THE SPECTRE OF RE-ARREST OF A VESSEL

The Daien Maru No. 18[1]

IN THE practice of Admiralty law, the ability to arrest a vessel is one of the most important features of the *in rem* action.[2] In fact, it has been judicially observed that '[i]t is the arrest which actually gives the claimant security; but a necessary preliminary to arrest is the acquisition, by the institution of a cause *in rem,* of the right of arrest."[3] Thus, any decision of the local courts shedding light on the subject of arrests of vessels is certainly deserving of close attention. *'The Daien Maru No. 18'* is one such decision.

The Facts

The circumstances which led to the arrest of the "Daien Maru No. 18" (hereafter the "Daien Maru") were, in the words of Mr. Justice Thean, 'rather unusual'. The defendants were the owners of the "Daien Maru" and they had commenced an action *in rem* (the owners' suit)[4] against the charterers of the vessel.[5] The vessel was arrested by the defendants on 20 March 1984. Six days later, the plaintiffs who were members of the crew on board the vessel filed a caveat against the release of the vessel.[6] On March 30th 1984, the plaintiffs commenced an action *in rem* against the defendants claiming for earned wages, subsistence money and expenses for the

1 Recently reported in [1985] 2 M.L.J. 90.

2 Or more precisely the Admiralty suit *in rem.* There is, in the present state of authorities, a debate as to the nature of the action *in rem.* For example, in *'The Daien Maru No. 18'* [1985] 2 M.L.J. 90 at 93, Mr. Justice Thean emphatically declared that 'an Admiralty suit *in rem* is an action against the *res.'* (See also *'The Henrich Bjorn'* (1886) L.R. 11 P.C. 270, at 276-277 *per* Lord Watson). However, in the recently reported case of *'The Kusu Island'* [1985] 1 M.L.J. 342 at 346, Mr. Justice Lai Kew Chai observed in clear and incisive terms that 'an action *in rem* is not an action against the *res* itself but is merely a procedural device to obtaining jurisdiction over the owner of the *res'* In essence, the debate revolves around whether the action *in rem* is a unique proceeding directly against the ship (the personification theory) or a device for obtaining personal jurisdiction over the shipowner (the procedural theory). Unfortunately, a discussion of this debate falls outside the scope of this casenote.

3 *Per* Brandon J., in *'The Monica* S' [1968] P. 741 at 754.

4 Admiralty Suit in Rem No. 174 of 1984.

5 In Singapore law, a plaintiff in an action *in rem* may arrest his own ship. Such an arrest is possible because the High Court Admiralty Jurisdiction Act, Cap. 6, Singapore Statute 1970 Rev. ed. (hereafter The HCAJA) provides in s. 3(1) that 'the Admiralty jurisdiction of the High Court shall be as follows: ...to hear and determine... (h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.' As the arrest procedure is an inherent part of the action *in rem* and the action *in rem* is one of the two procedures available to a plaintiff with a maritime claim (the other is the Admiralty action in *personam),* it follows that the arrest procedure is available to a plaintiff with a maritime claim falling within s. 3(1)(h) of the HCAJA. It must further follow that such a plaintiff may arrest his own vessel. It is noteworthy that in English law, the position is that a shipowner is not entitled to arrest his own ship—see *'The Eschersheim'* [1976] 1 W.L.R. 430 at 436 and 440, *per* Lord Diplock.

6 The procedure is provided for in the Rules of the Supreme Court, 1970 (hereafter RSC) in Order 70, rule 1.

return journey.[7] The defendants entered unconditional appearance[8] and the plaintiffs applied for and obtained summary judgement[9] for the full amount of the claim.

On May 29 1984, the defendants *qua* plaintiffs in the owners' suit filed an instrument of release[10] for the release of the "Daien Maru" but the caveators in that suit (including the plaintiffs) refused to withdraw the caveats.[11] Undeterred, the defendants *qua* owners applied by notice of motion in the owners' suit for an order of release of the vessel[12] and were successful in their application. Not to be outdone, the plaintiffs arrested the "Daien Maru" after its release.

The above sequence of events led to the defendants' application to discharge the warrant of arrest[13] and it befell Mr. Justice Thean to rule on the regularity of the arrest of the "Daien Maru" by the plaintiffs. The gravamen of the defendants' application was that the plaintiffs, having obtained final judgement against the defendants for the full amount of their claim, had lost the right to arrest "Daien Maru"; the point being that the plaintiffs' cause of action had merged with the judgement and the sheet anchor of the defendants' argument was the decision of Mocatta, J., in *'The Alletta'*.[14]

The Decision

Mr. Justice Thean dismissed the defendants' application, holding, on both authority and principle, that the plaintiffs were entitled to arrest the "Daien Maru". His Lordship observed that a proper review of the relevant authorities did not bear out the conclusion that the plaintiffs, by reason of having obtained an *in rem* judgement, were *ipso facto* deprived of their right to invoke the *in rem* procedure of arrest. In addition, his Lordship pointed out that it did not follow from the operation of the merger principle (*viz.,* that the cause of action in respect of which a judgement has been given is merged in the judgement so that a second action may not be brought on the original cause of action,[15]) that 'the right to security in the ship is lost or extinguished by such merger.' His Lordship said that he was fortified in his view by the established principle that a maritime lien was enforceable by an action *in rem.*[16]

[7] The claim for wages and the related items gives rise to a maritime lien. See *'The Arosa Star'* [1959] 2 Lloyd's Rep. 396 and *'The Halcyon Skies'* [1977] Q.B. 14.

[8] The entry of unconditional appearance to an action *in rem* also constitutes a submission to the *in personam* jurisdiction of the court. See *'The Gemma',* [1899] P. 285 and *'The August 8',* [1983] 2 A.C. 450.

[9] The Judicial Committee of the Privy Council deciding an Admiralty appeal from the Court of Appeal of Singapore has ruled that proceedings for summary judgement under RSC Order 14 may be instituted for an action *in rem.* See *'The August 8', op. cit.*

[10] Pursuant to RSC Order 70, rule 12(1).

[11] See RSC Order 70, rule 12(3) and (4).

[12] Pursuant to RSC Order 70, rule 12.

[13] Pursuant to RSC Order 2, rule 2.

[14] [1974] 1 Lloyd's Rep. 40.

[15] Ki*ng* v. *Hoare* (1844) 13 M. & W. 494; *Smith* v. *Nicolls* (1839) 5 Bing. (N.C.) 208; *Kendall* v. *Hamilton* (1879) 4 App. Cas. 504. See generally, Spencer-Bower and Turner *Res Judicata* (2nd Edition, 1969).

[16] As was first established by *'The Sold Buccleugh'* (1851) 7 Moo. P.C. 267 See also *Currie* v. *M'Knight* [1897] A.C. 97 and *'The Halcyon Isle'* [1981] A.C. 221.

The Discussion

Before one proceeds with an analysis of the case, it is apposite to outline the main areas of debate. The controversy centres first, on the correctness of the decision in *'The Alletta'*,[17] and secondly, on the availability of the *in rem* procedure of arrest[18] to enforce an *in rem* judgement.[19]

The Correctness of 'The Alletta'

Mr. Justice Thean held that *'The Alletta'* was wrongly decided in as much as Mocatta, J., in purporting to apply the rule as stated in *'The Point Breeze'*,[20] misapplied it.

It is pertinent to recall the facts in *'The Alletta'*. Shorn of its complexities, the case involved a collision between a Dutch-registered motor vessel (the "Alletta") and a British-registered motor vessel (the "England") in the River Thames. The owners of the "England" commenced an action *in rem* against the owners of the "Alletta". The acceptance of the service of the writ *in rem* by the lawyers of the latter obviated the need for the arrest of the "Alletta".[21] In the *in rem* action; the court held that the "England" was one-fifth to blame for the collision and the "Alletta" was four-fifths blameworthy. Some eight years later,[22] the owners of the "Alletta" sold the vessel to purchasers, who at the time of the sale, were unaware of any actual or potential claim by the owners of the "England" against the "Alletta".[23] As events transpired, the owners of the "England" obtained a warrant for the arrest of the "Alletta".[24] However, upon an undertaking to meet the liability of the "Alletta" in the event that it was adjudged that the owners of the "England" were entitled to arrest the vessel during her ownership by the purchasers, the "Alletta" was not arrested.[25] The issues which arose

17 [1974] 1 Lloyd's Rep. 40.

18 As provided for in RSC Order 70, rule 4.

19 Or, more precisely, an Admiralty judgement *in rem.*

20 [1928] P. 135.

21 See RSC, Order 70, rule 7(2).

22 The vessel was in fact sold on June 20, 1973, but not before several proceedings were heard by the courts. For a complete history of the litigation that arose from the collision with the "England", see: *'The Alletta'* [1965] 2 Lloyd's Rep. 479, *The Alletta'* [1966] 1 Lloyd's Rep. 573, *The England'*. [1972] 1 Lloyd's Rep. 375 and *The England'* [1973] 1 Lloyd's Rep. 373.

23 As the collision caused damage to the "England", it was beyond dispute that the owners of the "England" possessed a maritime lien with respect to their claim against the "Alletta". If authority be needed for the proposition that damage to a vessel gives rise to a maritime lien in favour of the owner of the damaged vessel, see *The Bold Buccleugh'* (1851) 7 Moo. P.C. 267. As a consequence, the maritime lien 'adheres to the ship from the time that the fact happens which gave the maritime lien, and then continues binding the ship until it is discharged, either by being satisfied or from the laches of the owner.... It commences and there it continues binding on the ship until it comes to an end.' *per* Mellish L.J. in *The Two Ellens'* (1872) L.R. 4 P.C. 161 at 169.

24 Pursuant to RSC, Order 70, rule 4.

25 Although The Rules of the Supreme Court do not provide for such a course of action, in practice the defendants may put up an undertaking and thus stave off the arrest of the vessel. The RSC provides for the procedure for a bail bond: see RSC Order 70, rule 15 and the procedure for payment into court: see RSC Order 70, rule 23(1).

before the court were, first, whether the owners of the "England" had lost the right to arrest the "Alletta" by reason of laches[26] (the laches point), and secondly, whether the right to arrest the "Alletta" was lost upon the procurement of final judgement.[27] On the laches point, Mocatta, J., held that in the circumstances of the case, the owners of the "England" had not been dilatory in the enforcement of their maritime lien.[28] More importantly, his Lordship held that the merger principle[29] operated to preclude the owners of the "England" from invoking the *in rem* procedure of arrest. In arriving at the latter conclusion, his Lordship said that he was following and applying the reasoning in *'The Point Breeze'*,[30] which, he stated, stood for the proposition that 'a warrant of arrest could not be properly served on a vessel after liability had been determined'. Thus, his Lordship observed:

> If a ship may be arrested after judgement on liability has been obtained against her and she is by the date of arrest the property of a third party who had bought her without knowledge of the maritime lien, grave injustice may be done.[31]

However, in *'The Daien Mam No. 18',* Mr. Justice Thean pointed out that the *ratio decidendi* of *'The Point Breeze'* was not the proposition as stated by Mocatta, J., in *'The Alletta'*. Instead Mr. Justice Thean said that it was 'abundantly clear' that the true *ratio decidendi* was that the ' "Point Breeze" could not be arrested on the ground that the initial bail had been put up and that bail released the vessel altogether from the cause of action in that action.' And according to his Lordship, the following passage from the judgement of Bateson, J., in *'The Point Breeze'* clinched the point:

> If the plaintiffs are right in their contention that they are entitled to arrest this ship, it seems to me that it will open the door to the rearrest of vessels, or arrest *after getting bail,* whenever a party thinks that his claim may be more than he originally thought it was. *No immunity from arrest will be obtained by giving bail,* and the result of that, on the question of maritime liens, might be very serious.[32]

[26] The celebrated case of *'The Bold Buccleugh'*, (1851) 7 Moo. P.C. 267 established that laches was a ground for the extinction of a maritime lien. In the words of Sir John Jervis, '(i)t is not necessary to say that the lien is indelible, and may not be lost by negligence or delay where the rights of third parties may be compromised;....' (at p. 285). For a clearer exposition of this principle, see *'The Two Ellens'* (1872) L.R. 4 P.C. 161, at 169.

[27] It is pertinent to point out that the judgement obtained by the plaintiffs in *'The Alletta'* was, by the time the proceedings came before Mocatta J., a final judgement *in rem.* For the judgement established the plaintiffs' right to recover damages *and* the quantum of damages recoverable. See generally *Halsbury's Laws of England,* 4th Edition, Vol. 12, para. 1202.

[28] In *'The Alletta',* it was uncontroverted that the plaintiffs possessed a maritime lien in respect of their maritime claim against the owners of the "Alletta"; see note 23, *supra.*

[29] See the text to note 15 and the authorities cited.

[30] [1928] P. 135.

[31] [1974] 1 Lloyd's Rep. 40 at 48 and 50.

[32] [1928] P. 135, at 142; emphasis added. See *'The Daien Maru No. 18'* [1985] 2 M.L.J. 90 at 92.

Stated in this way, the decision in *'The Point Breeze'* merely illustrates the application of the time-hallowed principle that 'the bail represents the ship and when a ship is once released upon bail she is altogether released from the action'.[33] It is respectfully submitted that Mr. Justice Thean was entirely correct when his Lordship said, " *'The Point Breeze.'* does not warrant the conclusion arrived at in *'The Alletta'* "; *viz.,* that a vessel could not be arrested (or re-arrested)[34] after a final judgement[35] had been obtained.[36]

However, a closer analysis of *'The Point Breeze'* reveals that there is another ground on which *'The Alletta'* can be said to be wrongly decided; *i.e.* that the merger principle could not have been pleaded at the time of the proceedings before Bateson, J., for the simple reason that the judgement obtained by the plaintiffs in that case was an interlocutory judgement.[37] The judgement was interlocutory for although it established the right of the plaintiffs to recover damages, the quantum of the damages was left to be ascertained by the registrar.[38] If there be any doubt as to the nature of the judgement, one need only refer to the following words of Bateson, J.:

> Under the judgement, the assessment of the damages was referred to the registrar, *but he has not ascertained what amount is due and it may well be some time before he does ascertain it.*[39]

[33] The earliest application of the principle is to be found in the judgement of Sir William Scott (as he then was) in *'The Peggy'* (1802) 4 C. Rob. 304. See also *'The Kalamazoo'* (1851) 15 Jurist 885; *'The Wild Ranger'* (1863) B. & L. 84. It is worthy of note that the position that obtains in the United States is the same; see *'The Thales'* 23 Fed. Cas. 884 (case no. 13,856), *'The Union'* 24 Fed. Cas. (case no. 14,346); *'The White Squall'* 29 Fed. Cas. (case no. 17,570); *'The Comanche'* [1923] A.M.C. 201. Note that in American Admiralty law, the 'bond' or 'stipulation' is the equivalent of the 'bail bond' in English law. *En passant* it is interesting to note that in the recent unreported case of *'The Arctic Star'* (The Times, 5th February 1985), the English Court of Appeal allowed in respect of the same maritime claim the rearrest of a vessel in England notwithstanding the provision of bail by the defendants in a Texan court. It is submitted that *'The Arctic Star'* is a case falling within the legal rubric of *lis alibi pendens;* see, for example, *'The Catterina Chiazzare'* (1876) 1 P.D. 368; *'The Reinbeck'* (1889) M.L.C. 366; *'The Christianborg'* (1885) 10 P.D. 141 and *'The Atlantic Star',* [1974] A.C. 436.

[34] A situation of rearrest occurs when the vessel has been released from a prior arrest: see RSC Order 70, rule 12(2) and (4).

[35] Which must *ex necessitate* be a final in *rem* judgement. It is axiomatic that in as much as a cause of action *in rem* is quite distinct in nature from an action in *personam,* a cause of action in *rem* does not merge into a judgement *in personam.* See *'The Bengal'* (1859) Swab. 468; *'The John and Mary'* (1859) Swab. 471; *Nelson* v. *Couch* (1863) L.J. (C.P.) 46; *'The Orient',* (1871) L.R. 3 P.C. 696. Although in all the above-cited cases, with the exception of *Nelson* v. *Couch,* the merger principle was not discussed.

[36] *Contra,* if the final judgement had been satisfied as then the plea of judgement satisfied will preclude the institution of any action by the plaintiffs, including an action *in rem.* See, for instance, *'The Orient'* (1871) L.R. 3 P.C. 696.

[37] The phrase 'interlocutory judgement' is used in this context to describe a judgement for damages to be assessed. See RSC, Order 13, rule 2 and Order 19, rule 3. See generally, *Halsbury's Laws of England,* 4th Edition, Vol. 26, paras. 504 to 506.

[38] [1928] P. 135, at 135 and 142.

[39] [1928] P. 135 at 142; emphasis added.

Now, it is axiomatic that one of the requirements for the operation of the merger principle is that the judgement recovered[40] must be a final judgement.[41] If authority is needed for such a proposition, it may be found in the Court of Queen's Bench decision of *Marston* v. *Phillips*.[42]

Thus, the fact that the judgement obtained by the plaintiffs in *'The Point Breeze'* was an interlocutory judgement reinforces the view of Mr. Justice Thean that the *ratio decidendi* of *'The Point Breeze'* was 'not that the "Point Breeze" could not be arrested because judgement had been obtained and the right of arrest was thereby lost'.[43] It is thus apparent that the ratiocination of Mocatta, J., in *'The Alletta'* — based as it was on the premise that *'The Point Breeze'* stood for the proposition that a vessel could not be arrested after judgement on liability — was fatally flawed. In the final analysis, one is left with a bald statement by Mocatta, J. that there can be no arrest of a vessel after judgement on liability. That this statement draws no support from the merger principle has already been demonstrated. The enquiry that ensues is whether the statement of Mocatta, J., is sustainable in principle; an enquiry which leads us to an examination of the availability of the *in rem* procedure of arrest to enforce an *in rem* judgement.

The Availability of the In Rem procedure of Arrest

At the outset, it is pertinent to point out that the judgement obtained by the plaintiffs in *'The Daien Maru No. 18'* was a final judgement.[44] As mentioned earlier, the substance of the defendants' contention was that the right to arrest the "Daien Maru" was lost after final judgement had been obtained on the ground that the cause of action had merged in the judgement.

In dealing with the defendants' contention, Mr. Justice Thean started with three incontrovertible basic propositions; first, that an Admiralty suit *in rem* is an action against the *res*,[45] secondly, that if no appearance is entered by the defendant to an action *in rem,* judgement when entered is enforceable only against the *res*,[46] and thirdly, that if a defendant enters an unconditional appearance in an action *in rem,* there is a personal submission to the jurisdiction of

[40] The term 'recovered' is a term of art used to mean the entering of judgement. A judgement recovered does not mean that the judgement has been satisfied: see, generally, Spencer-Bower and Turner, *Res Judicata* 2nd Edition, Chapter 16.

[41] A final judgement is one that is 'obtained in an action by which a previously existing liability of the defendant to the plaintiff is *ascertained* or *established' per* Cotton L.J. in *Re Chinery, ex pane Chinery,* (1884) 12 Q.B.D. 342 at 345.

[42] (1863) 9 L.T. 289. See also *Langmead* v. *Maple* (1865) 18 C.B.N.S. 255 and the judgement of Lord Denning M.R. in *Fidelitas Shipping Co. Ltd.* v. *v/o. Exportchleb* [1966] 1 Q.B. 630 at 640.

[43] [1985] 2 M.L.J. 90 at 92.

[44] It is to be recalled that in the application for summary judgement under RSC, Order 14, the plaintiffs obtained a judgement for the *full amount of their claim.*

[45] The authorities for this proposition are *inter alia 'The Henrich Bjorn'* (1886) 5 P.D. 106; *Currie* v. *M'Knight* 1897 A.C. 97; and *'The Burns'* (1907) P.D. 137.

[46] As established by *'The Burns'* (1907) P.D. 137.

the court with the result that the action *in rem* takes on the added dimension of an action *in personam*.[47] And the consequence of the third proposition, according to his Lordship, was that a judgement obtained in such an action *in rent*[48] was both an *in rem*[49] and an *in personam*[50] judgment. Ergo such a judgment was enforceable against the *res*[51] by a remedy[52] *in rem,* namely the procedure of arrest. Thus, if the defendants' contention — that after such a judgement the plaintiffs cannot arrest the "Daien Maru" — were correct,

> then it must follow logically that the judgement is not one operating *in rem* against the *res* and no recourse can be had against the *res,* except by way of writ of seizure and sale which is an execution proceeding for enforcing a monetary judgement *in personam*.[53]

Such a conclusion need only be stated to be refuted for it ignores the essence of the action *in rem.* Inherent in the action *in rem* is the right to arrest the vessel in order to obtain security for a claim.[54] It is the remedy[55] of arrest of the vessel which furnishes the security for the plaintiffs' claim. It is this security aspect of the action *in rem* which really sets it apart from the action *in personam*.[56] In fact, the security aspect of the action *in rem* was declared as early as 1842 by Dr. Lushington who said 'an arrest offers the greatest security for obtaining substantial justice in furnishing a security for prompt and immediate payment.'[57]

In similar vein, Lord Brandon (as he now is) with his customary clarity said:

47 See *'The Dictator',* [1892] P. 64; *The Gemma'* [1899] P. 285; and *The August 8'* [1983] 2 A.C. 450.

48 That is an action *in rem* where the defendant has entered unconditional appearance.

49 Inasmuch as the judgement operates *in rem* against the vessel. See generally, *Halsbury's Laws of England,* 4th Edition, Vol. 26, paras. 502 to 505.

50 Inasmuch as the judgement operates in *personam* against the defendant. The consequence of a judgement operating *in personam* against the defendant is that the value of the *res* is not the limit of the plaintiff's claim for 'the defendant, by appearing personally, introduces his personal liability.' (*per* Jeune J. in *The Dictator'* [1892] P. 304 at 319). The upshot is that any judgement pronounced beyond the value of the *res* is enforceable against the defendant by a writ of *fieri facias* or any other form of execution available to enforce an *in personam* judgement.

51 It follows that a judgement which possesses both *in rem* and *in personam* dimensions is enforceable by the *in rem* procedure of arrest. The availability of the *in rem* procedure of arrest to enforce such a judgement is a recognition of the *in rem* dimension of the judgement.

52 The arrest procedure has always been regarded as a provisional remedy to provide some measure of security for the plaintiff's maritime claim: see *The Monica S* [1968] P. 741. See, generally, D.C. Jackson *Enforcement of Maritime Claims,* Chapter 9.

53 *per* Mr. Justice Thean in *The Daien Maru No. 18'* [1985] 2 M.L.J. 90 at 93.

54 See *The Beldis'* [1936] P. 51; *The Monica* 5' [1968] P. 741.

55 At the pre-judgement stage, arrest is seen as a provisional remedy. See, generally, D.C. Jackson *Enforcement of Maritime Claims,* Chapter 9.

56 For a judicial exposition on the security aspect of the action *in rem,* see the judgement of Brandon J. (as he then was) in *The Monica S*' [1968] P. 741.

57 In *The Volant'* (1842) 1 W. Rob. 383 at 387.

> … the purpose of arresting a ship in an action *in rem* is to provide the plaintiff with security for the payment of any judgement which he may obtain in such action, or of any sum which may become payable to him under a settlement of such action.[58]

Thus, seen in its proper perspective, the defendants' contention was really to deny the security aspect of the action *in rem* and the dearth of case law on the point proved extremely unhelpful to them. So it was hardly surprising that Mr. Justice Thean opined that '(s)uch a conclusion (as contended for by the defendants)[59] is extremely strange and … untenable.' According to his Lordship, if a plaintiff by instituting an action *in rem* against a ship was able to 'properly assert as against all the world' that the ship was a security for his claim and arrest the same, then on principle, even after such a plaintiff has procured a final judgement for his claim, he could 'also properly assert that the ship is a security for the judgement obtained and therefore is entitled to arrest the ship.' His Lordship said that while it was undoubtedly the law 'that once a judgement has been obtained in an action the claim therein is merged in the judgement', it did not follow that the right to security in the ship — a right which is enforceable by the arrest of the ship— was lost by such merger.

It is respectfully submitted that Mr. Justice Thean was absolutely correct in enunciating the rule that the operation of the merger principle did not by itself extinguish the right to security (in the ship) in an action *in rem.* His Lordship's ruling is entirely in accordance with the long-established principle that the object of the arrest of a ship in an action *in rem* is to obtain security to satisfy a judgement.[60]

In addition, Mr. Justice Thean said that his conclusion *viz.,* that the plaintiffs had not lost the right to arrest the "Daien Maru" by reason of having obtained a final judgement *in rem*[61] was consistent with the established principle that a maritime lien is enforceable by an action *in rem.*[62]

It cannot be gainsaid that the plaintiffs' claim in *'The Daien Maru No. 18'* gave rise to a maritime lien.[63] Thus, the plaintiffs could enforce the maritime lien by an action *in rem.* It followed, according to Mr. Justice Thean, that the plaintiffs who had commenced an action *in rem* against the "Daien Maru" to enforce the maritime lien thereon, must be entitled to arrest the vessel in the same action

58 In *'The Rena K'* [1979] 1 Q.B. 377.

59 The interpolation is the writer's.

60 See *'The Beldis'* [1936] P. 51 at 67 and 73-74, *per* Sir Royd Merriman P. See also *'The Cello'* (1888) 13 P.D. 82 at 88 and *'The Rena K'*. [1979] Q.B. 377 at 396.

61 Which must *ex necessitate* be an Admiralty judgement *in rem:* see note 33, *supra.*

62 As was first established by *The Bold Bucclough'* (1851) 7 Moo. P.C. 267 is germaine to note that a maritime lien is a security interest; the primary purpose of a maritime lien is to confer security for the maritime claim. Thus, a maritime lien confers its holder with a security interest which is enforceable by an action *in rem* and is therefore enforceable by the *in rem* procedure of arrest.

63 See note 7 *supra.*

even after they have obtained judgement.[64] His Lordship said that it was fallacious to argue, as the defendants did, that if the right of arrest was said to have been lost by virtue of the judgement having been obtained,[65] then it must follow that the maritime lien was extinguished by the procurement of a final judgement *in rent* in the action *in rem* commenced to enforce the maritime lien. The argument was fallacious for it involved a *petitio principii;* the premise of the defendants' argument namely, that the right of arrest was lost upon the procurement of a final judgement *in rem,* assumed its conclusion *viz.,* that the maritime lien was no longer enforceable by an action *in rem* — and therefore arrest of the vessel was no longer available — as *ex hypothesi* the maritime lien was extinguished by the procurement of final judgement *in rem.* It is patent that the implicit assumption in the defendants' argument was that the merger principle precluded the invocation of the action *in rem* — therefore the arrest of the vessel — after the procurement of a final judgement *in rem:* an assumption which Mr. Justice Thean had demonstrated to be, on principle, misconceived. Thus, Mr. Justice Thean concluded that 'the right to security in a ship which arises from (the ability to bring)[66] an action *in rem* against the ship and the arrest thereof which is a remedy to provide for such security' was not extinguished by reason of the procurement of a final judgement *in* rem.[67]

The Wider Implications of 'The Daien Mam No. 18'

Before one proceeds with the discussion of the ramifications of the decision, it is significant to note that throughout the judgement of Mr. Justice Thean, his Lordship was careful to point out that the case before him did not involve a situation where 'bail had been put up for the *res'*. Different considerations will have applied if bail had been provided by the defendants to prevent the arrest of the "Daien Maru" by the plaintiffs. For instance, the ancient principle that 'the bail represents the res'[68] will have precluded the arrest of the "Daien Maru" by the plaintiffs. Moreover, in a situation where bail had been provided and judgement obtained,[69] the provision

64 That is to say, the interposition of a judgement recovered does not by itself affect the *right* to enforce the maritime lien by invoking the *in rem* procedure of arrest — as *ex hypothesi,* the arrest procedure is an inherent component of the action *in rem.*

65 Which must *ex necessitate* be a final Admiralty judgement *in rem;* see notes 35 and 41 *supra.*

66 Added by the writer; the interpolation of the words is, it is submitted, apposite to underscore the security aspect of the action in *rem,* for it is only when one *possesses* the *right* to institute an action *in rem* that the arrest procedure becomes relevant and it is via the arrest procedure that the security aspect of the action *in rem* is accorded recognition. See, generally, the learned exposition of Brandon J. (as he then was) in *'The Monica* S' [1968] P. 741 and *'The Rena K'* [1979] 1 Q.B. 377.

67 It is to be recalled that *'The Alletta'* was a case involving a maritime lien and apart from a cursory observation on the possible impact on innocent purchasers of a vessel encumbered by a maritime lien if a right to arrest after a judgement on liability was upheld, Mocatta J. did not deal with the *nature* of a maritime lien — that is the security interest afforded by the maritime lien — and its enforceability by an action *in rem.* In this respect too, it is submitted that Mocatta J. erred in principle by deciding as he did, that there can be no arrest of the 'Alletta' after a judgement on liability.

68 See *'The Kalamazoo'* (1851) 15 Jurist 885; *'The Wild Ranger'* (1863) Br. & Lush. 84.

69 That is, a final Admiralty judgement *in rem.*

of a second bail bond (a procedure which the defendants were perfectly at liberty to use)[70] by the defendants to secure the release of the "Daien Maru" from the arrest will give rise to a problem adverted to by Bateson J. in *'The Point Breeze',* namely '(i)f bail were given after such an arrest[71]... there will be no judgement against such bail nor any means of obtaining judgement in the action[72].. .'[73]

In any event, there is a more fundamental point; in a situation where bail or other security[74] has been provided to prevent the arrest of the vessel or to secure the release of the vessel from an arrest, to allow the plaintiffs the right to arrest the vessel after the procurement of a final judgement is to allow the plaintiffs the proverbial "second bite" at the vessel. It will be, in the words of Sir Joseph Napier, 'an abuse and perversion of the procedure of the Court of Admiralty for the unjust and illegal purpose of trying to augment the compensation.'[75] The *terminus a quo* for any discussion on the implications of a case is the determination of the exact limits of the decision. It follows that one enquiry is whether or not the rule laid down in *'The Daien Maru No. 18',* namely that the merger principle does not preclude the arrest (or re-arrest)[76] of a vessel after the procurement of a final judgement *in rent,* is confined to actions *in rent* involving maritime liens.

A scrutiny of the judgement of Mr. Justice Thean leads us to the conclusion that his Lordship did not distinguish between actions *in rem* involving maritime liens and actions *in rem* involving statutory rights in rem.[77] The whole tenor of his Lordship's judgement is only consistent with the view that the rule as enunciated by him was directed at actions *in rem* generally. For example, his Lordship said:

> (i)f a plaintiff by instituting *an action in rem* against a ship... can "properly assert as against all the world" that the ship is

[70] The procedure is provided for in RSC, Order 70, rule 15.

[71] *i.e.,* an arrest effected on a vessel *after* the procurement of a final judgement *in rem.*

[72] That is, the proceedings to determine the issues that arise from the re-arrest of the vessel or arrest after judgement on liability, as *ex hypothesi,* a final judgement has been pronounced.

[73] [1928] P. 135 at 142.

[74] Security may be provided by way of a bank guarantee, as in *'The Christianborg'* (1885) 10 P.D. 141 or by a letter of undertaking, as in *The Alletta'* [1974] 1 Lloyd's Rep. 40. See also RSC, Order 70, rule 23.

[75] *'The Orient* (1871) L.R. 3 P.C. 6%, at 705. Although the statement was directed at the plaintiffs there for attempting to pursue an action in the Admiralty Court in respect of a matter which they had already obtained judgement (which judgement had been satisfied) in a Court of Law, it is submitted that it applies with equal force to a situation where the plaintiff, having obtained bail or other security in place of the vessel, seeks to arrest or rearrest the vessel. See generally D.C. Jackson *Enforcement of Maritime Claims* Chapter 6. See also RSC, Order 18, rule 19(d) and Order 92, rule 4.

[76] A situation of rearrest occurs where, in respect of the same maritime claim, the vessel was released from the initial arrest but without the defendant putting up bail or other security to secure the release of the vessel. See RSC, Order 70, rule 12(2) and (4).

[77] A statutory right *in rem* is a maritime claim which does not give rise to a maritime lien but is nonetheless enforceable by an action *in rem.* In the context of Singapore Admiralty law, statutory rights *in rem* are provided for in The HCAJA, s.3(1)(a) to (c), (g), (h), (j) to (m), (p) and (r).

> a security for his claim and arrest the same, then.. .(even)[78] after such plaintiff has obtained judgement for his claim in that action he can, on principle, also properly so assert that the ship is a security for the judgement obtained and therefore is entitled to arrest the ship ....[79]

In a later passage of his judgement, his Lordship with precision observed that it was 'extremely odd that the right to security in a ship which arises from *an action in rem* against the ship and the arrest thereof... should be lost or extinguished once final judgement is pronounced or obtained in that action'.[80] Although the learned judge later adverted to the enforceability of maritime liens by action *in rem,* it is pellucid that that was only another ground to buttress his view that in cases where bail was not previously put up for the *res,* the right to security in the ship — and therefore the right to arrest the ship — was not extinguished by the procurement of a final judgement *in rem.*

Indeed on principle, there should be no distinction between actions *in rem* involving maritime liens and actions *in rem* involving statutory rights *in rem* wth respect to the availability of the action *in rem* to enforce an Admiralty judgement *in rem.* This is not to deny the differences that obtain between maritime liens and statutory rights *in rem* (also called statutory liens)[81] It is trite law that one fundamental difference is the creation of the two types of liens; while both a maritime lien and a statutory right *in rem* entail the accrual of a security by way of charge,[82] the maritime lienee's charge accrues from the moment of the occurrence of the event which gives rise to the maritime lien[83] whereas the charge of the holder of a statutory right *in rem* (also called a statutory lienee) accrues from the moment of issue of the writ of summons.[84]

Be it as it may, to create a distinction in this branch of the law out of the differences that obtain between maritime liens and statutory rights *in rem* is to bedevil the law with fine refinements. It is respectfully submitted that the broad brush approach of Mr. Justice Thean is eminently sensible and accords with principle. For principle dictates that the security aspect of the action *in rem* (whether it be one involving a maritime lien or a statutory right *in rem*) is to be accorded full effect as the action *in rem* is, by definition, an action against the vessel. And it is the security aspect of the action *in rem* that forms the rationale for the rule in *'The Daien Maru No. 18'.* It follows that there is, in law, no distinction between actions *in rem* involving maritime liens and actions *in rem* involving statutory

78 The interpolation is the writer's; the interpolation, it is submitted, is apposite to convey the thrust of the statement.

79 [1985] 2 M.L.J. 90 at 94; emphasis added.

80 *Ibid.*

81 As described by Hewson J. in *'The Zafiro'* [1960] P. 1, at 13; although, as Hewson J. himself was later to acknowledge, the label is not wholly apposite: see *'The St. Merriel'* [1963] P. 247 at 253.

82 See generally, Thomas *Maritime Liens,* British Shipping Laws, Vol. 14.

83 See *The Bold Buccleugh'* (1851) 7 Moo. P.C. 267; *The Two Ellens'* (1872) L.R. 4 P.C. 161; Currie v. *M'Knight* [1897] A.C. 97; *The Halcyon Isle'* [1981] A.C. 221.

84 As laid down in *Re Aro Co. Ltd.* [1980] Ch. 196.

maritime liens and actions *in rem* involving statutory rights *in rem* with respect to the rule laid down in *'The Daien Mam No. 18'*.

The next enquiry that arises is whether or not the rule enunciated in *'The Daien Maru No. 18'* is limited to actions *in rem* wherein the defendant has entered an appearance. It is submitted that the only tenable conclusion is that the rule knows no such limit. In fact, the rationale for the rule dictates that in a case where the defendant has not entered an appearance, the situation is one *a fortiori* calling for a full recognition of the security aspect of the action *in rem.* Thus, allowing the plaintiffs the right to arrest the vessel after the procurement of judgement notwithstanding the non-appearance of the defendant to the action *in rem,* accords this recognition, again because the 'Admiralty suit *in rem* is an action against the *res'*.[85] Hence where the defendant does not enter an appearance to an action *in rem,* the judgement obtained 'is enforceable against the *res, quoad res* and no more'[86] and it follows that the judgement is enforceable against the *res* by the procedure of arrest which is a remedy *in rem.*

'The Daien Maru No. 18' thus brings to the fore the *in rem* characteristic of arrest — and it is via the ability to invoke the *in rem* procedure of arrest that the security aspect of the action *in rem* is accorded full recognition, even after the procurement of judgement.[87] The upshot is that a local Admiralty judgement *in rem* is enforceable by an action *in rem* in cases where bail had not been previously put up for the ship. This puts the enforceability of local Admiralty judgements *in rem* on the same footing as the enforceability of foreign Admiralty judgements *in rem*[88] and arbitration awards (where the claim on the contract containing the arbitration clause or the original cause of action is enforceable by an action *in rem*).[89]

Conclusion

The following propositions may be stated after *'The Daien Maru No. 18':*

(1) The operation of the merger principle does not preclude the *in rem* remedy of arrest after the procurement of a final Admiralty judgement *in rem.*

(2) It follows from proposition (1) that an action *in rem* is available to enforce a local Admiralty judgement *in rem.*

(3) The above two propositions remain true even though the defendants to the action *in rem* have entered an appearance

[85] *per* Mr. Justice Thean in *'The Daien Maru No. 18'* [1985] 2 M.L.J. 90 at 93.

[86] *Ibid.*

[87] Which must *ex necessitate* be a final Admiralty *in rem* judgement. See note 35, *supra.*

[88] See *'The Despina G.K.'* [1983] 1 All E.R. 1 where Sheen J. held that a foreign Admiralty judgement *in rem* was enforceable by an action *in rem.*

[89] As in *'The Saint Anna'* [1983] 1 Lloyd's Rep. 637. It is pertinent to note that such an action *in rem* is not an action to enforce the arbitration award but an action founded on the original cause of action identified in the writ — see the leading judgement of Robert Goff L.J. in *'The Tuyuti'* [1984] 3 W.L.R. 231 at 241. Thus, such an action *in rem* may be described as only an *indirect* enforcement of the arbitration award by an action *in rem.*

and hence subjected themselves to the *in personam* jurisdiction of the court. However, the fact that the defendants have not entered an appearance to the action *in rem* does not, without more, detract from the truth of the above propositions.

(4) The above propositions apply whether or not the plaintiffs' maritime claim — which has, by reason of the procurement of the final judgement *in rem,* merged with the judgement — gives rise to a maritime lien.

(5) Different considerations apply in situations where bail had been previously put up for the vessel, either to prevent the arrest of the vessel or to secure the release of the vessel from an arrest.

It remains to be said that the spectre of arrest (or re-arrest) of a vessel after the procurement of final judgement is less daunting than what one would suppose from the fears expressed by Mocatta, J., in *'The Alletta',* namely that if a vessel may be arrested after a final judgement, grave injustice may be caused to innocent purchasers.[90] For in the succinct words of Lord Brandon (as he now is): 'A purchaser always has to reckon with the possibility of maritime liens … In practice a purchaser takes an indemnity from his seller against claims which have attached prior to the sale...'.[91]

In conclusion, it is heartening to note that the Singapore High Court has taken the lead to plumb through relatively uncharted waters to decide on principle, that in cases where bail had not been previously put up for the vessel, the right to arrest (or re-arrest) the vessel is not extinguished by reason of the procurement of an Admiralty judgement *in rem.* As a Parthian shot, it is opportune to remark that it is time for the law (as stated in the textbooks)[92] on the subject of arrest of vessels after a final judgement to be revised and rewritten to take into account the decision in *'The Daien Maru No. 18'.* Truly, this is a landmark decision in the Admiralty law of Singapore.

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90 [1974] 1 Lloyd's Rep. 40, at 50. See the text to note 31, *supra.*

91 In *'The Monica S'* [1968] P. 741 at 769.

92 See the *Supreme Court Practice,* 1985 Edition, Vol. 1, paragraph 75/5/6 where the authors state: 'When judgement is given in an action *in rem* the right of arrest in that action is lost.' (*'The Alletta'* was cited in support for the statement.) See also D.C. Jackson *Enforcement of Maritime Claims,* Chapter 9; but it is noteworthy that the distinguished writer does state in Chapter 13 (at p. 246) that 'the rule that the power to arrest terminates on an English judgement on liability sits ill with the undoubted continuation of a maritime lien until judicial sale or payment of moneys for which it reflects a security interest.... It seems, therefore, that any limitation on arrest not coincidental with a lien (be it maritime or statutory) is suspect.' The leading text on *Maritime Liens* by D.R. Thomas does not deal with the point. In fact, *'The Alletta'* (which, it is to be recalled, involved a maritime lien and the possible consequences to innocent purchasers of a vessel encumbered by a maritime lien if an arrest or rearrest of the vessel is permitted after a judgement on liability) is not cited.

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