

# Starboard: Collision and change of ownership: Who is the defendant in an action *in rem*?

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A collision occurs between two ships, A and B. The owner of ship A wishes to make a claim against the owner of ship B and to attach ship B as security for the claim. It can make its claim in Singapore under legal proceedings known as an action *in rem* and, within the action *in rem*, apply to arrest or attach ship B as security for its claim. An action *in rem* is an action commenced against a defendant, called nominally “the owner of ship B”. This is because, in appropriate circumstances, Singapore maritime law rules allow maritime claims to be made and maintained against ships even though they undergo a change in ownership. In collision claims, an action *in rem* can be commenced against a ship even after the ship undergoes a change in ownership. It gives the Singapore court the power to enter judgment against “the owner of ship B” if “the owner of ship B” does not appear in, or does not defend, the action. It also gives the court the power to order ship B to be sold and her proceeds applied to satisfy the judgment. By the time ship B comes into Singapore and the action *in rem* is served on ship B, ship B has undergone a change of ownership. In such a situation, who is the defendant in the action *in rem*? Who has the right to appear in the action *in rem* and to defend the claim? Is it the owner of ship B at the time of the collision? Or is it the owner of ship B at the time the action *in rem* is served on ship B in Singapore? If the defendant in an action *in rem* is the owner of ship B at the time of the collision, can the current owner appear as an intervener in the action *in rem* to protect its interest in ship B? These are questions that have regularly exercised the minds of parties to maritime claims and they are questions that a recent decision of the Singapore High Court has attempted to answer.

## Brief facts of the case

In *The Echo Star ex Gas Infinity* [2020] 5 SLR 1025 (*The Echo Star*), the vessels “*Royal Arsenal*” and “*Echo Star*” collided in the straits of Hormuz around April 2019. After the collision, the “*Echo Star*” was sold by its owner, Sea Dolphin Co Ltd (Sea Dolphin), to Cepheus Limited (Cepheus). After the sale of the “*Echo Star*”, the owner of the “*Royal Arsenal*” (plaintiff) commenced an action *in rem* and named the defendant in the action *in rem* as the “Owner and/or Demise Charterer of the vessel “*Echo Star*” in the usual way. The “*Echo Star*” was arrested when she came into Singapore. Cepheus appeared as defendant in the proceedings, and provided security for the release of the “*Echo Star*”. Subsequently, Sea Dolphin appeared as defendant and Cepheus sought to withdraw its appearance as defendant, and to appear instead as intervener in the proceedings. The owner of the “*Royal Arsenal*” did not agree to Cepheus’s request to change its status to that of an intervener. The main issue before the Court was to determine the correct defendant to enter appearance in the *in rem* proceedings following the change of ownership of the “*Echo Star*”.

## Decision of the Court

The Singapore High Court decided that the party who was the defendant in an action *in rem* concerning a claim in damages for a collision was the owner at the time of the collision. In coming to its decision, the Court used what it

regarded to be a first-principles approach. It considered that collision claims enjoyed the status of a maritime lien, which operated as an “encumbrance” (a security interest) on the ship from the moment the “cause of action” (the right to make a claim) arose. The maritime lien was enforceable (legally realised) through the procedure of an action *in rem*. Actions *in rem* were such that they were actions against the ship itself in the sense that if the defendant did not appear, the judgment would be enforceable (legally executable) against the ship only. If the defendant appeared in the action *in rem*, then the judgment was enforceable (legally executable) against not only the ship but any other property owned by the defendant. The Court also considered that collision claims were fault-based and looked to the owner of the ship at the time of the collision as the party responsible to compensate the claimant for loss and damage caused by the owner’s representatives. The Court thought that if the current owner of the ship was the defendant in an action *in rem*, there would be illogicality in a situation where the current owner appeared as defendant and the Court subsequently gave judgment favouring the claimant. In that situation, it would be illogical that the current owner’s other property became available for enforcement (legal execution) when the current owner was not the party responsible for the collision. The Court therefore found that the defendant in an action *in rem* in this situation was the owner of the “*Echo Star*” at the time of the collision.

## Starboard’s observations

Starboard observes that the case of *The Echo Star* revives the age-old question of the identity of the defendant in an action *in rem*. It is not an easy question to answer, not least because, historically, common law jurisdictions tended to regard the ship, an inanimate object, as if it was a legal person who was potentially liable to compensate the claimant. This evolved gradually towards the view that the owner of the vessel was considered the party potentially liable, with the ship as property which stood as security for the claim, and which could ultimately satisfy the claim. The Singapore High Court’s view that an illogical situation arises if the current owner of the ship, by appearing as defendant in an action *in rem*, becomes personally liable to satisfy the claim beyond the property of the ship is, no doubt, correct. The collision claim holds the previous owner of the ship responsible and, if there is anyone who should be personally liable to satisfy the claim beyond the property of the ship, it must be the previous owner. However, in situations like these, the previous owner may not be around to defend the claim. The previous owner may no longer be a going concern or may, indeed, be dissolved and no longer exist as an entity. It seems awkward that the current owner of the ship, who is the party who stands to lose the ship if the claim is undefended, should not be regarded as a party who can appear as a defendant to the claim and to otherwise protect the ship. It also seems awkward that the current owner can only do so as an intervener (third party) in the action *in rem*.

Perhaps a possible answer to this long-running question lies in remembering that an action *in rem* when served on a ship, puts a ship at risk of being sold to satisfy a meritorious collision claim if no party appears to defend the claim. The party who stands to lose is the current owner of the ship and the current owner of the ship ought to be entitled to appear as defendant in the action *in rem* to put the claimant to proof of the claim. In doing so, the current owner ought to be allowed to also put up any defence that the previous owner could have put up, with the only sanction being that of a reimbursement of legal costs should the adopted defences fail. If the claimant cannot prove its claim, or if the defences succeed, the claim will be dismissed and the ship protected. The rule that a party who appears as defendant in an action *in rem* exposes its other property to legal execution to satisfy any judgment given on the claim, ought not to apply in the case of an owner who was not the owner of the ship at the time of the collision. The reason why it ought not to apply is that the claim hold the previous owner, not the current owner, liable. The current owner of the ship ought to be allowed to apply to the court for clarification or, if necessary, dispensation of the rule, such that only the ship is liable to execution for the purpose of satisfying the claim.

Actions *in rem* have a complex historical and conceptual context and often give rise to difficult questions like the ones in *The Echo Star*. Those who have maritime claims or who defend against them should seek professional, specialist advice before proceeding.

## Your Key Contacts



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