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THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2021] IECA 7

Court of Appeal Record Nos 2018/324

Collins J

Binchy J

Pilkington J

IN THE MATTER OF THE M/V "*LADY MAGDA*"

BETWEEN

ATLAS BALTIC OÜ

Plaintiff/Appellant

AND

THE OWNERS AND ALL PERSONS CLAIMING AN INTEREST IN

THE M/V "*LADY MAGDA*"

Defendants/Respondents

JUDGMENT of Mr Justice Maurice Collins delivered on 18 January 2021

PRELIMINARY

1. The Appellant, Atlantic Baltic OÜ ("*the Agents*") brings this appeal from a Judgment and Order of the High Court (McGovern J) of 18 July 2018. For the reasons set out in that Judgment, the Judge dismissed the Agents' claim against the Respondents (*"the Owners*") in respect of "*disbursements*" (primarily port expenses but also including agents' fees) said to have been made by the Agents on behalf of the *Lady Magda.*

2. These proceedings and this appeal raise interesting issues relating to the liability of the owners of a vessel where it is let on time charter. Similar issues were considered by this Court in its recent decision in *The Almirante Storni* [2020] IECA 58. While the correctness of that decision was not directly challenged on this appeal, it is said to be distinguishable as a matter of fact. For the reasons I explain in this judgment, there is no material difference between the facts in *The Almirante Storni* and the facts presented here.

3. The Agents' claim is based on contract but it has not established any contract with the Owners or any contractual liability on their part. As was the case in *The Almirante Storni*, the disbursements at issue here were made at the request of the charterers, Dennis Maritime Oy Ltd ("*the Charterers*") not at the request of the Owners. There is no evidence that, in their dealings with the Agents, the Charterers were acting, held themselves out as acting and/or were understood by the Agents to be acting, on behalf of and/or with the authority of the Owners or with permission to pledge their credit. The evidence discloses no involvement by the master of the *Lady Magda* in the dealings

between the Agents and the Charterers. Thus, even if it is the law that the master of a ship is to be taken as having ostensible authority to pledge the credit of the shipowners in circumstances such as those here – and that is, in my view, very questionable – that does not avail the Agents. No personal liability on the part of the Owners for the disbursements made by the Agents or for the agency fees charged by them has been demonstrated. No such liability arises directly from the transactions between the Agents and the Charterers and neither does such liability arise by way of any supposed ratification of those transactions by the Owners.

4. It is common case that, in the absence of such personal liability on the part of the Owners, no claim can be pursued against them. That being so, the appeal must be dismissed and the Judgment and order of the High Court affirmed.

BACKGROUND

5. The Agents are an Estonian company providing agency services to ships. At all times relevant to these proceedings, the Owners were the owners of the M/V *Lady Magda*, a Dutch-flagged general cargo vessel built in 1993, with a gross tonnage of 2561 tons.

6. The circumstances in which the Agents' claim arises can be stated relatively briefly, though it will be necessary to consider some aspects in more detail in due course.

7. Since 2012, and throughout 2016, the *Lady Magda* was let on time charter to the Charterers, a Finnish company. I will refer further to some of the terms of the charterparty in due course but for present purposes it is sufficient to note that, for 2016 at least (but presumably for earlier years also),[1] it took the form of the Baltic and International Maritime Council (BIMCO) General Time Charter Party (commonly referred to as *Gentime*). The *Gentime* form is used for time charters where the vessel is to be used for the carriage of dry cargo. The evidence does not disclose any connection or legal relationship between the Charterers and the Owners other than that arising from the time charter.

8. The Agents and the Charterers had been dealing with one another since 2012 and in the period since then ship agency services had been provided by the Agents in Estonian and

[1] It appears from the evidence in the High Court that a new charterparty was entered into for 2016 because a gantry crane had been installed at the request of the Charterers and that needed to be reflected in the terms of the charterparty: Transcript at page 26 (evidence of Ms Bos).

Latvian ports for the *Lady Magda* and also for a significant number of other ships owned and/or operated by the Charterers. The evidence before the High Court disclosed that such services were usually provided on the basis of written appointments sent to the Agents by the operations department of the Charterers.

9. These proceedings arise from various appointments of the Agents as port agents for the *Lady Magda* in the period between June and October 2016. In accordance with the practice just referred to, those appointments were made in writing (by email) by the operations department of the Charterers.

10. As port agents, the Agents made disbursements to third parties for items such as port dues, navigation dues, berth dues, pilotage dues and the like. They also charged agency fees in consideration of their services. The Agents invoiced the Charterers from time to time for these disbursements, as well as for their agency services. The invoices relevant to this appeal date from the period of June to November 2016. While they differ as to the items and amounts, they are all in the same format. Each identifies the Charterer as "*debtor*", identifies the *Lady Magda* as the ship and identifies "*Magda C/O Wijnne & Barends Cargadoors*" as owner.[2]

11. Such invoices were discharged by the Charterers until, at the end of 2016, difficulties began to emerge in terms of delayed/missed payments. The Charterers acknowledged these difficulties in March 2017 and in April 2017 the Agents and the Charterers entered

[2] Wijnne Barends is a shipping company who acted as agents to the Owners and it executed the 2016 charterparty on behalf of the Owners in that capacity. Two employees of Wijnne Barends gave evidence in the High Court.

into an agreement for the deferred payment of outstanding invoices. However, the Charterers did not adhere to the agreed payment schedule and the deferred payment agreement was terminated by the Agents. The Charterers were ultimately declared bankrupt in August 2017.

12. In April 2017, a law firm in Estonia wrote to the Charterers, copying the Owners, giving particulars of unpaid invoices amounting to €99,334.72, demanding payment of that amount and referring to the possibility of the arrest of the *Lady Magda* on foot of the "*maritime lien*" which, it was said, the Charterers were entitled to. That letter did not result in any payment being made and the firm wrote again in May 2017, notifying the addressees (the Owners now being the primary addressee, with the Charterers copied) that the *Lady Magda* would be arrested if the outstanding balance (now stated to be €95,381.49) was not paid within 3 days. To this the Owners responded by observing that they did not know the status of any agreed services as the *Lady Magda* had been chartered out to the Charterers and denied that the Owners were debtors of the Agents.

13. Proceedings were commenced in the High Court on 19 July 2017. The proceedings were issued here because the *Lady Magda* was then in port in Drogheda. The indorsement of claim claimed payment of €95,381.49 as the sum "*due in respect of disbursements made by the Plaintiff on behalf of the merchant vessel "LADY MAGDA" … and/or her owners which the Defendant has in breach of contract and/or duty failed, refused and/or neglected to pay.*" The indorsement recited that the Court had jurisdiction to hear the claim by virtue of the "*inherent Admiralty Jurisdiction*" of the High Court, the provisions of the Court of Admiralty (Ireland) Act 1867 as amended

("*the 1867 Act*") and the provisions of the Jurisdiction of the Courts (Maritime Conventions) Act 1989 ("*the 1989 Act*"), including Article 1(1)(n) of the International Convention Relating to the Arrest of Seagoing Ships ("*the 1952 Arrest Convention*") to which the 1989 Act gives the force of law in the State.

14. A warrant of arrest issued on 19 July 2017 and the *Lady Magda* was arrested on the same day. An appearance was entered and, on the lodging of €135,000 by way of security, the ship was released on 21 July 2017. The vessel was subsequently sold and appears to have since been renamed.

15. A Statement of Claim was then delivered which, on its face, appears to make a straightforward contractual claim against the Owners. Thus, it pleads that, on various specified dates, "*the Plaintiff agreed to provide the Defendant, at its request, with agency and other services when the Plaintiff's vessel arrived at [various specified ports]*" (my emphasis). It further pleads that the Plaintiff had requested the Defendant to pay the relevant amount for each of the services by way of invoice and pleads that "*in default of the terms of the said agreements*" the Owners had failed to pay.

16. However, when the Owners sought particulars of these "*agreements*", the Charterers seem to have changed tack, asserting that they had "*entered into an agreement to provide agency and other services to the Vessel at the request of Dennis Maritime Oy Ltd*" (my emphasis). The particulars referred to a series of emails sent by the Charterers to the Agents to which I shall refer below.

17. The Defence of the Owners largely traverses the Statement of Claim. However, the Defence expressly pleads that that there was no contractual relationship between the parties and that the claim in contract was misconceived. It also expressly denies that the Agents provided services to the Owners or at their request or to their benefit. It also pleads that it did not receive the relevant invoices at the time and became aware of them only in April 2017.

THE HEARING BEFORE THE HIGH COURT

AND THE JUDGMENT OF MCGOVERN J

The Evidence

18. The only witness called by the Agents was their managing director, Eduard Kekkonen. He had previously provided a witness statement which was adopted as his evidence in chief. In that statement, Mr Kekkonen briefly explained the Agents' relationship with the Charterers since 2012. He stated that the Agents knew that the *Lady Magda* was not owned by the Charterers but did not know the "*contractual or other relations (charter or ship management contract or other)*" between the Charterers and the Owners. That, he explained, was "*not customary*". According to Mr Kekkonen, it would take too much time to check each vessel's ownership and her related contractual relations between the various parties such as the owners, charterers and managers.[3] In any event (so Mr Kekkonen said) there was no need to do so given the security entitlements on which the Agents could and did rely, referring in this context to the 1952 Arrest Convention as well as the 1999 Arrest Convention and to the right of arrest given by those Conventions to "*vessels service providers*".

19. Ireland has not ratified the 1999 Arrest Convention and it therefore is of no relevance to these proceedings. As previously noted, the 1952 Arrest Convention is part of Irish law: see section 4 of the 1989 Act. The 1952 Convention is concerned only with issues

[3] Of course, it is apparent from the invoices already referred to that the Agents were in fact aware of the ownership of the vessel, at least to the extent that they knew that Wijnne Barends were agents of the Owners.

of jurisdiction and the entitlement to arrest ships. It does not create any cause of action: Article 9. That is a matter for the "*law applied by the Court which [has] seisin of the case*" – here, the High Court. In this context, it is important to note that while in his witness statement Mr Kekkonen made various assertions about Estonian maritime law (as well as the 1952 and 1999 Arrest Conventions), it does not appear that he was a lawyer and he certainly was not proffered as an expert in Estonian law. The High Court was not invited to determine the Agents' claim other than by reference to Irish law. That may seem somewhat surprising. There does not appear to be any plausible reason to suppose that Irish law ought to govern the claim of Estonian shipping agents against the Dutch owners of a ship plying its trade in the Baltic sea, under a charterparty with a Finnish company governed by Dutch law. After all, the proceedings were brought in Ireland not because of any substantive connection with the jurisdiction but because of the happenstance that the ship put into port in Drogheda and was arrested there. But, in the absence of any argument that some other law – whether Estonian, Finnish or Dutch – ought properly to apply (and evidence of what that law was), the Agents' claim necessarily falls to be determined by application of Irish law.[4]

20. An attempt was made to elicit evidence from Mr Kekkonen of the Agents' "*dealings with the captain*" but that was not permitted by the Judge as it went outside the parameters of his witness statement. No challenge to that ruling was made in this appeal.

[4] It follows that no issue concerning the recognition of a foreign maritime lien, such as confronted the Federal Court of Australia in *The Sam Hawk* [2016] FCAFC 26, [2016] 2 Lloyds Rep 639, arises in these proceedings. As is evident from the judgments in *The Sam Hawk*, that issue is one of significant complexity.

21. In cross-examination, Mr Kekkonen accepted that the invoices on which the claim is founded identified the Charterers as the "*debtor*".[5] He was not in a position to dispute that the first time that the Owners became aware of any claim being made against them was on receipt of the legal correspondence in April 2017.

22. Two employees of Wijnne Barends gave evidence on behalf of the Owners. Again, they provided witness statements that were adopted as their evidence in chief. In his statement, Willem Bos (the chartering manager) explained the background to the chartering of the *Lady Magda* (originally, the *Magda*) to the Charterers. The first charter party commenced from 8 January 2012. Mr Bos stated that in 42 years of experience in the industry, he did not recall ever having come across a situation where an agent who entered into an agency agreement with an operator of a vessel to provide agency services to a chartered vessel, sought to recover the fees for such services from the owners of the vessel. In cross-examination, Mr Bos stated that he had not seen the emails appointing the Agents (though he had seen "s*imilar emails*"*)* and was not aware of how such appointments were made or what the Charterers may have said to the Agents in that context. The Owners were not aware of the arrangements and payment made by the Agents "*because we just rented out the vessel to Dennis Maritime*."[6] Asked how that could be the case when the captain was the Owners' employee, Mr Bos stated

[5] It is suggested in the Agents' written submissions that the reference to the owners indicated that the invoices were for the Owners' account with the Charterers. That was not the evidence of Mr Kekkoken and it is not consistent with the clear designation of the Charterers (rather than the Owners) as "*debtor"* on the face of the invoices. Furthermore, the invoices were not sent to the Owners and no assertion of any liability on their part was made until after the Charterers began to exhibit signs of financial distress.

[6] Transcript, at page 22.

that "*this is a matter of the vessel being chartered out so it is not our contracts with the port., that is just between Dennis Maritime and the port.*" [7] In response to a question from the Judge, Mr Bos confirmed his familiarity with the time charter and confirmed his understanding that the obligations of the charterers were set out in clause 13. I shall refer to clause 13 below.

23. The second witness on behalf of the Owners was Heindrik Barr, the Chief Financial Officer. His witness statement was in terms very similar to that of Mr Bos, though Mr Barr could call on a mere 19 years of experience when observing that he too had never come across a claim such as that advanced against the Owners here. In cross-examination, he also stated that he had not seen the emails that had appointed the Agents. Asked whether the captain had accepted all the arrangements made by the Agents, Mr Barr stated that the captain was not involved because it was an agreement between the operator, the charterer and the agent. The captain was, he said, instructed by the operations department of the Charterers. A series of questions were then put to the witness to the effect that the master was employed by the Owners and, through the master, the Owners exercised full control of the vessel. That proposition (which in truth is a matter of law as much as of fact) was disputed by Mr Barr.

Judgement

24. In his Judgment, the Judge noted that the Agents' claim depended heavily on the judgment of Dr Lushington in *The Perla* (1858) 1 Swabey 353 and in particular the

[7] *Ibid*, at pages 22-23.

judge's statement that:

> "*[W]here goods are furnished for the use and benefit of a ship, the presumption is that the ship is liable, and to rebut this presumption, it must be distinctly proved that credit was given to the individual only, whoever he may be.*"

However, the Judge considered that *The Perla* was distinguishable. While the master of the *Lady Magda* was employed by the Owners, he was not their agent during the currency of the charterparty because he was subject to the directions of the Charterers. The master of *The Perla* had been involved in the arrangements there whereas in the present case there was no evidence that the arrangements had been entered into by the master. On the contrary, the evidence of Mr Kekkonen was that the services provided by the Agents were provided on foot of written appointments sent by the operations department of the Charterers. There was no evidence that the master had sought the services of the Agents or made any representations to the Agents about his authority to do so.

25. Following the authority of *The Avro Hunter* (Unreported, Finnegan J, 27 April 2004), the Judge concluded that the fact that the pleaded claim was for disbursements was not determinative of the liability of the Owners but went only to the issue of jurisdiction. The Agents had to establish a personal liability on the part of the Owners but had failed to do so. The claim was one for breach of contract but there was no evidence of any contractual relationship between the parties and, accordingly, the claim failed.

26. Following on his Judgment, the Judge directed the payment out of the security in Court. He refused to stay that Order and this Court also refused such a stay. As a result, the security was released back to the Owners. Accordingly, by the time the appeal came before this Court for hearing, there was no *res* against which any judgment that the Agents obtains may be executed.

THE APPEAL

Argument

27. According to the Agents' written submissions the "*central issue*" on this appeal is as follows:

> *"Where a ship's port agent makes disbursements to pay for pilotage, channel dues, fairway dues, navigation dues, canal dues, mooring and unmooring, berth dues, cargo dues, sanitary dues, port clearance and customs notification, agency fees, all of which are necessary for the ship to use the port, does that create a personal liability on the ship-owner in possession of the ship at the time the disbursements were made even though the ship was under a time charter the existence of which, much less its terms and conditions, was neither known nor made known to the ship's port agent."* [8]

28. Mr Wilde Crosbie for the Agents emphasised that they make no claim to any maritime lien. Instead, they have a statutory right *in rem*, referring particularly to sections 31[9] and section 33[10] of the 1867 Act. The Agents also say that they have a "*maritime claim*"

[8] Revised submissions, at page 1.

[9] Section 31 provides that the "*Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs".*

[10] So far as material to the appeal here, section 33 provides that the "*Court of Admiralty shall have jurisdiction … over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship."*

within the meaning of the Arrest Convention, relying specifically on Article 1(1)(k) and (n).[11]

29. The Agents accept that, in order to succeed in their claim, they must establish personal liability on the part of the owners for the outstanding debt. They say that the necessary personal liability is based on contract and arises from the fact of ownership. As of 2016, the *Lady Magda* was not *res nullius*. The disbursements made, and services provided, by the Agents were to the benefit of the vessel and were necessary for it to use the ports concerned. In the circumstances, the Agents were entitled to proceed on the basis that the requests made of them were made with the authority of the Owners, who were at all times in possession of the vessel as a matter of law. The disbursements made by the Agents came within section 33 and Article 1(1)(n) and therefore the Owners were properly accountable for them. Reliance was also placed on section 31 of the 1867 Act, it being said by reference to *The Mogileff* [1921] P 236 that, where monies were advanced for the purchase of necessaries by a person, that person had the same claim *in rem* as if they had supplied the necessaries directly.

30. The Agents once again place very significant reliance on the statement by Dr Lushington from *The Perla* which has already been set out in paragraph 24 above. That statement was not, it is said, limited to transactions in which the master of the vessel

[11] Article 1(1) defines "*[m]aritime claim*" as "*a claim arising from one or more of the following: … (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 agents on behalf of a ship or her owner*." Although subparagraph (k) may appear to be narrower in its scope than section 31 of the 1867 Act, in *The Nore Challenger* [2001] 2 All ER (Comm) 667, the Admiralty Court (Steel J) construed "*goods or materials*" as incorporating all necessaries.

was involved and the Judge (and, by implication, this Court in *The Almirante Storni*) had erred in so interpreting *The Perla.* Any necessaries supplied to or disbursements made on behalf of and/or the benefit of a vessel *prima facie* gave rise to a personal liability of the owners, regardless of any involvement of the master. The fact that the vessel was let on a time charter did not affect that liability. Citing *The Tolla* [1921] P 22, the Agents submit that it is only where the agent or supplier is on notice that the terms of the time charter limit the authority of the charterer and/or exclude the liability of the owner, that the owner can escape personal liability for such supplies or disbursements. Where the owner sought to derogate from a "*statutory right*" (as it was put) something like Lord Denning's "*red hand*" rule should apply.[12] Here, it was emphasised, the Agents did not even know that the *Lady Magda* was under a time charter, had no knowledge of the terms of the charterparty and thus had no reason to believe that their recourse to the Owners might be restricted or excluded.

31. The Agents also emphasise the fact that the Owners were at all times in possession of the vessel and that it remained under the control of the master. That was in contrast to the position under a demise charter, as in *The Avro Hunter.* When the master of a vessel was on deck (so it was said) "*it was as if the owner is standing there*." Reliance was also placed on the fact that the bills of lading were signed by the master of the *Lady Magda.* The effect of this was that the Owners were directly liable to the cargo-owners, reliance being placed on *Wehner v Dene Steam Shipping Company* [1905] 2 KB 92.

[12] Referring to *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461, where, speaking of contractual exemption clauses, Denning LJ observed that *"[s]ome clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient*."

Thus, it was said, in making the disbursements they did, the Agents had conferred a benefit on the Owners because the expenditure had enabled them to discharge their obligations to the cargo-owners. In accepting such benefit, the Owners had effectively ratified the appointment of the Agents and assumed liability to them. In support of that argument, reference was made to Article 17 of *Bowstead and Reynolds on Agency* (21st ed; 2017) ("*Bowstead & Reynolds*") and in particular the discussion by the learned editors of ratification by conduct/implied ratification.

32. According to Counsel for the Agents, the Judge had taken too narrow a view of the 1952 Arrest Convention and had misunderstood the import of *The Avro Hunter*. All the Agents had to do was to establish that they had supplied, or funded the supply, of necessaries to the vessel. That was established by the invoices and it would completely undermine the "*statutory scheme*" not to allow the Agents to have recourse to the Owners.

33. For the Owners, Mr Jeffers disputed the suggestion that any presumption of personal liability could arise in the circumstances here. No such presumption arose from the 1867 Act or from the 1952 Arrest Convention. The former was concerned only with jurisdiction and the latter with jurisdiction and the availability of arrest. The Agents' submissions conflated the issue of jurisdiction on the one hand and the issue of substantive liability on the other.

34. Counsel referred to the pleaded claim. There was no claim that any request for services made by the Charterers had been made with the actual or ostensible authority of the

Owners. The claim was clearly based on an alleged agreement between the Agents and the Owners for the provision of agency services but the evidence did not establish any agreement. The services had been provided at the request of the Charterers and the invoices had correctly identified the Charterers as debtor. There was no evidence that the invoices had been sent to the Owners. It was only when the Charterers failed to pay that the Agents looked to the Owners for payment. The onus was on the Agents to satisfy the Court that the Owners had a personal liability as a matter of Irish law (in the absence of any reliance on foreign law). According to Counsel, *The Perla* did not support the broad proposition advanced by the Agents. Furthermore, even if there was any presumption that the Owners were liable, that presumption was rebutted on the evidence here. That evidence established that any credit extended by the Agents was in respect of the Charterers only. On their evidence, they had not sought to ascertain the identity of the Owners. They could have inquired of the Charterers whether they had the Owners' authority to appoint port agents but had not done so.

Discussion

Maritime liens and statutory claims in rem

35. A maritime lien is a *sui generis* creature of maritime law. It is "*a charge upon maritime property, arising by operation of law and binding the property even in the hands of a bona fide purchaser for value and without notice, but which can only be enforced by an*

Admiralty claim in rem."[13] In this part of the common-law world at least,[14] only a very limited class of claims have been recognised as giving rise to a maritime lien, some at common-law (damage done by a ship, salvage, seamen's wages and bottomry and *respondia*) and others created by statute (master's wages and disbursements).[15]

36. What the Agents assert here is a statutory right or claim *in rem*. Such claims arose from the extension of the jurisdiction of the Admiralty Court in the mid-19th Century, effected in this jurisdiction by the 1867 Act. While they are sometimes referred to as *"statutory liens*", they are not true maritime liens. The 1867 Act did not create any additional maritime liens "*but merely conferred jurisdiction upon the Court of Admiralty in cases in which it did not possess jurisdiction before*": per Lord Herschell LC giving the principal speech in *The Castlegate* [1893] AC 38 (citing the earlier decision of the House of Lords in *The Sara* (1889) 14 App. Cas 209 which, as the Lord Chancellor observed, applied equally to the 1867 Act). Such claims are, in substance, unsecured *in personam* claims, though, by reason of the provisions of the 1867 Act, they may be enforced *in rem*, so that jurisdiction may be founded on service on the ship and the ship may also be arrested so as to provide security for the claim.[16] The "*nature and legal incidents*" of such claims were not, however, altered by the Admiralty Court Acts.[17]

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[13] Meeson & Kimbell, *Admiralty Jurisdiction and Practice* (5th ed, 2018) at para 1.43. The discussion in the following paragraphs (para 1.44 – 1.48) is also valuable.

[14] It appears that a more expansive approach is adopted in the United States.

[15] As noted by McGovern J in *The Almirante Storni*, claims for bottomry are now obsolete.

[16] Aptly described in *The Sam Hawk* [2016] FCAFC 26, 2 Lloyd's Rep 639 as "*a .. class of unsecured general maritime claims that could crystallise into quasi-secured status at the point of action in rem*." (at para 72, per Allsop CJ and Edelman J)

[17] Per Lord Watson in *The Henrich Bjorn* (1886) 11 App. Cas 270, at 278, referring to section 6 of the Admiralty Court Act 1840 (3 & 4 Vict, c.65)

37. While certain maritime liens may arise independently of any personal obligation of the owner – such as those for the wages of master and crew – these constitute "*an exception from the general principle of the maritime law*" which is that "*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*": per Lord Watson in *The Castlegate* [1893] AC 38, at 52.[18] The discussion in *The Mogileff* [1921] P 236 is perhaps particularly illuminating:

> *"[I]t is well to warn oneself, as one has often to do in this Court, not to be misled by our habit of personifying the ship. We speak of a ship being to blame, when we mean that some person is guilty of negligence in relation to the ship. We speak of advances to a ship, when we mean that money is lent for ship's purposes to some person who becomes liable as debtor. It is convenient to speak in brief of advances made upon the credit of the owner as advances made upon the credit of the ship. <u>But it is an essential element of all actionable claims for necessaries that there should be a debtor, liable in personam. This personal liability may or may not be enforceable by proceedings in rem against the ship. But a proceeding in rem is only machinery for enforcing a right in personam. There is no such</u>*

[18] Again, it appears that a different approach may be taken in the United States. In their joint judgment in *The Sam Hawk* [2016] FCAFC 26, 2 Lloyd's Rep 639, Allsop CJ and Edelman J observed that "*the recognition of a maritime lien – its nature, character and priority – is informed by maritime legal policy, sometimes universal, sometimes national*." Different theories underpin different national regimes. In the United States, the scope and effect of maritime liens reflect the personification theory. As will be apparent from the passage from *The Mogileff* cited above, the personification theory has not generally held sway on this side of the Atlantic.

thing in a necessaries case as an advance upon the credit of the ship detached from the credit of some person who is personally liable as debtor." (at 242-243; my emphasis)

38. In *The St Merriel* [1963] P 247, Hewson J stated that it "*is a fundamental rule that the basis of maritime liens lies in the personal liability of the owner*" (at 256). That statement was cited and applied by Finnegan J in *The Avro Hunter,* which was in turn applied by the Judge in these proceedings and also cited with approval by this Court in *The Almirante Storni.*

39. Here, the Agents variously characterise their claim as a claim for necessaries supplied to the ship and as a claim in respect of disbursements made on its account. There is a close relationship between the two.[19] Although the claim is characterised as a claim for disbursements, it is not said that the claim gives rise to a maritime lien, presumably because the disbursements here were made by the Agents and "*there is no maritime lien for disbursements incurred by a shipper, charterer or agent.*" [20] In any event, the disbursement lien is not absolute in character and depends on the personal liability of the owner. That was the core holding in *The Castlegate*. A claim for necessaries does not give rise to a maritime lien. [21]

[19] See Thomas, *Maritime Liens* (1980) at para 360, where the author explains that a service rendered or thing supplied may invoke the law relating to disbursements or necessaries "*depending on the precise role adopted by the master*." Where "*the master takes the chattel or service on the credit of the shipowner*" the supplier's remedy will be a claim against the shipowner for necessaries. The emphasis on the role of the master is significant, having regard to the arguments being advanced by the Agents here.

[20] Meeson & Kimball, *op cit,* at para 2.136, citing *The Zafiro* [1960] P 1.

[21] Meeson & Kimball, *op cit,* at para 2.175, citing *The Heinrich Bjorn (*1885) LR 10, PD 44 (Court of Appeal)

40. Thus, regardless of whether it is characterised as a claim for necessaries or a claim in respect of disbursements, the claim made here requires the Agents to establish personal liability on the part of the Owners and the provisions of the 1867 Act on which they rely do not relieve them of that requirement.

41. The requirement for personal liability is accepted by Mr Wilde Crosbie, though he seemed also to suggest that such liability somehow arises expressly or by implication from the provisions of the 1867 Act and/or the 1952 Arrest Convention. Thus, it is said, the Agents had a "*statutory right*" from which the Owners are seeking to derogate. It was also suggested that the "*statutory scheme*" would be "*completely undermined*" if the Owners were permitted to escape liability here. The Agents' written submissions go so far as to suggest that "*on a literal construction*", the relevant provisions of the 1867 Act "*make the ship and her owner liable*" for necessaries (and presumably for disbursements also).[22] These submissions are, in my view, mistaken. The relevant provisions of the 1867 Act address issues of jurisdiction and remedy only, not issues of liability. As already discussed, a statutory claim *in rem* arises in respect of necessaries or disbursement only where the personal liability of the owner is established. No presumption of such liability arises from the fact that a claim is so framed as to come within the scope of the 1867 Act. The burden to establish the necessary personal liability of the owner at all times rests on the claimant.

[22] Paragraph 3

The 1952 Arrest Convention and "maritime claims"

42. That position is not altered by the 1952 Arrest Convention. Its purpose was to agree "*certain uniform rules of law relating to the arrest of seagoing ships*." [23] In many civil law countries, ships were liable to attachment in support of non-maritime claims. The Convention confines the power of arrest to "*maritime claims*" as defined. No reference to maritime liens is to be found in the Convention, other than in Article 9 which makes it clear that the Convention does not create any rights of action or any maritime liens.[24] The Convention is entirely silent as to the "*nature and legal incidents*" of maritime claims in national law. That being so, I do not accept the Agents' submission that Article 1(1)(n) is to be read as providing or implying a right to proceed against a ship "*without any condition as to ownership.*" Whether such a right arises is a question for the law of the relevant Contracting State – here the law of Ireland[25] – and cannot be reverse-engineered from the provisions of Article 1(1) of the Convention.

The Alleged Personal Liability of the Owners Here

43. How then is the personal liability of the Owners said to arise here? The Judge characterised their claim as one based on breach of contract and that finding has not

[23] Preliminary recital to the Convention.

[24] "*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 had 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*."

[25] Or such other law as might be applicable under Irish conflict of law rules. As already noted, no such issue arises here.

been contested on appeal.[26] The Judge found that there was no evidence of a contractual relationship between the Agents and the Owners. On the application of ordinary principles of Irish contract law, that conclusion appears inevitable. The request for the provision of services by the Agents was made by the Charterers, not by the Owners.[27] The terms and conditions were agreed between the Charterers and the Agents, with no involvement on the part of the Owners. The invoices raised by the Agents were sent to the Charterers (and only to them) and identified them as the "*debtor*" and, at least until they began to experience solvency issues, they were discharged by the Charterers. It was only when those solvency issues had become acute that the Agents first looked to the Owners for payment. It was not suggested that, in engaging the Agents, the Charterers were acting as agents of the Owners or were understood by the Agents to be acting in that capacity.

44. However, the Agents say that what is effectively a special rule applies in the circumstances here, a rule encapsulated in the passage from *The Perla* already set out. The services paid for and/or provided by the Agents here were, it is said, furnished for the use and benefit of the *Lady Magda* and that gives rise to a presumption that the ship (and therefore the Owners) are liable. While the Owners might escape such liability if they could show that the Agents were aware of the time charter and of its terms, that has not been shown here and therefore, it is said, the Agents are entitled to succeed in their appeal.

[26] Written submissions, at page 2

[27] As indeed was pleaded in explicit terms by the Agents in their replies to particulars.

45. This argument critically depends on the correctness of the Agents' reading of *The Perla* and so it is appropriate to turn directly to it. *The Perla* involved a claim for necessaries (in the form of copper sheathing) made against a Spanish ship by ships agents in England. The report records that in support of their claim the agents deposed that the master of the ship had attended at their offices in Liverpool, accompanied by a Mr Bell who introduced him (the master not being an English speaker) and who placed the order "*according to the practice common in such cases*". The evidence of the agents was that credit had not been given to Mr Bell but to the master as representing the owners and that is how the order was recorded at the time as a matter of fact. Further the bill had been sent to the master (and not to Mr Bell) headed "*Captain Andipoechia and owners of the Perla*". The owners pleaded that the credit had in fact been given to Mr Bell or, if not, that the credit had been entered to the ship as a result of fraud. Dr Lushington characterised as a "*question of fact*" the question of whether the credit for the item supplied had been given to the ship or to Mr Bell. He then made the statement relied on by the Agents here, namely that where goods are furnished for the use and benefit of a ship, the presumption is that the ship is liable.

46. It appears to me that, on any fair reading of the judgment of Dr Lushington, the involvement of the master was critical to his finding on liability. The agents' claim was advanced on the basis that they had given credit to the master as representing the owners, the order had been so recorded at the time and the bill was duly sent to the master for the owners. These features cannot be regarded as incidental or irrelevant – they were in fact central to the claim made, which was to the effect that the agents were entitled to regard the master as authorised to pledge the credit of the shipowner. In the

circumstances, the statement of Dr Lushington as to the presumption of liability of the ship must, in my view, be read and understood as referring to the goods furnished at the request (or apparent request) of the master. I do not read *The Perla* as authority for any broader principle of owner liability and it is notable that the Agents have not identified any subsequent decision or academic commentary supportive of any such principle.

47. That *The Perla* turned on the involvement of the master is consistent with the earlier decision of Dr Lushington in *The Alexander* (1842) 1 W. Rob. 347. It involved a claim for payment for an anchor and chain supplied to the ship at the request of the master. The claim failed because the "*material men*" failed to prove that the items were in fact needed by the ship, it being well-supplied with anchors. There was a prior issue, however, namely whether the items in question had been supplied "*for the service of the vessel and upon the credit of the owner*", it being suggested that they had been ordered by the master for his own account. Dr Lushington identified as the principle upon which an owner of a ship is made responsible for necessaries furnished to a ship as follows:

> *"[I]t is this, that in the employment of the ship the master is the agent of the owner, and his character and situation furnish a presumption that he has the authority from the owner to take all measures that may be necessary for rendering the employment of the vessel efficient and beneficial to his employer."*

The Alexander was not referred to in *The Perla* but the passage above is entirely consistent with the approach taken in the later case – in each case, the owner's liability rests on the presumed authority of the master.

48. Subsequent decisions have also focussed on the involvement and authority, express and/or apparent, of the master as agent of the shipowner.

49. *The Turgot* (1886) 11 PD 21 involved a claim by the master for disbursements made by him for necessaries in circumstances where the ship was under a time charter. The charterparty provided that the owners were to provide and pay for provisions and wages, whereas the charterers were to provide for coal and other expenses. The master was subject to the instructions of the charterers. The master purported to pledge the credit of the owners for the provision of coals (*inter alia*). The judge held that, whereas the master was the agent of the owners in providing such necessaries as were, by the terms of the charterparty, to be paid for by the owners (because "*in regard to them he was in the ordinary position of a master in respect of his owners*"), he was the agent of the charterers in providing necessaries for which they were to be responsible. The provision of coals being the responsibility of the charterers, the master had no authority to pledge the owners' credit in respect of them. Rejecting an argument that the master had *implied* authority to pledge the owners' credit as their agent *ex necessitate* in order to enable the ship to sail, the judge observed that, under the charterparty the charterers were bound to pay for the hire of the vessel during any detention and thus the owners had no interest in obtaining its immediate departure.

50. The master's claim therefore failed in respect of the provision of coals. It was, of course, a claim made by the master rather than by the coal supplier and the judgment notes that a copy of the charterparty had been provided to the master following his appointment.

51. Next is *The Castlegate.* This was an Irish case that ended up in the House of Lords and the decision of the Irish Court of Appeal is reported at 29 Law Reports (Ireland) 55. Like *The Turgot,* it involved a claim for disbursements by the master in respect of the provision of coal to a vessel under time charter. However, in the period since *The Turgot* had been decided, the Merchant Shipping Act 1889 had been enacted by Parliament to reverse *The Sara* and to create a maritime lien in respect of masters' disbursements. The nature and scope of the disbursements lien created by the 1889 Act was a significant issue before both the Court of Appeal and the House of Lords (with both courts concluding that the lien did not operate to permit a claim against the ship in the absence of personal liability on the part of the owners).[28]

52. Ultimately, the claim failed on the basis that, under the charterparty, it was the charterers' obligation to provide and pay for coals. The master was aware of the terms of the charterparty, as were the agents who had supplied the coals (and their claim

[28] As it was stated by Lord Watson, "*no liability capable of carrying a lien on ship can be properly incurred by a master on account of ship in the absence of express or implied authority from the owner*." (at 53). Referring to the decision in *The Turgot*, Lord Herschell stated that "*disbursements made by the master on account of the ship must be limited to disbursements which he had a right to make on the credit of the owners of the ship, and did not extend to disbursements made by him for purposes for which the charterers ought to have made provision, even though in a sense they might be said to have been made on account of the ship*" (at 47). In Lord Herschell's view that was the law prior to the decision in *The Sara* and the 1889 Act had simply restored that position.

against the owners had failed on that basis).[29] The position here is, of course, different. There is no evidence here that the Agents were aware of the terms of the charterparty and their evidence was that they were as a matter of fact unaware that there was a charter. Nevertheless, *The Castlegate* is important in terms on its focus on the authority, express and implied, of the master as agent of the owners.[30]

53. *The Tolla* [1921] P 22 was a claim for necessaries where, according to Hill J, "*the only question [was] whether the master had actual or apparent authority to pledge the credit of his owners*". [31] Hill J considered that the apparent authority of the master to pledge the credit of the owners for necessaries that, under the time charter, were to the account of the charterers rather than the owners, was not affected in circumstances where it was not suggested that the brokers who had supplied the necessaries involved were aware of the terms of the charterparty and where the judge in fact found that they were unaware that there was a time charter at all. Referring to the master's evidence that he had told the brokers that he had an owner and also had a time charter, Hill J stated:

> "*In that there is nothing in my view, supposing it to be true, which would take away from the master, vis-a-vis the plaintiffs, his apparent authority to pledge the owners' credit, because the mere fact that there is a time charter does not by*

[29] See the judgment of Lord Ashbourne, at 68.

[30] In the Court of Appeal, Barry LJ stated that the "*liability of the owners of a vessel for contracts made by the master for necessaries supplied or repairs done to the vessel or the like, is nothing but a simple instance or illustration of our general law of principal and agent by which a principal is bound by the contracts entered into on his behalf and on his credit by his authorised agent*" (at page 77).

[31] At page 24. Absent such a liability, there could not be a remedy *in rem* against the ship: *ibid*

itself affect the master's apparent authority to pledge the owners' credit. By the terms of the charter it might be that the whole of the expenses fell to the charge of the owners." (at 24)

Again, the emphasis on the apparent authority of the master is to be noted. I will come back to the question of whether the fact that the vessel was let on time charter affected (or ought to affect) the master's apparent authority.

54. While *The Mogileff* did not involve a time charter it again illustrates that the key issue in this context is the authority of the master, Hill J observing that "*one who supplies to a ship, upon the order of the master, necessaries which it is not within the actual or apparent authority of the master to order on the credit of the owner, has no right to recover against the owner by way of proceedings whether in personam or in rem.*"

55. In this Court's decision in *The Almirante Storni*, the Court considered that cases such as *The Perla* and *The Tolla* turned on the involvement of the master. Though that view is said by the Agents to be in error, in my opinion the review of the authorities above clearly confirms the correctness of that conclusion.

56. As the evidence does not disclose any involvement whatever by the master in the transactions at issue here, no presumption of any liability on the part of the owners arises on the basis of *The Perla*. The services were requested by the Charterers and, as I have already observed, there has been no suggestion that the Charterers were

authorised to act as agent of the owners in this context or that the Agents understood them to be so authorised.[32]

57. In fact, the charterparty here makes it clear that the Charterers were obliged to "*provide and pay for*" all of the services provided by and/or paid for by the Agents. Clause 13 provides that, unless otherwise agreed, the Charterers "*shall provide and pay for the costs of the following throughout the currency of this Charter Party*", with reference then being made (*inter alia*) to "*Voyage expenses*" and "*Agency Costs.*" "*Voyage expenses*" are further defined/explained as including "*All port charges (including compulsory charges for shore watchmen and garbage removal) light and canal dues, pilotage, towage, consular charges, and all other charges and expenses relating to the cargo and/or to the Vessel as a result of her employment hereunder, other than charges or expenses provided for in Clause 11.*" The charterparty (which is governed by Dutch law) also provides (in clause 12) that the master, though appointed by the Owners, "*shall at all times during the currency of this Charter Party be under the orders and directions of the Charterer as regards employment, agency or other arrangements.*"

58. Having regard to what was decided in *The Turgot* and *The Castlegate,* it is apparent that the master here had no *actual* authority to pledge the credit of the Owners in respect of costs and expenses coming with clause 13 of the charterparty. Nevertheless, the

[32] The Agents presumably relied on the Charterers, with whom they had been dealing in relation to various vessels for a number of years. Beyond that, the evidence of the Agents was to the effect that they provided the requested services on the basis of their understanding that, as a matter of law, they would have a right to arrest the ship in the event of default of payment. Whatever the correctness of that understanding as a matter of Estonian law, it does not correctly reflect Irish law.

decision in the *The Tolla* indicates that such would or may have been within the master's *apparent* authority. While that issue does not arise for determination on the facts here, I hope that I may be forgiven for making some observations about it.

59. The presumptive authority of the master to pledge the credit of the shipowner (and the corresponding obligation of the shipowner to answer for it) was, no doubt, a necessary construct to facilitate the development of maritime trade in times before modern communications technology that permits instantaneous communication – including electronic transfer of funds – across the globe. The security of the ship provided the necessary comfort to allow the provision of goods and services in circumstances where a vessel might be thousands of kilometres from its home port and where timely communication with its owners was impossible and where the supplier might have to wait a considerable time for payment. That is not the world in which we now live.

60. Separately, it is increasingly common that ships operate on charter. The time charter is "*one of the legal backbones of the deployment of vessels in international maritime commerce.*" [33] A common feature of time charters is that charterers are responsible to provide and pay for (*inter alia*) port expenses: see for instance, Coughlin *et al*, *Time Charters* (7th ed, 2014) at 1.29(3). Clause 13 of the *Gentime* form is thus typical in its allocation of responsibility for such expenses. It is also a normal feature of a time charter that the master, though usually appointed by the owner, is subject to the instructions of the charterer. That is also the position pursuant to the *Gentime* form: clause 12.

[33] *The Sea-Hawk* at 76 (per Allsop CJ and Edelman J)

61. Given these developments, it might be thought anomalous and anachronistic to continue to regard the master of a ship as having the apparent/ostensible authority of the shipowner to pledge its credit in circumstances such as those here. Certainly, that seems to have been the view of the Court of Appeal of England and Wales in *Marina Shipping Ltd v Laughton* [1982] 1 QB 1127, which Mr Wilde Crosbie brought to the Court's attention in the course of his reply. There the issue of the ostensible authority of the master arose in the rather unexpected setting of an application for an interim injunction to restrain the "*blacking*" of a ship – the refusal by lock-keepers to operate the locks necessary to allow the ship to leave port – in a dispute about rates of pay for the crew. The central issue was whether the action of lock-keepers was unlawful secondary action and that in turn depended on whether there was a contract between the port authority (the employers of the lock-keepers) and the shipowner for the provision of port services. If there was such a contract, then the withdrawal action would not be unlawful for the purpose of the Employment Act 1980.

62. The ship, *The Antama*, had berthed in Hull, the arrangements having been made by local shipping agents. The ship was let on a time charter, that (as here) required the charterers to provide and pay for (*inter alia*) "*port charges*" and "*pilotages*". The local agents had been engaged by agents of the charterer. The local agents had not made it clear to the port authority who they were acting for and the key issue was whether they had contracted on behalf of the owners or on behalf of the charterers. The following passage from the judgment of Lawton LJ warrants extensive quotation:

"*Mr. Hoffmann has put his case in this way. He started by stating that, where a vessel is on a time charter, the master, prima facie, at any rate, is the agent of the owners and, as such, he has ostensible authority, from the fact of being appointed the agent of the owners, to authorise expenditure on their behalf. Mr. Hoffmann went on to point out that one of the most obvious duties a master has is to go into port from time to time and, certainly so far as British ports are concerned, whenever a master takes his vessel into a port there are almost certainly port charges and dues to be paid and ostensibly, says Mr. Hoffmann, the master is authorised to undertake on behalf of the owners that the charges and dues will be paid.*

That was an attractive proposition as enunciated by Mr. Hoffmann, but it lacks any legal authority. He invited our attention to a case in 1682 in the reign of Charles II. It is a case entitled the Mayor and Commonalty of London v. Hunt *(1682) 3 Lev. 37, and it related to who was responsible for paying the tolls for a ship which was moored in the Thames to the east of London Bridge. The Exchequer Chamber adjudged that the master of the ship was. That is a very long way away from saying that a master has ostensible authority from the owner whenever a ship is on time charter to pledge the credit of the owner for harbour dues. The reason is that times have changed since then generally and, in particular, in the shipping world. Mr. Hoffmann accepted that we can take judicial notice of the fact that nowadays ships are frequently on charter. Mr. Buckley went a little further and invited us to take judicial notice of the fact that more often than not they are on charter. I am not, for my own part, prepared to go as far as Mr. Buckley wanted me to go in taking judicial notice, but I am*

> *prepared to take judicial notice of this, namely, that ships which are engaged in deep water traffic - I deliberately exclude coaster traffic - may be under the control of the owner, they may be under the control of somebody to whom they have been demised, or they may be under the control of charterers under time charters. Nowadays in general there can be no certainty as to who is controlling a particular ship until inquiries have been made. I am also prepared to go along with Mr. Hoffmann, and indeed with Mr. Buckley, to this extent, that when a master comes into port he may well have, and probably has, ostensible authority to pledge the credit for dock charges on behalf of whoever is in control of the ship, but whoever is in control is not necessarily the owner. No port authority, in my judgment, ought to assume in every case that the master of a ship is pledging the credit of the owner.*" [34]

The emphasis throughout this passage on the role of the master is notable.

63. Later in his judgment, Lawton LJ noted that there was no holding out by the owners that the ship's master had their authority to incur expenses for port dues. The local agents had "*no authority of any kind from the owners to contract on their behalf*." As for the argument made on the union's behalf that entering the dock amounted to a ratification by the master of the contract with the port authority, that argument depended on the proposition that the master had ostensible authority from the owners to pledge their credit for harbour dues which the judge found "*a very difficult proposition to accept and I do not accept it as a general rule of law*", noting that no authority

[34] At 1141B-G.

supporting such a proposition had been identified.[35] The master did not, and could not, ratify what had been done by the local agents and the port authority had no claim against the owners because they had no contract with them.[36]

64. The same approach was taken by the Court of Appeal in *Mercur Island Shipping Corporation v Laughton* [1983] 2 AC 570 and its decision was upheld on appeal to the House of Lords.

65. As I have already noted, the master here did not have any *actual* authority of the Owners to contract on their behalf, and on their credit, for the provision of port or agency services. It was expressly the responsibility of the Charterers "*to provide and pay for*" such services under clause 13 of the charterparty. In the absence of any specific representation by the Owners as to the authority of the master (and there was no suggestion of any such representation here), the *ostensible* (or *apparent*) authority of the master – the authority of the master as it *appears* to others – derives from the usual or presumed authority arising from his appointment as such. In such cases, "*the only representation made by the principal lies in putting the agent in a position carrying with it a usual authority*", that is to say "*the authority which a person normally possesses in certain circumstances to act on behalf of another person, whether or not he is actually authorised to do so.*" [37] Such representation by appointment is therefore a form of representation by conduct.[38]

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[35] At 1143A.

[36] At 1143B-C.

[37] See *Bowstead & Reynolds*, at para 3.005.

[38] *Ibid*, at para 8-015.

66. Whatever may have been the position when *The Tolla* was decided a century ago, the proposition that, in 2020, the master of a ship is generally to be regarded as having the *ostensible* authority of its owners to pledge their credit for categories of expenses/disbursements that, where the ship is let on a time charter, he has no *actual* authority to contract for on the owners' behalf, does indeed appear to me to be "*difficult*". The actual and apparent authority of an agent ought normally to coincide.[39] Apparent authority ought not to be a form of fiction, deriving from assumptions as to the actual authority of agents that no longer correspond with reality.

67. As Laughton LJ observed in *Marina Shipping v Laughton,* "*nowadays in general there can be no certainty as to who is controlling a particular ship until inquiries have been made*." Had the brokers in *The Tolla* been told that the ship was under time charter (and, it will be recalled, Hill J did not accept that they had), it is not easy to understand why that information ought not to have prompted an inquiry as to the terms of the charter and its impact on the authority of the master. But even if such an inquiry might not have been considered reasonable or necessary in 1920, it must surely be essential in 2020, in circumstances where the usual authority of the master <u>as agent of the owners</u> has diminished significantly in the intervening period.[40]

68. Here, there is no evidence that the Agents were aware that the *Lady Magda* was let on a time charter. However, they *were* aware that the Charterers (with whom they had

[39] *Ibid*, at para 8-013.

[40] *Ibid*, at pars 8-053 – 8-054.

extensive dealings over a number of years) were not the ship's owners. It was open to them to ask the Charterers to explain the basis on which they were operating the ship and in due course to look for a copy of the charterparty. They could have insisted on the Charterers providing some form of security for their liabilities to the Agents. Alternatively, they could have contacted the Owners (via Wijnne Barands) to seek their confirmation that they would be liable for services provided to the Charterers. Even if the master had been involved in the engagement of the Agents here (and there is no evidence to that effect), it appears to me that a compelling argument to be made that, in such circumstances, the Agents would have been put on inquiry and thus would not have been entitled simply to assume that the master was authorised to pledge the credit of the owners for the services they were being asked to provide.[41] Whether and in what circumstances any wider duty to inquire might arise (if, for instance, the Agents had not been aware that the Charterers were not the Owners) need not detain us here.

69. In the circumstances, I would reserve to another day the question of whether *The Tolla* should be followed.

Ratification

70. The Agents' alternative argument – that the Owners accepted the benefits of the expenditure incurred and services provided by the Agents and thus effectively ratified their appointment and assumed liability to them – must now be considered.

[41] See in this context the (*obiter*) observations of McGovern J in *The Almirante Storni*, at para 44.

71. In support of that argument, reference is made to Article 17 of *Bowstead & Reynolds*. It states that ratification may be express or implied. Implied ratification may arise from words or conduct, provided it is unequivocal. Receiving or retaining money paid under a contract, or the use of goods received under it, may constitute ratification of that contract. According to the editors, "*there are few cases where a person can keep another's property, or benefit otherwise at the expense of the another, without paying, unless he is unaware of the circumstances.*"[42] Ratification can arise from inactivity or acquiescence "*where the principal 'allows a state of affairs to come about which is inconsistent with the treating the transaction as unauthorised*'".[43]

72. Article 13 of *Bowstead & Reynolds* articulates the general principle of ratification as follows: "*Where an act is done purportedly in the name of or on behalf of another by a person who has no actual authority to do that act, the person in whose name or on whose behalf the act is done, may, if the third party had believed the act to be authorised, by ratifying the act, make it as valid and effectual … as if it had been originally done by his authority, whether the person doing the act was an agent exceeding his authority, or was a person having no authority to act for him at all.*" [44]

73. The ratification argument thus depends on the Charterers being regarded as having acted as agent of the Owners but having done so without, or in excess of, any actual authority from the Owners. However, there is no evidence that the Charterers here

[42] *Ibid*, at 2-0775

[43] *Ibid*, at 2-0779 and footnote 457.

[44] *Ibid*, para 2-2047

contracted with the Agents "*purportedly in the name of or on behalf of*" the Owners. On the contrary, all the evidence indicates that the Charterers contracted on their own behalf and the Agents did not make any contrary case in the High Court. It follows, in my opinion, that there is simply no scope for the application of the principle of ratification here.

74. In any event, even if the Charterers had held themselves out as the agents of the Owners, the ratification argument founders when one has regard to the terms of the charterparty. Under it, the Charterers were obliged to provide and pay for (*inter alia*) "*voyage expenses*" and "*agency fees*". Clearly, the Charterers were free to make the necessary arrangements with port agents to allow the *Lady Magda* access to port. But the fees and expenses involved were not the responsibility of the Owners and, insofar as it might be said that the Owners "*benefitted*" from the Charterers incurring liability for such fees and expenses, they had a contractual entitlement to such "*benefit*" under the charterparty. In such circumstances there is no question of the Owners having been enriched in any way at the expense of the Agents. In bringing the *Lady Magda* to port, the master was not acting on the instructions of the Owners but was "*under the orders and directions of the Charterers*": clause 12. In any event, bringing the *Lady Magda* to port did not in fact confer any benefit on the Owners. Their remuneration under the charterparty was not conditional upon or linked to the ship's trading activities. Rather, hire was payable by the Charterers at the stipulated rate of "*€2,700 per day pro rata net of commission*"*:* clause 8(a). Their position was therefore the same as the owners in *The Turgot.*

75. In these circumstances, the Agents have failed to identify any action, or inaction, on the part of the Owners that could plausibly be said to amount to an adoption by the Owners of the contract between the Agents and the Charterers and/or an assumption by the Owners of the liabilities of the Charterers under that contract.

76. That conclusion is not affected by the fact – if fact it be – that the Owners may have had some potential exposure to claims by the cargo-owners under the bills of lading. In the first instance, I cannot see any basis on which the Agents might be permitted to rely on the terms of the bills of lading (to which they were not a party and which were not put before the court) to seek to establish the liability of the Owners to them under a separate contract (to which the Owners were not a party). No argument was addressed to that issue by the Agents. Secondly, I cannot see any basis on which the bills of lading could be said to alter the respective rights and obligations of the Owners and Charterers under the charterparty. No argument was addressed to that issue either.

77. Accordingly, the ratification argument fails.

The Almirante Storni

78. The claim is in very similar terms to the claim made in *The Almirante Storni.* It is said on behalf of the Agents that the facts are different in that, in *The Almirante Storni*, the agents had had "*two streams*" of communication, one with the charterers and one with the owners. That is undoubtedly the case but I do not consider that it constitutes a significant difference from the facts here. Here, while they appear to have had no direct

dealings with the Owners in the course of 2016, the Agents were aware that the Charterers were not the owners and were aware of the identity of the Owners (or, at least, of their agents). The key fact here, as it was in *The Almirante Storni*, is that the Agents knew that they were not dealing with the Owners and did not claim to have understood the Charterers to be acting on behalf of the Owners.

79. Here, as in *The Almirante Storni*, the master was not involved in the arrangements between the Agents and the Charterers. That was regarded by McGovern J as an important point, given that, in his view, cases such as *The Perla* and *The Tolla* turned on the involvement of the master: at para 56. That is said by Mr Wilde Crosbie to have been a misreading of *The Perla*. As will be evident from the discussion above, I do not agree. This Court's decision in *The Almirante Storni* also indicates that the argument that the Judge here misunderstood the import of *The Avro Hunter* is without merit. It is the case that *The Avro Hunter* involved a demise charter. However, the significance of the decision for present purposes lies in its clear endorsement of the general principle that the basis of maritime liens lies in the personal liability of the owner. In *The Avro Hunter* the application to arrest was refused because the claimant had no claim against the person who owned the vessel at the time the proceedings were instituted and therefore no right to arrest the vessel. If the demise charter had not been terminated prior to the institution of the proceedings, a right to arrest would have arisen. That is unexceptional. The claim arose from fuel supplied to the demise charterer and thus gave rise to a statutory claim *in rem* for necessaries. However, that claim was lost when proceedings were not instituted during the currency of the demise charter, the termination of such a charter amounting to a change of ownership. The position would

have been different had a true maritime lien arisen. The facts here are materially different. The Charterers were time charterers only. They were never regarded in law as owners of the *Lady Magda* and, for the reasons I have explained, their liability to the Agents did not provide any basis for the Agents to assert any lien or statutory claim *in rem* against the vessel or the Owners.

80. I do not accept the contention that this Court's decision in *The Almirante Storni* is distinguishable. We have not been asked to depart from it as a matter of principle and, in any event, far from demonstrating that the decision in *The Almirante Storni* was wrong, in my view the arguments advanced on this appeal serve only to confirm that the decision was correct.

CONCLUSION

81. I have set out at paragraph 27 above what the Agents characterise as the "*central issue*" in this appeal. As will be apparent from the discussion above, that issue must in my view be resolved against the Agents. In my view, where a ship's port agent makes disbursements to pay for pilotage and other port expenses, at the request of a third party that it knows is not the owner of the ship, that does not give rise to a personal liability on the part of the ship-owner in the absence of some representation by the shipowner that the third party is contracting as its agent. That such disbursements may be "*necessary for the ship to use the port*" does not alter that position. Nor does the fact that "*the ship was under a time charter the existence of which, much less its terms and conditions, was neither known nor made known to the ship's port agent*."

82. There is, in my view, no analogy with the so-called "*red hand*" rule in the context of contractual exemption clauses. The Owners here are not seeking to escape from a contractual liability that would otherwise arise. No presumption of liability arose here. Rather, the onus was on the Agents to establish liability on the part of the Owners and for the reasons set out in this judgment I conclude that they have clearly failed to do so.

83. That is the position as a matter of Irish law. It may be that the issues in these proceedings would be determined differently if Estonian, Finnish or Dutch law applied. But that is a matter for conjecture.

84. It follows that the Agents' appeal must be refused and the judgment and order of the High Court affirmed.

85. As the Agents' appeal has been wholly unsuccessful, it would appear to follow that the Owners are entitled to the costs of the appeal. If the Agents wish to contend for a different order, they will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms I have suggested, the Agents may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

In circumstances where this judgment is being delivered electronically, Binchy and Pilkington JJ have authorised me to record their agreement with it.