

# THE NATURE OF ADMIRALTY ACTION IN REM AND RECONCILIATION OF *INDIAN GRACE* No2 WITH PREVIOUS AUTHORITIES BY CONCEPT OF QUASI IN REM

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The latest authority on the subject of `Admiralty action in rem` is the recent House of Lords decision in *The Republic of India v India Steamship Co. Ltd. (No2)*<sup>2[2]</sup>. The facts and judgement in the case have engendered a number of interesting questions. This case provided a golden opportunity to re-examine the law of the nature of an Admiralty action in rem firmly established in *The Dictator*<sup>3[3]</sup> and following decisions. The decision of the House of Lords in this case has revealed a new approach to the nature of an Admiralty action in rem. The House of Lords held that in substance the defendants to an Admiralty action in rem are the owners of the ship. Recent statements about the nature of an admiralty action, based upon a century authority, were said to be no longer supportable. This article suggests that the reassessment advanced by the House of Lords is impliedly reveals new form of Admiralty action in rem which places the missing link in reconciliation of *The Indian Grace* with previous authorities. This is a huge area of law and this article will provide only an overall picture of selected aspects.

## FACTS OF THE CASE

There was a cargo to be carried from Sweden to India. The cargo was destroyed after fire on board. This gave rise to action in personam against the carrier in India. In 25<sup>th</sup> of August 1989 claimant brought an action in rem against same shipowner in England. When the English action in rem was launched no judgement in personam in India had been obtained. On May 4, 1990 the claim form was served on *Indian Grace's* sister ship *Indian Endurance* and she was arrested in England. On 16<sup>th</sup> of December 1989 judgement was delivered in the Indian court and shipowner was held liable. The defendant applied to strike out the English action. The relevant question for purposes of this article was whether the defendant had agreed not to rely on s. 34 of the Civil Jurisdiction and Judgements Act<sup>4[4]</sup> that barred actions by *res judicata*. In other words, if dispute is between same parties and cause of action is same claimant can not bring an action in another court. The claimant argued that the s. 34 is not applicable because they are not same parties. Having brought one action in personam in one country (India) and action in rem in different country (England) makes actions pending between different parties, therefore s. 34 is not applicable and action in England can not be barred.

The House of Lords has held, for purposes of s. 34 that action in rem is against the owners of the ship. In reaching this conclusion Lord Steyn said that orthodox analysis of the action in rem put forward over a century can not longer be supported. Before start introducing suggested new approach to the decision it would be appropriate to deal with the nature of an Admiralty action in rem.

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<sup>2[2]</sup> [1997] 3 WLR 818, herein after to be referred as "*The Indian Grace*".

<sup>3[3]</sup> [1892] P 304.

<sup>4[4]</sup> `No proceedings may be brought by a person in England or Wales...on a cause of action in respect of which a judgement has been given in his favour in proceedings between the same parties, or their privies...in a court of an overseas country, unless that judgement is not enforceable or entitled to recognition in England and Wales..`.

## PRE 'INDIAN GRACE' ACTION IN REM

The Admiralty jurisdiction may be exercised *in personam* or *in rem*. It has for many years been the view that the action in rem under English jurisdiction is entirely independent of an action in personam. With regard to an action in rem, one only has to establish that the claim falls within the admiralty jurisdiction and the ship is within English jurisdiction<sup>5[5]</sup>. Execution against the ship has revealed necessity to explain characteristics and nature of action in rem. The important characteristic of the action in rem claim is that it has a dual function under English law: first, it ensures security for the enforcement of a plaintiff's claim by way of arrest of the relevant ship and judicial sale or obtaining a letter of undertaking for such security; secondly, it establish jurisdiction, if the rules of the Brussels 1968 Convention permit when convention apply<sup>6[6]</sup>. There were two schools of thought to explain the nature of the action in rem. According to first, which was known as a 'personification' theory, courts ascribed personality to a ship. The ship was regarded as both the source and limit of liability. The ship herself was 'wrongdoer'. After the Judicature Acts 1840 the personification theory fell into decline. The 'personification' theory gave way to a more realistic view of the nature of actions in rem. The Admiralty action in rem was first explained in terms so-called 'procedural' theory in *The Dictator*. According to this theory the action in rem had developed as a means of bringing the owner of a vessel before the court<sup>7[7]</sup>. The numbers of other subsequent decisions employed the principle in *The Dictator*. In *The Gemma*<sup>8[8]</sup> the court held that the persons appearing before the court become parties to the action, and thereby become personally liable. The decision in *The Burns*<sup>9[9]</sup> clarified a position regarding the appearance of the shipowner. Fletcher Moulton LJ said that, *it is not the institution that makes it a proceeding in personam but the appearance of the defendant*. Similar decision was given in *The August*<sup>10[10]</sup>.

However, the theory could not explain the ability of the marine lien to follow the vessel when it had been purchased from the person liable in personam. In *The Beldis*<sup>11[11]</sup> the Court of Appeal had to modify the procedural theory in order to explain why theory did not allow, as logically it should have, the arrest of any vessel owned by the person liable in personam, and not merely the vessel in connection with which claim had arisen<sup>12[12]</sup>. Where action in rem is brought, the shipowner can choose to defend the case he might come an appearance, but it is essentially an action against the ship itself not against him. Indeed, judgement in such an action could be obtained against the owners once they had entered an appearance and thereby submitted to the jurisdiction of the court. After that moment action in rem retains its character but case continue as proceedings *in personam* and can still give rise to judgement in rem against the res<sup>13[13]</sup>. In other words, the cause of action in respect of a cause of action in personam arising from the same facts. If shipowners did not enter an appearance, judgement could only be obtained in rem, that is, against the ship by selling it and paying out the proceeds of sale to the plaintiff in satisfaction of the judgement in rem<sup>14[14]</sup>. The judgement in rem is conclusive as against all the world in respect of rights in the res

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<sup>5[5]</sup> HILL, Christopher, 'Maritime Law', 5<sup>th</sup> ed., 1998, pg. 102.

<sup>6[6]</sup> SHEPARD-MANDARAKA, Aleka, LLM 1999, University of London 'Admiralty Law Syllabus and Study Guide', pg. 20.

<sup>7[7]</sup> *The Dictator*, pg. 312 and 321 '...the arrest –of property/res- operated only to compel appearance...'

<sup>8[8]</sup> [1899] P 285.

<sup>9[9]</sup> [1907] P 137, 148.

<sup>10[10]</sup> [1983] 2 AC 450.

<sup>11[11]</sup> [1936] P 51.

<sup>12[12]</sup> '(it) would be inapt in connection with supposed right to arrest any other property of the defendant owner...', pg. 75.

<sup>13[13]</sup> *The Nordglimt*, pg. 203 '...combined proceeding in rem and in personam.'; *The Rena K* [1979] QB 377, '..action in rem, being a different character from a cause of action in personam does not merge in a judgement in personam.', pg. 405.

<sup>14[14]</sup> *The Burns*, pg. 143.

but does not create any rights that are enforceable in personam<sup>15[15]</sup>. More importantly, in *The Deichland*<sup>16[16]</sup>, the Court of Appeal held that the owner of a vessel that is served with proceedings in rem is 'sued' for the purpose of art. 2 of Schedule 1 of the Civil Jurisdiction and Judgements Act<sup>17[17]</sup>, 1982. The essential basis of the decision was that it is not a ship that is being sued. The suit should be brought against whom the claimant would wish to proceed in personam if defendant appearance were to be entered (reality test). Similar in the decision of the European Court of Justice in *The Maciej Rataj*<sup>18[18]</sup> had to answer the question whether an action in rem were between the same parties for the purposes of the Brussels Convention, art. 21<sup>19[19]</sup>. The European Court held that an action in rem and an action in personam involve the same cause of action, the same object and same parties.

## CRITISISM ON THE DECISION

Some writers<sup>20[20]</sup> argued that the House of Lords decision in *The Indian Grace* failed to apply principles of the action in rem which it has been understood by the courts. It was said that many procedural questions affecting the action in rem have long been settled but after this rules are open to debate. Mr. Teare quoted a paragraph from *The Dictator*<sup>21[21]</sup> where judge referred to issue regarding an appearance of the shipowner and reached the conclusion that if there is no appearance judgement could only be obtained against the res and could not be entered against the owners. However it has not been understood as saying, that the owners were parties to an Admiralty action in rem before they entered an appearance. What only was stated that judgement in such an action could be obtained against the owners once they entered an appearance and thereby submitted to the jurisdiction of the court. In Mr. Teare's analysis it is a crucial aspect because the personal liability of the owners is not inherent in the Admiralty action in rem but is added or introduced by the owner when they choose to appear<sup>22[22]</sup>. But that analysis did not conclude that an action in rem is merely a device for getting the owners before the court or that such an action was in substance in personam before appearance. If it were so it would be difficult to account for the circumstance that a maritime lien can be enforced against an owner who purchased the vessel from the person liable in personam<sup>23[23]</sup>.

Moreover, the House of Lords did not consider the characteristic of the action in rem whereby it is enforceable against a vessel notwithstanding a change in ownership. Mr. Teare argues that this characteristic, more than any other, demonstrates the unique character of the action in rem and that it is not merely a procedural device for bringing the person liable in personam before court. The criticism made by Mrs. Koukliakou can be concluded as that reasoning of the House of Lords is not clear, very elaborate and does not deal with the position of a new owner who buys the ship before claim form is served. Therefore the reasoning of the House of Lords should not be enough

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<sup>15[15]</sup> *The Nordglint*, pg.201.

<sup>16[16]</sup> [1990] 1 QB 361.

<sup>17[17]</sup> There is a compulsory regime for jurisdiction. The touchstone is that the defendant should be sued in his domicile.

<sup>18[18]</sup> [1995] 1 LLR 302.

<sup>19[19]</sup> Art. 21 'Where proceedings involving the same cause of action and between same parties are brought in the courts of different Contracting States, any court other than the court first seized shall of its motion decline jurisdiction in favor of that court.'

<sup>20[20]</sup> TEARE, Nigel QC, LMCLQ 1998 Feb. issue 33; KOUKLIAKOU Theodora, 'The Brussels Convention', Ph.D. draft, UWC 1999.

<sup>21[21]</sup> *The Dictator*, pg. 319.

<sup>22[22]</sup> TEARE, pg. 35.

<sup>23[23]</sup> *The Terveate*, [1922] P 259, 275.

to treat previous authorities as wrong and this case must be considered only on its own fact that no maritime lien is involved and the shipowner being the same person.

## THE CONCEPT OF QUASI IN REM AND TRUE IN REM CLAIMS

Before trying to reconcile *The Indian Grace* with previous authorities it is worth mentioning two cases which would help us to make a distinction between claims which we call quasi in rem and true in rem claims. These cases are *The Longford* and *The Burns*.

The importance of these cases is that they both concerned about maritime lien and no personal liability was introduced. This type of claims was where no personal liability was introduced and they were actually against the ship itself<sup>24[24]</sup>. Additionally these cases are suggesting the real and technical distinction between action in rem and action in personam. The *Indian Grace* was concerned a claim for damaged cargo. This claim required in personam connection between claim and the ship at the time when claim form (writ) is issued. This decision is suggesting that that there is no distinction between action in rem and action in personam. Before *The Indian Grace* nobody talked about an action in rem, as it was only one action in rem. Since 1982 Supreme Court Act the only claim you can bring in admiralty court were the claims effecting maritime liens which are truly in rem claims. After introduction of the Supreme Court Act 1982 the claimant firstly have to establish personal liability in connection with the ship and after then to bring his action. On the other hand, we still have these claims in rem where claimant is not under any obligation to establish personal liability in personam between ship and claim. So what this article suggests that at the present time there is two types of in rem claim exist. In first type of action in rem a claimant actually enforces a maritime lien whereas in the other type of in rem claim the claimant simply enforces in personam liability. Mr. Meesons suggestion is to call the first type of claims true in rem claims and subsequent one as quasi in rem rem rem claims. According to this definition *The Indian Grace* will come under the quasi in rem type of claims. So, when we are dealing with action in rem claims it is necessary to identify whether the action in rem is concern enforcement of the maritime lien or action in rem is brought under the statue<sup>25[25]</sup>. If an action in rem is brought under the statue then really after *The Indian Grace* it is not possible to make distinction between action in rem and action in personam. The support of the argument that the House of Lords envisaged two types of in rem action we can see in the Lord Steyns speech where he left untouched actions in rem enforcing maritime lien. Lord Steyn said that `...this case is not concern with maritime liens. That is a separate and complex subject which I put to one side<sup>26[26]</sup>`. Therefore we can still say that an action enforcing maritime lien is against the ship. In true maritime claims there is no need to establish the personal liability of the shipowner, claim is enforceable regardless of the ownership.

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<sup>24[24]</sup> MEESON Nigel QC, 'Admiralty Jurisdiction and Practice' new addition (draft book, to be published by March 2000).

<sup>25[25]</sup> The reference is made to s. 21/4 Supreme Court Act 1982, 'In the case of any such claims mentioned in section 20 (2) (e) to (r), where-

(a) (a) (a) the claim arises in connection with a ship; and

(b) (b) (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 claims gives rise to a maritime lien on that ship) be brought in the High Court against-....

<sup>26[26]</sup> [1997] 3 WLR 818, 826.

## RECONSILATION

The decision of this case was highly influenced by the European Court of Justice in *The Maciej Rataj* and the procedural theory. Mr. Teare's criticism on that point was 'There is no doubt that the historical account of the origin of the action in rem given by Sir Francis Jeune, P., in *The Dictator* has been accepted by the courts, but also has his analysis of the action in rem and effect of an appearance by the owners. However, that analysis, while derived from the procedural theory, did not conclude that an action in rem is merely a device for getting the owners before the court or that such an action was in substance in personam before appearance. If it were so it would be difficult to account for the circumstance that a maritime lien can be enforced against an owner who purchased from the person liable in personam' and he makes reference to *The Terveate*<sup>27[27]</sup>. This is a drastic criticism, but he is right. Because we can not give an answer to question 'How do you account circumstances a maritime lien can be enforced against a purchaser who purchased the vessel from a person who is liable in personam?', the procedural theory does not cover this point. This article is suggesting that the only way to meet this criticism is to make this distinction. In other words there is necessity to introduce a theory which covers both claims quasi in rem and claims truly in rem. Form of this claims looks like an action in rem but it is not really, it is only quasi in rem. Those claims are actually action against the owners and it is possible to describe them as action in personam being 'dressed-up' in rem claims. Lord Steyn who said that 'The procedural theory stripped away the form and revealed that in substance the owners were parties to the action in rem'<sup>28[28]</sup> supported this statement. What Lord Steyn actually had in mind is that all cases other than maritime lien cases, the true nature of an Admiralty action in rem is in fact an action against the shipowner.

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<sup>27[27]</sup> [1922] P 259, 275.

<sup>28[28]</sup> [1993] 3WLR 818, 826.

Second criticism made is whether an innocent buyer going to be liable in rem for the unsatisfied judgement in personam commenced against the previous owner (change in ownership of the vessel) and *vice versa*<sup>29[29]</sup>. This question was considered as the anomaly. One way -and may be only way- to solve this problem is to employ decision in *The Monica S*<sup>30[30]</sup>. This case raised the question of whether a cargo damage claimant, who has issued a claim form (writ) in rem against the carrying ship at a time when she was still owned by the carrier but has not yet served the claim form or arrested the ship, has a right to proceed with the action despite a subsequent transfer of the ownership of the ship to a third party<sup>31[31]</sup>. The decision in *The Monica S* was a quasi in rem claim, because claimant had to satisfy in personam requirement at the time claim form is issued. At the time the claim form is issued the original owner (`relevant person`) is liable in personam, the claim form is served after the ship is being sold. In this situation the new owner is not liable in personam. Nevertheless the claimant is entitled to bring an action in rem and have the ship arrested. The new owner then has a dilemma that he either puts up security or the ship is going to be sold by proceeding commenced against him. If there is no change in the ownership the liability and security aspect of the action are vested in the original owner. Liability side is the original owner liable in personam and security side is provided by res of the ship for the original shipowners liability. Once the ship is sold we have division between liability and security aspects. The situation, as far as liability is concerned duringa the trial what is being tried is actually liability of the original owner to claimant. However we still have a security side. How would that liability to be enforced to the security? The security is the ship and the ship is in the hands a new owner. A new owner is responsible for the security side of the claim because the effect of issuing a claim form is giving security against the ship and any subsequent change in an ownership really does not matter. If we look to the problem from different aspect we can say that when the original owner sells the ship with such as security interest. The security interest in the ship `sticks` to the ship<sup>32[32]</sup> in the stage when the claim firm is issued. In a sense the nature of action will be examined in the stage when the claim form is issued rather than the claim form is served. Although the jurisdiction is not invoked until the claim form is served

We mentioned *The Deichland* and *The Macief Rataj* in context of influencing the Court. Important point about *The Deichland* and *The Macief Rataj* that they fall within a *quasi in rem* category claim. It is apparent from these cases that a person being sued in quasi in rem action is in personam defendant. The reason why a claimant is able to arrest a ship in a quasi in rem is because a ship belongs to person who is liable in personam or person would be liable in personam (for example demise charterer). In true action in rem we enforce maritime lien whereas in quasi in rem a claimant (plaintiffs) do not enforce maritime he enforces in personam liability.

Another criticism which was made that this case must be accepted on its own facts that where there is no change in the ownership and no maritime claim involves. This proposition seems to us

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<sup>29[29]</sup> Those two propositions emerged from *The Cella* [1888] 13 PD 82; *The Joannis Vatis (No2)* [1922] P 213; *The Rena K* [1979] QB 377.

<sup>30[30]</sup> [1967] 2 LLR 113, strangely enough this decision was not considered in *The Indian Grace* at all.

<sup>31[31]</sup> HILL, pg. 123.

<sup>32[32]</sup> It requires further analysis to clarify whether it sticks only to `that ship` or to `any other ship` and bound to that question what would be this `security interest` in nature in conjunction with a maritime lien. Because maritime lien travels with the ship and if ship sinks security is not enforceable to any other ship or asset. Does the same principle apply to `security interest`? The concept of `security interest` should be something strange in the nature because it sticks to the ship travels with *i.e.* enforceable regardless to change in the ownership. One of difference I have identified is that the `security interest` is activated with issuing of the claim form. That has a practical consequence, which differs from maritime lien. Because in case of the maritime lien even if the ship (wrongdoer) is sold before decision against the owner this decision can be enforced to the ship in the hands of new owner whereas that scenario probably is not applicable in cases concerned enforcement of `security interest`. In other words if you sell your ship before the issue of the claim form the claimant can ask this `security interest` to be attached to any other your ship.

is difficult to support. In *The Indian Grace* it was decided that for the purposes of s. 34 the parties were the same. It would be difficult to regard this conclusion is limited in that way. The reasoning in *The Indian Grace* goes a lot further than that and it seems quite clear that Lord Steyn does not limited himself to that case because the way he is dealing to that issue is to look firstly at the nature of the Admiralty claim in rem. His discussion of authorities in his analysis is started from what is the nature of an Admiralty claim in rem. He looks firstly from historical perspective and evolution of the procedural theory and after that he concludes that 'the procedural theory stripped away the form and revealed that in substance the owners were parties to the action'<sup>33[33]</sup>.

Other possible issue that may require clarification is a situation where in rem claim is being made against the ship and shipowner (defendant) does not intend an appearance but mortgagee or demise charterer does. Nevertheless that is not a claim against the mortgagee or demise charterer. It is still a claim by the claimant against the shipowner only difference is that the shipowner is represented by mortgagee or demise charterer. But they are really defending a claim which is against the shipowner. When mortgagee or demise charterer steps in, seised claim against defendant in that case is limited the value of the ship. Mortgagee or demise charterer can not be liable for the balance (in case of partial satisfaction of the debt) because they do not have personal liability.

## CONCLUSION

After *The Indian Grace* in an Admiralty law practice presumably has been introduced new type of claim, namely quasi in rem. This claim, according to analysis, is sub-division to the in personam claim. In other words we now have two main claims which are true in rem claims and in personam claims. But in personam claims are divided into two categories that are pure in personam claim and quasi in rem claim. Without making this division we would not be able to save previous authorities regarding an Admiralty in rem claims. After 'finding' an quasi in rem claim we are able to save those authorities which we would call now true in action in rem claims such as *The Burns*, *The Longford*, *The Dictator*, *The Lynda*..On the other hand we are losing authority such as *The Nordglimt*.

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<sup>33[33]</sup> [1997] 3 WLR 818, 826.