

**BANK OF SCOTLAND v. OWNERS OF “BLUE BREEZE” and REITER PETROLEUM INCORPORATED**

SUPREME COURT (Pizzarello, A.J.): October 22nd, 1998

*Shipping—mortgage of ship—jurisdiction—under Supreme Court Act 1981, s.20 court may determine questions relating to foreign mortgage of ship in Gibraltar waters—not to examine underlying purpose of mortgage if enforceable under governing law*

*Shipping—mortgage of ship—joint and several liability—mortgage of several ships creating joint and several liability on owners may be enforced against single ship regardless of sum advanced against it*

The intervenor applied for the execution of a judgment *in rem*.

The plaintiff loaned moneys to the defendant and other associated companies to buy ships. A side letter from the defendant’s broker to the plaintiff specified the sum which was to be applied for purchasing a particular ship in Panama. A mortgage was created in favour of the plaintiff by the defendant and the other ship owners, designating each ship as security for the total sum loaned under the agreement. The mortgage was governed by Panamanian law.

The Admiralty Marshal later sold the ship for a sum exceeding that allocated for its purchase under the loan. The plaintiff obtained judgment *in rem* under the mortgage for the full amount of the loan and was paid the proceeds of sale by the Admiralty Marshal. The intervenor then obtained judgment *in rem* against the ship for necessities. It applied for the judgment in favour of the plaintiff to be set aside and for its own interest in the proceeds of sale to be realized in priority to that of the plaintiff.

It submitted that (a) although the plaintiff might have a valid claim *in personam* against the defendant for the whole of the moneys loaned, under Gibraltar law an action *in rem*, *i.e.* against the ship itself, could only be brought in respect of moneys loaned on the security of and expended with the plaintiff’s knowledge on that vessel (or in some circumstances, a sister ship); (b) even if this were not the case, it would be unjust to permit the plaintiff to recover more than the sum advanced to the defendant when there were other claims *in rem* against the ship which would then not be met; (c) furthermore, the plaintiff, unlike itself, had the means to recoup all the money which it was owed by the arrest and sale of other vessels offered as security under the mortgage; and (d) accordingly, the plaintiff’s claim should be postponed at least in so far as it exceeded the sum used for the purchase of the ship.

The plaintiff submitted in reply that (a) since the ship was now in

Gibraltar, the Supreme Court had jurisdiction to hear an action *in rem* in respect of a foreign mortgage or charge over it under the Admiralty Jurisdiction (Gibraltar) Order 1987 and the Supreme Court Act 1981, s.20; (b) the mortgage, which secured repayment of the loan jointly and severally on the respective ships, was to be interpreted according to the law of Panama, and there was no rule of law to the effect that the charge over a particular vessel could be enforced only to the extent that the loan had been applied to financing it.

**Held**, dismissing the application:

The court had had jurisdiction to hear the plaintiff's action *in rem* by virtue of the location of the ship, and since the mortgage was a valid mortgage according to the law of Panama, the Supreme Court Act 1981, s.20(2) and (7) conferred a power on the court to determine questions relating to it. There was no reason, under Gibraltar law or Panamanian law, for the court to have looked at the underlying purpose of the mortgage in deciding whether it should be enforced. Since this mortgage provided for joint and several liability on the part of the respective shipowners, the defendant was liable to repay the whole of the loan and the court had properly given judgment for the plaintiff. The order of priorities to be applied was a matter of Gibraltar law, and the court would not, without good reason, exercise its equitable discretion to alter the usual order giving preference to the mortgage over the competing action *in rem* for necessities (*i.e.* the supply of fuel) arising at a later date (page 388, line 19 – page 389, line 1; page 389, lines 14–20).

**Cases cited:**

- (1) *Barclay & Co. Ltd. v. Poole*, [1907] 2 Ch. 284; (1907), 76 L.J. Ch. 488.
- (2) *Black v. Williams*, [1895] 1 Ch. 408; (1894), 64 L.J. Ch. 137, *dicta* of Vaughan Williams, J. applied.
- (3) *Evpo Agnic, The*, [1988] 1 W.L.R. 1090; [1988] 3 All E.R. 810.
- (4) *Pickaninny, The*, [1960] 1 Lloyd's Rep. 533, *dicta* of Hewson, J. applied.

**Legislation construed:**

Admiralty Jurisdiction (Gibraltar) Order 1987 (S.I. 1987/1263), s.2:

"The Colonial Courts of Admiralty Act 1890 shall, in relation to the Supreme Court of Gibraltar, have effect as if for the reference in section 2(2) thereof to the Admiralty jurisdiction of the High Court in England there were substituted a reference to the Admiralty jurisdiction of that court as defined by section 20 of the Supreme Court Act 1981...."

Supreme Court Act 1981 (c.54), s.20(1): The relevant terms of this sub-section are set out at page 387, lines 15–18.

s.20(2): The relevant terms of this sub-section are set out at page 387, lines 19–22.

s.20(7): The relevant terms of this sub-section are set out at page 387, lines 40–45.

*R.A. Triay* for the plaintiff;  
*C.C. Hernandez* for the intervenor.

**PIZZARELLO, A.J.:** This is a motion to set aside a judgment obtained on March 6th, 1998, in the sum of US\$4,176,640.57 in respect of a first preferred mortgage dated February 29th, 1996, over the vessel *Blue Breeze*, which the court declared was a valid and subsisting mortgage. The mortgage is a Panamanian mortgage and an affidavit of Panamanian law was duly sworn and filed. 10

The motion seeks to set aside the whole of the judgment or, in the alternative, that part of the judgment which exceeds the sum of US\$1.5m., on the ground that the mortgage which provided the vessel *Blue Breeze* as the security secured the sum of US\$1.8m loaned for its purchase, the remainder being sums advanced in respect of two other vessels secured under the same mortgage. Therefore, it is argued, the only claim *in rem* which the plaintiff has in respect of the *Blue Breeze* is that sum which was advanced in respect of the said vessel and secured by the mortgage, and therefore the court has acted in excess of its jurisdiction *in rem* by entering judgment in excess of \$1.8m. The *Blue Breeze* was sold by the Admiralty Marshal, Gibraltar, for the sum of US\$2.2m. 15 20

The motion is presented by the caveator, Reiter Petroleum Inc., which is the intervenor in this action. In Cause No. 7 of 1998 on June 30th, 1998, the caveator/intervenor obtained judgment in default of acknowledgement of service in the sum of US\$87,626.48 against the vessel *Blue Breeze* in an action *in rem* for necessaries, *i.e.* for the supply of bunkers. However, unless the court exercises its equitable jurisdiction to depart from the normal order of priorities, it is relegated in terms of priority to a mortgage in respect of the funds in the hands of the Admiralty Marshal. The caveator's rights were protected by the entry of a caveat in this action and in respect of the aforementioned judgment. Reiter Petroleum Inc. intervenes now by way of motion in this action to seek the payment out to it by the Admiralty Marshal for its judgment, submitting that if all the plaintiff can claim is the precise amount advanced in respect of the *Blue Breeze*, then the intervenor would be paid in full. The plaintiff has been paid by the Admiralty Marshal the sale price of the *Blue Breeze* less expenses and a sum which has been set aside to provide for the instant matter as per an order dated May 13th, 1998. 25 30 35 40

The certificate of preliminary registration of a ship's mortgage was issued by the Panamanian consul in Greece on March 1st, 1996. This refers to the first preferred Panamanian mortgage dated February 29th, 1996 and recites that it is constituted by Blue Lagoon Maritime Co. S.A. in favour of the plaintiff for the sum of US\$4,550,000 in respect of the 45

*Blue Breeze*. Recitals B–D of the first preferred Panamanian mortgage read as follows:

5       “(B) By a loan agreement dated February 23rd, 1996 and made  
between (i) the owner, Blue Bay Maritime Co. S.A. and Blue  
Marine Maritime Co. S.A. (together with the owner, ‘the  
borrowers’) and (ii) the mortgagee (a copy of which loan agreement  
without appendices is annexed hereto marked ‘A’ and made a part  
hereof) it was agreed, amongst other things, that the mortgagee  
would make available to the borrowers as joint and several  
10       borrowers upon the terms and conditions therein described a secured  
floating interest rate loan in two tranches of up to four million, five  
hundred and fifty thousand US dollars (US\$4,550,000).

15       (C) Pursuant to the said loan agreement, the mortgagee has on the  
date hereof advanced to the borrowers (and the borrowers are indebted  
to the mortgagee in) the first tranche of the said loan in the total  
principal amount of US\$3,050,000. The mortgagee has agreed to  
provide a second tranche of the said loan in the total principal amount  
of US\$1.5m. on or before June 15th, 1996. The full amount of the loan  
is repayable together with interest thereon (as provided in cl. 6.2 of the  
20       said loan agreement) in 14 equal consecutive three-monthly  
instalments of US\$271,429 each and a final instalment of  
US\$750,000, the first such instalment being payable on May 23rd,  
1996 and the last such instalment being payable on August 23rd, 1999.

25       (D) The owner, in order to secure the repayment of the said  
principal amount and interest thereon and all other sums of money  
from time to time comprising the secured indebtedness (as  
hereinafter defined), has duly authorized the execution and delivery  
of this first preferred mortgage which is entered into by the owner  
pursuant to the said loan agreement and in consideration of the  
30       obligations of the mortgagee thereunder.”

The first preferred Panamanian mortgage defines “ship” to mean “the  
motor vessel ‘Blue Breeze’ (ex ‘Atlantis A’).” The loan agreement dated  
February 23rd, 1996 at cl. 1.1 shows that there are three vessels involved  
in the loan transaction, whereby—

35       “the lender has agreed to make available to the borrowers on a joint  
and several basis a loan facility in two advances of up to the lesser  
of (i) four million, five hundred and fifty thousand US dollars  
(US\$4,550,000) or (ii) sixty two and one-half per cent. (62.5%) of  
the aggregate market values of the ships hereinafter defined, upon  
40       and subject to the terms and conditions contained in this  
agreement.”

Clause 1.1 reads:

45       “The loan shall be made available in two advances as follows:  
(a) as to an amount of up to three million, fifty thousand dollars  
(\$3,050,000), to assist (i) Blue Lagoon Maritime Co. S.A. in

part-financing the acquisition cost of the 1975-built 9958 gr. Cyprus flag vessel M.V. 'Atlantis A' from Soft Shipping Co. Ltd. of Cyprus and (ii) to assist Blue Bay Maritime Co. S.A. to refinance existing indebtedness secured on its Panamanian flag M.V. 'Blue Bay' (ex 'Chios Fortune').

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(b) as to an amount of up to one million, five hundred thousand dollars (\$1,500,000), to assist Blue Marine Maritime Co. S.A. to part-finance the acquisition cost of M.V. 'Andhika Eridhni' (or such other substitute vessel as Blue Marine Maritime Co. S.A. may nominate and the lender approve)."

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The letter from Sherimar Management Co. Ltd. addressed to the plaintiffs dated February 22nd, 1996 shows that of the loan advanced, US\$1.8m was in respect of the *Blue Breeze* and the plaintiff knew that this was so. Sherimar Management Co. Ltd. was a shipowner broker acting for the owners of the *Blue Breeze* and two other vessels.

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With those facts in hand, Mr. Hernandez submits that it is clear that the *Blue Breeze* is mortgaged for US\$1.8m. The plaintiff may have a valid claim *in personam* against the owners of the vessel *Blue Breeze* on the whole of the loan which secured payment jointly and severally on three ships but the only action *in rem* which can lie against the rest is in respect of US\$1.8m. and not a penny more. What is an action *in rem* is governed by Gibraltar law and that provides for an action *in rem* in respect of the moneys loaned by way of mortgage on the security of a vessel, and that is US\$1.8m. The affidavit of Panamanian law of Mr. Jose Raul Mulino does not address the point.

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Mr. Hernandez then refers to the categories of claim under which an action *in rem* may proceed. He submits that these show that a claim *in rem* has to arise in respect of a particular ship unless it is a sister ship. An action cannot be brought *in rem* against another vessel belonging to the same owner. It is a basic tenet of the admiralty jurisdiction *in rem* that such an action can arise only in respect of moneys expended against a particular vessel.

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With regard to priorities, Mr. Hernandez submits that if he is right, the payment out to the intervenor of the judgment in its favour must follow. If the court should find against his submission then, he submits, the court should exercise its discretion in its equitable jurisdiction to postpone the plaintiff's claim to that of the intervenor. He advances several reasons. One is that the sum received by the owners of the *Blue Breeze* was US\$1.8m. and that should be the maximum amount, together with interest, which the plaintiff should be awarded when there are other claims *in rem* against the vessel and there is not enough in the fund to pay all claimants. Secondly, the plaintiff has taken steps to arrest and sell the two other vessels which are covered by the loan agreement and it is likely that the amounts to be recovered by the plaintiff will exceed the amount of the sum loaned and therefore the plaintiff is in a position to recoup the

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sum loaned while the intervenor does not have that possibility. And thirdly, the court may in the exercise of its equitable jurisdiction depart from the normal order of priorities and can and should postpone the plaintiff's claim, as far as it exceeds US\$1.8m., to Reiter's claim.

5 Mr. Triay analyses the situation in this way; First, he asks: What is an action *in rem*? It is a certain type of action in respect of an object which dispenses with the necessity of serving a legal or natural person and makes the thing itself a defendant. Jurisdiction is founded on where the object might be found and in this case the *Blue Breeze* is in Gibraltar.  
10 Secondly, how does one qualify for an action *in rem*? The answer is to be found in the law. In Gibraltar the legislative enactment which gives the Admiralty Court jurisdiction in this matter is the Admiralty Jurisdiction (Gibraltar) Order 1987, as a result of which the Supreme Court Act 1981, s.20 applies. Section 20 reads:

15 "(1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say—

(a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2)....

(2) The questions and claims referred to in subsection 1(a) are—

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(c) any claim in respect of a mortgage of or charge on a ship or any share therein...."

Thirdly, what is a mortgage? Mr. Triay refers to Meeson, *Admiralty Jurisdiction & Practice*, at 4 (1993) and submits that a mortgage is a transfer of property by way of security and there are obligations to repay the loan. The transfer is not absolute and is subject to redemption and is a security for any debt or combination of debts. In the instant case the plaintiff's claim meets all these criteria, says Mr. Triay. The intervenor's suggestion that the action *in rem* can hold good only to the extent of US\$1.8m. is wrong, he submits, on two grounds: (a) the law of Gibraltar does not demand that the mortgage should be the subject of scrutiny as the intervenor suggests, because the mortgage which is the paramount consideration has to be taken as a whole and, in any case, in that document the loan is in respect of other vessels as well—the mortgage is joint and several and the intervenor is wrong to seek assistance from the other categories of claim where the claim is directly concerned with a ship; and (b) Gibraltar law looks at Panamanian law to ascertain this point—as the ship flies the Panamanian flag, the *lex situs* here is Panama. Section 20(7), as far as is relevant, reads:

40 "The preceding provisions of this section apply—

...

(c) so far as they relate to mortgages and charges, to all mortgages or charges, whether registered or not and whether legal or equitable, including mortgages and charges created under foreign law...."

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Mr. Triay points to the affidavit of Panamanian law of Jose Raul Mulino and says it is clear that the plaintiff is entitled by the law of Panama to the judgment it has obtained. No affidavit in rebuttal has been filed. Mr. Triay mentions *The Evpo Agnic* (3). It is not directly pertinent to the instant case but he draws comfort from a remark of Lord Donaldson of Lymington, M.R. in the context of the legitimate running of ships as a fleet ([1988] 1 W.L.R. at 1097): “As governing shareholder in each shipowning company, he can cause them to use their individual assets to the mutual advantage of the members of the group and of Mr. Pothitos.”

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In his reply, Mr. Hernandez reiterates that one has to distinguish between an action *in rem* and an action *in personam* which is a matter for the law of Gibraltar. The affidavit of Mr. Mulino does not, he insists, address that issue and it is one for the law of Gibraltar. As far as *The Evpo Agnic* is concerned, one should be careful about reading into Lord Donaldson’s remark something that might not be there. That case concerned sister ships. He made the point again that the fact is that US\$1.8m. were paid to a particular legal entity and that does not confer rights *in rem*, and what is more the plaintiff knew the exact position.

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The position before me is that there is judgment for the plaintiff and there is a declaration that the first preferred Panamanian mortgage is a valid and subsisting mortgage. The assault on that judgment, as it turns out, relates only to the sum over US\$1.8m. and to that extent that part of the judgment is unaffected by these proceedings. The judgment was also criticized in its form but again the substantive matter which I am dealing with is unaffected. In my view, this action comes squarely within the provisions of s.20 of the Supreme Court Act 1981. There is a mortgage, it is an action *in rem*, the mortgage is created under foreign law, that foreign law is Panama and there is an affidavit of law. I accept the position as stated in the affidavit. The plaintiff is entitled to the judgment of March 6th, 1998, and I shall not set it aside in part or in whole.

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I turn to the question of priorities, which is a matter for Gibraltar law. In *The Pickaninny* (4) it was said by Hewson, J. ([1960] 1 Lloyd’s Rep. at 537) that “the Court must be slow to depart from the usual order of priorities.” I see nothing in the intervenor’s case to warrant a departure from the usual order, despite Mr. Hernandez’s strong appeal to a form of natural justice which springs from a combination of two facts, namely, that US\$1.8m. was the actual sum loaned in respect of the ship (a fact which I accept) and that the plaintiffs were aware of this. A necessities man’s right arises when he crystallizes his claim by an action *in rem* and dates from then. A mortgagee’s right arises at the date of the mortgage.

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I consider that Mr. Hernandez’s submission that one should look at the mortgage to ascertain how much of that mortgage was used in respect of the particular ship is wrong. I agree with Mr. Triay that in this case the mortgage is security for the three vessels jointly and separately and that is because unless there is good reason for it, the court ought not to look at

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the underlying cause of the mortgage. In Meeson's *Admiralty Jurisdiction & Practice* (*op. cit.*, at 162) reference is made to *Black v. Williams* (2) where Vaughan Williams, J. said ([1895] 1 Ch. at 421):

5       “The Legislature has recognised that occasions arise when it is to  
the interest of the whole community that people should be able to  
raise money on ships by sale or mortgage, and in the interests of the  
general public it has therefore provided that registered title in the  
statutory form shall have a priority, thus enabling those who are  
10       disposed to purchase or lend money upon ships to do so with perfect  
confidence that their titles will not be overridden by priority being  
obtained by equitable unregistered titles which happen to be prior in  
point of time....”

And the case quoted thereafter—*Barclay & Co. Ltd. v. Poole* (1)—shows  
that a current amount was secured by a mortgage of a vessel. It seems to  
15       me once a vessel is mortgaged it is susceptible to an action *in rem* for the  
whole of the mortgage. So having come to the conclusion that the *in rem*  
judgment on Panamanian law is justified in the sum of US\$4,176,650.57, I  
do not consider it right to give the intervenor priority over the mortgagee.

20       The motion is dismissed. There will be an order for the payment out of  
the balance of the fund in court to the plaintiff.

*Orders accordingly.*

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## HAMIANI v. GIBRALTAR SHIPREPAIR LIMITED

SUPREME COURT (Schofield, C.J.): October 28th, 1998

*Tort—personal injuries—damages—multiple injuries—crushing injuries  
to lower leg and hand causing severe deformity, chronic infection and  
progressive deterioration—quantum*

The plaintiff brought an action for damages for personal injury.

The plaintiff, now aged 51 and a father of eight, was employed by  
the defendant as a skilled engine-fitter in the dockyard. Whilst he was  
repairing a heavy piston the lifting mechanism holding the piston failed  
and it fell, crushing his right leg and left hand against the cylinder. He  
sustained severely comminuted fractures of the right knee and tibia,  
and of the metacarpal of his left thumb. He received emergency  
surgery during which skin and soft tissues were removed from his  
lower leg and part of his thumb amputated. A further 16 operations