

SUING A VESSEL WITHOUT JOINING ITS OWNERS OR CHARTERERS

There is a recent development in the Admiralty court in Nigeria whereby claims are presented by receivers against a vessel without the owner, charterer or other person having a relationship with the vessel being joined as party to the proceedings. The claimant's argument in this regard has been that the law allows a claim to be presented against a vessel simpliciter without the need to identify the owner of the vessel. This article attempts to explore the current position of Nigerian law on this issue as it currently stands.

The applicable law is found in Order IV Rule 1 of the Nigerian Admiralty Jurisdiction Procedure Rules 1993, which provides as follows:

“ Order IV

1(1) *The writ in a proceeding commenced as an action in rem shall specify a relevant person in relation to the maritime claim concerned as a defendant and shall be in Form B in the Schedule to these Rules.*

(2) *The specification may be by reference to ownership of or other relevant relationship or other property concerned therewith.*”

Similarly, the provision of S. 5(4) of the Admiralty Jurisdiction Decree 1991, which relates to the mode of exercising Admiralty Jurisdiction provides that:

“(4) *In any other claim under section 2 of this Decree where the claim arises in connection with a ship and the person who would be liable on the claim in an action in personam (in this Decree referred to as “ the relevant person”) was, when the cause of action arose, the owner or charterer of or in possession or in control of the ship, an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought against:*

(a) *that ship if at the time the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of the ship under a charter by demise; or*

(b) *any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in the ship.”*

With the exception of certain specified instances such as cases of proprietary maritime claims where the ownership, title, mortgage, or possession of a ship is in issue and maritime lien where there is a claim for salvage, crews' wages, masters' disbursements, collision and damages, the plaintiff must as of necessity

join a relevant person in addition to the ship at the time of commencing his action.

This provision of the law was interpreted by the courts in NATIONAL OIL & CHEMICAL & MARKETING PLC -V- MX DEV. LTD. VOL. 4 1990 - 1993. N.S.C. 260 AT 263 to mean that the Plaintiff must establish at the institution of the action that the Defendants in the suit must either be named as the beneficial owner of the vessel or that he is the charterer of the ship under a charter by demise.

The court went further to hold that:

"A Plaintiff who wishes to sue on a bill of lading has the heavy onus of finding out the proper party to be sued namely the owner of the vessel or the demise charter. It seems to me therefore that the onus is on the Plaintiff/Respondent to prove that they have complied with the provisions of Section 5(4) of the Admiralty Jurisdiction Decree 1991 by bringing the action against the owner or the charterer of the ship by demise. This in my view they have failed to do. I am of the view that Exhibits Vol. 1 - Vol. 6 has not assisted the court on the issue. As the Plaintiff/Respondents have negligently failed to search for the proper party to be sued namely; the owners of the M/T "Phoenix." I therefore have no difficulty in granting the release of the vessel."

In at least two cases where Plaintiffs have commenced actions against the vessel without joining the owners or charterer, Plaintiff's counsel has argued that such non-joinder amounts to a mere irregularity which can be excused by the courts. This contention may be again at variance with the law because the courts have held that except there is special leave given by the court, non-compliance with the rules is a vice that will invalidate the proceedings. See IBRAHIM -V- HABU [1993] 5 NWLR (PT 295) 570 where the court held that:

"The effect of non-compliance, with the absence of any special leave given by the court, is that any proceedings, hearing and final determination in such circumstances will be vitiated by the non-compliance."

This law, in effect, is more strictly applied where the non-compliance relates to a jurisdictional or fundamental requirement, like naming a relevant party, which goes to the foundation of the action. OYEBADE -V- AJAYI [1993] 1 NWLR (Pt. 269) 313 at 331 - 332 where the appellate court held that:

"Where the non-compliance affects the foundation and fundamentals of the case so much so that the case of party in default cannot be salvaged in the principles of equity and fair play then the case must be thrown out."

This position is the same in Admiralty proceeding. See M/V S. ARAZ -V- SHEEP [1995] 6 NWLR (Pt 447) 204 at 225 where Uwaifo (JCA) stated as follows:

"I am of the view that the court will not have jurisdiction to arrest a ship when no proper action in rem is before it."

It is believed that any further controversy in this area of the law will be resolved in two separate appeals currently pending before the Nigeria Court of Appeal in Appeals No. CA/PH/2M/2000 - **NATIONAL WESTMINSTER BANK PLC. -V- FIVE ANCHORS GROUP LIMITED** and CA/L/72M/99 - **M.V. MUSTAFA -V- AFRO ASIAN IMPEX LIMITED.**

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