

RETHINKING **the** ADMINISTRATION **of** JUSTICE

Essays in Honour of

Hon. Justice Abdullahi Mustapha,
OFR, FCI Arb (Rtd)

Editors

Rickey Mustapha Tarfa, SAN

Olanrewaju Fagbohun, Ph.D

Gbolahan Gbadamosi

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• **Professor Olanrewaju Fagbohun, Ph.D**

Mr. Gbolahan Gbadamosi

(Editors)

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Contributing Authors

Chapter 1

Effect of the Cabotage Act 2003 on The Nigerian Maritime Industry

Savage-Oyekunle Oluremi, Lecturer, Private & Property Law Department, Faculty of Law, Lagos State University

Chapter 2

Mediation as a Tool For Resolving Commercial Disputes

Dr. Ani Comfort Chinyere LL.B (Hons.) BL; LL.M., Ph.D. *Ag. Head, Centre for Conflict and Dispute Resolution, Nigerian Institute of Advanced Legal Studies, Lagos.* E-mail: chinnyani@yahoo.com

Chapter 3

Trademarks, Counterfeiting and Consumer Protection in Nigeria

Temitope O. Oloko, LL.B (Hons); LL.M; B.L., Lecturer, Faculty of Law, Lagos State University, Lagos Nigeria

Chapter 4

The Role of the Customs in the Battle Against Piracy and Counterfeiting

Dr. Bankole Sodipo, Ph.D (London) Partner, Chief G. O. Sodipo & Company (Barristers & Solicitors), Lagos

Chapter 5**Fundamental Denial: Primitive Restriction on the Right to Popular Participation in Nigeria**

Bamidele Aturu., Managing Partner, Bamidele Aturu & Co

Chapter 6**Partners In Progress: Interface Between Courts and Arbitration/ADR in the Context of the Overriding Objectives**

Babatunde J. Fagbohunlu, SAN, Partner in the Law Firm of Aluko & Oyebode

Chapter 7**Control of Interest Rates on Bank Credit Facilities by Central Bank of Nigeria (CBN)**

Felix O. Fagbohunbe, (SAN), Principal Partner, F. O. Fagbohunbe & Co

Chapter 8**Niger-Delta Crisis: A Tragic Failure of the Legal Profession**

Lucius E. Nwosu, SAN, Principal Partner, Lucius Nwosu & Co

Chapter 9**The Rule of Law in the Emerging Nigerian Democracy**

Rickey Mustapha Tarfa, SAN, Head of Chambers, Rickey Tarfa & Co

Chapter 10**Case Management in Admiralty Matters**

Justice Adamu Bello, Federal High Court

Chapter 11**The Inner Bar as the Engine Room of Ethical Revolution at the Bar**

Alhaji Abdullahi Ibrahim, SAN, Former Attorney General of the Federation and Minister of Justice

Chapter 12**Prospects and Challenges of Automated Collateralization of Shares in Nigeria**

Nelson C. S. Ogbuanya, Lecturer, Nigerian Law School, Lagos Campus

Chapter 13**The Role of Nigerian Courts in Enforcing Intellectual Property Rights**

Justice G. O. Kolawole, Federal High Court

Chapter 14**The Role of Language, Culture and Justice in Africa's Environmental Protection and Sustainable Development**

Professor Olanrewaju Fagbohun, Nigerian Institute of Advanced Legal Studies (NIALS)

Chapter 15**Admissibility of Documentary Evidence**

Professor Sariyu Abiodun Adesanya, formerly Professor of Law, University of Lagos (UNILAG)

Chapter 16**The Need for the Court's Assistance in the Arbitral Process**

Justice Olayinka Faji, Federal High Court

Chapter 17**Maritime and Statutory Lien under the Nigerian Admiralty Law**

Gbadebo Anthony Olagunju – Lecturer, Faculty of Law,
Lagos State University

Appendix**Valedictory Special Court Session In Honour of The Honourable Justice Abdullahi Mustapha, OFR, FCI Arb, (Retired) Chief Judge**

Address by the Retired Chief Judge

Contents

<i>Contributing Authors</i>	v
<i>Foreword</i>	xiii
<i>Introduction</i>	xvii
<i>Table of Statutes</i>	xxv
<i>Table of Cases</i>	xxix
Chapter 1	
Effect of the Cabotage Act 2003 on The Nigerian Maritime Industry	1
Chapter 2	
Mediation as a Tool for Resolving Commercial Disputes	29
Chapter 3	
Trademarks, Counterfeiting and Consumer Protection in Nigeria	51
Chapter 4	
The Role of the Customs in the Battle Against Piracy and Counterfeiting	75

Chapter 5	
Fundamental Denial: Primitive Restriction on the Right to Popular Participation in Nigeria	99
Chapter 6	
Partners In Progress: Interface Between Courts and Arbitration/ADR in the Context of the Overriding Objectives	113
Chapter 7	
Control of Interest Rates on Bank Credit Facilities by Central Bank of Nigeria (CBN)	129
Chapter 8	
Niger-Delta Crisis: A Tragic Failure of the Legal Profession	143
Chapter 9	
The Rule of Law in the Emerging Nigerian Democracy	153
Chapter 10	
Case Management in Admiralty Matters	173
Chapter 11	
The Inner Bar as the Engine Room of Ethical Revolution at the Bar	185
Chapter 12	
Prospects and Challenges of Automated Collateralization of Shares in Nigeria	197
Chapter 13	
The Role of Nigerian Courts in Enforcing Intellectual Property Rights	221

Chapter 14	
The Role of Language, Culture and Justice in Africa's Environmental Protection and Sustainable Development	239
Chapter 15	
Admissibility of Documentary Evidence	257
Chapter 16	
The Need for the Court's Assistance in the Arbitral Process	283
Chapter 17	
Maritime and Statutory Lien under the Nigerian Admiralty Law	313
Appendix	
<i>Valedictory Special Court Session In Honour of The Honourable Justice Abdullahi Mustapha, OFR, FCI Arb, (Retired) Chief Judge</i>	337
<i>About the Editors</i>	349
<i>Index</i>	351

Maritime and Statutory Lien under the Nigerian Admiralty Law*

Introduction

Maritime lien constitutes one of the core actions in admiralty law. Mostly used but often abused, it is one of those actions, which an aggrieved party resorts to in order to seize or detain the vessel/ship of the defendant until his claim is settled.

Today the incidence of this action is on the increase in our courts because of the volume of international trade engaged in, on daily basis in Nigeria.

Nigeria is mainly an importing nation. Thus, a lot of vessels enter its shores everyday in order to off-load their cargoes and move out again. But some of them have had to contend with detention for wrongful acts advertently or inadvertently committed by them. What is maritime (and/or statutory) lien? How is it enforced? When does the right of enforcement cease etc? These are some of the issues this chapter intends to look at. It is also

*Gbadebo Anthony Olagunju Lecturer, Faculty of Law, Lagos State University. Former Visiting Research Fellow Max Planck Institute for Comparative Public Law and International Law, Germany and Fellow Salzburg Global Seminar, Austria. Email: debsontop@gmail.com

the aim of this chapter to examine the common forms of security used as alternatives before a ship is released while action is pending.

To set the tone for our discussion, let us begin by looking at the nature of maritime actions generally.

Maritime Actions

Maritime action may take either of these two forms or a combination of both, which are:

1. Action in Rem; and /or;
2. Action in Personam.

Action In Rem

This is the action taken against the ship or vessel itself referred to as the property or the “res”. Such action is not however limited to the ship for, in proper circumstances, it could proceed against the freight or cargo.¹ A ship from time immemorial both in national and international law has been granted some special rights and privileges. It is in fact regarded as real property and actions directed at it are regarded as *in rem* actions under admiralty law. Such matters include arrest and detention of the ship etc. This was rightly pointed out by the court in the case of *Vamos Navigation Ltd. v. Ojomo & Anor*², when it stated thus:

Although a ship is a movable object or property, its nature, functions and characteristics are such that, from time immemorial all nations by common agreement and international usages have accorded a ship special rights and privileges among which are those that relate to status, nationality, and a ship is usually regarded as a

¹ See the dictum of Karibi-Whyte J. in *The Bosnia* [1907-1979] NSC Vol. I, P. 430 and also the case of *Marivana Maria Compania S.A. Panama (owners of M.V. Arpa Sun) V Congerial (Belgium) N.V. Antwerp & Ors, The Arpa Sun* [1980-86] NSCE Vol. 2. 90.

² [1907-1979] NSC Vol. I. Pg. 306.

res – in other words, a ship is regarded as real property as distinct from personal property and an action against a ship is regarded as an action in rem as distinct from an action in personam³.

The court went further:

Furthermore, because ships by their nature and functions go on voyages by sailing in the high-seas and do so from country to country, matters relating to the arrest and detention of a ship are matters in rem in Admiralty⁴.

Also in *Anchor Limited v. The owners of the Ship Eleni*,⁵ The Federal Supreme Court defined an action in rem as:

One in which the subject matter is itself sought to be affected, and in which the claimant is enabled to arrest the ship or other property, and to have it detained, until his claim has been adjudicated upon, or until security by bail has been given for the amount, or for the value of the property proceeded against, where that is less than the amount of the claim⁶.

It could be gleaned from the above therefore that an action in rem carries with it the power (or rather the right) to arrest and detain a ship, the “res” (and in fact to dispose of same) in settlement of claims against it. It seems however that in certain cases an action in rem may not necessarily confer a right of lien as was held in the case of *Tawa Petroleum Products v. Owners of M. V. Sea Winner, “The Sea Winner”*:⁷

³ Ibid, at P. 313.

⁴ Ibid, also at P. 313 per Omo-Eboh. J.

⁵ (1956–60) Vol. 1, NSCC P. 16.

⁶ Ibid, at P. 17 per Foster Sutton, F.C. J.

⁷ [1980-86] NSC Vol. II P. 25 at 35. See also the English case of *C.C. J. Northcote vs. The Owners of the Heinrich Bjorn* (1886) 11 App. Cases 270 where the Court held that action in rem lies for “necessaries” supplied to a ship, but, such jurisdiction did not confer a maritime lien.

In that case, the court held that even though an action in rem lies against the defendant (the ship), it would not accept that a debt for supply of oil confers a right to exercise a lien on it.

Action in Personam

An action in Personam as distinct from action in rem is that which is directed at the person or individual human being concerned with the wrong complained of. While action in rem is founded on the res or property, action in personam is founded on the person. In such actions (in personam) the courts have held that it is necessary to look at the person who was liable at the time the cause of action arose.⁸ It is an action just like in contract or tort, directed at the person liable under the contract or tort.

An action in personam does not however give right of arrest or the exercise of a lien like an action in rem⁹. It can however be instituted alongside the in rem action.¹⁰

What is a maritime lien?

Generally, a lien in law is a limited right exercised over another's property. A right which gives a person power to retain possession over the property of another person in order to secure a claim for debt (or some other obligation) owed him by that other person.¹¹ Usually, the property over which lien is exercised must have come

⁸ See *Mercantile Bank of Nig. Ltd. v E.R. Tucker and Ors, The Bosnia* [1970 – 1979] NSC Vol. I, 428 at 430, and also *The St. Merriel* [1963] 1 Lloyd's Rep. 63.

⁹ See *The Bosnia* (supra) at P. 432 and also *Anchor Ltd. vs. The owners of the ship Eleni* (supra) where the Court held that where action has been commenced in personam and judgment entered thereon, no order for arrest (of ship) can be made by the court.

¹⁰ See the dictum of Brandon J. in *The Rena K.* (1979) Q.B. 377 at 405.

¹¹ E.g. your horologist has a "repairer's" lien over your watch or clock under repairs for his charges. So also does a mechanic has a lien over your car in his possession until his charges for the repairs on it are met.

into the possession of the person exercising the right lawfully. Under admiralty law, there is a bit of variation in the exercise of this right. According to Carver therefore,

A Maritime Lien attaches to the property from the time the claim first arises, and clings to it without regard to the person who may have possession, and notwithstanding any transfers of the general rights in the property.¹²

The exercise of maritime lien therefore is separated from possession. It is a right in rem which does not require possession before it is carried into effect. The locus classicus with respect to the exercise of this right came before the English Courts for consideration in 1851 in the case of *The Bold Buccleugh*.¹³

In that case, a Scottish ship "ran down" an English ship in the Humber; proceedings were commenced but before the Scottish Ship could be arrested she left and went to Scotland. Later she was sold and the purchasers, quite ignorant of the collision and the proceedings, sent her to England where the warrant of arrest was executed and the proceedings were allowed to continue, despite the complete innocence of the current owners. The Court said that the injured party had a right in the ship before she sails. The collision itself created the right which "ran with" the ship, into whomsoever's hands it might come. This right was incomplete – "inchoate" – but could be completed – "perfected" – by legal action. However, until such time as it might be lost (e.g. by delay – Time bar), it continued to exist, without legal action being taken, without the need to notify the owners.¹⁴

The lien is thus a proprietary interest in the res (the ship) or property, which attaches to the latter immediately the cause of

¹² Carver, *Carriage of Goods by Sea* (12th ed) Vol. Para. 1383, 1172.

¹³ (1851) 7 Moo. P. C. 267.

¹⁴ Reported also is Robert Grime, *Shipping Law* (2nd ed) P. 14.

action, arises and travels with it even into the hands of third or subsequent parties. And this is irrespective of whether such party(ies) are aware of the lien or not.¹⁵

The lien (unlike the ordinary lien) also allows a right to realize what is owed from the property by disposing of or sale of it, and not just merely to retain possession until debt is paid.

The Exercise of the Right

The right is exercisable by any person who has a claim or charge over a ship as a result of debt owed in relation to the ship or damage caused by it. According to section 5(3) of the admiralty jurisdiction Act 1991:

In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in rem may be brought in the Court against that ship, aircraft or property, and for the purpose of this subsection, "maritime lien" means a lien for:

- (a) Salvage; or
- (b) Damage done by a ship; or
- (c) Wages of the master or of a member of the crew of a ship;
- (d) Master's disbursements.

Here the case of *Joseph Eustace Fernando v. Owners of M.V. Rhodian Trader*,¹⁶ is worth examining in relation to the provision of S. 5. (3) (c) above.

In the case, eighteen crew members of the M. V. Rhodian

¹⁵ See the dictum of Karibi-Whyte J. in *Mercantile Bank of Nig. Ltd. vs. E.R. Tucker & Ors, The Bosnia* (supra) particularly at P. 430 where he defined it (maritime lien) as a "claim or privilege upon a maritime res in respect of service done to it or injury caused by it and attaches to the res and travels with it into whosoever possession the res comes".

¹⁶ [1980-1986] NSC Vol. II P. 339.

Trader brought an action in rem against the vessel for non-payment of their wages for several months. The vessel was abandoned by other owners at Lagos and no provisions were made for the welfare of the crew. In addition to their arrears of wages, the crew also claimed food allowance, one month's salary in lieu of notice of termination, and repatriation allowances.

The court held, per Belgore J. *inter-alia* as follows:

1. That the crew had a valid maritime lien on the vessel and were entitled to an order for the sale of the vessel in satisfaction of their wages;
2. That an allowance for food as well as for repatriation expenses was equivalent to wages and therefore enjoyed a maritime lien;
3. That in view of the provisions of Ss 1 (1) (0), 3 (4) and (6) of the Administration of Justice Act 1956 (which is similar in effect to the above provision i.e. 5 (3) (c) of the Admiralty Jurisdiction Act 1991)¹⁷, one month's salary in lieu of notice was allowable;
4. That in view of the above provisions that claim falls properly within an in rem jurisdiction¹⁸, and that the judgment should be satisfied from the proceeds of the sale of the vessel.

Statutory Lien

At this juncture, let us pause here and examine the term statutory lien. This lien is more or less an extension of the common law right granted under maritime lien and it is governed by the Admiralty Jurisdiction Decree, 1991 which greatly expanded the admiralty jurisdiction of the Federal High Court to many claims in rem which would not ordinarily have been covered under maritime

¹⁷ Words in bracket mine for emphasis.

¹⁸ Ibid, at P. 342-343. Here the Court expressed that "an allowance for victualling" and "cost of repatriation" were equivalent to wages and consequently enjoyed maritime lien.

lien.

Suffice to say here, that the question of arrest arising under maritime lien is a subject covered under international agreement. Thus, the Administration of Justice Act itself was an Act which gave enforcement to the Convention on the Arrest of Sea-going ships 1952¹⁹, which itself set out list of claims regarded as legitimate to arrest a ship. As said earlier this list has now been incorporated in the Admiralty Jurisdiction Decree, 1991. The list created some rights quite distinct from the traditional common law maritime lien. It is sometimes called "Statutory lien" or "arrest lien".

Under the Admiralty Jurisdiction Decree, 1991 the following are the "maritime claims" which the Federal High Court may entertain under S. 2 (3):

- (a) A claim for damage done by a ship whether by collision or otherwise.
- (b) A claim for damage received by a ship;
- (c) A claim for loss of life or for personal injury sustained in consequence of a defect in a ship or in the apparel of equipment of a ship;
- (d) Subject to subsection (4) of this section, a claim, including a claim for loss of life or personal injury, arising out of an act or omission of:
 - (i) The owner or charterer of a ship;
 - (ii) A person in possession or control of a ship;
 - (iii) A person for whose wrongful act or omission the owner, charterer or person in possession or control of the ship is liable.
- (e) A claim for loss or damage to goods carried by a ship;
- (f) A claim out of an agreement relating to the carriage of goods or persons by a ship, or to the use or hire of a ship, whether by charter-party or otherwise.

¹⁹ See the dictum of Brandon J. in *The "Eschersheim"* [1974] 2 Lloyd's Rep. 188.

With respect to (a) and (c) above, let us examine the case of *Westminster Dredging Company v. Adeyemi Ikesusan*²⁰, based on S. 1 (1) (d) and (f) of the Administration of Justice Act 1956 which is the equivalent section or paragraphs 2 (3) (a) and (c) of the Admiralty Jurisdiction Decree, 1991.

In that case, the plaintiff was engaged as a deck hand on the defendant's vessel. Whilst in the pursuit of his work in discharging sand from a stationary dredger he suffered injuries, which resulted in the cutting off, of his left leg. It was held inter-alia, that a claim in tort of negligence committed in a ship comes squarely under paragraphs (d) and (f) of section 1 (1) of the Administration of Justice Act 1956 (which are equivalent sections of paragraphs 2 (3) (a) and 2 (3) (c) of the Admiralty Jurisdiction Decree, 1991).²¹

As regards S. 2 (3) (e) the courts have held that it is essential for the goods to have actually been lost before discharge or delivery. Once the goods are off-loaded from the ship and delivered to the bailor, then the paragraph cannot apply. Thus in the case of *Aluminium Manufacturing Co. (Nig.) Ltd. v. NPA*²²:

The Plaintiff/Appellant claimed against the NPA the sum of ₦198,872.99 being general and special damages arising out of the failure of the NPA to locate and re-deliver to the appellant 47 packages of aluminum sheets landed ex M.V. River Aboine into respondent's custody which got missing. The Court held, per Ademola J.C.A thus:

...on the pleadings filed thus far in the case in the court below, it seems to me that the liability of the respondent arose after the contract for the carriage by sea by the carrier has ended. The carrier of the consignment (M.V. River Aboine) who is not a party

²⁰ [1980-1986] NSC Vol. II. P. 314.

²¹ Words in bracket for emphasis.

²² [1980-86] NSC V. II P. 321.

to this action has performed his side of the contract with the appellant under the bill of lading and handed over the consignment to the respondent for delivery to the appellant. That contract under the bill of lading has in my view terminated. The element of a contract of carriage of goods by sea in the case is no longer there. The element that has come into play in the case is the contract of bailment which now exists either by implication or expressly between the appellant and the respondent.²³

The court therefore concluded that the case was not an admiralty matter within the meaning of S. (1) (g) of the Administration of Justice Act 1956 (which is an equivalent provision to S. 2 (3) (e) of the Admiralty Jurisdiction Decree, 1991 above).²⁴ On further appeal, the Supreme Court held in the same vein.

It is also a requirement of this paragraph that the claim must be made by one of the parties to the contract of Carriage.²⁵

Enforcement of Right of Arrest

The right of lien (either maritime or statutory) is enforced by arrest. This is done by the claimant bringing an application for the arrest of the ship.²⁶ A warrant of arrest is then issued by the

²³ Ibid, at P. 324.

²⁴ Words in bracket mine.

²⁵ See the case of *Dr Omololu Soyombo vs. The Owners of the vessel M. V. Veronique* (unreported) FHC/L/CS/170/92.

²⁶ The application is brought under S. 79 of the Ports Act, 1956, Cap 361 (formerly Cap. 155) Laws of the Federation of Nigeria, 1990.

²⁷ See Sections 1 (1) and 19 of the Admiralty Jurisdiction Decree, 1991 which vests exclusive admiralty jurisdiction on the Federal High Court in Nigeria. This decree repealed and replaced the Admiralty Jurisdiction Decree of 1962 which had hitherto vested admiralty jurisdiction on State High Courts. The warrant is issued on Form 63 under order II, rule I of the Judgments (enforcement) Rules which provides: "An order ...for the arrest and detention of any ship shall be enforceable by a warrant in Form 63".

Admiralty Court, which is the Federal High court in Nigeria.²⁷ Once so issued, the warrant is executed by the Admiralty marshal who is an officer of the Admiralty Court. The warrant is fixed or posted conspicuously to the superstructure of the ship while a copy of it is left permanently aboard.

The order of Arrest can only be enforced if the *res* is within the territorial jurisdiction of the court.²⁸ The ship once arrested comes into the possession of the court and may not be moved. To do so or even attempt to do so amounts to contempt of court of all persons involved. In *Universal Fishing Co. Ltd. v. The Owners of the Ship Polar M.C. "The Polar M.C."*²⁹:

An arrested ship escaped from port without an order for its release or a discharge of the arrest order. The court held inter-alia, that all the officers of the Nigerian Ports Authority (NPA) involved in the arrest and detention of the ship "could be made liable for culpable negligence, which might breed contempt if everything was in order".³⁰

Earlier the court had held in that case that the Department of Customs and Excise also has a duty to perform in arrest and detention of a ship, in carrying out a court's order, and if they fail to perform that duty, they have a case to answer.³¹

A party seeking an order for arrest must prove or establish a cause of action, which entitles him to such arrest. The mere bringing of an action in *rem* does not automatically confer a right of arrest. Thus the court in *Chellchan Enterprises Ltd. v. Owners of Sea Thand II, "The Sea Thand II"*, after reviewing the applicable rules on the matter concluded that:

The intention (of the rules) is to ensure that whoever applies for a writ to arrest a ship does in fact have cause of action against the owner of the ship which carries with it a right of arrest...³²

²⁸ See *the Bosnia* (supra), at P. 430.

²⁹ [1907 - 1979] NSC Vol. 1, P. 363.

³⁰ Ibid, at P. 367.

³¹ See p. 366 of the report.

³² [1907 - 1979] NSC Vol. I, P. 295 at 298.

A veritable ground for ordering Arrest would be where it is shown that the ship is indebted and there is no evidence that it can meet this indebtedness.³³ The plaintiff must also show that he has no other means of recovering his claim if successful at the trial unless order for arrest is made. e.g. that the owner(s) of the vessel has no other property or asset within the jurisdiction of the court.³⁴

It may be pointed out here that quite apart from the judicial process discussed above; to enforce legal claims, a ship may also be detained (or arrested) for some other reasons bordering on executive acts. This includes non-compliance with customs procedure, port health authorities regulations, unseaworthiness etc.

What Can Be Arrested?

It is apt to begin here with Section 5 (4) of the Admiralty jurisdiction decree, which provides that:

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

- (a) That ship, if at the time the action is brought the relevant person is either the beneficial

³³ See the case of *National Bank of Nig. Ltd. vs. Okafor Lines Ltd.* No. I [1907–1979] NSC Vol. I, 84 particularly at P. 86–87.

³⁴ See the case of *Anglo-French steel corporation V Panfixing shipping Co. Ltd. & Ors, and Roussamito Compania Naviera S. A. V. Kos International & Anor* [1907–1979] NSC Vol. I, PP 302 and 421 respectively.

owner of that ship as respects all the shares in it or the charterer of the ship under a charter by demise; or

- (b) Any other ship of which at the time the action is brought the relevant person is the beneficial owner as respects all the shares in the ship.

From the above provision, a claimant may arrest:

1. the "particular ship" (or offending ship) so long as the owner truly does own it or charters it by demise; or
2. any other ship he owns (referred to as "alternative" or "sister" ship).

Here the courts require a common ownership link between the offending ship and the sister ship chosen for arrest. In other words, the two vessels must be under the same beneficial ownership as regards all their shares.

The Nigerian courts have not been confronted with problems under this section but for comparative study let us turn to the British Admiralty Law and see how the provision is interpreted. In *Medway Drydock & Engineering Company Ltd. v. The "Andrea Ursula" (owners), (The "Andrea Ursula")*³⁵.

The plaintiff ship-repairers carried out repairs to the Motor Coaster *Andrea Ursula* at the request of the demise charterers of that vessel. The plaintiffs claimed \$5, 180 (The cost of the repairs)

³⁵ [1991] 1 Lloyd's Rep. 145.

³⁶ The Act, by this section greatly expanded the traditional Common Law maritime lien hitherto limited to salvage, wages and collision issues. It in fact created the incidents of statutory lien in England. The law as it is currently practised is contained in the English Supreme Cour Act 1981, Ss 20 to 24. section 20 (2) of The Act sets out a long list of "Maritime Claims" which though similar to our own S. 2 (3) of the admiralty Jurisdiction Decree, 1991 is far more comprehensive.

under the Administration of Justice Act, 1956, Sect. 1 (1) (n) ³⁶ in an action in rem against the vessel. On a motion for judgment in default of appearance, the issue being whether, at the time action was brought, the vessel was “beneficially owned as regards all the shares therein” by the demise charterers and the plaintiffs could proceed in rem under Administration of Justice Act, 1956, Sect. 3 (4),³⁷ which provided:

In the case of any such claim as is mentioned in paragraphs (d) to (r) of subsection (1) of section one of this Act, being a claim arising in connection with a ship, where the person who would be liable on the claim in a action in *personam* was, when the cause of action arose, the owner or charterer of, or in possession or in control of the ship, the Admiralty Jurisdiction of the High Court... may... be invoked by an action in *rem* against –

- (a) That ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or
- (b) Any other ship which, at the time when the action is brought, is beneficially owned as aforesaid.

It was held by the court, that the words “beneficially owned” meant owned by any person with *complete possession and control of the vessel*,³⁸ who might thereby become liable on a claim within the Administration of Justice Act, 1956, Sect. 1 (1) (d) to (r), and that the vessel was, at the date when action was brought, beneficially owned as respects all the shares therein by the demise charterers within Sect. 3 (4).

³⁷ This section is similar in provision to S. 5 (4) of the Admiralty Jurisdiction Decree, 1991 under discussion.

³⁸ Emphasis mine.

As a matter of fact in that case, the court after having identified the two meanings, the words are capable of, - i.e.

- (1) Legal and equitable title (ownership) vested in one and the same person; or
- (2) Legal title vested in one person, with the equitable title (ownership) vested in another, added a third meaning. According to Brandon. J.:

The words seem to me to be capable also of a different and more practical meaning related not to title, legal or equitable, but to lawful possession and control with the use and benefit which are derived from them. If that meaning were right, a ship would be beneficially owned by a person who, whether he was the legal or equitable owner or not, lawfully had full possession and control of her, and by virtue of such possession and control, had all the benefits and use of her which a legal or equitable owner would ordinarily have³⁹.

He went further:

A ship which is demise chartered is an example of a ship which is possessed and controlled by a person not the legal or equitable owner in the way that I have described ... Because of the extent of his possession and control, a demise charterer has often been described as the owner *pro hac vice* or the temporary owner⁴⁰.

It may be noted that “relevant person” here (under the

³⁹ *Ibid.*, at P. 147.

⁴⁰ *Ibid.*, also at P. 147. c.f. the cases of *Salomon vs. Commissioners of Customs and Excise (C.A.)* [1967] 2 Q.B. 116 or [1966] 2 Lloyd’s Rep. 640; and *Post Office vs. Estuary Radio Ltd., (A)* [1968] 2 Q.B. 740 or [1967-2 Lloyd’s Rep. 299 Contra. The St. Merriel [1963] 1 Lloyd’s Rep. 63.

section) means the person that is legally liable in the claim who would probably be the owner of the ship (as employer of the negligent crew member responsible for the accident – e.g. collision that led to the claim) or a demise charterer. That person must be the person who would be liable on the claim if an action were to be brought *in personam*.

With respect to the “sister” or “alternative” ship arrest, we can only arrest such ship if owned by the “relevant person” but not a “sister” or “alternative” ship chartered. In a similar vein, if the “relevant person” is not the owner or demise charterer of the “particular” or “offending” ship we cannot arrest that ship. We may however arrest any ship owned by him at the time of arrest.⁴¹ For the purpose of a better understanding under this paragraph, let us pause to look at the *International Convention on the Arrest of Sea Going Ships 1952* which is the convention pursuant to which the Administration of Justice Act, 1956 governing the arrest of ships was passed in England. Then in 1991, the Admiralty Jurisdiction decree, which is similar in provisions to the Administration of Justice Act, was passed in Nigeria. It should be noted at this juncture that the convention referred to above was ratified for Nigeria by Britain, Nigeria then being a dependent colony of Britain.

Before the convention the state of the law was such that jurisdiction *in rem* was limited to a jurisdiction to arrest the *offending ship* itself. The right to arrest therefore existed alongside the exercise of maritime lien. The right does not extend to the arrest of a ship or other property of the defendant unconnected with the cause of action,⁴² unless the defendant joins the *in rem* action in which case the proceedings *in rem* continues as an action *in personam* against him. In such case, if judgment is entered against him, then execution can be levied against any of his

⁴¹ See Robert Grime, op ct P.21.

⁴² See *The Beldis* [1935] 53 L.I.L. Rep. 255.

⁴³ See *The Dictator* [1892] P. 304; *The Gemma* [1899] P. 285; *The Duplex* [1912] P. 8.

property within the jurisdiction of the court.⁴³ The above was the state of the law in England (and also in Nigeria) but some other continental countries permitted the arrest not only of the offending ship but also any other ship belonging to the same owner. In order to harmonize these various positions, an international convention was held in Brussels in 1952, the outcome of which was the convention on the arrest of sea going ships signed on May 10, 1952. the convention tried to find a middle way to the various positions. It made it clear that only one ship of the same owner may be arrested. Article 1 (1) of the convention defines a “maritime claim” as including: (a) damage caused by any ship either in collision or otherwise. While “arrest” means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.⁴⁴

According to Article 3 (1) of the convention:

... a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship ...

Ships are said to be in the same ownership when all the shares therein are owned by the same person or persons.⁴⁵

Finally Article 3 (3) states that:

... if a ship has been arrested in any one of such jurisdictions, or bail or other security has been given in such jurisdiction ... any subsequent arrest of the ship or any ship in the same ownership by the same claimant for the same maritime claim shall be set aside, and the ship released...

⁴⁴ See Article 1 (2).

⁴⁵ See Article 3 (2).

From the above provisions of the convention, it is clear that only the particular (or "offending") ship may be arrested or in the alternative a "sister" ship but not all of the defendant's ships. A very testy case on this point came before the English court of Appeal in 1970. This was the case of *"Monte Ulia" (Owners) v. The "Banco" and other vessels (Owners)*, (The "Banco").⁴⁶ In that case, the issue was whether the plaintiff is entitled only to arrest either the vessel concerned with the claim or anyone other vessel in the same ownership under Section 3 (4) of the Administration of Justice Act 1956 which is similar to Section 5 (4) of the Admiralty jurisdiction decree, 1991 in Nigeria. The facts of the case are set out as follows:

The plaintiffs' Motor Vessel Monte Ulia collided with a jetty in River Thames causing extensive damage. The plaintiffs alleged that collision was caused by the negligent navigation or management of the defendants' motor tanker Banco. The plaintiffs issued a writ in rem against the defendants and arrested seven vessels owned by the defendants including the Banco. The defendants contended that under the Administration of Justice Act, 1956, Section 3 (4), the plaintiffs only had the right to arrest the Banco or any one other vessel in the same ownership. The Court held, after referring to the convention, that section 3 (4) of the Administration of Justice Act meant that the plaintiffs might arrest one ship of the defendants only, which might be the offending ship or alternatively, any other ship in like ownership.

According to Lord Denning, M. R. who delivered the leading judgment in the case:

⁴⁶ [1971] 1 Lloyd's Rep. 49.

The important word in that sub-section is the word 'or'. It is used to express an alternative as in the phrase 'one or the other'. It means that the admiralty jurisdiction in rem may be invoked either against the offending ship or against any other ship in the same ownership, but not against both. This is the natural meaning of the word 'or' in this context. It is the meaning which carries into effect the international convention. It is the meaning which on high authority we ought to give to it.⁴⁷

Cessation of Arrest

A ship once arrested comes into the custody or possession of the court as pointed out earlier, and once the action in rem is successful is subject to sale by the order of the court. Before sale, the ship must be "appraised" or valued on the application of the claimant. The sale must be for the highest price obtainable and not below the appraisal. This is referred to as *judicial sale* and it not only puts an end to the claim in rem but also all other claims and charges on the ship.

A purchaser of such sale takes free from all encumbrances. All pending claims are transferred to the proceeds of the sale and are governed by separate applicable rules of "priority" among the claimants. If there is a balance after all claims have been settled, this goes to the defendant but this seldom happens. Where the proceed is not enough to settle the claimant, then if the action was also one in personam, personal remedies could be issued in addition against the defendant to make up for the shortfall in the value of the ship. It is however not clear what happens where action was in rem only (e.g. where defendant did not defend and

⁴⁷ *Ibid.*, a p.53. See also the dictum of Willmer. J. in *The St. Elefterio* [1957] 1 Lloyd's Rep. 283 at P.287.

therefore there is no in personam action against him). In such instance, if the proceeds of sale did not go round no additional sum can be awarded against him since he did not join the action in rem.

Release of Ship

Once arrested, for a vessel to be released pending the trial of the case before the court, security must be furnished unless the arrest was frivolous or there was no basis for making the order in the first instance. The security must be provided by the owner of the ship (i.e. the defendant) in the in rem proceedings as an alternative to cover the plaintiff's claim in the event of him succeeding at the conclusion of the trial of the case.

Two forms of alternative security have been recognized by the courts for a long time. These are:

1. Bail Bond; and
2. Guarantee or letter of undertaking.⁴⁸

Bail Bond

This is the oldest form of alternative security and it is a sworn undertaking by persons of means (usually not less than two) stating that they are ready to meet whatever is owed in the action. These persons are referred to as the "sureties" and they must be people of good financial standing to meet the stated obligations. In Atkins Court forms it is stated thus:

The owner of the property under arrest may ordinarily secure its release by giving bail in the amount of the plaintiff's claim and costs. Bail is given by bond. The ordinary practice is for the defendant's solicitor to submit the names of the

⁴⁸ See the cases of "*The Sea Thand II*" (supra) at P.298, and *Anglo-French Steel Corp. vs. Panfixing shipping Co. Ltd.* & ors (supra) at p. 304.

proposed sureties to the plaintiff's solicitor, if no objection is taken, bail is at once completed before the commissioner.⁴⁹

A bond covers only the particular claim upon which the arrest was made or threatened to be made, and not other claims which must be filed separately. Once the bond is given and accepted, the claimant must be satisfied and cannot re-arrest the ship.

This is more in vogue today than the old system of Bail bond. Atkins noted it as follows:

It is, however, rare in practice for bail to be put up. In vast majority of cases the arresting party will agree to release the vessel on security being provided by way of a guarantee or undertaking by a bank or protection and indemnity Association or other body known to him to be in good standing.⁵⁰

In Nigeria, this practice (of using Guarantee) is very common. Thus, Anyaegbunam J. noted this when he pointed out in the *Anglo-French Steel Corporation case*,⁵¹ as follows:

In most cases of this nature the solicitors for the parties agree between themselves that the plaintiffs will be satisfied with an undertaking on behalf of the defendants to provide security if called upon to do so. A guarantee by a bank, or an insurance company or a reputable shipping agent or corporation may be agreed upon guaranteeing payment of any sum which the court may hold to

⁴⁹ See Atkins Court Forms Second Edition Vol. 3 by Lord Evershed, P. 32, para. 28.

⁵⁰ Atkins Court Forms, *op cit.* The Protection and Indemnity Association (also referred to as the "P & I Club") is an association of ship owners in Britain.

⁵¹ (Supra) at p. 304.

be due to the plaintiffs or may be agreed between the parties if they settle.

In that case,

A motion was brought by the defendants seeking to rescind an earlier order of the court arresting and detaining the defendant's ship berthed at Port Harcourt. The defendant did not furnish any security and the court refused to vacate its earlier order until security was provided. In the words of Anyaegbunam J.:

"I therefore order that the vessel *M. V. Hydra Gale* be released *provided* that the defendants provide security by way of guarantee or undertaking by a bank or an insurance company or any other company or corporation of repute in Nigeria in the sum of ₦115,992.10 (which is the amount claimed)".⁵²

Usually, the guarantee or undertaking is a simple promise in writing (to the claimant) stating that the guarantor(s) will meet the claim up to a stated sum, if the ship is released. Legally, this operates as a contract between the guarantor and the claimant. Thus, if the terms in the undertaking are not met, the guarantor becomes liable in damages for breach of contract to the claimant.

⁵² *Ibid.*, at P. 306. Italics mine for emphasis. Words in brackets also mine.

⁵³ See the dictum of Brandon J. in *The Moschanthy* [1971] 1 Lloyd's Rep. 37 at p. 44 when he said: "The principle to be applied is, in my view, as follows: The plaintiff is entitled to sufficient security to cover the amount of his claim with interest and costs on the basis of his reasonably arguable best case". A best arguable case is the plaintiff's *prima facie* case which entitles him to reasonable security on his claim.

Limit or Extent of Security

A security must be sufficient to meet the claim and expenses of the action.⁵³ It cannot exceed the value of the res (ship). This was aptly stated by *Karibi-Whyte. J. in Ibe Abai & Co. (Nig.) Ltd & Anor v. Oceanic Traders Navigation Ltd*,⁵⁴ when he said:

I accept the argument of counsel for the applicant that the security given should ordinarily not exceed the value of the rest in respect of which the claim is being made.

In this regard, therefore, the claimant must be reasonable in quantifying the amount of security to cover the value of his loss (or claim). However, in considering the amount of security, the court will prefer to err on the side of the higher figure than the lower. The rationale for this is not far-fetched as was enunciated by the court in the *Ibe Abai* case:

Plaintiff cannot recover on the security more than the judgment debt if he is successful. He should not be made to come back to the courts on the grounds that the security was not adequate to satisfy the judgment debt.⁵⁵

Conclusion

We may here safely conclude that maritime lien is a veritable tool in the hands of the plaintiff (claimant) to protect his claim since it is coupled with the right of arrest (and disposal of the ship where his action is successful). Traditionally (i.e. under common law) it covered only claims relating to salvage, wages and collision damages. But today the list has been widened by statute to cover a variety of claims such as services rendered to the ship, loss of life or personal injury caused by the negligence of the owner or

⁵⁴ [1907-1979] NSC Vol. 1, P. 418 at 419.

⁵⁵ (Supra) at P. 420.

charterer of a ship, loss or damage to goods carried by a ship etc. Often the plaintiff must come under an action in rem. But not all actions in rem carry the right of lien. Where it does however carry such right, the plaintiff can immediately apply for a warrant (of arrest) of the ship once his action is brought. A study of all the cases has however shown that the issue of warrant is not at all automatic as the plaintiff is wont to believe. The court will see to it that he has a prima facie case against the defendant, for the cost of Arresting and Detaining a ship can sometimes be too much on the latter. And of course if he (the plaintiff) has no case what is the use allowing him to abuse the court process simply because he has headed his claim (or action) in rem.

In some instances in fact the courts have had to request (or direct) the plaintiff himself to furnish security for arresting and detaining the defendant's ship in the event of costs awarded in his favour against the plaintiff if the latter loses the case. One of such situations arose in the case of *The Gloria Maritime Company v. Aleco Koutroumanides & Anor* ("The Antzy"):⁵⁶

There, the plaintiffs having obtained an order for the arrest of the defendants' vessel Antzy, took no further step to pursue the action pursuant to which the arrest was made. The defendants then brought a motion seeking security for costs for the continued detention of the vessel since the plaintiffs had no assets in Nigeria. It was held that this is a proper case for ordering security for costs and the court so ordered. The court further held that in the event of the plaintiff not meeting the security, the vessel should be released.

It is submitted that the procedure should be used more by the courts in appropriate cases in order to discourage the abuse of its process (es).

⁵⁶ [1980-86] NSC Vol. II, 62.