

IN THE PRIVY COUNCIL

No. 13 of 1974

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 O N A P P E A L

 FROM THE SUPREME COURT OF HONG KONG  
 (APPELLATE JURISDICTION)

CIVIL APPEAL NO. 53 of 1973

 (On Appeal from Admiralty Jurisdiction  
 Folio Nos. 103, 106 and 139 of 1973)
 

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## B E T W E E N :

10 THE OWNERS OF THE SHIP  
 "PHILIPPINE ADMIRAL" (Philippine  
 Flag) Appellants

- and -

WALLEM SHIPPING (HONG KONG)  
 LIMITED  
 TELFAIR SHIPPING CORPORATION Respondents

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## CASE FOR THE APPELLANTS

RECORD

20 1. This is an appeal from the judgment of the  
 Full Court of Hong Kong (Huggins, McMullin and  
 Leonard, J.J.) given on the 26th April 1974,  
 whereby the Full Court allowed appeals by the  
 Respondents against judgments given by Chief  
 Justice Briggs on the 14th and 17th December  
 1973 on interlocutory applications in several  
 actions in rem commenced in 1973 by the  
 Respondents against a ship "The Philippine  
 Admiral". The Full Court is hereinafter called  
 "the Court of Appeal".

pp.219-248

pp.16-22

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RECORD

2. The actions in question number three in all, two brought by the First-named Respondents and one by the Second-named Respondents. The former two are actions against the ship for varying sums, H.K. \$75,207 and H.K. \$90,160 for goods supplied or disbursements made for the ship, with claims for (if necessary) the appraisal and sale of the ship. The third action is for damages for an alleged breach of a charterparty in relation to the ship. No issue arises on these appeals as regards the merits of these claims.

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pp.123-130

3. Each of the actions was brought against the Owners of the Ship, and the writ in each action was served on the Liberation Steamship Company Inc., (hereinafter called "Liberation") a company incorporated in the Republic of the Philippines. Liberation have operated the ship under the terms of an agreement for its conditional sale to them by The Reparations Commission, an agency of the Government of the said Republic (hereinafter called "the Government"). The Government's said Agency were at all material times the owners of the ship, and when they heard of the actions and of an order made for its appraisal and sale, the Government applied as a person interested to the Court for the setting aside of the actions.

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4. The issue which arose on the application in each action and which arises on this appeal is whether the Government is entitled to sovereign immunity from these proceedings in respect of the ship. The essential question is whether the Government is, in effect, deprived of the ordinary immunity granted to foreign Sovereigns in respect of their property, by reason of the facts :-

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- (i) that neither the Government nor any recognised Government agent was directly operating the ship, and/or

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(ii) that the property was a ship which had been trading commercially.

RECORD

5. The basic facts are not in dispute. In summary, the ship in question was built in Japan for the Republic of the Philippines under a Reparations Treaty, which required that products supplied under the Treaty should not be re-exported from the territories of the Republic. A Philippine Act (Republic Act 1789) required that all reparation goods should be used in such a manner as to ensure the maximum possible economic benefit to the people of the Republic, that the moneys derived from them should be placed in a special Economic Development Fund, and that no such goods should be resold leased or disposed of except to Philippine citizens or entities wholly owned by Philippine citizens. The Reparations Commission was set up to acquire and deal with such goods, and in 1960 the Commission made a "Contract of Conditional Purchase and Sale" of the ship in question with Liberation. Under that Contract, Liberation agreed to pay the price of the ship by instalments, but the Commission retained full title to the ship until the total price was paid. There was a provision for automatic avoidance of the contract in the event of any default in payment by Liberation, but also there were further provisions which envisaged, not an automatic avoidance of the contract, but a rescission brought about by an act on the part of the Commission in the event of a default on the part of Liberation. Liberation were required by the Contract to use the ship in accordance with Philippine laws and in particular subject to the requirements of the Act referred to above. In 1963 the Commission acted to prevent the chartering of the ship by an Indian Corporation. Liberation used the ship until 1972, and on the 21st December 1972 entered into a charterparty in favour of the Respondents Telfair in respect of the ship. The ship was then in dock at Hong Kong and remained there until after the hearing before the Full Court in April 1974.

pp.155-174

pp.103-122

p.103

pp.105-6

p.116

p.107

pp.123-130

p.125

p.127

p.128

p.124

pp.131-150

p.34

p.224

RECORD

p.224  
p.40

6. By the time the present actions were commenced (in May, June and September 1973) Liberation were substantially in default on their instalments. On the 10th October 1973 the Commission resolved to retake possession. But the ship had meanwhile been arrested on the 2nd June 1973 and ordered on the 8th October 1973 to be appraised and sold.

p.27

p.254

7. After the Court of Appeal's decision on the 26th April 1974, the Government on the 27th May 1974 procured an order for the release of the ship from arrest by filing a Bail Bond as security in the sum of H.K.\$5,000,000. 10  
Following the release of the ship, the Commission pursuant to a letter of instruction issued by the President of the Government of the Philippines dated the 16th July 1974, delivered the vessel on the 2nd August 1974 to the National Steel Corporation (of the Philippines) which is another organ of the Philippine Government. As a result of the above facts the Government continues to have the ownership and right to possession of the ship and it is now also at risk as regards the Bail Bond which has had to be filed. It is submitted that the release of the ship does not prejudice the present Appeal, but that the necessity for a Government to file a Bail Bond in order to achieve the release of its own property demonstrates in a factual way the validity of the proposition of law that an action in rem brought against the property of a foreign Sovereign impleads that sovereign as directly and effectively as an action in personam brought against the Sovereign; see per Lord Wright in Compania Naviera Vascongado v. s.s. Cristina 1938 A.C. 485 at page 505. 20 30

8. The Court of Appeal have held :-

p.242

(1) that before immunity in respect of a ship against which an action in rem is brought can be successfully claimed by a foreign Sovereign, 40

that Sovereign or his agent must be the "operator" of the ship or must "control" the ship.

RECORD

(2) that no claim for immunity in respect of a trading ship such as the present one can be successful because such a trading use is incompatible with the requirement that the ship should be in or destined for public use.

pp.238-241

10 (3) that (on the basis that the ship must be in, or destined for, public use) the ship in question here was neither in, nor destined for, public use.

pp.241-247

The Appellants submit that each of the above findings is wrong.

9. As general propositions in English Common Law relating to claims for immunity, it is submitted :-

20 (a) that a foreign Sovereign can claim immunity in respect of any action brought "in personam". (A "foreign Sovereign" herein includes a personal Sovereign, or a Government)

(b) that for the above purpose it does not matter :-

(i) whether the remedy sought by the Plaintiff is directed against the foreign Sovereign himself, or his acts, or against his property, or against his purse;

nor

30 (ii) whether any property of the foreign Sovereign which is involved in the action is property merely "personal" to the Sovereign, or property used for the purpose of the Sovereign's official functions and public duties;

nor

RECORD

(iii) whether the activities of the foreign Sovereign out of which the action arises are official activities performed in the course of his functions or duties; or purely personal activities (such as the making of a promise to marry); or commercial activities (such as either where a personal Sovereign carries on trading for his own benefit; or where a foreign Government carries on trading, or employs its property, in order to raise revenue for its public purposes). 10

(c) that in order to claim immunity successfully a foreign Sovereign does not have to prove anything save that his claim is not illusory. Provided that the claim is shown not to be illusory, the very claim itself to immunity is sufficient, and the Court will not require the foreign Sovereign to go further, because to do otherwise would be to make the Sovereign submit to the jurisdiction in order to prove his claim. 20

(d) that each of the above propositions is so well established in English law that it could not be changed save by legislative action.

10. The Government submits that it is against the above background relating to actions in personam that the issues relating to actions in rem against ships should be considered. The Government will rely upon the decision and reasoning in United States of America & Republic of France v. Dollfus Mieg et Cie and Bank of England 1952 A.C. 582, which (although it does not relate to a ship) is of general application to the issues in this case. Although that was an action in personam, it affected property claimed by the U.S. and French Governments, who intervened to prevent their interest being prejudiced, in the same way as the Government has done in this case. 30

11. As regards the first finding of the Court of Appeal referred to in paragraph 8 above, it is 40

submitted that no question about the operation or control of a ship arises save in circumstances where the Sovereign claiming immunity cannot show a greater interest in the ship in question than that of a factual possession or control over the ship. If the Sovereign claims that he is the owner of the ship in question (a fortiori if he claims that he is also entitled, as a matter of right, to possession of the ship, as in this case), the Appellant submits that the question whether the Sovereign also operates or is in factual control of the ship is irrelevant, since any prejudice to the Sovereign's ownership (and right to possession, as in this case) can and will be far greater than any prejudice to the Sovereign's operation of the ship. The many reported cases in England in which the question of factual control or operation has arisen are cases in which the Sovereign in question could not establish either an overriding proprietary right or a right to possession.

12. The true principle in English law is that summarised by Lord Atkin in The Cristina 1938 A.C. 485 when he said at page 490 that there are "two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute..... The second is that [the courts] will not by their process, whether the Sovereign is a party to the proceedings or not, seize or retain property which is his or of which he is in possession or control". There is, it is submitted, no English decision in which it has been held that a Sovereign who owns, but is not at the material time in factual possession or control of, a ship is unable to claim immunity in respect of it. It is submitted that Huggins J. in the Court of Appeal was wrong in putting the emphasis the other way, when he said that there was no reported case in which immunity has been granted in an action in rem solely upon ownership or upon any other proprietary interest of a Sovereign.

RECORD

13. It is submitted that it would be anomalous, illogical and unjust if the court, by granting immunity in a case where a foreign Sovereign is in present control of a ship (e.g. by having requisitioned it for temporary purposes), protects an interest which may be transitory, but denies protection to a permanent interest such as ownership with a right to immediate possession, which may be of far greater importance and value. No distinction may be made between possession and the right to possession. 10

14. Further, even if a factual relationship of control is necessary, the mere fact that the Government in this case had not been able, in pursuance of its right to possession which accrued before the application for immunity was made, to perform any act of control over the ship, because the ship was under arrest and in the custody of the court, was adventitious and does not, it is submitted, render the Government's interest insufficient in English law to justify immunity. The material time for considering the sufficiency of the Government's claim is, as the Court of Appeal rightly held, the time of the application to the Court, not the time when the actions were started or when the arrest or order for sale was made. 20

15. If however, the Court of Appeal's finding that the "operator" of the ship must be the Government or an agent of the Government means, not that the interest which they claim must give them the control or factual possession of the ship, but that the ship cannot be in public use or destined for public use unless it is operated by the Government or its agent, then the Government relies upon the submissions made below in paragraphs 16 and 17. 30

16. As regards the second finding of the Court of Appeal referred to in paragraph 8 above, it is submitted - 40



(i) that if there is an established requirement that the ship in respect of which immunity is claimed in an action in rem should be in public use or destined for public use, then:

10 (a) that requirement is an exception to the basic principle which runs through the general propositions referred to in paragraph 9 above, and should be construed narrowly, so as not to give rise to more inconsistency with that principle than is necessary;

20 (b) that the conclusion that the ship, being "a trading ship", cannot comply with that requirement is unjustified, because the employment by the Government of a reparations ship for letting for trading purposes (in order to comply with express statutory duties and for the purpose of sustaining the economy of the Philippines) does not prevent its use being a public use. The true question is not "is the ship a trading ship"? but "For what use does the Government hold its interest in the ship?" Neither the nature of the ship nor the purpose for which the ship is held by the end-user is significant.

30 (c) there is no authority in English law for the proposition that even a sole trading use of a ship is incompatible with a public use. Indeed in the Porto Alexandre 1920 P.30 the English Court of Appeal held the contrary, and that decision was right. The only distinction between that case and the present case is the element of operation or control exercised in that case by the Portuguese Government over the ship in question; and the Appellants' submissions about the element of control have already been made above. For the reasons given  
40 by MacKenna J. in Swiss Israel Trade Bank v. Government of Salta 1972 1 LL.R. 497, the judgment in The Parlement Belge, supra

RECORD

is not authority for the proposition that mere trading ships are excluded from the immunity otherwise afforded to foreign Sovereigns. It is submitted that, both in principle and by authority, neither the sole nor the partial use of a ship for trading purposes is in any way inconsistent with the ship being used or destined for public purposes.

(ii) that having regard to the broad principles upon which Sovereign immunity rests, the right to immunity in relation to a ship does not or should not depend on showing a public purpose, if that limitation has the effect of excepting a trading ship from such immunity. Such a limitation is quite inconsistent with the broad principle that a Sovereign is immune in relation to all matters arising from his commercial activities, as exemplified in Compania Mercantil Argentina v. United States Shipping Board 1924 131 L.T. 388; Baccus S.R.L. v. Servicio Nacional del Trigo 1957 1 Q.B. 438; Mellenger v. New Brunswick Development Corporation 1971 1 W.L.R. 604; Swiss Israel Trade Bank v. Government of Salta, supra; and c.f. the Dolfuss Mieg case, supra. 10 20

17. As regards the third finding of the Court of Appeal referred to in paragraph 8 above, it is submitted that even if in relation to ships there is an exception to the general rule of immunity, namely a requirement that the ship should be in or destined for public use, then in the present case :- 30

(1) the Government owns and has been using the ship for purposes which the Government has treated and claims herein as public purposes, and an English and Hong Kong Court should therefore treat them as public purposes unless such claim can be dismissed as obviously without foundations. 40

- (2) The ship was acquired under a Reparations Treaty, and the Government was bound by the law of the Philippines to use it for the objects stated in Act 1789 and to make revenue by such use of the ship, which revenue was to be placed in a Special Economic Development Fund, and was to be used for the purposes laid down by that Act.
- (3) The Government was bound by law not to use the ship for the purpose of entering into competition with private industries, and was expressly bound to give preference to the private sector.
- (4) even if it were thought (as suggested by Lord Maugham in The Cristina, supra at pages 521-2) that it would be inconsistent with sovereign dignity to operate a tramp steamer, the Government in this case has not been operating a tramp steamer, but employing its assets in the manner expressly prescribed for it by the statutes of its country. The non-operation of the ship by the Government is a factor in its favour and not a factor prejudicial to it.
- (5) the Government had a right to immediate possession of the ship at the time of the hearings in Hong Kong, and was only prevented from taking such possession by reason of the ship's arrest.
- (6) by reason of its employment of the ship in accordance with its public duties, the Government had acquired the right to receive revenue from its use by Liberation; and had also retained its ownership of the ship and a right to retake possession in certain eventualities in order to ensure that the decreed public purposes would be achieved.
- (7) just as the ownership or possession of the gold bars in the Dolfuss Mieg case, supra, was and could only be for the financial benefit which the gold might give to the Allied Governments, and not for any other public purpose, so in this

RECORD  
pp.155-174  
pp.103-122

pp.105-6

p.104

p.105

p.234

RECORD

case the ownership and right to possession of the ship was of essential financial consequence to the Government in the discharge of its express public duties.

(8) accordingly the ship was in or destined for public use.

p.231  
p.240  
pp.242-243

18. It is submitted that the Court of Appeal were wrong in attaching undue weight to the decision of the Supreme Court of the United States of America in Government of Mexico v. Hoffman 1945 324 U.S.30. Apart from other matters, that decision was inconsistent with the same court's decision in Berizzi Brothers Company v. s.s. Pesaro 1925 271 U.S. 562, which had been cited with approval in Compania Espanola v. Navemar 1937 303 U.S. 68, a further decision of the same court. Alternatively the decision in Government of Mexico v. Hoffman supra, was based on the practice observed in United States courts (but not in England) whereby the courts refer the questions of immunity to their own Government and then follow the views expressed by the Executive branch. Moreover, the element of "public use" which arises on the facts of the present case was absent in the Hoffman case, and no distinction was relied on in that case between the commercial transaction and the public purpose pursued by the Government. It is submitted that there are wide divergences, both in substantive law and in practice, between the principles followed respectively in the U.S.A. and England.

19. The Appellants submit that the judgment of the Full Court should be reversed and the judgment of Briggs C.J. granting the immunity sought should be restored for the following among other

R E A S O N S

(i) BECAUSE the person and property of a sovereign power are ordinarily immune from

process in foreign courts and there is no exception to this rule in respect of ships or trading ships.

RECORD

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- (ii) BECAUSE ownership of a ship, particularly if coupled with an immediate right to possession, suffices to found a claim for immunity whether or not the Sovereign power controls or operates the ship.
  - (iii) BECAUSE use of a ship for trading purposes is not inconsistent with its being in or destined for public use.
  - (iv) BECAUSE on the facts of this case the ship was in or destined for public use.

T.H. BINGHAM

DAVID SULLIVAN

No. 13 of 1974

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THE OWNERS OF THE  
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(Philippine Flag)

Appellants

- and -

WALLEM SHIPPING  
(HONG KONG) LIMITED

TELFAIR SHIPPING  
CORPORATION

Respondents

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CASE FOR THE APPELLANTS

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