# The Eternal Strength
# [2006] SGHC 12

**Case Number** : Adm in Rem 245/2003, SIC 4636/2004

**Decision Date** : 18 January 2006

**Tribunal/Court** : High Court

**Coram** : Joyce Low Wei Lin AR

**Counsel Name(s)** : Daryll Ng (Haridass Ho and Partners) for the defendant; Gerald Yee / Chow Sy Hann (Joseph Tan Jude Benny) for the plaintiff

**Parties** : —

18 January 2006

**AR Joyce Low:**

By an application pursuant to O 12 r 7(1) of the Rules of Court ('the Rules'), the defendants move for an order that the writ of summons and all subsequent proceedings be set aside and that a letter of undertaking given on behalf of the defendants to secure the plaintiffs' claim be cancelled. The material facts, as they appeared from the pleadings and the affidavits put before me, are as follows.

**Facts**

2 The plaintiffs are a company incorporated in Italy. They carry on business in harbour towage, deep-sea towage and salvage for reward. On 2 April 2002, by a charterparty ('the Charterparty'), they chartered the *Eternal Strength*, formerly known as the *Gema Pertiwi*, from PT Gesuri Lloyd who were the owners of the ship at that time. By a voyage charterparty made on or about 30 April 2002, the plaintiffs sub-chartered the ship to AWB Limited.

3 In May and June 2002, the ship suffered engine problems that were allegedly caused by the defendants' breach of their obligations under clauses 1 and 8 of the Charterparty to keep the ship in a thoroughly efficient state for and during the voyage and to prosecute the voyage with utmost despatch. As a result, the ship was off-hire for a period. Pursuant to clause 59 of the Charterparty, the hire would be suspended from the time of inefficiency and all directly related expenses incurred would be for the owners' account should the ship be put back whilst on her voyage by reason of a breakdown.

4 On or about 13 March 2003, the ship was sold to the defendants, Wellston Financial Ltd. Shortly thereafter, the ship was arrested and sold by the Sheriff pursuant to the action in Admiralty in Rem 100 of 2002. Subsequently, on 23 September 2003, the plaintiffs filed a writ *in rem* against the *Eternal Strength* claiming a deduction of the costs of hire, compensation for the expenses incurred for the period that the ship was off-hire and an indemnity for any liability to AWB Limited under the voyage charterparty. As the ship had been sold and the proceeds of sale were in Court, the plaintiffs served the writ on the Sheriff pursuant to O 70 r 7(1)(b) of the Rules of Court ('the Rules'). The defendants entered an appearance in the action.

5 The defendants, as interveners in Admiralty in Rem 100 of 2002 then applied for the remaining proceeds of sale of the *Eternal Strength* to be paid out to their solicitors after provision was made for claims against the ship, including the present action, to be secured. The court ordered the payment of the whole of the proceeds of sale to the defendants for, *inter alia*, the provision of full security for the plaintiffs' claim. In compliance with the order of court, the defendants provided a

letter of undertaking dated 7 May 2004 to the plaintiffs.

6 On 20 August 2004, the defendants filed the present application to set aside the writ and cancel the letter of undertaking for want of jurisdiction.

**Issues**

7 Section 3(1)(h) of the High Court (Admiralty Jurisdiction) Act ('the Act') provides that the Court has admiralty jurisdiction to hear and determine any claim arising out of any agreement relating to the use or hire of a ship. It is not disputed that the Court has jurisdiction over the plaintiffs' claim, which falls under this subsection.

8 Counsel for the defendants, Mr Daryll Ng, contended that the writ should nevertheless be set aside because one of the requirements of s 4(4) of the Act was not met and the Court has no jurisdiction over the ship. It was submitted that there was non-compliance with the subsection because PT Gesuri Lloyd, the party liable *in personam* on the charterparty, were no longer the beneficial owners of the ship at the time the action was commenced because the ship had been transferred to the defendants.

9 On behalf of the plaintiffs, Mr Gerald Yee did not pursue the argument that the requirements of s 4(4) of the Act were satisfied. He submitted instead that those requirements were irrelevant for two reasons. First, in an application pursuant to O 12 r 7(1) of the Rules, the applicant must challenge the existence, and not merely the exercise, of the Court's jurisdiction. Since s 4(4) relates to the manner in which admiralty jurisdiction is exercised, it is irrelevant to the application. Secondly, it was unnecessary for the plaintiffs to satisfy the subsection because they did not invoke the *in rem* jurisdiction of the Court, since they did not arrest or serve the writ on the ship. In the alternative, Mr Yee argued that even if the requirements of s 4(4) of the Act were relevant and were not satisfied, the plaintiffs were, in any event, entitled to proceed against the defendants *in personam* because they entered an appearance in the action.

10 The issues raised in this application are:

(1) Whether the defendants' challenge to the plaintiffs' right to bring an action *in rem* against a ship pursuant to s 4(4) of the Act constitutes a dispute as to jurisdiction for the purposes of an application under O 12 r 7(1) of the Rules;

(2) Whether service of a writ on the Sheriff pursuant to O 70 r 7(1)(b) is an act that invokes the *in rem* jurisdiction of the Court; and

(3) Whether the plaintiffs are entitled to proceed against the defendants *in personam*, even if the requirements of s 4(4) of the Act are not met.

***First issue – Construction of O 12 r 7(1) of the Rules***

11 The relevant portion of O 12 r 7(1) of the Rules reads:

> A defendant who wishes to *dispute the jurisdiction of the Court* in the proceedings by reason of any such irregularity as is mentioned in Rule 6 or on any other ground shall enter an appearance and within the time limited for serving a defence apply to the Court for –
>
> (a) an order setting aside the writ or service of the writ on him (emphasis mine).

12 As I alluded to earlier, counsel for the plaintiffs submitted that the words "dispute the jurisdiction of the Court," refer to a dispute as to the existence and not the exercise of jurisdiction. He cited the decision of our Court of Appeal in *The Jian He* [2000] 1 SLR 8 for this principle. In that case, the defendants took out an application for a stay of proceedings on the basis that Singapore was not the appropriate forum to determine the dispute because there was an exclusive foreign jurisdiction clause binding the parties. One of the issues raised was whether there was a delay in taking out the application. The defendants argued that there was no delay because they filed their application within the time limited for serving their defence, pursuant to O 12 r 7(1). Chao Hick Tin JA, who delivered the judgment of the court, rejected this argument and reasoned, at paragraph 44 of the judgment, that O 12 r 7(1) does not apply to stay applications. It only applies where the jurisdiction of the Court is being challenged and in a stay application, the applicant does not challenge the Court's jurisdiction but prays for it to exercise its discretion not to assume jurisdiction in favour of a foreign court.

13 Counsel submitted that *The Jian He* is authority for the principle that a party who wishes to file an application under O 12 r 7(1) must challenge the existence, and not the exercise, of the Court's jurisdiction. In the admiralty context, he contended that this means that the applicant must prove that the requirements of s 3(1) of the Act are not satisfied. The requirements of s 4(4), which relate only to the availability of an action *in rem* go to whether the admiralty jurisdiction of the Court is properly exercised, are irrelevant to the issue of whether the Court has jurisdiction. He relied on the following portion of the decision of Belinda Ang JC (as she then was) in *The Alexandrea* [2002] 3 SLR 56 at paragraphs 40 and 41:

> "40 As stated, the existence of admiralty jurisdiction depends on s 3(1) of the Act, but the availability of an action in rem depends on s 4."
>
> "41 Section 4(1) makes it clear that admiralty jurisdiction may exist and be exercisable by an action in personam without an action in rem being available."

14 On behalf of the defendants, it was argued that counsel for the plaintiffs fell into error in failing to appreciate the fundamental distinction between the existence of subject matter jurisdiction, which is governed by s 3(1) of the Act and the Court's admiralty jurisdiction over the plaintiffs' claim against the defendants' vessel. A jurisdictional challenge can take either form. In the present application, since the defendants allege that the Court does not have admiralty jurisdiction over the *Eternal Strength* because s 4(4) was not satisfied, there is a dispute of the Court's jurisdiction and consequently, O 12 r 7(1) is applicable.

15 I am of the view that the analogy drawn by counsel for the plaintiffs between applications for stay of proceedings on the grounds that Singapore is not the more appropriate forum and applications to set aside the writ because the requirements of s 4(4) are not met is flawed. A challenge pursuant to s 4(4) of the Act may also be referred to as a dispute relating to the exercise or invocation of the Court's admiralty jurisdiction. However, counsel for the plaintiffs failed to recognise that an application pursuant to s 4(4) of the Act, is not merely a dispute as to the *exercise* of the Court's discretion but its *right* to hear and determine a particular claim over a vessel. The relief granted when the Court has no jurisdiction to entertain an action *in rem* is the setting aside of the writ: see e.g. *The Rainbow Spring* [2003] 3 SLR 362 and *The AA V* [2001] 1 SLR 207. The nature of the relief sought in such applications, i.e. the setting aside of the writ and all subsequent proceedings is consistent with and reflective of a jurisdictional challenge. This is in contrast to stay applications where the court does not set aside the writ but, in its discretion, declines to exercise jurisdiction by staying the action.

16 The recent amendments to O 12 of the Rules fortify my interpretation of O 12 r 7(1). As O 12

r 7(1) applied only to jurisdictional challenges and not stay applications on the ground that Singapore is not the more appropriate forum, O 12 r 7(2) was amended to provide specific rules to govern such stay applications. However, the draftsmen did not find it necessary to provide similarly for applications to challenge the *in rem* jurisdiction of the Court. In my view, the proper inference to be drawn is that such challenges were and continue to be provided for under O 12 r 7(1) because they are applications to dispute the jurisdiction of the Court. The alternative interpretation proposed by counsel for the plaintiffs, will lead to awkward inconsistencies because a challenge pursuant to s 3(1) of the Act, but not one pursuant to s 4(4) of the Act, must be filed within the time provided for under O 12 r 7(1). I am not persuaded such an interpretation and its results are the proper reflection of the intention of the draftsmen.

***Second Issue – Effect of service of writ on Sheriff pursuant to O 70 r 7(1)(b)***

17 The second argument advanced by counsel for the plaintiffs was that the requirements under s 4(4) of the Act were inapplicable because the *in rem* jurisdiction of the Court had not been invoked. He cited the decisions of our Court of Appeal in *The Fierbinti* [1994] 3 SLR 864 and our High Court in *The Trade Resolve* [1999] 4 SLR 424 for the principle that *in rem* jurisdiction must be invoked by either actual service of the writ on the ship or arrest of the ship. On the facts, since neither of these events occurred, counsel submitted that the *in rem* jurisdiction had not been invoked but the action proceeds *in personam* against the shipowners who entered an appearance.

18 Counsel for the defendants contended that it was wrong to argue that the lack of arrest meant that the *in rem* jurisdiction of the Court had not been invoked and treat an arrest as the defining characteristic of an action *in rem*. The distinctive feature of such an action is not an arrest but that it is an action against the *res*. Although the right to arrest a vessel is confined to actions *in rem*, this is merely a reflection of the unique characteristic of such an action, which allows a plaintiff to proceed against the *res* and obtain security through its arrest. It was further submitted that, in the present case, service on the Sheriff after the ship has been sold is equivalent to service on the *res*. This is because the proceeds of sale of a ship lying in Court represents the ship and service on the Sheriff is merely a mechanism provided by O 70 r 7(1)(b) for service on what represents the *res*.

19 In *The Fierbinti*, the plaintiffs took out a writ *in rem* against the owners of or other persons interested in 19 ships, including the *Fierbinti*, for loss and damage to the cargo carried on board the *Fierbinti*. The writ was issued but not served. The defendants' solicitors, in a bid to avoid the arrest of any of the ships, confirmed that they would provide security for the plaintiffs' claim. The plaintiffs served the writ on the defendants' solicitors who entered an appearance for "the owners of the ship or vessel Fierbinti". Thereafter, the parties became embroiled with negotiations on the terms of the security. The negotiations finally ended when the plaintiffs' solicitors were informed that no security would be provided after all. Subsequently, when one of the ships named in the writ, i.e. the *Mehendinti*, called, the plaintiffs caused a warrant of arrest to be issued and arrested her. The defendants applied to set aside the arrest.

20 One of the issues before the court was whether the *in rem* jurisdiction of the Court had been invoked against the *Fierbinti* when the writ was served on the defendants' solicitors pursuant to O 70 r 7(2) of the Rules. As a result, O 70 r 7(1) and (2) were subject to the court's analysis. The relevant provisions of O 70 are:

> (1) Subject to paragraph (2), a writ by which an action *in rem* is begun must be served on the property against which the action is brought except –
>
> …

(b) where the property has been sold by the Sheriff, in which case the writ may not be served on that property but a sealed copy of it must be filed in the registry and served on the Sheriff and the writ shall be deemed to be served on the day on which the copy was filed.

(2) A writ need not be served or filed as mentioned in paragraph (1) if the writ is deemed to have been duly served on the defendant by virtue of Order 10 Rule 1(2) or (3).

21 LP Thean JA, who delivered the decision of the court, said at page 870:

It is important to note that para (2) of r 7 does not say that where a writ is deemed to have been duly served on the defendants by virtue of O 10 r 1(2) or (3) such 'deemed' service amounts to or is deemed to be service of the writ on the property under para (1) of r 7. Rule 7(2) does not equate a 'deemed' service of the writ on the defendant under O 10 r 1(2) or (3) with the actual service of the writ on the property under O 70 r 7(1). Effectively, r 7(2) operates to dispense with service *of the writ on the property* under r 7(1), where the writ is deemed to have been duly *served on the defendant* by virtue of O 10 r 1(2) or (3)…On our analysis of the rules, there was no actual service of the writ on the res, i.e. any of the 19 ships; such service had been dispensed with by the operation of O 70 r 7(2). It seems to us that the distinction between service of the writ on the res and deemed service of the writ on the defendant is inevitable in an admiralty action in rem (emphasis are the judge's).

22 The court also had to decide when the admiralty jurisdiction *in rem* of the Court is invoked and specifically whether it was invoked against the *Mehendinti* upon arrest and concluded, at page 879 of the report, that it is invoked when the writ is served on the ship or when the ship is arrested, whichever first occurs. On whether arrest was an essential step to invoke *in rem* jurisdiction, the learned judge had this to say, at page 877:

The issue and service of the writ are a process of the court. By issuing the writ in rem against a ship the court asserts its jurisdiction to determine the plaintiff's claim against the ship, and by serving it on the ship, the plaintiff 'notifies' the ship and its owner and also all persons interested therein of his claim against the ship. He has by that process invoked the court's jurisdiction to determine his claim against the ship. In our opinion, upon service of the writ on the vessel, the plaintiff has invoked the jurisdiction of the court. *Arrest is not an essential or necessary step in the invocation of the court's jurisdiction*. The arrest is the means given by law whereby security is obtained for the claim against the ship: see *The Zalfiro* at page 15, per Hewson J (emphasis mine).

23 I turn now to the arguments made by counsel for the plaintiffs in relation to *The Fierbinti*. To the extent that counsel for the plaintiffs submitted that the lack of an arrest is a determinative factor as to whether *in rem* jurisdiction has been exercised, the submission must be rejected in light of clear statement of law in *The Fierbinti* that an arrest of the ship is not an essential step to invoke *in rem* jurisdiction.

24 His argument that actual service on the *res* is the *only* mode of service that invokes *in rem* jurisdiction because the court in *The Fierbinti* referred only to such a mode of service as an event that invokes the *in rem* jurisdiction of the Court can also be dealt with briefly. In my judgment, there is no basis for inferring that the court meant to exclude all other modes of service under O 70 r 7(1) from amounting to an act that invokes *in rem* jurisdiction. The court had no occasion to consider the effect of serving a writ in the manner provided by O 70 r 7(1)(a) and (b) simply because these modes of service were not in issue before it.

25 The court in *The Fierbinti* drew a distinction between cases where service is effected on the *res* (or, in the alternative, the *res* is arrested) and cases where service is effected on the defendant in person. In the former, the *in rem* jurisdiction is invoked but in the latter case, the *in personam* jurisdiction is invoked. The question is whether service of the writ on the Sheriff should be treated as service on the *res* and therefore an event that invokes the *in rem* jurisdiction of the Court.

26 I am of the view that the question requires an affirmative answer. It is trite law that the proceeds of sale lying in Court after a ship has been sold by the Sheriff represents the *res*: see e.g. *Admiralty Law and Procedure* by Toh Kian Sing at page 36. The purpose of serving the writ on the Sheriff is to "notify" all persons interested in the proceeds of sale of the plaintiffs' claim and to enforce any judgment against such proceeds, which represent the *res*, and not a personal defendant. It also serves to compel those interested in what represents the *res* to raise security, a consequence that flows naturally from the *in rem* nature of the claim.

27 In the present case, the plaintiffs had in fact relied on the benefits of the *in rem* nature of their claim to obtain security. The defendants, as interveners in Admiralty in Rem 100 of 2002 and the applicants in Notice of Motion 141 of 2002, applied for and obtained an order that the whole of the proceeds of sale of the vessel be paid out to their solicitors for, *inter alia*, the provision of full security for the plaintiffs' claim in the present action. Pursuant to paragraph 1(c) of the Order, the court made the following orders:

> For the avoidance of doubt, the Order made under paragraph 1 above directing payment out of the proceeds of sale in the first instance to Messrs Haridass Ho & Partners for the purposes outlined under prayer 1(a) to (d) above shall not in any way detract from or be construed as removing *the secured in rem status of the claims specified therein to the proceeds of sale of the Vessel* which shall be expressly reserved and preserved by this Order (emphasis mine).

28 It is disingenuous for the plaintiffs, having relied on the *in rem* nature of their claim to obtain security, by way of the letter of undertaking provided by the solicitors of the defendants, to now submit that the action is in reality only an action *in personam* against the defendants.

29 I turn to consider the actual language of O 70 r 7(1) of the Rules. The subsection provides three modes of service, i.e. actual service on the property, service on the cargo or the ship in which the cargo was carried when the property in question is freight pursuant to O 70 r 7(1)(a) and service on the Sheriff when the property in question has been sold by him pursuant to O 70 r 7(1)(b). In my opinion, all three modes of service specified in that subsection provides for actual or substituted service of the writ *on the property*. The first two of these modes of service relate to service of the writ on the property in question and O 70 r 7(1)(b) provides a means of substituted service on the property when it is no longer possible to effect actual service on the property itself because it has been sold by the Sheriff. In contrast, O 70 r 7(2) provides for service pursuant to O 70 r 7(1) to be dispensed with altogether if service has been effected on the defendant. This analysis of O 70 r 7(1) and (2) is consistent with the decision of *The Fierbinti*, which I have set out in paragraph 21 of these grounds; specifically, where the court considered that *service on the defendant* pursuant to O 12 r 7(2) operates to dispense with "*service on the property under r 7(1*)"

***Third Issue – Jurisdiction to hear action in personam against defendants***

30 For the reasons that I have set out above, the requirements of s 4(4) are relevant because a challenge as to the availability of an action *in rem* amounts to a jurisdictional challenge and the plaintiffs have invoked the *in rem* jurisdiction of the Court by serving a writ on the Sheriff pursuant to O 70 r 7(1)(b) of the Rules. In light of these conclusions, it became necessary to consider the final

argument put forth on behalf of the plaintiffs, i.e. that even if the requirements of s 4(4) are relevant and have not been satisfied, the writ should not be set aside because they are entitled to proceed *in personam* against the defendants, who have entered appearance in the action.

31 On this issue, counsel for the plaintiffs cited the decisions of *The Lloydiana* [1983] 2 Lloyd's Rep 313 and *The Ohm Mariana* [1993] 2 SLR 698. In *The Lloydiana*, the claim was within the admiralty jurisdiction of the Court. The conditions for exercising the jurisdiction by an action *in rem* over the ship were not met but the shipowners accepted service of the writ personally. Sheen J held that the action proceeded as an action *in personam* against the shipowners although it was unnecessary to proceed *in rem*. In *The Ohm Mariana*, a decision of our Court of Appeal, the court found that there was admiralty jurisdiction and that it was exercisable by an action *in rem*. It went on to express the opinion that even if the action *in rem* was instituted in error, the action *in personam* was maintainable on a point of jurisdiction because the subject matter of the claim was before the court. Counsel for the plaintiffs contended that these cases are authorities for the proposition that an action *in personam* is maintainable independently of the availability of an action *in rem*.

32 Counsel for the defendants sought to distinguish these cases. He argued that *The Lloydiana* was authority only for the proposition that, where a defendant who agrees to accept personal service and thereafter provides security and enters an appearance without service of the writ on the *res*, the action proceeds *in personam*. In other words, an action can proceed *in personam* only when it is unnecessary to proceed *in rem*. With respect to *The Ohm Mariana*, he submitted that it was also distinguishable because the defendants entered an appearance unconditionally and did not apply to set aside the writ and warrant of arrest whereas his clients entered an appearance under protest.

33 I do not agree that *The Lloydiana* should be read as narrowly as counsel for the defendants has done. In that case, Sheen J adopted the well-established principle in *The Gemma* [1899] P 285 that an action, though originally commenced *in rem* becomes a personal action against the defendant upon appearance, such that the action continues both *in rem* and *in personam*. On the facts, it was unnecessary for the plaintiffs to proceed *in rem* since the defendants' solicitors accepted service. In applying the general principle in *The Gemma* to the specific context of the case before him, the learned judge observed that the action proceeded *in personam* although the action *in rem* was unnecessary. The judgment, however, did not go so far as to limit the application of the principle in *The Gemma* only to cases where an action *in rem* is unnecessary.

34 Such a condition is also not required pursuant to the decision in *The Ohm Mariana*. In that case, the plaintiffs served the vessel and the defendants subsequently entered appearance in the action, as in our present case. The court held that even if an action *in rem* was commenced and there was a subsequent ruling that it was wrongly instituted, there was no impediment to the maintenance of an action *in personam* if the defendants submitted to the jurisdiction of the Court and the subject matter of the claim was before it. LP Thean J, who delivered the judgment of the court, made the following observations at page 712 of the report:

> Further, even if the action in rem was instituted in error on the ground that, when the cause of action arose, the respondents were not the owners of Ohm Mariana, that error was not fatal to the appellants' claim at trial. As we have held, the claim of the plaintiffs came within para (o) of s 3(1) of the Act, and the court has jurisdiction to hear and determine the claim. The defendants had not, at the initial or any subsequent stage of the proceedings, applied to set aside the writ and the warrant of arrest. They entered an appearance unconditionally and in so doing submitted to the jurisdiction of the court and from then onwards the action continued as an action in rem as well as an action in personam: see *The Gemma* and *The August 8*…

> Assuming that the action in rem was wrongly instituted, the action in personam was clearly maintainable on the point of jurisdiction. There was no impediment to the plaintiffs bringing an action in personam against the defendant making the same claim as was made in this action. Equally, we can see no impediment to the action continuing as an action in personam. The subject matter of the claim was before the court and the court had jurisdiction to hear and determine it.

35 In both *The Lloydiana* and *The Ohm Mariana*, the courts applied the general principle laid down in *The Gemma* without any further qualification. It is, in my view, therefore clear that there is no requirement that an action *in rem* must be unnecessary before an action *in personam* is maintainable when the other conditions, i.e. that the defendant has submitted to jurisdiction and the Court has jurisdiction over the claim, are met.

36 I will now turn to consider whether the fact that the defendants entered an appearance under protest has any impact on the validity of the action *in personam*. In both *The Lloydiana* and *The Ohm Mariana*, there was no issue as to the defendants' submission to the jurisdiction. In the former case, the defendants' solicitors acknowledged service of the writ and did not file any application to dispute the jurisdiction of the Court within the prescribed timelines. In the latter case, the defendants entered an appearance unconditionally and also did not challenge the validity of the writ.

37 Counsel for the defendants argued that since his clients had not submitted to the jurisdiction, having taken out the present application to set aside the writ for lack of jurisdiction, the admiralty jurisdiction of the Court cannot be exercised by an action *in personam*. The argument is circuitous and is tantamount to saying that this Court does not have jurisdiction simply because the defendants challenged jurisdiction. It is pertinent to recall that the defendants do not dispute that the subject matter of the dispute falls within this Court's admiralty jurisdiction and that they have been properly served. In the circumstances, I find that there are no valid grounds to challenge the action *in personam* against the defendants on the point of jurisdiction.

**Conclusion**

38 In conclusion, the *in rem* action was wrongly instituted against the ship since the requirements of s 4(4) were relevant and had not been proved, but the plaintiffs are entitled to proceed against the defendants *in personam*. Accordingly, I dismissed the defendants' application to set aside the writ but allowed their application to cancel the letter of undertaking because it was given as security for the plaintiffs' action *in rem*.