THE COURT OF APPEAL
CIVIL

[2020] IECA 53
Record No. 2019/297

McGovern J.
Haughton J.
Collins J.

M.V. ALIMIRANTE STORNI

BETWEEN/

SPAMAT S.R.L.

PLAINTIFF/
APPELLANT

- AND–

THE OWNERS AND ALL PERSONS CLAIMING AN INTEREST IN THE M.V. ALIMIRANTE STORNI

DEFENDANTS/
RESPONDENTS

JUDGMENT of Mr. Justice McGovern delivered on the 9th day of March 2020

1. This is an appeal against a judgment of McDonald J. delivered *ex tempore* on 24 May 2019 and the order of the same date perfected on 29 May 2019 in which the plaintiff's/appellant's claim was dismissed.

2. In the High Court proceedings, the appellant claimed the sum of €38,314.07 from the respondent in respect of a debt claimed to be due and owing to the appellant in respect of disbursements made by the appellant on behalf of the ship "Almirante Storni" ("the vessel") or her owner in respect of towage, pilotage, master's disbursements, including disbursements made by shippers, charterers or agents or goods or materials supplied to the ship for her

ship for her operation or maintenance, at the port of Bari, Italy between 4 March 2018 and 13 March 2018.

3. The appellant pleaded that the claim was a "maritime claim" within the meaning of Article 1 of the International Convention for the Unification of Certain Rules Relating to the Arrests of Sea Going Ships done at Brussels on 10 May 1952, ("The Arrest Convention"). The appellant claimed that the court had jurisdiction to hear and determine the claim pursuant to the Jurisdiction of Courts (Maritime Conventions) Act 1989, and pursuant to the Admiralty Courts (Ireland) Acts, 1867-1876.

4. The services giving rise to the claim were ordered by GK Shipping, a Greek company which was the time charterer of the vessel. The respondent, NSC Atlantic Trading GmbH & Cie.KG is a German Limited liability partnership and at all material times was the bareboat or demise charterers of the vessel under a Bareboat Charter dated 12 February 2018 running from 14 February 2018 to the end of June or July 2021. As such the respondent was at all material times the disponent owner of the vessel.

5. The respondent entered into a time charter with GK Shipping on 5 February 2018 for an intended period of a minimum three months to a maximum of five months. The time charter terminated on 8 April 2018.

6. The appellant's appointment as ship's agent for the vessel was made by an e-mail dated 21 February 2018 received from G.K. Shipping. The e-mail stated:

> *"We, G.K. Shipping, the disponent Owners of M.V. Alimirante Storni, we hereby appoint your good company to act as vessels (sic) agent while calling Bari Port ETA 28-1st March 18'agwwp for discharging 30,000mt wheat. In this respect you are kindly requested to provide yr best proforma D/A.*

Please liaise with the Master and provide berthing prospects/required docs etc. Kindly note that our Add/details are as foll and all the correspondence will be addressed to:

GK SHIPPING CO, : (GREECE OFFICE)

ANDROU 5,"

7. The appellant responded furnishing the information sought and stated that they would send all pre-arrival forms to Bari Port directly to the Master.

8. Although the original e-mail refers to G.K. Shipping as being "the disponent Owners" that was not, in fact, correct as they were the time charterers.

9. The following day, 22 February 2018, at 11.36 the appellant received an e-mail from NSC Shipping which stated:-

"Please kindly note that we are managing Owners of the MV "Almirante Storni" which will call Bari on/abt 3.03.2018 agw.

We have a cash to Master request as per below details:...

[10,000 usd in different denominations]

Please so kind and advise estimated costs incl. all bank charges for delivery to our vessel.

Many thanks for your kind assistance.

Best regards,

i.A. Daniel Montalbetti

Chartering Dept.

.....

as manager and/or agent for and on behalf of the owner only

NSC Shipping Gmbh & Cie.KG"

10. That was a request for funds to be forwarded to the Master. The bareboat charterer is considered the owner of the vessel during the time of the bareboat charter. The registered owner hands over complete control of the vessel to the bareboat charterer who has to provide a master and crew. The time charterer takes the vessel for the period specified in the charter party with a Master and crew on board who are subject to the directions of the time charterer. Throughout this judgment the bareboat charter will be referred to as "the owner" or "the respondent", as appropriate.

11. The trial judge held that the existence of separate e-mails from the time charterers on the one hand and the owner on the other hand put the appellant on notice that from the moment of receipt of the e-mail on 22 February 2018 the appellant -

> "...was aware that there were, in fact, two streams of contact being made with it in respect of two separate streams of liability, one by G.K. Shipping and the other by NSC".

I will come back to this later in the judgment.

12. The appellant billed G.K. Shipping in respect of the services which it rendered and/or procured at its request. On 7 March 2018 after the vessel had docked and discharged its cargo of wheat the appellant sent an e-mail to G.K. Shipping stating:

> "Good morning,
>
> Pls note that the PDA including the Italian anchorage dues is 37,820 euro. We kindly ask you to send us the swift copy of payment.
>
> Many thanks and best regards."

13. This was not copied to the owner. When G.K. Shipping reverted to the appellant stating that their company's policy was to remit 80% only, they received a prompt response informing them:

"We are sorry but as per Italian rule law 135, is necessary to receive the 100% of PDA before vessel departure

Eventual balance in your favour once FDA will be closed will be credited to your account".

14. There was a further exchange of e-mails on the question of the safe transfer of funds to the appellant. At 11.28 on 8 March 2018 G.K. Shipping sent an e-mail stating: "Please find attached payment confirmation related to PDA. Kindly confirm safe receipt of funds."

15. On a superficial examination this document looked like a SWIFT payment but in fact it was conditional and required that the transaction be classified as "Go pending until sufficient funds are available". Unaware that the purported SWIFT payment had not been processed and was "pending" the appellant permitted the vessel to leave the port of Bari. It later discovered that payment had not gone through.

16. The appellant continued to press G.K. Shipping for payment but made no demand on the respondent. It did however ask the respondent to put pressure on G.K. Shipping to ensure that the payment was made. The conduct of the appellant throughout, establishes that in its mind G.K. Shipping was responsible for the debt and not the respondent.

17. These proceedings were commenced on 3 October 2018 and on 4 October 2018 a warrant was issued for the arrest of the vessel. The vessel was duly arrested at the port of Drogheda but was released the following day when a bond was put up by way of security for the appellant's claim. Even by the time the proceedings were commenced no letter of demand had been received by the respondent. As appears from the appellant's invoice the disbursements claimed are for union fees, pilotage in/out, mooring/unmooring, garbage disposal, service courier, bunker, Bari port informer, towage, A/33 light dues, harbour dues, stamps on applications, stamp and sundries and the Statement of Claim pleads (at paragraph

5) that "All the said disbursements were necessary to enable the Almirante Storni to navigate and use the port of Bari".

Although the pleadings refer, *inter alia,* to "master's disbursements" there was no evidence that any such disbursements, as understood in Maritime Law, were made. This is of some significance when it comes to considering the question of maritime liens later in this judgment.

The judgment of the High Court

18. The judgment of the trial judge was delivered *ex tempore* and is relatively simple in its terms. The background facts were not in dispute. He concluded, on the basis of exchanges of e-mails, that the appellants were aware of the distinction between G.K. Shipping on the one hand and the owner of the vessel (the respondent) on the other. He held that the services had been ordered by G.K. Shipping and that it had not been established that the owner had a personal liability in respect of the services that were provided. It is clear that there was credible evidence to support the trial judge's findings of fact.

19. While there was little controversy about the facts, the judgment does give rise to an interesting question of law, namely, whether the appellant was entitled to pursue its claim *in rem* to the point of having recourse to the vessel to satisfy its claim.

20. The trial judge held that there was no such right as the existence of such a right would require personal liability on behalf of the owner. It is that question which the Court has to determine on this appeal.

Legal issues arising on the appeal

21. The appellant, in its written legal submissions, set out the following as the issues to be decided on the appeal:-

(i) What is the nature of the statutory right *in rem* given to a ship's agent who has made disbursements on behalf of a ship or her owner under the Irish legislation implementing the 1952 Arrest Convention?

(ii) In what circumstances can a ship owner derogate from the ship's agent's statutory right *in rem*, such that the ship's agent is deprived of his right to have recourse to the ship?

(iii) Was the fact that the ship's agent became aware the day after his appointment that there were now two entities involved, sufficient to deprive the ship's agent of his statutory right *in rem* to have resource to the ship?

(iv) Is the fact that the appointment of the ship's agent is made by a person other than the ship owner sufficient to deprive the ship's agent of his statutory right *in rem*; or is the relationship of the owner to his ship and his master and crew, and the bringing of the ship to the port to take the benefit of the disbursements sufficient to render the owner liable *in rem*?

(v) Ought the *ratio decidendi* in the *MFV. Avro Hunter* (approved judgment of Finnegan P. delivered 27 April 2004), that "demise charterers are regarded as the temporary owners of the ship", to be applied in the instant case or ought the cases be distinguished by the differences between a demise charter and a time charter?

22. The first question above is based on an error of fact in as much as the disbursements were not made on behalf of the owner but rather on behalf of the time charterer, G.K. Shipping. The fourth question is also based on an incorrect assumption, namely, that the owner took the benefit of the disbursements. It is clear that the disbursements were for the benefit of G.K. Shipping as time charterer. They were for the purpose of facilitating the operation of the vessel so as to enable the time charterer to earn freight.

The Law

23. The International Convention for the Unification of Maritime Law on the Arrest of Sea Going Ships 1952 ["the Arrest Convention"] was given the force of law in Ireland by s.4 of the Jurisdiction of Courts (Maritime Conventions) Act 1989. Article 1(2) of the Convention defines "arrest" as meaning

"...the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment."

24. Article 1(1) defines "maritime claim". The following matters fall within the definition:

"...

(i) towage,

(j) pilotage;

(k) goods or materials wherever supplied to a ship for her operation or maintenance;

...

(n) Master's disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owner;

..."

25. The general endorsement of claim in the plenary summons makes a claim for a sum of money "...being a debt due and owing to the Plaintiff in respect of disbursement made by the Plaintiff on behalf of the ship "Almirante Storni" or her owner in respect of towage, pilotage, Master's disbursements, including disbursements made by shippers, charterers or agents or goods or materials supplied to the ship for her operation or maintenance, at the port of Bari, Italy, on or about the 4th day of March 2018 to the 13th day of March 2018." The claim, as pleaded is a "maritime claim" for the purposes of the Convention thereby giving

the appellant the right to arrest the vessel. Although the vessel is registered in Liberia which is not a contracting State, Article 8(2) states:-

"(2) A ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in article 1 or of any other claim for which the law of the Contracting State permits arrest."

26. The appellant was entitled to arrest the vessel in this jurisdiction if it had a "maritime claim". As the pleadings, on their face disclosed such a claim, it follows that the High Court had jurisdiction to hear and determine the claim under the 1989 Act. The jurisdiction *in rem* and the concomitant right to arrest a ship are important and distinguishing features of the Admiralty jurisdiction. These features have evolved over time to facilitate international maritime commerce. As ships move around the world, expenses and liabilities may be incurred by ship owners or others operating the vessels in many different jurisdictions. Without the ability to arrest a vessel as security for a claim many claimants against the owners or operators of a vessel would find themselves with no asset available to satisfy a claim in the jurisdiction where the claim arises, once the vessel had departed that jurisdiction. The jurisdiction has evolved over time. The courts in Ireland and a number of other common law jurisdictions have tended to follow English law.

27. Certain maritime claims give rise to a maritime lien. However, there are many maritime claims which do not. The distinction between claims giving rise to a maritime lien and other claims is of some significance to the nature of the appeal being brought in this case. That issue is similar to the one which arose in an Australian case, the *"Sam Hawk"*, [2016] 2 Lloyds Law Reports, 638 where one of the issues was whether a contract between parties who had no interest in the ship could create a maritime lien, *in rem*, in relation to that ship which bound the owner of the ship. The Court observed that this was not an issue which could be categorised as contractual but rather involved determining the question of whether

proprietary rights to a ship were created by operation of law by a transaction between parties with no interest in the ship and as to which transaction the ship owner had no involvement.

28. In Irish law a maritime lien is created in respect of the following claims:-

(i) salvage;

(ii) collision damage;

(iii) seaman's wages;

(iv) master's wages, and

(v) master's disbursements.

29. While formerly bottomry gave rise to a maritime claim, such claims are now obsolete.

30. The history of Admiralty law shows that over time the categories of maritime liens have changed. For example, a claim for necessaries supplied to a vessel formerly gave rise to a maritime lien but no longer does so in this jurisdiction or in English law. However, in U.S. law such a claim would give rise to a maritime lien as virtually all maritime claims are capable of giving rise to a maritime lien in that jurisdiction. The history of this evolution in the law relating to maritime liens is very ably and helpfully set out in the judgment of Allsop C.J. in the *Sam Hawk* decision.

31. At p. 647 Allsop C.J. sets out a description of what a maritime lien involves. He stated:-

> *"48. The maritime lien is an important creature and feature of maritime law. It is not based on possession. It is not a possessory lien at common law. Nor is it an equitable lien such as the liens recognised by equity in various circumstances, usually involving the adjustment of mutual rights and obligations: see the discussion by Isaacs J in Davies v Littlejohn [1923] HCA 64; [1923] 34 CLR 174 at p. 185; the vendor's lien discussed in Hewett v Court [1983] HCA 7; [1983] 149 CLR 639; and the*

liquidator's lien discussed in Stewart v Atco Controls Pty Ltd (in Liquidation) [2014] HCA 15; [2014] 252 CLR 307."

49. Different legal systems identify different maritime claims that give rise to the maritime lien. Those differences of recognition can be attributed to different legal policy in the development of maritime law in different jurisdictions. Some essential characteristics of the maritime lien, however, are widely and commonly understood: as a security or privilege attaching to the ship itself, travelling with the ship (irrespective of any change in ownership, or in encumbrance, of the ship) and arising from circumstances concerned with the ship: Mayers, E "Maritime Liens" (1928) 6(7) Can Bar Rev 516; as a privilege (under civil law) or as a charge on the ship, importantly, for this case, attaching automatically by operation of law, upon the occurrence of the relevant events (even though some of the events that give rise to the lien may be consensual or transactional), for services rendered to, or damage caused by, the ship; adhering to the ship, notwithstanding a change of ownership; enforced only by maritime proceedings against the ship, and in that sense inchoate, until perfection by the bringing of maritime proceedings; its importance being both as to access to the property for payment irrespective of ownership, and as to priority over other claimants to the ship represented by the fund to which it attaches, even secured claims such as mortgages. See generally Thomas, Maritime Liens (Stevens & Sons, 1980) at pp 11-15, paras. 12-13; Price, The Law of Maritime Liens (Sweet & Maxwell, 1940); The Ripon City [1897] p 226; United Africa Co. Ltd. v. Tolten (owners) (the Tolten) [1946] 79 Lloyds Law Report; [1946] p 135. As Professor Derrington and Mr Turner say (The Law and Practice of Admiralty Matters (2nd edition, Oxford University Press, 2016) at pp. 54-55, para. 4.01) there are two key and uncontested

features of a maritime lien: first, claims attracting such a lien are accorded a high ranking when it comes to the distribution of a fund inadequate to meet all the claims against it; and secondly, such a lien survives a change of ownership. See also Davies and Dickey, Shipping Law (3rd ed, Law Book Co, 2004) at pp. 99-100...."

32. The creation of maritime liens arose out of matters of public policy and the need to protect maritime trade.

The maritime policy

33. A lien in respect of collision damage is aimed at preventing careless navigation and in the case of salvage claims public policy dictates the necessity of liberal recompense for the encouragement of parties to undertake risk and danger in order to save a vessel. In *The Castlegate* [1893] AC 38 Lord Watson said at p.52:-

"In the case of lien for wages of master and crew the legislature has recognised the rule that it attaches to ships independently of any personal obligation of the owner, the sole condition required being that such wages shall have been earned on board the ship".

34. There are obvious policy reasons why such claims should give rise to a maritime lien. Likewise, in the case of master's disbursement where a master makes disbursements on account of the ship it is proper that he can recover in respect of those disbursement even into the hands of a *bona fide* purchaser of the ship for value, on grounds of public policy.

35. At para. 70 of his judgment in the *"Sam Hawk"* Allsop C.J. said:-

"The necessary connection in English law of ownership of the ship between the claim and the relevant person (unless there was a maritime lien) has underpinned Anglo-Australian maritime law (and the maritime law of countries with an historical connection to English law) concerning in rem actions since the latter part of the 19th

century. This connection of ownership underpinned the negotiation of the 1952 Arrest Convention and can be seen as informing the structure of that Convention".

36. The claim arising in these proceedings does not give rise to a maritime lien in Irish law. Insofar as the claim involves "disbursements" they were not disbursements made by the master but by the ship's agents. In the *MF/V "Avro Hunter"* (Unreported judgment, Finnegan P., 27 April 2004) the President adopted the decision of Hewson J. in *The St. Merriel* (1963) 1 ALL ER 537 where at p. 542 he adopted the speech of Lord Watson in the *Castlegate* (1893) A.C. 38:-

"In the case of lien for wages of master and crew the legislature has recognised the rule that it attaches to ships independently of any personal obligation of the owner, the sole condition required being that such wages shall have been earned on board the ship. But that rule, which is founded upon obvious considerations of public policy, constitutes an exception from the general principle of the maritime law, which I understand to be that, inasmuch as every proceeding in rem is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability."

37. At p. 543 Hewson J. said:-

"It is a fundamental rule that the basis of maritime liens lies in the personal liability of the owner."

38. It was on that basis that the President decided the issue before him in the "*Avro Hunter*".

39. In its written submissions the respondent referred the court to a number of legal publications which support the view that the claim made by the appellant could not give rise to a maritime lien. In Meeson & Kimbell, *Admiralty Jurisdiction and Practice* (5th Edition 2018) the authors state at para. 2.97 that: *"Ordinary towage does not give rise to a maritime*

lien". Jackson, *Enforcement of Maritime Claims* (4th Edition 2005) reaches a similar conclusion at para. 2.112. Meeson & Kimbell also state at para. 2.136 that: *"There is no maritime lien for disbursements incurred by a shipper, charterer or agent"* and a similar conclusion is reached by the authors in Jackson, *Enforcement of Maritime Claims* (4th Edition 2005) at para. 2.95.

40. In *Atlas Baltic OU v. M.V. Lady Magda* [2018] IEHC 426 McGovern J. adopted the decision of Finnegan P. in *"Avro Hunter"* and said at para. 19:-

> *"I am satisfied that this claim is based on breach of contract and the defendants were never a party to that contract. There is no evidence of a contractual relationship between the plaintiff and the defendants. The fact that the claim was one for disbursements merely went to the issue of the admiralty jurisdiction to arrest the vessel. It was not determinative of whether or not the vessel could be condemned for this claim. I adopt the judgment of Finnegan P. in the Avro Hunter and I am satisfied that there is no liability on the part of the defendants in respect of the claim made in these proceedings and therefore neither the vessel nor the security provided can be condemned in respect of that claim."*

41. The time charter at clause 2 provides-

> "2. That whilst on hire the Charterer shall provide and pay for all fuel except as otherwise agreed. Port charges, Canal Tolls, customary and compulsory Pilotage, Agencies, Commissions, customary and compulsory sludge/garbage removal, customary and compulsory watchmen unless ordered by owners."

The charter body also provides at Clause 96:

> "The Charterers will not suffer, nor permit to be continued any lien or encumbrance incurred by them or their agents, which might have priority over the title and interests of Owners in the vessel, in no event shall Charterers procure, or permit to be procured,

for the vessel, any supplies necessaries or services without previously obtaining a statement signed by an authorised representative of the furnisher thereof, acknowledging that such supplies, necessaries or services are being furnished on the credit of the Charterers and not on the credit of the vessel or of her Owners, and that the furnisher claims no maritime lien on the vessel therefore."

42. The appellant claims that it was not aware of these terms in the charter party and is not bound by them and relies on the decision of the Court of Appeal in *Manchester Trust v. Furness* [1895] 2 Q.B. 539. That was a case in which a charter party contained a proviso that the captain and crew, although appointed and paid for by owners, should be the servants of the charterers, and that in signing bills of lading, the captain should only do so as agent of the charterers and that the charterers would indemnify the owners against all liabilities arising from the captain signing the bills of lading. The court held that the special clause in the charter party was binding only between the owners and the charterers and did not affect the liability of the owners to the holders of the bills of lading who were entitled to consider the captain as the agent of the owners. The court also held that the reference to the charter party in the bills of lading did not give the holders constructive notice of the contents of the charter party, the equitable doctrine of constructive notice of contents of documents not being applicable to mercantile transactions.

43. There are two significant differences between that case and the matter before this court on appeal. In the first place it concerned bills of lading which were to be delivered "unto order, or to assigns..." and were therefore negotiable instruments which in that case were endorsed by the Master to bankers at Manchester to cover an advance and were forwarded by their agents to Rio de Janiero with instructions that the cargo should be delivered against payment of the advance. Secondly, the matters giving rise to the dispute in that case

concerned the acts of the master of the vessel which caused the goods to be mis-delivered so that the holders of the bills of lading suffered loss.

44. There is, perhaps, a third difference. According to *Scrutton on Charterparties* (19th. Edition) Art.178 Time Charters usually contain an express indemnity clause which would commonly state: "the captain (although appointed by the owners) shall be under the orders and direction of the charterer as regards employment, agency, or other arrangements...". In fact, clause 8 of the Time Charter contains those very terms. If it be the case that such a clause is "usual", then one would expect the ship's agent to be aware of the fact and, it seems to me that a question of constructive notice would arise. At the very least, it would put the agent on inquiry as to the position. While this point was not raised at the hearing in the High Court and did not form part of the trial judge's decision it does tend to support the position taken by the respondent.

45. The Manchester Trust case is not determinative of the issue that arises on this appeal, namely, whether the appellant's claim gives rise to a maritime lien so as to burden the owner of the vessel in circumstances where it did not contract with the appellant for the services rendered in the port of Bari.

46. Article 9 of the Arrest Convention states:

> "Nothing in this Convention shall be construed as creating a right of action, which, apart from the provisions of this Convention, would not arise under the law applied by the Court which has seisin of the case, nor as creating any maritime liens which do not exist under such law or under the Convention on Maritime Mortgages and Liens, if the latter is applicable."

The significance of Article 9 is that the Arrest Convenient does not create any maritime liens where none existed before. This is important in view of arguments advanced by the appellant on its appeal.

Discussion

47. The appellant makes the following argument: -

(i) the claim comes within Article 1(n) of the Arrest Convention on the basis that the claim relates to "disbursements made by...agents on behalf of a ship" (the vessel);

(ii) the claim is therefore a "maritime claim" for the purposes of the Convention;

(iii) the agent was therefore entitled to arrest the vessel under the jurisdiction of Courts Maritime Conventions Act 1989;

(iv) it follows that the High court had jurisdiction to hear and determine the agent's claim under the 1989 Act;

(v) the claim is, or is to be taken to be, a claim *in rem*; and

(vi) it follows from the fact that the claim is an *in rem* claim, that it can be maintained against the ship (and effectively against the owner) independently of any personal liability on the part of the owner (NSC Shipping).

48. On the basis of the law outlined earlier in this judgment there is nothing remarkable about the appellant's argument set out at (i)-(v) above. But the argument set out at (vi) requires further examination. The authorities establish that the basis of maritime liens lies in the personal liabilities of the owner. The claim made in these proceedings by the appellant is not in respect of matters which give rise to a maritime lien. See *Meeson & Kimbell(op. cit.)* and *Zafiro* [1960] P1 (Hewson J.).

49. The appellant's contention that Article 1(n) of the Arrest Convention entitled an agent to maintain a claim against the owner of the vessel for disbursements made by such agent "on behalf of a ship", even in the absence of any personal liability on the part of the owner, is not supported by any of the authorities cited by the appellant or by any of the text books

to which the court has been referred by the parties. It is fair to say that the authorities are clearly against this proposition.

50. If the disbursements made do not create a maritime lien then nothing in the Arrest Convention can be construed as creating any maritime lien under the law of this State where such does not already exist. This is the clear effect of Article 9 of the Arrest Convention.

51. The appellant's argument that, in agreeing to the provision of services by the appellant, the time charterer did so as agent of the owners is not tenable and is completely against the weight of the evidence. The appellant was unable to establish, in the High Court, that the time charterers entered into the arrangements with the appellant on the basis of actual authority from the owner. Neither was any evidence offered to the court to establish ostensible authority. The respondent made no representations to the appellant such as would hold out the time charterer as its agent and all the correspondence between the appellant and the time charterer up to the commencement of these proceedings clearly shows that the appellant believed that it was the time charterer who was responsible for the sums claimed.

52. The appellant invites this court to consider the nature of the statutory right *in rem* given to a ship's agent who has made disbursements on behalf of a ship or her owner and to what extent (if any) a ship owner can derogate from the ship agent's statutory right *in rem* such that the ship's agent is deprived of his right to have recourse to the ship.

53. The answer to this question depends on the nature of an *in rem* action and the particular facts. In this case the disbursements were not made on behalf of the ship or the owner of the vessel. There can be no doubt that the appellant's claim, as pleaded, is a "maritime claim" within the meaning of Article 1 of the Arrest Convention. Accordingly, the High Court had jurisdiction to hear and determine the claim. If the claim was a "maritime claim" the Court had jurisdiction to arrest the vessel by virtue of Article 8(2).

54. While all maritime liens are "maritime claims" the converse is not true. Where a claimant has a maritime claim within the meaning of the Convention, it can arrest the vessel and thereby obtain security for its claim. The admiralty proceedings which follow the arrest may involve the court determining whether or not the claimant may have recourse to the vessel (or the security offered). Following arrest, the vessel or the security offered in lieu thereof is no more than an asset against which a successful claimant can recover on foot of a judgment. In this case there was no privity of contract between the appellant and the respondent nor was it established that the time charterer was acting as agent of the respondent. In those circumstances the trial judge was correct in dismissing the claim. Once the claim was dismissed there could be no basis on which the appellant could seek to have the vessel or the security condemned.

55. Jackson, *Enforcement of Maritime Claims* (4th Ed. 2005) discusses in some detail the distinction between maritime liens and what he refers to as "statutory liens" (or statutory liens in admiralty) by which he means claims enforceable by an action *in rem* which are not based on maritime liens. At para 18.13(c) the author states as follows:

> "In some circumstances a maritime lien is enforceable against a chartered ship even when the charterer and not the owner is liable in personam (whereas in relation to most claims a statutory lien would only be so if at the time of the issue of the claim form the charterer has become owner or has become or remained demise charterer by the date of the issue of the claim form)". [Emphasis added].

Clearly that is not the case in this appeal.

56. In this appeal the appellant relies heavily on a number of cases in support of its claims. They are *The Perla* [1858] 1 SWABEY 333, *Manchester Trust v Furness* [1895] 2 QB 539 and *The Tolla* [1921] P.22. Unlike the present case all these cases turned on the involvement of the Master and the High Court Judges' analysis of the cases appears to be correct.

57. Article 6 of the Arrest Convention empowers the Court to release a vessel on bail if proper security is put up for the claim. Article 5 states *inter alia* "the request to release the ship against such security shall not be construed as an acknowledgement of liability or as a waiver of the benefit of any legal limitation of liability of the owner of the ship".

58. If a party has a maritime claim against the owner of a vessel "...a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship..." (Article 3(1)). Article 3(4) provides "when in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claims".

59. The scheme of the Convention appears to provide therefore that if the claim is against an owner, any vessel registered in the name of that owner can be arrested as security for the claim. But if the maritime claim is against a demise charterer a vessel so chartered may be arrested but no other vessel belonging to the registered owner can be arrested as security for the claim. In this appeal the demise charterer has been sued but the High Court judge concluded that the demise charterer was not liable for the claim. In those circumstances it cannot be said that a demise charterer "...is liable in respect of [the] maritime claim relating to that ship".

60. A maritime claim like any other claim has to be proved before the execution process can take place. If there is a maritime claim against the owner of a vessel then, following upon the arrest of the vessel or the posting of security by the owner, a successful claim can

be executed against the vessel or the security bond. Claims which do not have the status of a maritime lien do not attach to the vessel and are in a different category.

61. Although the pleadings contend for a "maritime claim" as defined in the Arrest Convention the appellants did not establish on the evidence that they had such a claim. The trial judge did not decide the issue as to whether or not the facts established a "maritime claim" within the meaning of the Convention. He did record that "...the ship was arrested in circumstances where the claim on the face of the plenary summons clearly fell within the categories of claim in respect of which there is a right *in rem*, assuming that the vessel is, in fact, or the owners of the vessel are, in fact, indebted to the plaintiff in respect of the amount claimed". Ultimately the case was decided on the basis that the owners of the vessel had no personal liability for the sum claimed and in those circumstances the appellant was not entitled to pursue the ship *in rem* in respect of that claim.

62. In view of the questions raised by the appellant on this appeal I believe it desirable that a determination be made as to whether or not the facts established that there was a "maritime claim" as defined in the Convention. In Berlingieri on *Arrest of Ships* (4th Edition) para. 52.254 the author discussed disbursements as defined in Article 1(n) of the Arrest Convention. He says:

> "The final words of this sub-paragraph, although specifically referring to the disbursements made by shippers, charterers and agents, may also be utilised to establish the type of Master's disbursements covered herein. Therefore, the disbursements made on behalf of a person other than the owner of the ship, such as the bareboat charterer or the time or voyage charterer, do not qualify as maritime claims unless made on behalf of the ship."

63. He went on to state the following:

"52.255. The disbursements made on behalf of the ship (or, more correctly in respect of the ship) seem to be of a different nature to those made on behalf of the owner, otherwise there would have been no reason to refer to both. If this is so, they should cover a more limited area and relate to the ship itself, and not to its operation, such as maintenance and repairs costs. Disbursements made for the operation of the ship such as harbour dues, agency fees, pilot fees, tug charges, stevedoring costs and the like, would not consequently be maritime claims unless made on behalf of the owner of the ship.

52.256. Such restricted interpretation of the notion of disbursements made on behalf of the ship seen to be supported by the fact that, if it were to include disbursements made for the running of the ship to the extent that this is at the charge of a charterer, it would make no sense to refer to disbursements made by charterers on behalf of the ship, for these would be made by them on their own behalf."

64. The observations of Professor Berlingieri deserve to be given considerable weight as he was a former President of the Comité Maritime International (CMI) under whose auspices the Arrest Convention was drafted and he was intimately involved in the work leading up to the final draft of the 1999 Convention designed to replace the 1952 Convention. The drafting committee, of which he was a member, had to consider in great detail the text of the 1952 convention while carrying out their work. For my part, I am happy to accept the observations made by Professor Berlingieri as representing the correct position on this topic and the views which he expressed are in accordance with what I understand to be Irish law. This also gives some context to the remarks of Jackson, Enforcement of Maritime Claims, supra (para 55). I am satisfied, on the evidence that the appellant's claim is not a "maritime claim" on the basis of the extracts just quoted.

65. In any event, the appellant has failed to establish any basis on which it claims, even if it had been established to be a "maritime claim" within the meaning of the Arrest Convention and the 1989 Act was a claim which could be executed against the vessel, in circumstances where, it is clear, no maritime lien arose and where no liability on the part of the owner was established.

Conclusion

66. The High Court judge's finding that the services of the appellant were ordered by GK Shipping was entirely supported by the evidence. There was no evidence to support the claim made by the appellants that the contract had been ratified by the owners or that GK Shipping were acting as agents for the owners.

67. The High Court judge was correct in determining that the onus of proof was on the appellant to establish that the owners of the vessel (NSC Shipping), had a personal liability in respect of the services that were provided and that they had failed to do so.

68. The appellant did not establish that it had a "maritime claim" within the meaning of the Arrest Convention which would give it a right *in rem* against the vessel. Nor did the appellant establish that it had a maritime lien in respect of its claim which would attach to the vessel.

69. For the reasons set out above I would dismiss the appeal

Cross appeal on costs

70. The High Court judge granted costs to the respondent but deducted 10% on the grounds of a failure to properly comply with directions which he made on an *ex parte* application before him in Galway. He took the view that the respondent did not properly give effect to the direction as it was not conveyed to the appellant's solicitors. This in turn led to some confusion over what papers were to be in a core book used by a witness namely Mr. Lubbers who has given evidence by video link. The trial judge took the view that this caused

difficulty and there were also problems with the video link, evidence which started off on the basis of "...a wrong footing as a consequence of that". The respondent has appealed the decision to only grant 90% of its costs. Unfortunately, the judge's criticisms referred to at p. 127 of the transcript of Day 2 seem to relate back to observations made by him on Day 1. This court does not have the transcript of Day 1 which gives rise to a difficulty in fully considering the issue.

71. The High Court judge gave a reasoned decision as to why he was only allowing 90% of the respondent's costs in the High Court and in my view the respondent has failed to establish that the trial judge was in error. The trial judge correctly adopted the default position set out in O.99 of the RSC in awarding costs to the respondent as the successful party. It was a matter within the judge's discretion as to whether or not he should award all of the costs or not and he was in the best position to make such adjustments as he thought were necessary. It seems to me that the trial judge acted within the margin of his discretion in making the deduction of 10% from the respondent's costs in the High Court and he gave his reasons for doing so. His reasons were supported by the events which unfolded immediately prior to the trial and during the trial. I would not interfere with that order.

72. Accordingly, I would dismiss the counterclaim on the costs issue.

Approved 9-07-2020

B. J. Mc C.