Case Note

Action *in rem* under the Nigerian Admiralty Jurisdiction Act 1991 – Service of writ of summons and statement of claim in an admiralty action*in rem*

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***M/T 'Ane (Ex M/T Leste) &Anor v M/V/ 'Dalmar Majuro' & The Owners of the M/V Dalmar Majuro,* unreported, Suit No FHC/L/CS/994/07**

Facts

The plaintiffs at the Federal High Court (FHC),[2] Lagos, claimed jointly and severally against the defendants the sum of USD7, 000,000.00, being damages for collision damage done by the M/V DALMAR MAJURO to the first Plaintiff vessel, cost of replacement of body parts, towage, dry docking costs and other consequential losses arising therefrom. In order to obtain a security for the satisfaction of this claim, the plaintiffs arrested the first defendant by a motion ex parte. The address for the service of the writ of summons on the Defendants was 'The Defendants, C/O The Master, M/V Dalmar Majuro, Berth 14, Apapa Port, Lagos.' After the arrest of the first defendant/ship, the defendants brought an application to strike out the suit and vacate all orders so far given in the suit inter alia on the grounds that the Plaintiffs did not obtain the leave of the FHC 'to issue the writ of summons and statement of claim on the second defendant who is admittedly ordinarily resident outside the jurisdiction of the Court because the plaintiffs pleaded in the statement of claim 'that the defendants do not reside within jurisdiction and have no known or realisable assets within the jurisdiction of the

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[1] LLB (ABSU), LLM in Shipping Law with distinction (Cape Town), PhD in Shipping Law (Cape Town).

[2] In terms of s 251(g) of the Nigerian 1999 Constitution, as amended (hereafter '1999 Constitution, as amended) read with s 9 Admiralty Jurisdiction Act (AJA) Cap A5, Laws of the Federation of Nigeria (LFN), 2004 (hereafter 'AJA 2004'), ss 7(1)(d) and 8 FHC Act 1973 as amended by s 230 of Act No 107, 1993 (hereafter 'FHC Act 1973, as amended'), the FHC has exclusive jurisdiction in all admiralty matters in Nigeria. See also AJA 2004, ss 1 and 2; *American International Ins Co v Ceekay Traders Ltd* (1981) 5 SC 81. Thus, an admiralty proceeding may be filed in any judicial division of the FHC in which the ship or other property is located. See AJA 2004, s 22. It is noteworthy that there is one FHC in Nigeria with its jurisdiction spreading throughout Nigeria with judicial divisions for convenience. See 1999 Constitution, as amended, s 249(1); *Abiola v FRN* (1995) 7 NWLR (Pt 405) 1 (SC).

Honourable Court other than the 1st Defendant vessel.' The Defendants also argued that the action filed by the Plaintiffs was both *in rem* and *in personam,* the statement of claim having stated that the owners of the first defendant sued as seconddefendant is outside the jurisdiction of the Court and consequently the leave of court was necessary for the issuance of the writ and a concurrent writ ought to have been issued and so marked for service on one of the parties by virtue of sections 97 and 99 of Sheriffs and Civil Processes Act (SCPA) 2004[3] for the suit to be proper. The Plaintiffs contended otherwise and stated that that leave of court was not required under Order V rule 1 of Admiralty Jurisdiction Procedure Rules (AJPR) 1993[4] once the action is *in rem.*

Issue

The issue before the FHC was, having regard to the pleadings of the plaintiffs, whether the leave of the honourable court should have been obtained to serve the processes in the suit on the second defendant taking cognisance the provisions of the SCPA 2004.

Decision

In its Ruling dated 14 July 2010, the FHC, Lagos, held *inter alia* as follows:

i. The averment in the statement of claim that the defendants were duly registered in Panama and Majuro is an admission that the defendant (sic) is resident outside the jurisdiction of the Court.

ii. The Plaintiffs' argument that leave was not required under Order V rule 1 of the AJPR (1993) once the action is *in rem* would have been on a strong wicket had the action been founded only *in rem,* but it was not the case because the action was not only against a ship or

[3] SCPA Cap S6 LFN 2004 (hereafter 'SCPA 2004'). SCPA 2004, s 97 read with s 99, provides that the leave of court (in the case under consideration, the FHC) must be obtained to serve the processes in an action on a defendant that lives outside the jurisdiction of the court. In this context, it means a party who resides outside Nigeria or outside the judicial division of any FHC in Nigeria. See the Supreme Court's decision in *Owners of MV 'Arabella' v NAIC* (2008) 11 NWLR (Pt 1097) 182 (SC) at 207.

[4] Order V Rule 1 AJPR 1993 is in *pari materia* with Order V Rule 1 of the new AJPR 2011.

other property but also an action *in personam* against the owners of the vessel resident outside the jurisdiction of the court.

iii. Much as the issuance of the writ on the first defendant - a vessel - would not require leave of court to issue, leave under the SCPA is required for the issuance of the writ against the second defendant-owners of the ship in an action *in personam*.

iv. The Plaintiffs' writ was a concurrent writ which ought to have been so marked but not marked and failure to endorse the writ was a nullity.

Relying on the Nigerian Supreme Courtcase of *Arabella v Nigeria Agric Corp,*[5] the learned trial Judge struck out the suit and discharged all orders made in the suit.

Comment

Introduction

An admiralty action could be commenced *in rem* or *in personam*. The exercise of *in personam* jurisdiction of a court does not necessarily pose any peculiar difficulties as an *in personam* action is essentially not different from a civil action in a court of competent jurisdiction. In fact, all cases within the jurisdiction of a court with admiralty jurisdiction can be commenced by an admiralty action *in personam,*[6] but the unique feature of admiralty litigationis the ability to commence an action *in rem* in certain cases and in certain circumstances.[7] The utility of an *in rem* action is that it can be instituted in a court of competent jurisdiction irrespective of where the course of action arose and irrespective of the domicile of the defendant. Thus, it is pertinent to briefly examine what an action *in rem* is in order to provide the proper context for the analysis of the decision of the FHC in the case under consideration.

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[5] (2008) 11 NWLR (Pt 1097) 182 (SC) at 206.

[6] An i*n personam* action, succinctly put, is an action against a natural or artificial person either in contract or in tort. See *The 'Sardina Sulcis'* [1991] 1 Lloyd's Rep 201 (CA); *The 'Tatry'* [1992] 2 Lloyd's Rep 552 (CA); *Chief Registrar High Court Lagos State v Vamos Navigation Ltd* (1976) 1 NSC 40 at 42.

[7] *Ming Rein Shipping v Amatemesso Shipping Agencies Ltd* (1979) 1 NSC 462 at 466.

Exercise of admiralty jurisdiction *in rem*

An admiralty action *in rem*, as implied by its name, is an action against a thing rather than an action against a person.[8] The *res* (property) in an admiralty action *in rem* is the proper defendant in the action. *In rem* jurisdiction can only be exercised against a maritime property such as ship,[9] cargo,[10] bunkers,[11] freight,[12] among others.[13] Admiralty action *in rem*, in most jurisdictions, is commenced by the issuance of the writ of summons and the arrest of the maritime property against which an *in rem* claim lies. Such an arrest, among other things, serves the invaluable purpose of providing pre-judgement security[14] for the claim. An order for the arrest of the *res*can be made even where the *res* is not within the jurisdiction of the court but the arrest can only be executed only when the *res* is within the jurisdiction of the court. Thus, in the Nigerian scenario, an arrest order of the FHC can only be executed when a vessel is within the territorial waters of Nigeria.[15] As stated above, an *in rem* action is against the *res* and not against the owner of the *res*. The owner of the *res* has a choice whether or not

[8] See *Rhein Mass Und See GmbH v Rivway Lines Ltd* (1998) 5 NWLR (Pt 549) 265 at 277-278 (SC).

[9] *The 'Sardina Sulcis'* (n 6).

[10] Ibid. See also *The 'Victor'* (1860) Lush 72 (Admlty).

[11] An *in rem* action may only be brought against bunkers which do not belong to the shipowner in respect of a claim for salvage. See Supreme Court Act (SCA) 1981, United Kingdom (hereafter 'SCA 1981'), s 21(3). Thus, an *in rem* action may not be brought against bunkers belonging to time charterers and the bunkers arrested in respect of any other claim against the time charterers.

[12] See SCA 1981, s 21(3). An *in rem* action may be brought against freight that is unpaid (destination freight) and where freight is subject to a maritime lien. A maritime lien attaches to freight in cases of salvage, damage, bottomry and wages and disbursements. See *The 'Orpheus'* (1871) LR 3 A & E 308 (Admlty). However, the maritime lien on freight is parasitic. This is because it is dependent on there also being a maritime lien on a ship that earned the freight. See *The 'Castlegate'* [1893] AC 38 (HL).

[13] An *in rem* action may be brought against an aircraft in a claim for salvage, towage and pilotage when the aircraft is waterborne. See SCA 1981, s 21(3) and (4); AJA 2004, s 2(3)(g) and (j).

[14] *The Cella* (1888) 13 PD 82 (CA) at 87; *MV 'Da' Qing Shan v Pan Atlantic Commodities Pte Ltd* (1991) 8 NWLR (Pt 209) 354 (CA) at 366.

[15] See AJA 2004, s 2; *Chiladakis v Owners of MV Rinio* [No 2] (1987) 3 NSC 120. It has been suggested that the *in rem* jurisdiction of the FHC extends to the exclusive economic zone (EEZ - ie 200 nautical miles from the baseline) of Nigeria in cabotage actions as such an order of arrest could be executed against a ship in a cabotage action where the ship is within the EEZ of Nigeria. See MikeIgbokwe SAN 'The Arrest Process Proper,' 3, available at www.mikeigbokwe.com/publications.php, accessed 12 July 2014. See also Coastal and Inland Shipping (Cabotage) Act No 5, 2003, s 3 read with s 41.

to acknowledge service of the writ on the *res* and intervene as a party to the action.[16] Where the owner of the *res* acknowledges service on the *res* and enters appearance in the suit, the action will continue as a hybrid, being an action both *in rem* and in *personam*.[17]

However, it is pertinent to note that there are two types of action *in rem*. These are actions that are truly *in rem* and actions that are *q*uasi *in rem* (also referred to as statutory right of action *in rem*).[18] An action that is truly *in rem* is an action that may be brought against a ship or other maritime property in connection to which a claim arises, irrespective of who owns the property at the time the action is commenced and irrespective of who would be liable on the claim *in personam.* This category of an action *in rem* is recognised under English law[19] and Nigerian law.[20] Thus, in an action that is truly *in rem*, the claim is against the *res* (such as a ship) as 'the instrument of havoc' without any consideration of its ownership or any person that might be liable *in personam* for the claim. The ship is the proper defendant and in practice it is usual for the writ to be indorsed, for example, as follows 'AB v Owners of the ship 'MV Ursula.'[21] Accordingly, there is only one defendant in an action that is truly *in rem*. On the other hand, a quasi *in rem* action or a statutory right of action *in rem* may only be

[16] Although an action *in rem* is a proceeding against the res it is indirectly a process compelling the appearance of the owner of the *res* (who would be affected by the decision of the court) to defend its property thereby impleading it to answer to the judgment to the extent of its interest in the property. See *The 'Burns'* [1907] P 137 (CA) at 147-148; *The 'Nordglimt'* [1998] QB 183 at 200-201; *Chief Registrar High Court, Lagos State supra* (n 6).

[17] *The 'Burns'* (n 16) 148.

[18] Nigel Meeson *Admiralty Jurisdiction and Practice* (Lloyd's of London Press 1993) 70-74. A commentator has referred to the statutory right of action *in rem* (provided in AJA 2004, s 2(2)) as giving rise to 'statutory maritime liens.' See Mike Igbokwe SAN (n 15) 6; Mike Igbokwe SAN 'Arrest of Ships & Release – A Synoptic Guide on Procedure & Laws,' 7, paper presented at the 11th Workshop Series of Alpha Juris Continuing Legal Education Department, 5-6 June 2003, Rivers State. It is submitted that this is a flawed statement. Statutory maritime liens are not the same as statutory right of action *in rem*. statutory maritime liens are classes of liens specifically created in a jurisdiction by statute and they give rise to actions that are truly *in rem*. See for example, Merchant Shipping Act (MSA) 1970, United Kingdom (hereafter 'MSA 1970') s 18, that categorised master's wages and disbursements as a statutory maritime lien.

[19] SCA 1981, s 21(2).

[20] AJA 2004, s 2(2).

[21] See Nigel Meeson (n 18) 110. See also *The 'Assunta'* [1902] P 150 (CA); *The 'Wilhelmine'* (1842) 1 Wm Rob 335 (Admlty); *The 'Euxine'* (1871) LR 4 CP 8 (CCP).

brought *in rem* against the ship in connection with which the claim arises if the following conditions are satisfied:[22]

i. the claim must have arisen in connection with a ship; and

ii. the person who would be liable on the claim in an action *in personam* must have been the owner[23] or the charterer[24] or in possession or control of the ship when the cause of action arose; and

iii. at the time when the action is brought,ie when the writ is issued,[25] the person who would be liable on the claim in an action *in personam* must be the beneficial owner of all the shares in the ship[26] or the charterer of it by demise.

These conditions, stated above, must exist at the time the quasi *in rem* action is commenced for the action to be competent. Thus, in a quasi *in rem* action or statutory right of action *in rem*, the ship is the proper defendant. However, the claimant must go further to show, with respect to the *res*, the 'ownership/control link' at the time the cause of action arose and also '*in personam* liability link' at the time the action was commenced in order to show that the action is competent. In practice, in a quasi*in rem* action, it is the usual practice to indorse the writ, for example, as follows 'AB v Owners of the ship 'MV Ursula' & Ursula Ltd.'[27] In such a scenario, averments will be made in the pleadings to show that 'Ursula Ltd' at the time the

[22] SCA 1981, s 21(4); AJA 2004, s 2(2).

[23] This refers to the registered owner. See *The 'EvpoAgnic'* [1998] 1 WLR 1090 (CA).

[24] The word charterer is not limited to a demise charterer but includes a time charterer and even a slot charterer. See *The 'Permina 108'* [1978] 1 Lloyd's 311 (Singapore CA); *The 'Span Terza'* [1982] 1 Lloyd's Rep 225 (CA)

[25] *The 'Carmania II'* [1963] 2 Lloyd's Rep 152 (Admlty) at 154.

[26] In *the MV S Araz v Scheep* (1996) 5 NWLR (Pt 447) 204 (CA) at 219, it was held that the application for the arrest of the ship could not be sustained as 'Koray Shipping Co Ltd' (which was averred to be the beneficial owner of the ship) was not the beneficial owner in respect of all the shares in the MV S Araz.

[27] This is pursuant to the provision of Order V Rule 1 AJPR 2011 which provides that a writ of summons in an admiralty action *in rem* must apart from having a ship or other property as a defendant, have a natural person or an artificial person (other than a ship or other property) as a defendant. It is argued that Order V Rule 1 AJPR 2011 read with s 5(4)(a) AJA 2004 has the effect that the provisions of Order V Rule 1 only apply to quasi *in rem* actions and not to an action that is truly *in rem*. Thus, it is submitted that in an action that is truly *in rem* under Nigerian law, there is no need to add a natural or artificial person as a defendant in the writ of summons in addition to having the ship as a defendant.

cause of action arose was the 'owner, or the charterer or in possession or control of the ship when the cause of action arose' and that 'Ursula Ltd' at the time the writ was issued was the 'beneficial owner of all the shares in the ship or the charterer of it by demise.' However, it should be noted that such averments in the writ in a quasi *in rem* claim do not automatically turn it into a hybrid action. The action is an *in rem* action and only becomes a hybrid (that is, being both *in rem* and *in personam*) if the beneficial owners of the vessel (in the above example, Ursula Ltd) enter appearance in the action. In which case, the owners will have personal liability[28] for any order or judgment in the case.

Consequently, in any admiralty action brought before a court of competent jurisdiction, it is pertinent for the court to ask itself two salient questions:

i. Is the action an action that can be brought *in rem* or is it an action that can only be brought *in personam*?

ii. If the action is an action that can be brought *in rem,* what type of action *in rem* is it? Is it an action that is truly *in rem* or a quasi*in rem* action?

It is argued that the answers to the above two pertinent questions would enable the court to determine if the action before it is competent taking cognisance of the pleadings and this determination by the court would determine the required evidentiary proof in the action and the proper order(s) the court could make in the circumstances. Having stated this, the principles of law highlighted above will now be applied to the case under consideration.

Application of the law to the facts of the case

From the pleadings in the case, the writ of summons and the statement of claim, it is clear that the action is an action that is truly *in rem*. The plaintiff in the case claimed damages for collision damage in which the ship 'M/V Dalmar Majuro' was alleged to be the 'instrument of havoc.' Collision damage under the AJA 2004 is a claim that falls under the heading 'damage done by a ship'[29] which under the English common law and Nigerian law gives rise to a maritime lien.[30] Being a maritime lien, collision damage, both under the English common

[28] *The 'Burns'* (n 16) 148.

[29] SCA 1981, s 21(e); AJA 2004, s 2(3)(a).

[30] A maritime lien has been defined as a claim or privilege upon a thing carried into effect by an action *in rem*, such claim or privilege travelling with the thing into whosoever's possession it may come (even a *bona fide*

law, statute and Nigerian law, gives right to a truly *in rem* claim. Therefore, in the case under consideration, the only proper defendant is the ship. The writ of summons and the statement of claim should have been indorsed as follows 'M/T 'Ane (Ex M/T Leste) & Anor v Owners of the ship 'M/V Dalmar Majuro,' without adding the owners of MV Majuro as the second defendant.[31] Furthermore, though the plaintiffs had added the owners of the ship as the second defendant and had pleaded that the owners of the ship resided outside the jurisdiction of the FHC, the cause of action, as could be deduced from the pleadings (the writ of summons[32] and the statement of claim[33]) showed that the action was a truly *in rem* claim. As such, the court needed not to have concerned itself about whom the owners of the vessel were and the issue of the service of the processes on them.

Accordingly, in the above case, it is argued that the issue of the service of the processes on the defendant should not have arisen in the first place not to talk of the issue of obtaining the leave of court to serve the owners of the vessel outside the jurisdiction of the Court pursuant to the provisions of the SCPA 2004. In practice, in a truly *in rem* action, the arrest order is executed by affixing a sealed copy of the order to the mast or other conspicuous part of the superstructure of the ship and a copy of the processes is left with the master of the ship.[34] It is argued that once this is done in a truly *in rem* claim, the defendant in the action,ie the *res* (ship) has been properly served. What obtains in practice is that after the master has been served with a copy of the processes, he would then contact the managers of the ship or the owners of the ship (where he has direct contact with them). The owners of the vessel would then elect whether or not to enter appearance in the suit.

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purchaser without notice). It is inchoate from the moment the claim or privilege attaches and when carried into effect by a legal process by a proceeding *in rem*, relates back to the period when it first attached. See *The 'Bold Buccleugh'* (1851) 7 Moo PC 267 (Admlty); *The 'Rippon City'* [1897] P 226 (CA). Under the English common law, only a limited class of liens are recognised viz damage done by a ship (such as collision damage); salvage, seamen's wages, bottomry and respondentia. See *The 'Bold Buccleugh'* ibid. Presently, under English law, a fifth class (statutory) could be added which is a claim for master's wages and disbursements. See MSA 1970, s 18. The four classes of maritime lien, enumerated in the Bold Buccleugh case are recognised in Nigerian law. See AJA 2004, s 5(3). However, more classes (statutory) of maritime liens have been created under Nigerian law. See MSA No 27 of 2007 (now Cap M11 LFN 2010), s 66.

[31] This is because Order V Rule 1 AJPR 2011 only applies to quasi *in rem* claims and not to a truly *in rem* claim.

[32] *Adeyemi v Opeyori* (1976) 9-10 SC 31.

[33] *Onuoha v Kaduna Refining & Petrochemical Co Ltd* (2005) 2 SC (Pt II) 1.

[34] Mike Igbokwe SAN (n 18) 11.

It is submitted that in the case under consideration, the owners of the ship should not have been joined as a party to the suit in the first place and the leave of court was not needed to serve the processes on the owners of the vessel as the processes had been properly served on the proper defendant in the action which was the ship; the action being a truly *in rem* claim. It sufficed in the above case to have provided the address of service as 'The Defendants (sic), C/O The Master, M/V Dalmar Majuro, Berth 14, Apapa Port, Lagos.' It is submitted that the issue of obtaining the leave of court to serve the processes on a defendant that resides outside the jurisdiction of the court in an admiralty action arises only in an admiralty action *in personam.*[35] It is further submitted that even in a quasi *in rem* action, where a natural or artificial person must be added as a defendant in the writ of summons in addition to the ship as a defendant, the need to serve such a natural or artificial person the processes or to obtain leave of court to serve such a natural or artificial person (where he/it resides outside the court's jurisdiction) does not arise. In such an action, service of the processes on the first defendant (ie the ship) suffices. This is because the proper defendant in the action is the ship. A natural or artificial person is only added to the suit in order to show the 'ownership/control link' as at the time the cause of action arose and to show the '*in personam* liability link' as at the time the writ was issued. This is to show that the quasi *in rem* action before the court is competent. The owners of a vessel, who are added as the second defendant in a quasi *in rem* action, then have a choice whether or not to acknowledge service of the processes on the *res* and enter appearance in the suit.

Conclusion

It is obvious that the learned trial judge, with respect, erred in law in the case under consideration in deciding that the action was a hybrid ie both an *in rem* and *in personam* action and therefore, that the leave of court should have been obtained to serve the processes on the second defendant who (from the averments in the pleadings) resided overseas. The learned trial judge, with respect, should have looked at the cause of action as shown in the pleadings in order to determine the type of *in rem* claim the action was. This would have enabled the learned trial judge to reach the correct decision. This error in the judgment of the trial court seems to have stemmed from the endorsements on the writ of summons (which seems to have arisen from an incorrect construction of the provision of Order V Rule 1 AJPR

[35] This is the effect of Order VI Rules 1, 2 and 3 AJPR 20011 read with ss 97 and 99 SCPA 2004. See also *Arabella v Nigeria Agric Corp* (n 5).

2011 by the plaintiffs with respect to the facts of the case) and the averments in the statement of claim. The endorsements on the writ of summons, the averments in the statement of claim and the decision of the court shows that most Nigerian maritime lawyers and judges still do not fully appreciate the fine and important distinction between an action that is truly *in rem* and a quasi*in rem* action and their application to a maritime claim.[36] This surely does not bode well for the growth and development of Nigerian maritime jurisprudence.

[36]A previous commentary on the case under consideration also failed to fully apply the distinction between a truly *in rem* claim and a quasi *in rem* claim*viz-a-viz* Order V Rule 1 AJPR 2011 in its analysis of the decision in the case. See Mike Igbokwe SAN 'Recent Developments in Nigerian Maritime Litigation,' paper delivered at the NIMASA Fourth Strategic Admiralty Law Seminar for Judges held at the Lagos, 5-6 December, 2012.