

## IN REM OR IN PERSONAM: MODE OF EXERCISE OF ADMIRALTY JURISDICTION

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## IN REM OR IN PERSONAM:MODE OF EXERCISE OF ADMIRALTY JURISDICTION

### Admiralty Jurisdiction.

- 1.1 Jurisdiction is the authority by which a court has to decide matters brought before it for litigation or to take cognisance of issues presented before it in a formal way for its decision.<sup>1</sup> The jurisdiction of a Court is determined by the cause of action of the plaintiff endorsed on the writ of summons<sup>2</sup> and statement of claim<sup>3</sup> and it is the pillar upon which the entire case before the court stands and once the defendant shows the court has no jurisdiction; the foundation of the case is shaken and entirely broken.<sup>4</sup>
- 1.2 The jurisdiction of a court is a strict matter of law conferred by either the Constitution or by statute.<sup>5</sup> Being a creature of statute, the jurisdiction of a Court is confined and circumscribed by the statute that creates the Court and so courts are forbidden from encroaching on or enlarging their jurisdiction for by so doing they will be usurping legislative functions.<sup>6</sup> The yardstick for determining whether the Federal High Court has jurisdiction over a subject-matter is to see if it is specifically mentioned in any of the statutes conferring jurisdiction on it. The jurisdiction of the Federal High Court is conferred and defined by section 7 of the Federal High Court Act, section 230(1) 1979 Constitution as amended by Decree No. 107 of 1993, Federal High Court (Amendment) Decree No. 60 of 1991 and section 251(1) of the 1999 Constitution<sup>7</sup>.
- 1.3 However, the current trend is that in actions in which the Federal Government or any of its agencies is a party even if the cause of action is not covered by section 251 of the 1999

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<sup>1</sup> *Satyan 1 v. IMB Ltd* (2002) 5NWLR (Pt.760) 397 at 410.

<sup>2</sup> See, *Owners of Baco Liner 3-v-Adeniji*, supra at 668. *Akinfolarin v. Akinola* (1994)3NWLR [Pt335] 659; *Adeyemi v. Opeyori* (1976) 9&10 SC 31.

<sup>3</sup> *Onuohah v. Kaduna Refining & Petrochemical Co Ltd* (2005)2SC(Pt.II) 1at 6.; *Tukur v. Government of Gongola State* (1989)4NWLR (Pt.117)517.

<sup>4</sup> *Okolo v. UBN Ltd* (2004)3NWLR [Pt. 859] 87 SC.

<sup>5</sup> See, *Owners of Baco Liner 3 –v- Adeniji* (1993) 2NWLR (Pt274) 195 at 201. CA; *Lekwot v. Judicial Tribunal* (1997) 8NWLR [Pt.515] 22 at 35 SC.

<sup>6</sup> See *African Newspapers Ltd v. AGF* (1985)NWLR (Pt.6) 137; *Satyan 1 v. IMB Ltd* (2002) 5NWLR (Pt.760) 397 at 410.

<sup>7</sup> *Owena Bank (Nig) Plc v. Adejojo* (2003)17NWLR (Pt.848) 174 at 191.

Constitution and notwithstanding the nature of the claim in the action, a State High Court would no longer have jurisdiction in the matter and so the identity of the parties is now an issue to be considered in determining whether the Federal High Court or the State High Court has jurisdiction in a matter. As such in *NEPA v. Edeghero*<sup>8</sup> the Supreme Court held that the intention of the law makers of section 230(1) paragraphs (q), [r] and (s) of the 1979 Constitution (which are in *pari materia* with section 251(1) paragraphs (q), [r], (s) of the 1999 Constitution), was to take away from the jurisdiction of the State High Court and confer same exclusively on the Federal High Court. Moreover, the expressions “civil causes and matters connected with or pertaining to” as used in Section 7 of the Federal High Court Act and “civil causes and matters arising from” as used in section 230 of the 1979 Constitution, which is similar to the expression used in section 251 of the 1999 Constitution, have been held to bear their ordinary and natural meaning.<sup>9</sup>

- 1.4 Section 251(1)(g) of the 1999 Constitution<sup>10</sup>, section 19 of Admiralty Jurisdiction Act and sections 7 and 8 of the Federal High Court Act (as amended by section 230 of Act No. 107 of 1993) confer on the Federal High Court, *exclusive* jurisdiction in admiralty causes or matters whether civil or criminal including shipping and navigation in the Rivers Niger, Benue and their affluents and international inland waterways... and carriage by sea but State High Courts lack jurisdiction to entertain admiralty matters.<sup>11</sup> A very close look at section 251(1) of the 1999 Constitution shows that it recognises an addition to the existing jurisdiction already conferred upon the Court pursuant to section 251(1)(g) of the 1999 Constitution such as matters arising from and offences committed beyond the limits of the territorial waters and within the Exclusive Economic Zone of

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<sup>8</sup> (2002) 18 NWLR [Pt.798] 1 at 95/96. But see the decisions of the Court of Appeal to the contrary in *Hon. Minister for Works & Housing v. Tomas Nigeria Limited & Ors* [2002]2NWLR [Pt. 752] 740 at788; *Tanarewa Nigera Limited v. Plastifarm Limited* [2003]14BNWLR [Pt. 840] 355 at 372/3 which of course cannot stand in view of the judgement of the Supreme Court in the *NEPA v. Edeghero* case.

<sup>9</sup> See *C.G.G. (Nigeria) Ltd v. Asagbara* (2001)1NWLR (Pt. 693) 155.CA.

<sup>10</sup> See also, *Crownstar & Co Ltd-v-The Vessel MV Vali* (2000)1NWLR (Pt 639) 37.

<sup>11</sup> *Alraine Shipping Nigeria Limited –v-Endura Auto Chemicals* (2001) 12 NWLR (Pt. 728) 759 [CA].

Nigeria which have been reserved for it under the Cabotage Act, 2003<sup>12</sup> ("CISCA").

1.5 It must be noted that the admiralty jurisdiction of the Federal High Court had in the past been a subject matter of controversy. After being established as the Federal Revenue Court,<sup>13</sup> the Court was given jurisdiction in civil causes and matters of admiralty jurisdiction without the statute defining the admiralty jurisdiction.<sup>14</sup> In the case of **Fas Brothers Ltd v. Marine Merchants Nig. Ltd**<sup>15</sup> it was held that the provisions of the English Administration of Justice Act, 1956 applied by necessary implication to the High Courts of Nigeria with respect to the admiralty jurisdiction which was vested in them by virtue of section 1(1) of the Admiralty Jurisdiction Act, 1962 and that the admiralty jurisdiction formerly so exercised by the High Court was then exercised by virtue of sections 7(1)(d), 8(1) and 63(4) of the Federal Revenue Court Act, 1973. Even though section 230 of the 1979 Constitution (as amended), the Federal High Court Act, the Admiralty Jurisdiction Act and section 251 of the 1999 Constitution have improved the old situation by now defining what an admiralty matter is, it was only in 1991 that by virtue of the Admiralty Jurisdiction Act, wide admiralty subject matters were stated from which one could get a detailed meaning but without a specific definition of the expression "admiralty jurisdiction." Before then, the Supreme Court had held that both the Federal High Court and the State High Court had concurrent jurisdiction to hear admiralty matters thereby leading to a tussle between the two courts as to which of them should exercise admiralty jurisdiction in Nigeria.<sup>16</sup>

1.6 It must be noted that there is only one Federal High Court in Nigeria<sup>17</sup> with its jurisdiction spreading throughout Nigeria, although it has various judicial divisions for convenience,

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<sup>12</sup> Sections 3 and 41.

<sup>13</sup> The Federal Revenue Court Decree No. 13 of 1973.

<sup>14</sup> See sections 7 (1)d and 63(1) *ibid*.

<sup>15</sup> INSC 401. See also *AIICO v. Ceekay Traders Ltd* 2NSCC 65.

<sup>16</sup> For further reading, see, "Nigerian Shipping Practice and Procedure" at page 1 by L.N. Mbanefor, SAN.

<sup>17</sup> Section 249(1) 1999 Constitution.

admiralty proceedings *may* be filed in any judicial division of the Court in which the ship or other maritime property is located.<sup>18</sup> **Its admiralty jurisdiction covers all ships, whether or not their owners reside or are domiciled in Nigeria (but because of sovereign immunity, it does not cover ships demised or sub-demised to the Federal or State Government or ships being used by the Navy) and all maritime claims notwithstanding where they arise.**<sup>19</sup> This does not mean that an action *in personam* cannot be filed in Court against or in respect of relevant persons in matters relating to the admiralty jurisdiction of the Court. However, where contrary to the law, a plaintiff files an action *in rem* against a government ship or property, the suit can be converted into and can proceed as an action *in personam*, if the Court is satisfied that it was so commenced on the reasonable belief that the ship or property was not a Government ship or property. See Section 24(3) AJA.

1.7 The extent of the admiralty jurisdiction of the Federal High Court is stipulated in *sections 1 and 2 of AJA*<sup>20</sup>, a part of which is set out as follows:

*1(1) The admiralty jurisdiction of the Federal High Court (in this Act referred to as "the Court") includes the following, that is-*

*(a) jurisdiction to hear and determine any question relating to a proprietary interest in a ship or aircraft or any maritime claim specified in section 2 of this Act;*

*(b) Any other admiralty jurisdiction being exercised by any other court in Nigeria immediately before the commencement of this Act;*

*(c) Any jurisdiction connected with any ship or aircraft which is vested in any other court in Nigeria immediately before the commencement of this Act;*

*(d) Any action or application relating to any cause or matter by any ship owner or aircraft operator or any other person*

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<sup>18</sup> Section 22 AJA.

<sup>19</sup> See, Sections 3 and 24 of AJA. See, also *Satyan 1 –v-Ivory Merchant Bank Limited* (2002)5NWLR (Pt.760) 397 at 413. CA It has been argued that consequently ships owned or demised or sub-demised to a Local Government Council or a corporation which is an agency of any of the three tiers of Government does not enjoy such an exclusion or sovereign immunity which for security reasons State and Government ships not being used for commercial but public purposes enjoy in international law.

<sup>20</sup> *The Tee Jay No. 2 Vol. 7NSC 396*. See also, *G & C Lines –v-Hengrace Nigeria Ltd* [2001]7NWLR [Pt.711] 51 at 61.

*under the Merchant Shipping Act or any other enactment relating to a ship or an aircraft for the limitation of the amount of his liability in connection with shipping or operation of aircraft or other property;*

- (e) Any claim for liability incurred for oil pollution damage;*
- (f) Any matter arising from shipping and navigation on any inland waters declared as national waterways;*
- (g) Any matter arising within any Federal Port or National airport and its precincts, including claims for loss or damage to goods occurring between the off-loading of goods across space from a ship or aircraft and their delivery at the consignee's premises, or during storage or transportation before delivery to the consignee;*
- (h) Any banking or letter of credit transaction involving importation or exportation of goods to and from Nigeria in a ship or aircraft, whether the importation is carried out or not and notwithstanding that the transaction is between a bank and its customer;*
- (i) Any cause or matter arising from the constitution and powers of all ports authorities, airport authorities and the National Maritime Authority (now Nigerian Maritime Administration and Safety Agency);*
- (j) Any criminal cause and matter arising out of or connected with any of the matters in respect of which jurisdiction is conferred by paragraphs (a) to (i) of this subsection.*

*(2) The admiralty jurisdiction of the Court in respect of carriage and delivery of goods extends from the time the goods are placed on board a ship for the purpose of shipping to the time the goods are delivered to the consignee or whoever is to receive them whether the goods were transported on land during the process or not.*

*(3) Any agreement or purported, monetary or otherwise, connected with or relating to carriage of goods by sea whether the contract of carriage is executed or not shall be within the admiralty jurisdiction of the Court.*

1.8 It has been argued that unless the aircraft is waterborne or have maritime colouration, it cannot be construed as 'other maritime property', as to warrant invoking the admiralty jurisdiction of the Court. By virtue of section 1(1)[a] of AJA and section 11 of the Federal High Court Act,<sup>21</sup> the exercise of the jurisdiction of the Federal High Court in a case inevitably involves the right to hear and determine the case on the merits, but security for damages, interest and/or costs that may be awarded in a proceeding cannot constitute a cause of action because they belong to the realm of adjectival law which prescribes a method or procedure of enforcing rights or obtaining redress for their invasion.<sup>22</sup> Section 2 of the AJA set out maritime claims which are proprietary or general that fall within the admiralty jurisdiction of and exercised by the Federal High Court.

1.9 It is submitted that the categories of the subject matters of admiralty jurisdiction stated in sections 1 and 2 of AJA are not exhaustive because of the use of the word "includes" in section 1(1) thereof.

1.10 A major implication of the admiralty jurisdiction of the Federal High Court is that where a case falling within its admiralty jurisdiction is filed in a court other than the Federal High Court, the suit will be incompetent and the court will lack jurisdiction to hear and determine it. Consequently, any order made by such a court will be null and void for being made without jurisdiction.<sup>23</sup> However, under section 22(2) of the Federal High Court Act, the Federal High Court upon finding that it lacks jurisdiction to entertain a suit, is entitled to transfer it to the appropriate State High Court and not strike it out, but it has been held that a State

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<sup>21</sup> Cap. ?? Laws of the Federation of Nigeria.

<sup>22</sup> See, NV. Scheep-v-MV "S.Araz" (2000) 15 NWLR [Pt.691] 622 at 669.[SC].

<sup>23</sup> See, *Alraine Shipping Ltd-v-Endura Auto Chemicals* (2001) 12NWLR (Pt728) 759 CA where the Anambra State High Court, Onitsha was held to lack the jurisdiction to entertain a suit claiming that the 2<sup>nd</sup> respondent was not entitled to clear and warehouse the goods covered by some bills of lading and orders of injunction and damages for breach of contract. See also *Ming Ren Shipping & Trading Co. Ltd-v-Amatemeso Shipping Agencies Ltd*, Vol. 1 NSC at 462 showing that a claim in respect of disbursements made on account of a ship fell within the admiralty jurisdiction which the Federal High Court and not the State High Court has jurisdiction to hear and determine. See also, *Satyan 1 -v- Ivory Merchant Bank Limited* (2002) 5NWLR ( Pt.760) 397 at 415.; and *Crownstar & Co Ltd v. The Vessel MV Vali* (2000)1NWLR (Pt. 639) 37 at 61-62.

High Court which finds that it lacks jurisdiction to entertain a matter before it does not have jurisdiction or power to transfer the suit to the Federal High Court but should strike the suit out<sup>24</sup>, notwithstanding section 22(3) of the Federal High Court Act.

### **Mode of exercise of Admiralty Jurisdiction.**

2.1 Both the Admiralty Jurisdiction Procedure Rules, 1993 and the Federal High Court (Civil Procedure) Rules, 2009 regulate the practice and procedure in maritime claims in the Federal High Court, which arrest and release of ships are a part of. But it has been argued that by virtue of *Order 54 rule (2)[1] of the Federal High Court Civil Procedure Rules, 2000* which is now *Order 56 rule 2(1) of the Federal High Court Civil Procedure Rules, 2009*, which states that “where no specific procedure is given in any of the enactment in Appendix 1 to these Rules, the rules and procedures in these Rules shall apply with necessary modification so as to comply with the subject matter the enactment in Appendix 1 to these Rules deals with”, the AJPR 1993 which is an enactment listed in Appendix 1, being rules made to govern specific situations, should prevail in respect of any conflict between those Rules and the Federal High Court (Civil Procedure) Rules 2000 in matters of practice and procedure on admiralty matters. However, in other cases where there is no conflict between the two Rules, the two Rules are meant to complement each other.<sup>25</sup> The Federal High Court exercises its admiralty jurisdiction through actions *in rem* and actions *in personam* but it must be noted that it is only where an action *in rem* has been filed (especially if there is statutory and certain conditions have been met or maritime lien), that a ship or other property can be arrested either at the time of filing the action or subsequent to filing the admiralty action *in rem*.

### **Admiralty action in rem and in personam.**

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<sup>24</sup> See *Amavo Ltd v. BTM Ltd* (1991)8NWLR (Pt.207) 37 at 52; *Aluminium Manufacturing Co Nigeria Ltd v. NPA* (1987)1NWLR (Pt51) 475. (SC). *Crownstar & Co Ltd v. The Vessel MV Vali* (2000)1NWLR (Pt. 639) 37 at 65. *Western Steel Works Ltd v. Iron & Steel Workers Union* (1986)3NWLR(Pt.30) 617.

<sup>25</sup> Hon. Justice E.O.Sanyaolu in his Lordship’s paper “Appraisal of Procedural Problems in Maritime Litigation-Expeditious Disposal of Suits and Appeals” presented at the Maritime Law Seminar of the Nigerian Maritime Law Association, in Lagos in May, 2003.

3.1 The distinction between an admiralty action *in rem* and an admiralty action *in personam* must be understood for purposes of knowing how to invoke the admiralty jurisdiction of the Federal High Court and obtain an arrest of a ship or other property as a pre-judgment security for the satisfaction of the claim or how to obtain its release from arrest. **All actions which are aimed at the person requiring him to do or not to do or to take or not to take an action or course of conduct are actions *in personam* whilst all actions 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 claim, are actions *in rem***<sup>26</sup>. Consequently, the respondent's action which was a claim for disbursements made as ship agent on account of various vessels for and on behalf of the appellant is an action enforceable *in rem*, even though it could be enforced *in personam*.<sup>27</sup> **In the case of *Mercantile Bank of Nigeria Ltd-v-Tucker & Ors, The Bosnia*,**<sup>28</sup> **an action *in rem* was described in as an action against a *res* (thing) which is usually a ship or cargo or freight and may be filed against the proceeds of sale of the *res***<sup>29</sup> **by the court and the *res* may be arrested if within jurisdiction whilst an action *in personam* is like an action in contract or tort and it is necessary to look at the person who was liable at the time the cause of action arose. An action *in personam* is designed to settle the rights of the parties as between themselves.**<sup>30</sup> **Simply put, an *in rem* action is against a thing**<sup>31</sup> **and not its owner, whilst an *in personam* action is against a person or a company.**

3.3 Although, an action *in rem* is primarily a proceeding against the ship or *res* by way of an arrest, yet it is indirectly a process compelling the appearance of the owner of the ship to defend his property

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<sup>26</sup> See *Rhein Mass Und See GmbH –v-Rivway Lines Limited* (1998) 5NWLR (Pt. 549) 265 at 277/278.[SC]; *NPA v. Panalpina* (1973) 5SC 77; *Satyan I v. IMB Ltd* (2002) 5NWLR (Pt. 760) 397 at 414

<sup>27</sup> See, *Anchor Ltd v. The Owners of the ship, Eleni*, 1 NSC 14

<sup>28</sup> Vol. 1NSC 428 at 430.

<sup>29</sup> See for instance, Section 8 of the Admiralty Jurisdiction Act, 1991.

<sup>30</sup> Cheshire ad North's Private International Law 13<sup>th</sup> Ed. 199 at page 285.

<sup>31</sup> A ship is a proper sole defendant in an action *in rem* and benefits from all the defences of the carrier: See *Afro Asian Impex Limited & Anor – v-M/V Mustafa* 7NSC 425/430-431 confirmed by the Court of Appeal in *MV Mustafa –v-Afro Asian Impex Ltd* (2002) 14NWLR (Pt 787) 395 at 410/414.

thereby impleading him to answer to the judgement to the extent of his interest in the property.<sup>32</sup> Even though in form, the ship is the defendant, in actual fact, an action *in rem* is an action against the owner of the ship and as such the distinction between action *in rem* and action *in personam* is often said to be procedural only. That is why it is often said that there are two theories associated with maritime lien namely, the personification theory (where the ship is regarded as a juridical entity) and the procedural theory (where the ship is taken to be a means of compelling her owner to appear). Except in certain claims, the same cause of action may give rise to both actions in rem and action in personam depending on which action the plaintiff initiates having regard to the procedural difficulties involved.<sup>33</sup> While a ship is under arrest, or the proceeds of its sale are in court, the action *in rem* continues as an action *in rem*. An *in rem* writ and an *in personam* writ can be issued for the same cause of action, *but only one writ* and not the two writs, must be served. As stated earlier, by section 5(1) AJA, any of the cases falling within the admiralty jurisdiction of the court may be instituted by an action *in personam*, but by section 5(3) AJA 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 against the ship, aircraft or property and for the purpose of section 5(3) AJA 'maritime lien' means salvage, damage done by a ship, wages of master and crew members and master's disbursements. **However, it is debatable whether since section 66 of the Merchant Shipping Act, 2007 has increased the scope of maritime lines beyond the 4 listed in AJA, the additional ones such as claims for wreck removal and contribution in general average, claims for ports, canal and other waterways, dues and pilotage dues can be basis of actions in rem in view of the use of the expressions 'for the purpose of this subsection' and 'means' in section 5(3) AJA.** A maritime lien or privilege travels with the res into whoever's possession it may come and it is inchoate from the moment the claim or privilege attaches and when executed by legal process by an action in rem, relates back to the period when it

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<sup>32</sup> See Chief Registrar High Court, Lagos State-v- Vamos Navigation Limited (1976)1SC 40/42, Ming Ren Shipping-v-Amatemesso Shipping Agencies Ltd(1979)1NSC 462 at 466/7, Rhein Mass Und See GmbH-V-Rivway Lines Ltd, supra at 281; Angara v. Chrismatel Shipping Co Limited (2001)8NWLR [Pt.716] 685.

<sup>33</sup> See Rhein Mass Und See GmbH v. Rivway Lines Ltd, supra at 281.

first attached. By a community reading of its sections 2(3) and 5(4), our AJA recognises 'statutory liens' or 'statutory rights of action in rem' and actions which in form are in rem but in substance are in personam ('quasi in rem'). Any of the general maritime claims in section 2(3) of AJA can be the basis of the arrest of a ship or sister ship or other property if the conditions stated in section 5(4) thereof are met by the Plaintiff. As stated earlier, an action in rem can through the arrest of the res (which is the security) it provides, give the arrestor a pre-judgment security for the satisfaction of his claim which a *mareva* injunction available in an action in personam cannot give and whereas there is no cross undertaking in damages in action in rem.

3.4 Where the defendant enters appearance in an action *in rem*, it proceeds as an action *in personam* and judgment against the defendant can be executed against any of his property within the jurisdiction including his other ships or goods by way of a writ of *fifa* after final judgement has been obtained. But if a ship is not arrested, or is released after arrest, there is no "*res*" against which the plaintiff or any other interested person can proceed and the action proceeds as an action *in personam* regardless of the form of the writ<sup>34</sup>. If no appearance is entered to the suit, it remains an action *in rem* only as it began and operating against the ship or *res* arrested so that any default judgement can only be enforced by a sale of the ship or other property, but not enforced against the defendant personally.<sup>35</sup> If the proceeds of sale of the ship are insufficient to cover the sum claimed, the plaintiff who has earlier obtained a judgement *in rem* may bring a subsequent action *in personam* in respect of the same claim.

3.5 Unlike in an action *in rem*, a plaintiff in an action *in personam* must apply for and obtain the leave<sup>36</sup> of the Federal High Court to issue, and the leave of the Court to serve, the writ *in personam* outside the jurisdiction of the Court, if the defendant is or resides

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<sup>34</sup> See, *The "Deichland"* (1989) Vol. 2 Lloyds Rep. 113 at 125.

<sup>35</sup> See, *The Banco* (1971) Probate 137 at 151.

<sup>36</sup> Where the court grants leave to serve the court process on the defendant (outside its jurisdiction), the court cannot after the plaintiff has proved his case say it has no jurisdiction: *Unipetrol Nigeria Limited –v-Prima Tankers Limited* Vol.2 NSC 647. See also Order 6 rules 12, 13 and Order 13 rules, 13, 14 and 15 of the Federal High Court Civil Procedure Rules, 2000.

outside the Court's jurisdiction and if he is outside Nigeria it will be assumed that he has his habitual residence or place of business in Nigeria as stated in section 5(7). It is true that Order 7 Rule 31 of the Federal High Court (Civil Procedure) Rules 2009 provides that out of jurisdiction 'means out of the Federal Republic of Nigeria', but it is submitted that since Sections 97 and 98 of the Sheriff and Civil process Act is not subject to the rules of the Court and the Supreme Court has held in the case of **OWNERS OF MV "ARABELLA" v. NAIC (2008) 11 NWLR (Pt.1097) 182 at 207** that 'outside jurisdiction' is outside the State where the Federal High Court is sitting, any defendant in a maritime claim in personam that is outside the State/venue (where a division of) the Federal Court is sitting is now outside the jurisdiction of the Court and leave of court must be obtained to issue and serve the writ of summons on such a defendant.

3.6 The writ of summons for service outside jurisdiction shall have endorsed on it a notice that it is to be served not just only out of Nigeria and in the particular country where the defendant is resident<sup>37</sup> but also outside the State. However, where the writ of summons had been served on a defendant outside jurisdiction without leave of Court, the defendant may submit to and waive the non-compliance with the procedural jurisdiction of the Court, but not the substantive jurisdiction of the Court because no litigant can confer (substantive) jurisdiction on the Court where the Constitution or a statute or any provision of common law says that the Court does not have jurisdiction. Objections to defects in matters of practice and procedure which do not amount to a breach of natural justice ought to be taken up timely at the stage of trial at the court of first instance and not on appeal, where the belated objection would be deemed to be a waiver of his rights to object to the procedural jurisdiction.<sup>38</sup> It was held in the case of *Famfa Oil Limited v. AGF*<sup>39</sup> that any non-compliance with any rules of court is prima facie an

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<sup>37</sup> See Section 77 of the Sheriff and Civil Process Act, 2004 which uses the expression "as the case may be" to make room for the endorsement.

<sup>38</sup> See *Ndayako v. Dantoro* (2004)13NWLR (Pt.889)187 at 218/219; *Noibi v. Fikolati* (1987)1NWLR (Pt. 52) 619; *Ibenu v. Ogebeide* (1994)7NWLR (Pt.588) 576.

<sup>39</sup> <sup>39</sup> See *Famfa Oil Ltd v. AGF* (2003)18NWLR (Pt.852)453.

irregularity and not a ground for nullity unless such non-compliance amounts to a denial of natural justice or any miscarriage of justice has resulted or occasioned to the respondent.<sup>40</sup> The case also illustrates the consistency of the Supreme Court in shifting from the narrow technical approach to justice which characterised some of its earlier decisions on various matters and its current pursuits in its stead, the course of substantial justice. Accordingly, courts of law should not be unduly tied down by technicalities, particularly where no miscarriage of justice would be occasioned.<sup>41</sup>

3.7 The specified cases of *in rem* actions falling within the admiralty jurisdiction are preferably classified as follows<sup>42</sup>:

- (a) the truly *in rem* cases involving *proprietary maritime claims*<sup>43</sup> relating to the possession or ownership or mortgage of a ship or a share in it or mortgage of its freight; or interest payable on any general maritime claim or a claim between co-owners of a ship relating to the possession, ownership, operation or earning of a ship where actions *in rem* can be brought against the ship or other property in connection with which the claim arises irrespective of who owns it at the time the action commenced and who may be liable in an action *in personam*. They are claims where in substance there is a claim to the ship in whole or in part.
  
- (b) a claim giving rise to a *maritime lien or other charge on the ship* for the amount claimed<sup>44</sup>. Maritime liens in the AJA<sup>45</sup> are claims for salvage, or damage done by a ship, or wages of the master or a member of the crew of a ship<sup>46</sup>, or

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<sup>40</sup> Supra at 476. See also Order 51 of the Federal High Court (Civil Procedure) Rules, 2009, which was held to confer a discretionary power on the court to treat a wide range of failure to comply with the rules therein stipulated as an irregularity.

<sup>41</sup> Supra at 469. See also Consortium M.C. v. NEPA (1992)6NWLR (Pt.246) 132; Okonjo v. Odje (1985)10SC 257; Bello v. AG Oyo State (1986)6NWLR (Pt.45)828.

<sup>42</sup> The AJA classifies maritime claims in section 2 thereof in two respects, namely proprietary maritime claims and general maritime claims.

<sup>43</sup> See sections 2(2) and 5(2) AJA. Many of the maritime claims stated here are similar to or in pari materia with those in section 21(3) of the Supreme Court Act, 1981 of UK.

<sup>44</sup> Due to the absence of proof of a maritime lien or charge on the vessel in *The Advance* Vol. 4 NSC at 54, the prayer for arrest was refused.

<sup>45</sup> See section 5(3) AJA. In "*Bold Buccleugh*" (1851) 7 Moo. P.C. 267, claims leading to maritime liens were stated as damage done by a ship, salvage, seamen's wages, bottomry and respondentia. A maritime lien is a claim or privilege upon a maritime *res* in respect of service rendered to it or injury caused by it and attaches to the *res* and travels with it into whosoever's possession the *res* comes: "*The Bosnia*", supra.

<sup>46</sup> See, *Fernando & Ors -v-The Owners of M.V. Rhodian Trader*, Vol. 2 NSC at 339 in which it was held that the crew had a valid maritime lien on the vessel and were entitled to an order for its sale in satisfaction of their wages and that the allowance for food and for repatriation expenses was equivalent to wages and therefore enjoyed a maritime lien.

master's disbursements (that is, disbursements in which the Master makes himself liable in respect of things immediately necessary for ships' navigation). Being a charge on maritime *res*, arising by operation of law and binding the property, it can be enforced by an action *in rem* in such person's hands or the hands of a bona fide purchaser for value without notice, and so it is not affected by a subsequent sale of the *res* to a third party or a change of ownership. From the time it attaches, a maritime lien sticks to the ship like a leech and continues binding on the *res* until it is discharged either by being satisfied, or from laches or delay of the owner or operation of law:<sup>47</sup> or by total destruction or capture or judicial sale. There are two theories about the nature of maritime liens, namely, the personification theory (the ship is a juridical entity) and the procedural theory (the ship as a means to compel its owner to appear in court to an *in rem* action).

(c) claims limited by ownership status referred to in section 2(3) of AJA as *general maritime claims* and giving rise to *statutory maritime liens* which may be brought as actions *in rem* against a ship or other property if the conditions stated in *sections 5(4) and 5(4)(a) of AJA* are fulfilled, namely:

- (i) the claim must have arisen in respect of a ship,<sup>48</sup>
- (ii) the person who would be liable on the claim in an action *in personam* must have been the owner<sup>49</sup>, or charterer<sup>50</sup> or in possession or in control of the ship<sup>51</sup> *when the cause of action arose*.

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<sup>47</sup> See "*The Two Ellens*" (1872) LR 4PC 161.

<sup>48</sup> A claim for debt owed and not admiralty is outside the admiralty jurisdiction of the Federal High Court: *Texaco Overseas Nig Ltd v. Pedmar Nig. Ltd* [2002]12NWLR [Pt.785] 526 at 542SC.

<sup>49</sup> The word "owner" refers to a registered owner: *The Evpo Agnic* (1988)1WLR 1090 CA.

<sup>50</sup> The word "charterer" includes a demise charterer, a time charterer and a slot charterer. See "*The Permina 108*": (1978)1Lloyd's Report 31, *The Span Terza* (1982)1Lloyds Rep. 225, *The Tychi* (1999)2Lloyds Rep. 11 but in Nigeria as shown by *The Advance*, Vol. 4 NSC 54, it appears that the word 'charterer' is a reference to a 'demise charterer' only.

<sup>51</sup> In *The Phoenix* (Vol.4 NSC at 260/263) it was held that by section 5(4) of AJA, the onus is on the plaintiff to show that it had a valid claim against the ship owners or charterer by demise. In *Tigris Int. Co-v-Ege Shipping* Vol. 6NSC 285, it was held that a person merely in control or possession of the ship who is not the owner or demise charterer is not contemplated under section 5(4) AJA and cannot be sued.

(iii) *at the time the action is brought* (i.e. when the writ is issued<sup>52</sup>), the person who would be liable on the claim in an action *in personam* must be the beneficial owner of all the shares in the ship<sup>53</sup> or the demise charterer<sup>54</sup>. This requirement of beneficial ownership and demise charterer is to show an *in personam* link between the ship against which the *in rem* action is brought and the arrest is effected and the Plaintiff's claim, and as such if the ship has been sold and its ownership changed after the cause of action has risen but before the writ is issued, the ship cannot be arrested because the relevant person is no longer the beneficial owner of the ship, but an *in personam* action can be maintained against the relevant person. This is unlike the case where at the time of the change in the ship's beneficial ownership a traditional maritime lien has attached to the ship before the action was brought because in such a case, the ship can still be arrested notwithstanding the change of ownership. In *Sugar porters London Ltd & Ors-v- M/V Fairwind & Ors*<sup>55</sup>, following, *The "I Congresso del Partido"* [1971]1 *Lloyds Rep.* 531 & *The Andrea Ursula*[1971]1 *ALLER* 821, a beneficial owner was held to be a legal owner or an equitable owner or the person who has full lawful possession and control and has all the benefits and use of the ship which a legal or equitable owner would normally have. An arrest of a ship was set aside and the ship released because the

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<sup>52</sup> "The Carmania II" (1963) 2 *Lloyd's Rep.* 364.

<sup>53</sup> There are historically, 64 shares in a ship but since it became common to have one-ship companies, the 64-share ownership is becoming insignificant in ship ownership. See, "The Chaika" 6NSC 368 on "beneficial ownership" of ship. In *The MV S. Araz-v-Scheep* (1996)5NWLR (Pt447) 204 at 219, it was because Koray Shipping was not the beneficial owner as respects all the shares in MV S. Araz that the application for the arrest of MV S. Araz was held not maintainable.

<sup>54</sup> A demise charterer is the lessee of a ship and during the charter he is treated as the owner of the ship employing the master and crew of the vessel. See, *Franco Daval Ltd-v-The Owners M/V "Vitali II" & Anor* (3NSC, 630). NB: *This requirement is to show an in personam link between the ship or other property against which the in rem action is brought and the arrest is effected, and as such if the ship has been sold after the claim has arisen but before the writ is issued, the ship cannot be arrested because the relevant person is no longer the beneficial owner of the ship, but an in personam action can be maintained against the relevant persons.* C/f where maritime lien has attached to the ship at the time of the change in its beneficial ownership. In *Supermaritime Nig Ltd-v-International Chartering, Operating & Shipping & Anor, The Advance*, Vol. 4 NSC 54, where there was no evidence as to the nature of charterparty between the owner of *The Advance* and 1<sup>st</sup> Defendant, application for arrest was refused because it is only in the case of a charter by demise that an arrest order can be made against a ship. A demise charter has also been defined as a contract by which the lessor (shipowner) places a ship in the hands of the lessee (demise charterer) who assumes possession and control and pays hire as consideration at specified intervals during the term of the charterparty, but the shipowner appoints the master and crew of the ship who are paid and controlled by the demise charterer. A bareboat charter or net charter is a demise charter in which the bareboat charterer pays and controls the master and crew of the vessel.

<sup>55</sup> Vol. 7NSC 330

person who would have been liable in an action *in personam* was not the beneficial owner of the vessel in the case of *MV S. Araz v. LPG Shipping SA*<sup>56</sup>. In *The Advance*<sup>57</sup>, the arrest of a ship was refused because there was evidence that the 1<sup>st</sup> Defendant was not the owner of the vessel and there was no evidence that the vessel was beneficially owned by him. The court also held that it is important that the nature of the charterparty be established because it is only in a case where the charterparty is by demise that an order for an arrest can be made against a vessel. These are referred to as quasi in rem claims or statutory lien claims or statutory rights of action in rem because they are all other maritime claims (than true in rem claims) which may be brought in rem but which depend upon establishing a link with liability in personam.

- (d) maritime claims which can be brought against either the offending ship or *another ship in the same ownership as the offending ship* (i.e. sister<sup>58</sup> or alternative ship but not both the offending ship and the sister ship) if:
- (i) the claim arose in respect of the offending ship,
  - (ii) the person who would be liable on the claim in an action *in personam* (i.e. "relevant person") is the beneficial owner of the offending ship or a charterer (of the ship under a charter by demise under which he would have full possession and control but not ownership of the ship) and so is in possession or control of the offending ship *when the cause of action arose*,

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<sup>56</sup> (1996) 6NWL(RPt.457) 720/732

<sup>57</sup> Vol. 4 NSC page 54

<sup>58</sup> A ship owned by a sister company is not a "sister ship", because it is not in the same ownership as the offending ship; see *The Evpo Agnic* (1988) 2 Lloyd's Rep. 411.

(iii) *at the time the action is brought*, the relevant person is the beneficial owner of all the shares in the ship against which the action is brought [i.e. sister ship]. It is only where the arrest of the offending ship is sought that the person liable *in personam* must be the beneficial owner or demise charterer but where it is sought to arrest a sister ship, the person who is liable *in personam* must at the time the action is brought be the owner of the offending ship and not merely a demise charterer of the offending ship.<sup>59</sup>

3.8 It should however be noted that a claim *in rem* may not be brought for every claim within the Admiralty jurisdiction of the Federal High Court and that the right to bring a claim *in rem* is restricted by the Admiralty Jurisdiction Act and Section 7 of the Federal High Court and Section 251 of the 1999 Constitution and is not available if it is for damage received by a ship because there would be no property against which it can be brought *in rem* except where the claim also falls within damage done by a ship which is another ground for *in rem* action, limitation actions and applications brought under the Merchant Shipping Act, 2007, Cabotage Act, 2003 or Nigerian Ports Authority Act, 1999.

3.9 Although the writ commencing an action *in rem* ought to be in Form B in the Schedule giving the defendant 14 days from service to file acknowledgement of service without requiring any formal appearance<sup>60</sup>, in practice it is the Form of the writ of summons in the Federal High Court (Civil Procedure) Rules 2009, giving 30 days to the defendant to enter appearance to the suit that the Registry of the Federal High Court insists must be followed and used by the Plaintiff. Some scholars and

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<sup>59</sup> See, section 5(4)[b] of AJA. It has been argued that since a relevant person includes a mere charterer (whether under demise or otherwise) of the primary ship, an action can be brought against another ship owned by a charterer of the primary ship although it is not a sister ship: see *The Span Terza* (1982) 1 Lloyd's Rep. 225 involving a time charterer.

<sup>60</sup> Order XI rule 2(1) AJPR

practitioners have contended that where the Rules 2009 generally makes provisions for what AJPR has already provided for on admiralty matters, AJPR being rules specially made for admiralty matters, should govern the situation and that Form B of the prior AJPR and not the Form of writ of summons under the subsequent 2009 Rules, ought to apply to admiralty actions. This is in line with the general principle of interpretation of statutes that a subsequent Act does not affect or interfere with or modify or repeal the provision of a prior, special or private Act, unless it is expressly provided or the intention is clearly manifested in the general Act<sup>61</sup> but the Registry of the Federal High Court is yet to accept that argument in practice.

- 3.10 Furthermore, under Order II rule 2 of the AJPR, it is only a writ in an action *in rem* when being filed that needs to be accompanied by a statement of claim. Even though under AJPR a plaintiff in an admiralty action *in personam* is not required to file a statement of claim, by virtue of the front-loading provisions of Order 3 rule 3 of the 2009 Rules, he is now bound to accompany his writ of summons with a statement of claim, copies of every document to be relied on at the trial, list of documents, list of witnesses to be called at the trial, their written statements and a sufficient affidavit in verification of the endorsement. The rationale behind the rule is to speed up trial by ensuring that parties are not taken by surprise in preparing for their cases and that documents, which are not in existence at the time the action is being filed, are not “manufactured” and concocted for the purpose of the case. However, the drawback in the application of this rule to admiralty actions *in rem* is that it causes avoidable delay in the preparation and filing of processes required to quickly obtain an arrest of a ship before the ship leaves Nigerian territorial waters.
- 3.11 Some cases illustrate the action in rem and in personam and the effect they have on cases. In *Anchor Ltd-v-The Owners of*

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<sup>61</sup> See: *Olu of Warri v. Kperegbeyi* (1994) 4NWLR (Pt.339) 416/437; *Ojeme v. Momodu II* (1995) 6NWLR (Pt.403) 583/597.

*the ship Eleni*<sup>62</sup>, where the plaintiff proceeded in an action *in personam* and obtained judgement against the defendants personally, the arrest of the ship was held wrong. In *Supermaritime Nigeria Ltd-v-International Chartering, Operating Shipping MV Antwerp & Anor*<sup>63</sup> an application to arrest the "MV Advance" was refused because no maritime lien or charge on the vessel was proved to attach to the vessel to give the plaintiff a right of action *in rem*. In the *Bosnia*,<sup>64</sup> the claim was held un-maintainable against the owners of *The Bosnia* since a maritime lien did not arise from the claim. In *the MV S. Araz-v-Scheep, supra* at 225 it was held that the court would not have jurisdiction to arrest a ship simply to meet an award to be given in an arbitration when no proper action *in rem* was before the court, the sole purpose being to provide security in respect of an action for which an arbitration proceeding was already in progress in a foreign country. In *MV S. Araz v. LPG Shipping S.A.*<sup>65</sup>, the Court of Appeal held that because the vessel had been improperly and indiscriminately arrested it should be unconditionally released from arrest. In *Franco Daval Ltd-v-The Owners M/V "Vitali II" & The Master*<sup>66</sup> the order of arrest was discharged because the time charterers instead of the owners of the arrested ship, were sued. In the unreported suit No FHC/L/CS/881/2003 of *Eurafric Oil and Coastal Services Limited v. MT Ebony and Zenon Petroleum & Gas Limited* delivered by Shuaibu J on 28<sup>th</sup> October, 2003, the arrest order of the first defendant was set aside and the suit struck out upon a successful application of its owners based on want of jurisdiction of the court the claim not being within the admiralty jurisdiction of the Federal High Court. In *the Advance*,<sup>67</sup> where the applicant for arrest negligently failed to search for the proper party to be sued as the owner of the vessel, the order of arrest was set aside. In *Sugar Exporters London Ltd & Ors-v-M/V Fairwind*<sup>68</sup> *supra*, an action *in rem* did not satisfy the stipulations

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<sup>62</sup> (1966) Vol. 1NSC 22.

<sup>63</sup> Vol. 4NSC at 54

<sup>64</sup> (1978)1NSC 428 at 430.

<sup>65</sup> [1996]6NWLR [Pt.457] 720 at 736

<sup>66</sup> Vol. 3NSC 630.

<sup>67</sup> Vol 4 NSC 260.

<sup>68</sup> See also *Stallion Nigeria Ltd-v- The MV Aria & Ors: "The Aria"* Vol. 7 NSC 204.

in *section 5(4)(a) AJA* and the defendants were not the owner or demise charterers of the ship but merely parties to a voyage charter party in respect of the ship, and so, the arrest warrant was set aside and the action struck out. In *The Phoenix*<sup>69</sup>, where the arrest of a vessel was irregularly and unlawfully obtained in that a non-owner of the vessel was sued in an *in rem* action the plaintiff, upon the application of the rightful owner, the arrest was discharged and the ship was released. It must be borne in mind that section 10 of AJA presupposes the existence of a pending action that is ordered to be stayed or dismissed and where plaintiff's claim is not for the enforcement of or a claim arising out of, an arbitral award but for the purpose of obtaining security for the satisfaction of whatever award that might ultimately be made in his favour in a foreign (UK) arbitration proceedings, he cannot invoke the admiralty jurisdiction of the Federal High Court by an action *in rem* for that purpose.<sup>70</sup>

3.12 Where a plaintiff sees that it cannot make out a proper case *in rem* for the arrest of the offending ship or other property, it can still file a maritime claim in an action *in personam* against the owners of the ship and other persons who are liable to him in contract or tort. He will not be assured in advance of a security for the satisfaction of his claim if he succeeds at the trial but will be left with levying execution of the judgment on the available assets of the defendants within jurisdiction or registering the judgment in a foreign court for enforcement if there is reciprocity treaty between Nigeria and the foreign country on enforcement of judgements<sup>71</sup>.

3.13 *Finally, it should be noted that the admiralty jurisdiction of the Federal High Court has limits. In this regard, ships and property belonging to the Government and foreign Government cannot*

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<sup>69</sup> Vol. 4NSC 260

<sup>70</sup> See *NV Scheep v. MV S. Araz* (2000) 15NWLR (Pt. 691) 622 at 654/6. (SC).

<sup>71</sup> See *Unipetrol Nigeria Limited -v- Prima Tankers Ltd* (1986) 2NSC 646 where judgement obtained in an admiralty matter in Nigeria was registered in Gibraltar and enforced against the defendants who were outside Nigeria.

*be arrested by action in rem although such action could be converted to an action in personam. See section 24 AJA.*

3.14 *So, from the above, it is clear that the Federal High Court exercises its exclusive admiralty jurisdiction both in rem and in personam.*

I thank you for listening.

Mr Mike Igbokwe, SAN

In rem or in personam mode of exercise of admiraltywdpp1-21