The power of *in rem*
Tecoil Shipping Ltd v Neptune EHF [2021] EWHC 1582 (Admlty)

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This decision considers the effect of an *in rem* judgment in subsequent *in personam* proceedings.

Facts

The proceedings arose out of a collision in July 2018 between two ships, the "POSEIDON" and the "TECOIL POLARIS". The claimant ("**Tecoil**") was the owner of the "TECOIL POLARIS'. The first defendant ("**Neptune**") was the owner of the "POSEIDON". The "TECOIL POLARIS" was at berth in Hull when the "POSEIDON" crashed into her. Neptune had never disputed liability for the collision.

After the collision, Neptune's insurers ("**the Insurers**") issued a letter of undertaking ("**the LOU**") which provided:

"IN CONSIDERATION of your releasing and/or refraining from arresting or re-arresting at any time hereafter or otherwise detaining the 'POSEIDON' or any other vessel or property in the same or associated ownership, management, possession or control for the purpose of obtaining security in respect of your claim arising out of the above collision we hereby undertake to pay you on demand such sum or sums as may be due to you from the owners of the 'POSEIDON' in respect of your said claim either by agreement between the parties hereto or by the final unappealable judgment of the English Courts, provided always that our total liability hereunder inclusive of interest and costs shall not exceed the sum of US$200,000."

In June 2019 Tecoil commenced *in rem* proceedings against the "POSEIDON". No acknowledgement of service was filed and Tecoil applied for judgment in default. The application required evidence proving the claim to the satisfaction of the court and a public hearing of the application in open court. The hearing took place before the then Admiralty Registrar, Mr Jervis Kay QC, who gave judgment on 24 February 2020 ([2020] EWHC 393 (Admlty)). He awarded Tecoil EUR124,462 and £119,033 plus costs assessed at £105,584.50 (a grand total of around US$525,000).

The Insurers made it clear that they were not intending to make payment under the LOU on the ground that it did not respond to an *in rem* judgment. Tecoil issued an *in personam* collision claim against Neptune seeking substantially the same relief. Tecoil joined the Insurers as defendants to these proceedings.

Tecoil applied for and obtained judgment against Neptune in default of an acknowledgment of service under CPR Part 12 in the same terms as the *in rem* judgment. It then made a demand under the LOU. The Insurers rejected the demand – contending that the default judgment was not a "final unappealable judgment" within the meaning of the LOU – and applied to set the judgment aside.

Decision

After the hearing of this application but before the Registrar had circulated a draft judgment, the parties informed the Court that they had settled the dispute. The Registrar nevertheless exercised his discretion to promulgate the part of his judgment which raised issues of wider interest.

The first issue concerned the Insurers' contention that the judgment was wrongly entered because default judgment was unavailable in a collision claim unless the party seeking judgment had either filed a collision statement of case or at least obtained an order dispensing with that requirement. Rejecting this submission, the Registrar held that an application for judgment could be made in default of an acknowledgment of service under CPR Part 12. There was no requirement to file a collision statement of case.

The more significant point arose on the Insurers' argument that the Court should set aside the default judgment under CPR 13.3 on the ground that there was a reasonable prospect of successfully defending the claim. This depended on the Insurers establishing that it would be open to Neptune to re-litigate the issues determined in the earlier *in rem* judgment. In the Registrar's judgment, however, Neptune was bound by the determinations in the *in rem* claim. At para. 30, he said:

"This is because although Neptune were not, strictly speaking, parties to the *in rem* proceedings, they were 'at least indirectly impleaded to answer to, that is to say, to be affected by, the judgment of the Court'; see the analysis of Brett LJ in The "Parlement Belge" (1880) LR 5 PD 197 (CA) at 218. The liability to compensate was 'fixed not merely on the property, but also on the owner through the property', ibid. That is why, following longstanding practice, the owners appeared on the *in rem* claim form as nominal defendants and were described there and in other documents as 'The Owners of the Ship 'POSEIDON''; (see PD61 paragraph 3.3)."

The Registrar added that he would hold that this result would follow save, perhaps, in a case where, despite service on the ship, the owners were able to satisfy the court that they had no notice of the *in rem* proceedings.

Conclusion

This is an important decision which supports the proposition that an *in rem* judgment in a collision action can be deployed against the shipowner in later *in personam* proceedings, even if it took no part in the original claim. Shipowners and their insurers who choose not to respond to an *in rem* claim may find themselves bound by the result. This case serves as a cautionary tale.

Whether the LOU would have responded to the original *in rem* judgment remains an open question and one which – given the standard wording – may arise for determination in another case.

Tom Bird acted for the Claimant (instructed by Haris Zografakis, Rebecca Crookenden and Simon Domin of Stephenson Harwood)

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