transnet can still pursue its claims against the owner in personam, it cannot get pre-judgment security for those claims unless it arrests some other property in the same or associated ownership that might be found within the jurisdiction.

Conclusion

For those with an interest in the debate about the true nature of the admiralty action in rem, and in particular the extent to which and the point in time from which actions in rem and in personam are to be regarded as being between the same parties, the South African court's decision of the case on the narrower submission point is regrettable. The judgment nevertheless establishes some important points.

First, the judgment is an important statement of the effect of the judgment in *The Dictator*, and in particular that the rule as to personal liability following entry of appearance is not to be regarded as applying beyond a party on whose personal liability the action in rem is founded. In Australia such a party is referred to as the 'relevant party' in s 17 of the *Admiralty Act 1988* (Cth).

Second, the case confirms that the second proposition for which *The Dictator* is authority, namely that a judgment in rem after appearance by an owner on whose personal liability the action depends can be executed against the owner in personam, does not apply in South Africa.²¹

Third, the judgment establishes important common ground between the action in rem as developed in South Africa from the English admiralty law and the attachment to found or confirm jurisdiction as developed from the Roman-Dutch civil law.²² Both procedures have the effect of establishing the jurisdiction of the court in the action in question, and if the owner who is personally liable on the underlying claim defends the action in rem then in personam jurisdiction is also established. Whilst this does not necessarily mean that the action continues both in rem and in personam, a point that was expressly left open, it is no longer possible to contend that the two actions are entirely separate.

¹⁸ (1995) 4 SA 49, (C) (Farlam J).

¹⁹ (2004) 1 SA 1, (SCA) (Farlam JA).

²⁰ *Ibid* [33]-[35].

²¹ *Ibid* [30].

²² The common origins of the civil law attachment and the common law arrest procedures are traced in Malcolm Wallis, *The Associated Ship & South African Admiralty Jurisdiction* (Siber Ink, 2010), 28-36.