

IN ~~THE JUDICIAL COMMITTEE OF~~ THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG (APPELLATE JURISDICTION)

A CIVIL APPEAL No. 53. of 1973

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

BETWEEN

B THE OWNERS OF THE SHIP  
"PHILIPPINE ADMIRAL"  
(Philippine Flag)

Appellants

- and -

C WALLEM SHIPPING (HONG KONG)  
LIMITED  
TELFAIR SHIPPING CORPORATION

Respondents

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CASE FOR THE RESPONDENTS

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RECORD

D 1. This is an appeal by leave of the Supreme Court of Hong Kong (Appellate Jurisdiction) from an Order of the Full Court dated 16th April 1974 allowing Appeals from Orders of Chief Justice Briggs made on 14th and 17th December 1973.

E 2. The Order of Chief Justice Briggs was made on p.15 an application by the Government of the Republic of p.28 the Philippines that the proceedings herein be set aside on the ground that the subject matter of the proceedings, the vessel "PHILIPPINE ADMIRAL", is the property of the said Government which declines to

sanction the institution of these proceedings in this Court". Chief Justice Briggs granted the application. The Full Court (Mr. Justice Huggins, Mr. Justice McMullin and Mr. Justice Leonard) allowed an appeal by the Plaintiffs who are Telfair Shipping Corporation, charterers of the vessel, and Wallem Shipping (Hong Kong) Limited, shipping agents.

3. The substantive question which arises on this Appeal is whether the Appellants are entitled to sovereign immunity from suit in respect of proceedings in rem against the said vessel. The registered owner of the vessel is the Reparations Commission a government agency but since it was built in Japan in 1960 the vessel has been in the possession and control of the Liberation Steamship Company Inc. a privately-owned company incorporated in the Philippines under a conditional sale agreement and has been operated by the said company for its own benefit in the normal course of trade. The Full Court held that the vessel was not and is not destined for public use and that immunity therefore should not be granted.

4. Initially on the 11th June 1973 the Liberation Steamship Company Inc. entered an appearance as owners of the vessel.. The Appellants intervened on the 29th October 1973 following an Order for Appraisal and Sale of the vessel dated the 8th October 1973 made on the application of the Registrar of the Supreme Court. Thereafter on the 16th November 1973 the Liberation Steamship Company Inc. pursuant to an Order of Mr. Justice Pickering dated 3rd November 1973 amended its Memorandum of Appearance which now reads "Liberation Steamship Company

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J'ment  
pp.241 and 247

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- Inc. who claims to be a beneficial owner" of the Vessel. p. 56
5. Liberation Steamship Company Inc. (hereinafter called "the Company") appealed against the said Order of Chief Justice Briggs but withdrew its J'ment p.226
- A appeal after the Court of First Instance of Manila upon the complaint of the Reparations Commission issued a writ of preliminary injunction restraining the Company "from performing any act tending to obstruct, delay or interfere with the release of the
- B m.s. "PHILIPPINE ADMIRAL" by the Hong Kong Supreme Court". The Supreme Court, at a late stage of the hearing before it, was informed that the Company appealed against the said injunction but the result of the appeal was not known. J'ment p.225
- C History of the proceedings J'ment p.246
6. By a Writ dated 23rd May 1973 the first-named Respondents (hereinafter called "Wallem Shipping") brought an action in rem (Folio 103 of 1973) in the Supreme Court p. 11
- D (Admiralty Jurisdiction) against the vessel for the sum of H.K. \$63,372.27 (subsequently amended to H.K. \$75,207.57) together with interest and costs for goods, materials and necessary disbursements supplied to the vessel at Hong Kong and
- E further claiming, if necessary, on order for the appraisal and sale of the said ship. By a Writ dated 7th September 1973 (Folio 139) Wallem Shipping brought similar proceedings and sought similar relief in respect of a claim for
- F H.K. \$90,160.41 being the price of goods, materials and necessary disbursements supplied to the vessel during the period from May to July 1973.

By a Writ dated 2nd June 1973 (Folio 106) the second-named Respondents (hereinafter called "Telfair") who were charterers of the vessel under a charterparty dated 21st December 1972 brought a further action in rem against the vessel for damages for breach of the said charterparty.

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7. On 2nd June 1973 a Warrant of Arrest was issued by the Acting Deputy Registrar of the Supreme Court of Hong Kong at the instance of Telfair and on 12th July 1973 upon the application of the Chief Bailiff of the Supreme Court an order was made to preserve the vessel. The Order for appraisalment and sale dated the 8th October 1973 and the application to set aside the proceedings made by the Appellants herein on the 29th October 1973 (both referred to in paragraph 4 above) were made in the action brought by Telfair (Folio No. 106 of 1973). Similar applications by the Appellants were made in four other actions including Folio Nos. 103 and 139 in which Wallem Shipping are the plaintiffs. The said other applications were heard by Chief Justice Briggs on the 14th December 1973. They were decided in favour of the Appellants. The application in Folio No. 106 of 1973 brought by Telfair was heard on the 17th December 1973 and was similarly decided for the reasons given by the learned Chief Justice in his judgment given on December 14th. It was further ordered that all appeals arising out of the said decision should be heard together. In the event the Full Court heard appeals in three actions Folios Nos. 103, 106 and 139. The same issues arose in each appeal. The Notice of Appeal is dated the 27th December 1973. A Supplementary Notice of

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Additional Grounds of Appeal is dated the 25th February 1974 the first day of the hearing of the appeal. Judgment was given by the Full Court on the 26th April 1974. Leave to appeal to Your Majesty in Council was granted on the 16th May 1974 by the Full Court. On the 27th May 1974 it was ordered that the vessel be released from arrest and that the Order for appraisalment and sale be discharged upon a Bail Bond having been filed as security in the sum of H. K. \$500,000,00 (£450,000 approximately).

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The Issue

9. "The issue on the appeals is whether immunity ought to have been granted" (per Mr. Justice Huggins). It is not disputed that the Republic of the Philippines is a foreign independent sovereign State nor (upon an assurance given by Counsel before the Supreme Court) that the application to set aside the proceedings is duly made on its behalf.

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It is respectfully submitted that the question whether immunity should be granted depends upon :-

(1) the nature and extent of the

Appellants' interest in the vessel. This is a matter of dispute between the Appellants and the Company as hereinafter appears; and

(2) whether immunity may be claimed in respect of proceedings in rem against a vessel which although owned by an agency of a sovereign government has been used otherwise than in the public service (publicis usibus destinata); in particular, where the

vessel has been in the possession and control of and operated by a private corporation, on its own behalf and for its own benefit, so that the corporation has been and claims to be, the beneficial owner of the vessel. No question of government requisition arises in the present case; and

(3) if there is a right to immunity in respect of proceedings in rem against such vessels, whether the Appellants have not waived the right to claim such immunity in the present case.

10. Evidence

The Company acquired the vessel under a Contract of Conditional Purchase and Sale dated 16th November 1960 from the Reparations Commission which was created in about 1957 by Republic Act 1789. The object of the Republic Act 1789 was to govern the utilization of goods acquired under a treaty concluded in 1956 between the Republic of the Philippines and Japan whereby

Japan agreed to make available a total sum of U.S. \$550 million by way of reparations for damage done to Filipino property during the Second World War. Of this sum U.S. \$500 million was to be provided in the form of such capital goods and services as might be requested by the Philippine Government and agreed to by the Japanese Government. Section 1 of the Act declared that it was the policy of the Philippine Government that all reparations payments procured from Japan should be utilised "in such manner as shall assure the maximum possible economic benefit to the Filipino people and in as equitable and widespread a manner as possible". This policy was to be implemented

by the "procurement, disposition and utilisation" of inter alia capital goods which were to be made available both to approved Government projects and to Filipino citizens and entities wholly owned by

A Filipino citizens whose applications were required to be accompanied "by the requisite project study" (Section 2(a)). The Act further provided that the Philippine Government should not utilize reparations goods for the purpose of entering into competition

B with private industries where such industries had shown their capacity and readiness to serve the public fairly and adequately and that in general preference was to be given to "private productive projects" after the first year and Government

C projects were only to receive preference in a limited category of cases (Section 2(a)) p.105

11. The proceeds from the sale of reparation goods disposed of to such persons (referred to in the Act as "end-users") were placed in a Special

D Economic Development Fund to be used for the specific public purposes stipulated in the Act (Section 2(f)). The Act established a Mission in Japan as p.105

E the sole and exclusive agent of the Philippine Government in Japan charged with the implementation of the treaty and the procurement of all reparations goods and services. The Act also created the

F Reparations Commission whose function was to administer the acquisition, utilization and distribution of reparations goods and services. As a result of a successful application to the Reparations Commission by the Company for the grant of an ocean-going ship, the Reparations Mission in 1959 entered into a p.64

contract on behalf of the Government of the Republic of the Philippines with a Japanese shipbuilding company for the construction of a vessel.

The contract declared that "the vessel subject matter of this contract is being procured under the Reparations Agreement for the Liberation Steamship Company of Manila, Philippines".

- A 12. At the date of the Contract of Conditional Purchase and Sale of Reparations Goods between the Reparations Commission and the Company the vessel was named "THE DAGOHOY" the name subsequently being changed by the Company to "THE PHILIPPINE ADMIRAL". p.123
- B Although the contract was never signed by the Reparations Commission it is common ground that a contract in the terms of the written form referred to above was concluded in November 1960. Under the said contract the Company agreed to pay by instalments
- C the price which was payable to the shipbuilder and the Commission did "conditionally cede, transfer and convey unto the [Company] the utilization of the vessel" subject to the terms and conditions thereafter set-out. It was provided that the Commission
- D "retains title to and ownership of the above-described vessel until the same is fully paid for" and that the Company would take "delivery and possession of the aforesaid vessel at the port of Japan, and put the necessary officers and crew aboard the same before
- E delivery of subject vessel in order to operate and utilize the same in accordance with Philippine laws". There were annexed to the contract certain common form "terms and conditions" which provided, inter alia, that "title to and ownership of the reparations
- F goods subject to this contract shall remain with the [Commission] until the same shall have been fully paid for, and upon the full payment of the purchase p.124



price as hereinbefore mentioned, this conditional deed of sale shall become absolute, subject only to the limitations established by Republic Act 1789 with respect to inspection, transfer and utilization of said reparations goods."

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13. The Company took delivery and possession of the vessel pursuant to the terms of the said contract and operated her in the course of its shipping business until some time in 1972. By a charterparty on the New York Produce Exchange form dated 21st December 1972 the vessel was chartered by the Company to Telfair for a period of "nine months to about twelve months, period in charterers' option". By an Addendum No. IV dated 5th March 1973 to the said charterparty it was provided, inter alia, as follows: "Laydays/Cancelling to be changed to March 27/ April 6, 1973". At the time the charterparty was concluded and during the period which followed the vessel was under repair at Hong Kong. It would appear that the Company was unable to pay the shipyard's account and on 8th May 1973 Telfair received a telex from the Company purporting to cancel the charterparty. As a result of this telex and the Company's failure to deliver the vessel in accordance with the terms of the charterparty Telfair commenced proceedings in rem on the 2nd June 1973 (Folio 106) claiming damages for breach of charterparty.

14. On 4th June 1973 the vessel was arrested at the instance of the Second-named Respondents On 12th July 1973 upon the application of the Chief Bailiff of the Supreme Court an order was made to

preserve the vessel. The Reparations Commission made no attempt to intervene until after the Order for appraisalment and sale made on the 8th October 1973. Thereafter the Commission sought to assert its interest in the vessel. On the 10th October 1973 it resolved, inter alia, to direct the immediate repossession of the vessel. Pursuant to the said Resolution applications were made to set aside these and other proceedings against the vessel in the Supreme Court of Hong Kong as hereinbefore set out. The Reparations Commission's alleged right to repossess the vessel was and is disputed by the Company and no attempt was made (so far as the Respondents are aware) to repossess the vessel in fact. At all material dates after about July 1973 the vessel lay under arrest at Hong Kong and remained in the possession of the Company through its officers and crew who regarded the Company or its principal shareholder Mr. Thomas Cloma as "the owner". The state and appearance of the vessel at the time of the hearing before the Full Court are described in an affidavit dated the 1st March 1974 sworn by the Respondents' Solicitor herein.

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The Law

15. It is respectfully submitted that the starting point in any consideration of the principles of sovereign immunity as applied in English Law must be the proposition enunciated by Lord Reid in Rahimtoola v Nizam of Hyderabad [1958] A.C. 379 at p. 404:

"The principle of sovereign immunity is not founded on any technical rules of law: it is founded on broad considerations of public policy, international law and comity".

- A The present case is concerned not with the position of a foreign sovereign who is impleaded by way of proceedings in personam but with the present scope of sovereign immunity where the plea is raised in an action in rem.
- B 16. In The Cristina [1938] A.C. 485 the House of Lords held inter alia that a sovereign is "impleaded" by proceedings in rem against a vessel in which he has a proprietary or possessory interest and the Respondents do not seek to contend otherwise.
- C But it is respectfully submitted that the fact that a sovereign is impleaded does not necessarily result in immunity from suit being granted. In Sultan of Johore v Abubakar Tunku Aris Bendahar [1952] A.C. 318, at p.343 the advice of your Lordships was as follows :-
- "Their Lordships do not consider that there has been finally established in England (from whose rules the rules to be applied in the court at Singapore would not differ) any absolute rule that a foreign independent sovereign cannot be impleaded in our courts in any circumstances. It seems desirable to say this much having regard to inferences that might be drawn from some parts of the Court of Appeal's judgment in The Parlement Belge and from the speech of Lord Atkin in The Cristina".
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Furthermore it is submitted that there is no precedent for granting immunity in circumstances such as those of the present case and that there are strong reasons which have been acknowledged by Courts in England and  
A elsewhere for not extending the rules regarding sovereign immunity beyond their already established scope.

17. The Respondents' first submission is that sovereign immunity from suit will not be granted in proceedings in rem against a vessel even where a foreign sovereign  
B state is the registered owner of the vessel unless the vessel is operated or required to be operated for public or national purposes - "publicis usibus destinata".

18. In The Charkieh (1873) L.R. 4 Adm. & Ecc. 59 Sir Robert Phillimore was concerned with an action  
C in rem against a vessel owned by the Khedive of Egypt. The vessel was involved in a collision whilst under charter to a British subject who had advertised her to carry cargo from England to Egypt. The learned judge rejected the claim of the Khedive to be entitled  
D to the privileges of a sovereign prince but he then went on to consider what the position would have been had the Khedive made out his claim to such privileges. He concluded that :

"The sovereign prince or his representative is  
E exempted from the operation of this principle, absolutely, so far as his person is concerned, and with respect to his property, at least so far as that property is connected with the dignity of his position and the exercise of his public  
F functions" -- at p.88,

and later on he observed that :

"proceedings of this kind, in rem, may in some

cases at least be instituted without any violation of international law, though the owner of the res be in the category of persons privileged from personal suit". -- at p. 93.

- A 19. In The Parlement Belge (1880) 4 P.D. 147 Sir Robert Phillimore held that a steamer owned by the Belgian sovereign and carrying mail and other cargo to the United Kingdom did not fall to be classed as a public vessel to which immunity would extend. The B Court of Appeal reversed this decision ((1880) 5 P.D. 197 ). Lord Justice Brett stated that at the time of its arrest the vessel was in the possession and control of the sovereign and was being employed in the service of the State i.e. the carriage of mail. The C Court held that the sovereign was not deprived of immunity by the fact that the vessel was used "subordinately and partially" for the carriage of cargo other than mail. Although the Court of Appeal differed from the judge at first instance as to the true D character of the vessel, nevertheless it is submitted that the judgments proceed on the basis of the same principle as the learned judge. Brett L.J. referred to to The Prins Frederik 2 Dod.451 as being worthy of great attention and then observed that the following E passage in the argument of Dr. Arnold was of the "closest and most forcible reasoning, to which we see no answer":-

- F "There is a class of things which are not subject to the ordinary rules of property, which are not liable to the ordinary rules applying to property, which are not liable to the claims or demands of private persons, which are described by civilians as extra

commercium, and in a general enumeration are by them denominated sacra religiosa, publica publicis usibus destinata".

It is submitted that Brett L.J. was correct in  
A concluding that the plea of sovereign immunity should not succeed unless the vessel is shown to be a public ship used for national or public purposes. The Respondents respectfully refer to the analysis of the judgments in The Parlement Belge by Mr. Justice McKenna in  
B Swiss Israel Trade Bank v The Government of Salta [1972] 1 Lloyds Rep. 497.

20. The circumstances in which the sovereign immunity may be claimed in the case of proceedings in rem were considered by the House of  
C Lords in Compania Naviera Vascongado v Steamship "Cristina" [1938] A.C. 485. In that case the Spanish Government had requisitioned a vessel both owned and registered in Spain whilst it was lying in Cardiff. The requisitioning was effected by the  
D local Spanish consul who discharged the master and such members of the crew who were not loyal to the Government and appointed a new master who held the vessel for the Government. Lord Atkin formulated two propositions of international law which, he said,  
E form part of English law, the second of those propositions being that the Courts will not, by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.  
F He adverted to the differences that are to be found in State practice as to whether there are any limitations upon this second principle, and in particular,

whether it extends to property of the sovereign used only for commercial purposes, and he expressed the opinion that it does so extend. It is respectfully submitted however, that this was both obiter and the  
A minority view. All of their Lordships were of the opinion that the "Cristina" was dedicated to public uses and therefore held that the plea succeeded. But Lords Thankerton, Macmillan and Maugham were of the view that immunity might not extend to  
B State-owned vessels engaged in ordinary commerce. Thus, Lord Maugham, having referred to the judgment of Sir Robert Phillimore in The Parlement Belge, observed;

"For my part I can see no sufficient reason  
C for not following in the case of a State-owned vessel, being neither a ship of war nor in any true sense a vessel publicis usibus destinata, the decision of Sir Robert Phillimore. The effect would be that these State-owned  
D ships would be treated as exceptions to the general rule to this extent, that proceedings against the ships themselves might be brought and prosecuted to a conclusion".-- at p. 520.

21. Doubts were expressed by Lords Thankerton,  
E Macmillan and Maugham as to the correctness of the decision of the Court of Appeal in The Porto Alexandre [1920] P.30. That case concerned a vessel owned by the Portuguese Government but engaged in ordinary trading carrying cargoes for private individuals. The  
F vessel ran aground and salvage services were rendered to her. When a writ in rem was issued the Portuguese Government pleaded sovereign immunity. In unreserved

judgments and without calling upon counsel for the Government to address them the Court of Appeal held that the case was concluded by the decision of the same Court in The Parlement Belge. For the purposes of the Respondents' first submission it is not necessary to contend that The Porto Alexandre was wrongly decided, it being clearly distinguishable (it is submitted) on the ground that the vessel was in the possession and control of the foreign Government and prima facie was trading for the account of that Government. Nevertheless if and to the extent that the judgment of the Court of Appeal in the Porto Alexandre may support the proposition that immunity should be granted even in respect of a vessel which is not "destined for the public use" it is respectfully submitted that the judgments were wrong and that the reservations expressed by a majority of their Lordships in The Cristina were well founded.

22. The Respondents respectfully refer, in particular, to that part of the judgment of Brett L.J. in The Parlement Belge which stated (at p.204) that the question before the Court was whether the Admiralty Division had jurisdiction in rem in respect of a vessel which was at the time of the proceedings "the property of a foreign sovereign, is in his possession, control and employ as sovereign by means of his commissioned officers, and is a public vessel of his state", and to the judgment of Warrington L.J. in the Porto Alexandre where it was emphasised, it is submitted, that the vessel was not the property



of the Portuguese Government but was in its possession for the service of that State and employed under the orders of that Government.

A 23. The Respondents' second submission is that the "Philippine Admiral" although owned by the Reparations Commission was not used or destined for use for public purposes. The Reparations Commission relinquished both possession and control of the vessel to a private corporation on terms whereby the vessel was engaged in ordinary trading for the benefit of that corporation which was permitted and did hold itself out as beneficial owner. In all cases in English Law in which the plea of sovereign immunity has succeeded the vessel has been in the possession or control of the foreign sovereign. It is submitted that the full Court of Hong Kong correctly held that the vessel was not publicis usibus destinata.

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D 24. It is respectfully submitted that the facts in The Porto Alexandre were clearly distinguishable from the present one, on the grounds stated in paragraph 21 above, and that the Respondents' second submission is supported by the leading authorities referred to above, namely The Parlement Belge and The Cristina.

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F 25. In The Gagara [1919] P. 95 the Court of Appeal upheld the decision of Hill J. in setting aside a writ in rem claiming possession of a vessel which was in the possession of the Estonian Government. A similar result obtained

in The Jupiter [1924] P.236 where the Russian Government was held to be in possession of the vessel through the action of the master in repudiating the possession and ownership of the plaintiffs by whom he had been appointed and thereafter holding the vessel for the Government

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However, in The Annette [1919] P. 105 where the foreign sovereign was not in possession of the vessel the Court declined to set aside the writ. In that case the owners of the two

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vessels issued proceedings in rem claiming possession of the vessels which had been requisitioned by the Provisional Government of Northern Russia and hired by that Government to a trading partnership subject to the control

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of the Director of Naval Transports. Hill J. held that even if he had been prepared to accept the claim of the Provisional Government to be recognised as a sovereign independent State (which he was not) he would have refused

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to set aside the proceedings because the Government was not in possession of the vessels:-

"If it is not in possession, the Court interferes with no sovereign right of the Government by arresting the vessel..... " at p.111

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26. It is respectfully submitted that the Full Court in the present case rightly attached much importance to the decision of the Supreme Court of the United States in Republic of Mexico v Hoffman (1945) 324 U.S. 30. The facts of that case are in some

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respects not dissimilar to those in the present case.

The vessel against which proceedings in rem were instituted was owned by the Mexican Government but she was neither in the possession nor the public service of that Government being

A let to a private trading corporation for a period of five years. She was engaged in ordinary commercial activities and the interest of the Government was a purely financial one, it being entitled to 50% of any profits that might be made.

B The Supreme Court refused to extend the rules regarding sovereign immunity to include the case of a vessel which was neither in the possession nor the public service of the foreign sovereign.

27. Nowhere in the voluminous evidence do

C the Appellants assert in terms that the vessel was used or destined for use for public purposes. The reason no such assertion was made is clear. From the time of her delivery from the ship-builders' yard in Japan the vessel was in the possession of and operated by the Liberation

D Steamship Company, a private Philippine company, as an ordinary trading vessel. The master and crew were appointed and employed by the Company which retained in full any

E profits accruing from the operation of the vessel. The Appellants' interest was of a purely financial nature, namely its right to receive instalment payments of the purchase price. Apart from that, the only interest to

F which the Appellants could point was the somewhat nebulous public benefit which accrues

to any State whose nationals own or operate a merchant fleet. The Respondents respectfully point out that the Republic Act 1789 itself distinguished in terms between public and private "end use" and it provides that where reparation goods are disposed of to private end-users the proceeds of sale rather than the property itself are to be used for public purposes (Section 2).

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B 28. On the last day of the hearing before the Full Court the Appellants sought to argue that Presidential Decree No. 332, dated 9th November 1973 (then produced in evidence for the first time) showed that the vessel was or might be destined

C for the public service at some future time. It is respectfully submitted that the Appeal Court was right in concluding that the bare possibility that the vessel might at some future time become a public vessel in the

D service of the State was not sufficient to discharge even the limited burden of adducing evidence which is required for support of the claim for immunity Juan Ysmael & Co. Inc. v The Government of The Republic of

E Indonesia [1955] A.C. 72

F 29. The Respondents' third submission is that in any event, sovereign immunity should not be granted in proceedings in rem against a vessel which is owned by a foreign sovereign state but engaged in normal trading activities

even if the vessel is in the possession or control of the State.

This submission is contrary to the decision of the Court  
A of Appeal in the Porto Alexandre (referred to in  
paragraph 21 above). For this purpose, therefore, the  
Respondents respectfully submit that that decision  
was wrong; that the case was distinguishable from  
and ought to have been distinguished from the  
B Parlement Belge where the vessel was engaged in  
the public service of carrying mails;  
that Counsel for the appellants (Mr. Dunlop) was wrong  
to admit that the point was concluded against him by the  
Parlement Belge; and that the reservations expressed  
C by a majority of their Lordships in The Cristina as to the  
correctness of the decision in The Porto Alexandre were  
well founded.

30. There are dicta in reported cases supporting the  
Respondents' submission which variously ascribe the  
D withholding of immunity either to the view that a vessel  
engaged in normal trading activities is not "publicis usibus  
destinata" or to a waiver by the sovereign of the right  
which he would otherwise enjoy. It is respectfully  
submitted that the former rationale is to be preferred  
E but in the alternative the Respondents rely upon the  
latter in support of their fourth submission (Waiver)  
in paragraph 34 below.

31. Sir Robert Phillimore in The Charkieh stated  
obiter that a State-owned trading vessel was not entitled  
F to immunity from suit. By assuming the character of  
trader when it is to his benefit to do so, the foreign

sovereign must be taken to have waived his right to immunity. Brett L.J. in The Parlement Belge, it is submitted, took a similar view and suggested that a State-owned trading vessel is not to be regarded  
A as a public vessel at all. In The Cristina Lord Thankerton and Lord Macmillan expressly reserved the question whether immunity would extend to a State-owned trading vessel. It is submitted that the terms in which they expressed themselves strongly suggest that they  
B would not admit the principle of sovereign immunity in such a case. Both of their Lordships were doubtful as to the correctness of the decision in The Porto Alexandre. Lord Maugham stated in terms that he saw no reason for extending the principle  
C to a State-owned vessel engaged in ordinary trading voyages "being neither a ship of war nor in any true sense a vessel publicis usibus destinata".

32. It is submitted that there is no decision of Your Lordships nor of the House of Lords which holds  
D that sovereign immunity should be granted in the case of proceedings in rem against a vessel used in the ordinary course of trade and that so to hold would extend the application of the existing rule. It is further submitted that both the practice of other  
E States and the decisions of Courts in other jurisdictions weigh heavily in favour of restricting the grant of immunity within its present scope.

33. In this connection the Respondents respectfully refer to :-

F (1) Decisions of the Supreme Court of the United States from Schooner Exchange v McFadden

- (1812) 3 L. ed 114 to The Republic of Mexico v Hoffman (1945) 324 U.S. 30 which display, it is respectfully submitted, a consistent principle precluding the grant of immunity in such cases; and by inference the decision of the Supreme Court of Canada in Flota Maritime Browning de Cuba S.A. v The Canadian Conquerer (1962) 34 D.L.R. (2d.) 634 where the question was expressly left open.
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- B (2) The speech of Lord Maugham in The Cristina regarding the Brussels Convention of 1926. The said Convention under which in times of peace no immunity is granted as regards State-owned ships engaged in commerce, is currently ratified by 13 States and signed but not ratified by 6 other States (including the United Kingdom) two of which subsequently withdrew. In addition 8 States have acceded to the Convention.
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- (3) The statements of law and practice by text-book writers, including
- Oppenheim, Vol I, 8th ed. pp. 272-275
  - Cheshire, Private International Law, 8th ed. pp. 96-109
  - D.P. O'Connell, International Law, 2nd ed. pp. 866-872
  - Dicey and Morris, The Conflict of Laws, 9th edition pp. 138-144.
- (4) The overwhelming proportion of reported cases in which State-owned trading corporations have appeared as Defendants without sovereign immunity being claimed.
34. The Repondents' fourth submission is that if,

contrary to the foregoing submission a foreign State is entitled to immunity in proceedings in rem against trading vessels which it owns, then:-

- A (a) Such immunity is waived when the sovereign State operates the vessel in the normal course of trade for its own commercial benefit, and a fortiori where, as in the present case, the vessel has been operated by a private corporation in its own name and for its own account; and/or
- B (b) the immunity was waived by the Appellant Government in the present case, by permitting the actions to proceed notwithstanding the arrest of the vessel in July 1973.

35. As to (a) the Full Court held, correctly it is submitted, "there is no doubt that a foreign sovereign can waive his immunity and submit to the jurisdiction: Sultan of Johore v Abubakar Tunku Aris Bendahar" but held also that the doctrine is confined within very narrow limits. It is respectfully submitted that the question whether there has been a waiver of a right to immunity is one of mixed fact and law and that there is no rule of law which precludes a finding of waiver where a foreign sovereign State has operated or caused others to operate its vessel in the ordinary course of trade. In the Charkieh Sir Robert Phillimore preferred waiver as the rationale for withholding immunity in such a case :-

"I must say that if ever there was a case in which the alleged sovereign (to use the language of Bynkershoek) was "strenue mercaterem agens",.. it is the present case; and if ever a privileged person can waive his privilege by his conduct, the privilege has been waived in this case". - at p.99

p.248



36. It is submitted that the learned judge's reasoning applies with added force in the present case. At all material times the Company operated the vessel as beneficial owner. The fact that the Reparations Commission remained the registered owner served only as notice that

A the Appellants were aware of and consented to such operation of the vessel by the Company. A description of the vessel as she was at the time of the hearing before the Full Court in February 1974 appears in the affidavit of Struan Robertson dated the 1st March

B 1974. The identifying words "Reparations Vessel" nowhere appeared; the funnel was painted with the house colours of the company: the crew regarded the Company (or Mr. Thomas Cloma) as the owner.

37. The Respondents further submit that those reported

C cases which hold that immunity can only be waived "in face of the Court" (such as Mighell v Sultan of Johore [1894] 1 Q.B.149 and Duff Development v Kelantan Government [1924] A.C.797) arose out of actions in personam and thus are readily distinguishable from proceedings in rem against

D a vessel which has been held out by the sovereign as being engaged in the ordinary course of trade with the concomitant liability to such proceedings in respect of its obligations so incurred.

38.(b) Finally, the Respondents submit that the conduct

E of the Appellants after the institution of these proceedings constituted a waiver of the alleged right to have the proceedings set aside. The Writ herein names "The Owners" of the vessel as the Defendants and it is addressed to "The Owners and all others interested in

F the ship "Philippine Admiral" (Philippine Flag)". It is respectfully submitted that it must be inferred that

the Appellants were content that the proceedings should take their course notwithstanding the subsequent arrest of the vessel, and that when they first sought to intervene on the 29th October 1973 their right to claim immunity (if, A contrary to the foregoing submissions, there was ever such a right) had been waived.

39. The Respondents submit that the Appeal herein should be dismissed for the following among other

REASONS

B 1. Because the Government of the Republic of the Philippines and its agency the Reparations Commission are not entitled to claim sovereign immunity in respect of proceedings in rem against the said vessel.

2. Because there is insufficient evidence to establish C the claim to a legal interest in the vessel which the said Government and Reparations Commission have made therein.

3. Because at all material times the vessel has been beneficially owned and operated for its own account by D Liberation Steamship Company a private corporation.

4. Because at all material times the vessel has been engaged in the ordinary course of trade and commerce.

5. Because at all material times the vessel has not been engaged in the public service - "publicis usibus E destinata".

6. Because there is no or insufficient evidence that the vessel was required to be used otherwise than in the ordinary course of trade and commerce.

7. Because the decision of the Court of Appeal F (England) in The Porto Alexandre is distinguishable from the present case.

8. Because, alternatively, the said decision is wrong and

should not be followed, and because the doubts as to its correctness which were expressed by a majority of the House of Lords in The Cristina were well-founded.

9. Because the principles stated in the Parlement Belge and the Cristina preclude the grant of immunity in the  
A present case.

10. Because the said Government and the Reparations Commission waived their right to immunity (if such right existed) by causing or permitting the Plaintiffs  
B herein to employ and render services to and on behalf of the said vessel and her beneficial owners the Liberation Steamship Company Inc, without any or adequate notice of the interest now claimed by the said Government and the said Reparations Commission herein.

11. Because the said Government and the Reparations Commission waived their said right (if any) by permitting the Company to operate the vessel in the ordinary course of trade and commerce for its own account as beneficial owners of the vessel.

12. Because the right to immunity (if such right  
C existed) was waived by the said Government and the Reparations Commission by permitting these proceedings to continue and the vessel to be placed and remain under arrest from July to October 1973.

13. Because the judgment herein of Chief Justice Briggs  
D was wrong.

14. Because the judgments of the Supreme Court (Appellate Jurisdiction) (Mr. Justice Huggins, Mr. Justice McMullin and Mr. Justice Leonard) were correct and should be affirmed.

ANTHONY EVANS Q.C.,  
IAN HUNTER.

IN ~~THE PRIVY COUNCIL~~ OF  
THE PRIVY COUNCIL

ON APPEAL

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)

BETWEEN

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 RESPONDENTS

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HOLMAN, FENWICK &  
WILLAN,  
1, Pepys Street,  
LONDON, EC3.