[HADJIANASTASSIOU, J.]

REEDEREI SCHULTE AND BRUNS BALTIC,

*Plaintiffs,*

*v.*

ISMINI SHIPPING COMPANY LIMITED,

*Defendants.*

*(Admiralty Action No. 21/75).*

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*Admiralty—Practice*—Lis alibi pendens—*Action in Cyprus for damages arising from collision and order prohibiting dealing with ship—Made under section 30 of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law, 1963 (Law 45 of 1963)—Preceded by another action in West Germany by the same plaintiffs against the same defendants in respect of the same collision—And arrest and release of ship on giving security by defendants—Application by shipowner to discharge order made under said section 30—Granted.*

*Merchant Shipping (Registration of Ships, Sales and Mortgages) Law, 1963 (Law 45 of 1963)—Order prohibiting dealing with ship under section 30 of the Law—Discharged because of new facts that have come to light since the making thereof*—Lis alibi pendens.

Upon an *ex-parte* application by the plaintiffs, in an admiralty action, which was made on the 6th May, 1975, under the provisions of s. 30 of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law, 1963 (Law 45 of 1963) the Court granted an order prohibiting any dealing with the ship "Ismini" or "Eteoklis II" belonging to the defendants. The claim of the plaintiffs in the action was for damages caused to them due to negligence in navigation and/or breaches of statutory duties on or about 5th December, 1974, when the said vessel collided with the vessel "Annemarie Schulte" and caused her to sink in the river Weser.

Prior to taking the above proceeding the plaintiffs in this action had brought an action against the same defendants in the Court of Bremen Germany. The claim

of the plaintiffs in both the German and Cyprus actions, arose solely from the collision between the two ships as aforesaid. Following the ship's arrest by order of the German Court, and an agreement reached between the parties on December 23, 1974 the defendants furnished a security of DM600,000 in order to secure its release whereupon the plaintiffs agreed not to take any further steps against the ship in question.

Counsel for the defendants submitted that the order obtained under s. 30 of the Law was made without the Court knowing all the facts and was, therefore, contrary to the general principles of law and practice pertaining in the Admiralty Courts.

*Held,* (1) An action in rem will be stayed if the plaintiffs have already begun an action in rem abroad and bail has been given to release the ship, because it would be oppressive to allow the ship to be arrested a second time. Furthermore, proceedings in rem will be restrained, when a ship has been arrested abroad and afterwards released on a guarantee being given for the amount of the damage, though no litigation was going on abroad between the parties. (See the *Jasep* [1896] 12 T.L.R. 434 following the *Christiansborg* [1885] 10 P.D. 141).

(2) Having read the agreement reached between the parties of December 23, 1974, in Germany and in the light of the authorities, it seems to me that had I been aware of all the facts I now know I might have found myself in a different frame of mind, when on May 6, 1975 I decided to grant the order under the provisions of s. 30 of the Law.

(3) The security given is in effect giving bail. The bail is a release and the meaning of it is that the proceeding is not to go on against the res. In my view the giving of bail is the release of the ship and certainly, it means that the ship is released from the effect of the collision, but even if the effect of the guarantee was not equivalent to bail, it may be considered as a private agreement so that the release has been definitely purchased by the guarantee.

(4) As it now appears that the granting of the order

under s. 30 of our law has placed the plaintiffs in an over-advantageous position, I have reached the conclusion, exercising my discretionary powers, to discharge the said order made on May 6, 1975, because the facts and circumstances of this case are within the principle formulated in *The Christiansborg* case (*supra*).

*Order accordingly.*

Cases referred to:

*La Blanca and El Argentino* [1908] 77 L.J. P.D. & A. 91;

*Beneficial Finance Corporation Ltd.* v. *Price* [1965] 1 Lloyd's Rep. 557 at pp. 561 - 562;

*The Christiansborg* [1885] 54 L.J. P.D. & A. 84; [1885] 10 P.D. 141, at p. 148;

*The Soya Margareta* [1960] 2 All E.R. 756 at pp. 761 - 762;

*Slough Estates Ltd.* v. *Slough B.C.* [1967] 2 All E.R. 270;

*The Mansoor* [1968] 2 Lloyd's Rep. 218;

*The Golaa* [1926] P. 103;

*The Marinero* [1955] P. 68;

*Peruvian Guano Co.* v. *Bockwoldt* [1883] 23 Ch. D. 225;

*The Monte Urbasa* [1953] 1 Lloyd's Rep. 587;

*The Jasep* [1896] 12 T.L.R. 434;

*The Mannheim* [1897] P.D. 13;

*The Juno* [1922] 128 L.T. 671;

*Ionian Bank Ltd.* v. *Couvreur* [1969] 2 All E.R. 651.

**Application.**

Application by the defendants for an order varying or rescinding or discharging the previous order of the Court dated 6th May, 1975, made under section 30 of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law, 1963 (Law 45/63) against the owners

of the ship "Ismini" prohibiting any dealing with the said ship.

*Ch. Mylonas,* for the plaintiffs.

*E. Psilaki (Mrs.),* for the defendants.

The following judgment was delivered by :-

HADJIANASTASSIOU, J. : On May 6, 1975, the plaintiffs Reederei Schulte and Bruns Baltic Schiffahrts K.G., of Bremen, filed an action against Ismini Shipping Co. Ltd., of Limassol, claiming compensation for damages caused to the plaintiffs due to the negligence in the navigation and/or breaches of statutory duties on or about 5th December, 1974, when the vessel "Ismini" collided with the vessel "Annemarie Schulte" and caused her to sink in the River Weser.

In the meantime, on the same date, the plaintiffs in an *ex-parte* application applied for an Order of the Court restraining the defendants from selling, mortgaging or otherwise disposing of the vessel "Ismini" or "Eteoklis II" belonging to the respondents and/or prohibiting for such time as the Court thinks fit any dealing with the vessel "Ismini" or "Eteoklis II" or with any share therein under such terms and conditions as the Court may think just. This *ex-parte* application was based on s. 30 of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law, 1963, (Law 45/63) (as amended), and the inherent powers of the Court and the Practice of the English Courts.

This application was supported by an affidavit of the same date sworn by Chariklia Ch. Mylona of Famagusta pursuant to counsel's advice. According to paragraph 3, the plaintiffs were the owners of the vessel "Annemarie Schulte" which was sunk in the River Weser on or about 5.12.74 as a result of the collision between her and the vessel "Ismini" owned by the defendants in this action.

Paragraph 5 shows that the defendants are a Cyprus company and their vessel "Ismini" is registered under the Cyprus flag. The registered office of the defendants is situated at 9 Archbishop Kyprianos Street, Limassol within the jurisdiction of this Court. And according to paragraph 6, as a result of the collision, the plaintiff suffered da-

mages in the region of DM 3,000,000 and the plaintiffs have a right against the vessel "Ismini" to recover such damages. Furthermore, it appears that the defendants applied to the Ministry of Communications and Works and obtained a permit to change the name of the vessel "Ismini" to "Eteoklis II", but the plaintiffs are not aware whether the change was in fact effected or not (paragraph 7).

Finally, in paragraph 8, the affiant claimed that the vessel "Ismini" or "Eteoklis II" is the only property owned by the defendants and if the defendants are left free to dispose of same the plaintiffs will not be able to recover the full amount of damages which they sustained.

On May 6, 1975, the Court, taking into consideration the provisions of s. 30 of our law, and having read the affidavit, granted an order as per application, which was returnable on May 19, 1975. On the date on which the order was returnable, counsel appearing on behalf of the defendants opposed the application for an order preventing any dealings with the ship in question and put forward that the defendants had already furnished a bank guarantee in Germany which was considered as being sufficient in those circumstances. The bank guarantee was for DM600,000 which counsel claimed to be approximate to the value of the ship. Then the application was adjourned to enable counsel on behalf of the defendants to file a written application.

On August 28, 1975, the defendants filed an application, applying for an order varying or rescinding or discharging the previous order of the Court made on the 6th May, 1975, restraining the defendants from dealing with the vessel "Ismini" or "Eteoklis II". This application was based on rules 204, 207, 208, 211 and 212 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, and the facts relied upon were set forth in the accompanying affidavit of Mr. Joseph Christou, of Limassol, dated June 18, 1975. It appears from this long affidavit that the affiant is the registered clerk of the law office of Chrysses Demetriades & Co., of Limassol, who have been entrusted by the defendants with the defence of the action and with the making of

the present application. This affidavit was sworn by Mr. Christou to the best of his knowledge, information and belief, acquired mostly from his perusing various relevant documents and on counsel's advice, and I propose quoting those paragraphs only :-

"5. As a result of the above collision the plaintiffs took legal action in W. Germany before the competent Court of Bremerhaven and filed an application for an Order for the arrest of the Ship whilst in Germany. The defendants through their Advocates in Germany, Messrs. Loening Ahlers, Schottelius, Woelper, Bulling and Gottwald, of Bremen appealed against the said Order for arrest and a judgment of the Court at Bernerhaven, was subsequently issued on/or about 17.12.74.

The said judgment of 17.12.74 provided that the security filed by the plaintiffs on their application for the arrest of the ship which at the time amounted to DM200,000.- was to be increased to DM900,000.- and that the ship would be kept under arrest until an amount of DM3,000,000.- was given as security for her release.

6. Following the above judgment however the plaintiffs together with other interested parties and through the German Advocate acting on their behalf at the time, Dr. Huebner, of Bremerhaven, reached an agreement with the Defendants through their above named German Advocates which was later reduced into writing on 23.12.74. Photocopy of the said agreement in the German language was supplied to us by the said Advocates of the Defendants under cover of their letter dated 4.6.74. The Original of the said letter with the attached photocopy of the said agreement in the German language shown to me and marked 'A' and 'B' respectively are attached hereto. A true translation of the said agreement into Greek made by a certified translator of the University of Vienna shown to me and marked 'C' is also attached hereto.

7. Under the terms of the said agreement the plaintiffs mutually agreed with the Defendants that

the securities requested by the said Order of the Court by both parties, as aforesaid, were to be reduced to DM200,000.- in the case of the plaintiffs and to DM600,000.- in the case of the defendants. In other words it was mutually agreed that the plaintiffs were not to give any further security than that furnished by them originally whilst the security required to be furnished by the defendants for the release of the ship from arrest was reduced by mutual agreement to DM600,000.- which amount represented the market value of the ship at the time. The plaintiffs further undertook not to proceed to any execution whatsover against the ship then or in the future. The parties further agreed to the application of German Law and to the Jurisdiction of the competent Court in Bremen before which the plaintiffs undertook to bring an action on the subject matter on/or before 31.1.75.

8. The plaintiffs brought an action on 31.1.75 in the Court of Bremen in respect of the subject matter and a photocopy of the writ of summons and Statement of Claim in the said action delivered at the registered office of the defendants, shown to me and marked 'D' and 'E' respectively, are attached hereto.

9. In full compliance with the terms and conditions of the said agreement the defendants had given the required security in the form of a Bank guarantee of an amount of DM600,000.- in favour of the defendants. Photocopy of the said guarantee, shown to me and marked 'F', is attached hereto. The said guarantee remains unchanged and valid and in full force until now.

10. As I am being advised and informed and as I verily believe the defendants observed at all times and have no intention whatsoever of not observing the terms of the said agreement with the plaintiffs whilst the latter in complete breach thereof have taken new steps against the ship and have obtained the order preventing all dealings therewith, against which the present opposition is made.

11. The plaintiffs' claim against the defendants is not over DM3,000.000.- as appears in the writ of

summons issued in the above action. It is for an amount of DM1,100,000.- as it appears in the Statement of Claim of the German Action (*Exhibit* 'E') which is the amount to which the defendants' liability is limited, by virtue of the rules governing Limitation of Shipowners' Liability. In other words, should the plaintiffs' claim in respect of the collision in question succeed, which is denied, the maximum amount to which judgment will be given against the defendants is DM1,100,000.-.

12. Irrespective however of the above, as I am being advised and informed and as it is implied from the said agreement (*Exhibit* 'B') the market value of the ship does not exceed the amount of DM600,000.- and this amount was deposited by the defendants as security in favour of the plaintiffs in the form of the Bank guarantee (*Exhibit* 'F') and was accepted by the plaintiffs as sufficient security, as a result of which acceptance the ship was released from arrest.

13. As I am being advised by counsel and as I verily believe the order applied for and obtained provisionally, is vexatious and oppressive and is causing the Administration of Justice to be perverted for an unjust cause and/or for the cause of furnishing the plaintiffs with double security for their present claim, the maximum of which security was obtained and accepted and agreed upon by the plaintiffs at the time of the arrest of the ship in Germany. The plaintiffs obtained all the security which could be obtained from the defendants and/or have themselves agreed to such security being sufficient and furthermore the plaintiffs expressly agreed to abstain from any proceedings against the ship.

14. As I am being advised and informed and as I verily believe the order complained of causes very grave hardship to the Defendants in view, *inter alia*, of the following :-

It affects substantially the cash flow schedule and assets position as well as the financial position of the Defendants and causes great embarrassment to the relationship of the Defendants with their inter-

national bankers and endangers their whole financial structure. It further imposes an unwarrantable and unjustifiable restriction on the defendants over and above that which was legally enforced against them by the plaintiffs by the arrest of the ship by the latter which secured to them the value of the ship in cash. The defendants are widely restricted to do any act with their ship despite the fact that they had purchased the right to deal freely therewith by furnishing the said guarantee.

15. For all the above reasons it is humbly prayed that the Order complained of be dismissed unconditionally with costs.

16. Entirely without prejudice to the above, and taking into consideration all the facts of the present case and in view of the falling prices of ships, and the great difficulties and problems that in any case exist now in respect of chartering and/or securing finance on the mortgage on ships. I am being advised and informed and I verily believe that the defendants are suffering substantial damages and hardship by the granting of the Order complained of which cannot be covered in any way by the bond given by the Plaintiffs on securing the said Order which is totally inadequate. For these reasons it is humbly prayed that should the Order complained of be allowed to stand it may be varied accordingly by increasing the security given by plaintiffs."

On September 29, counsel on behalf of the plaintiffs filed a notice opposing the application of the defendants, and the said application was based on the Cyprus Admiralty Jurisdiction Order, 1893, rules 203 - 212; rule 231 and on the Practice of the Admiralty Division of the High Court of Justice of England and on s. 30 of the Merchant Shipping (Registration of Ships. Sales and Mortgages) Law, 1963 (Law 45/63) (as amended), and on the inherent powers of this court.

The facts supporting the said application appear in the sworn statement made by Christoforos Nicolaou, an advocate's clerk in the law office of the advocate for the plaintiffs. These facts appear under some of these paragraphs and I propose quoting only some of them :-

"4. Paragraphs 7, 10, 11, 12, 13, 14, 15 and 16 and their contents is denied and not admitted. Furthermore the affidavit of Mr. Joseph Christou is irregular and contrary to the rules and should be disregarded. The affiant has no personal knowledge of the facts which he states and he does not state the source of his information.

5. The allegations that the market value of the vessel "Ismini" was D.M.600,000 is denied and the affiant is not in a position to state the value of a ship.

6. The interpretation given to the documents attached to the affidavit of Joseph Christou and his conclusions are wrong. The allegations that the liability of the defendants is limited or that the market value of the ship was D.M.600,000 or that the plaintiffs are seeking double security for the same damage already covered by other security or that the value of ships is falling are all and each one of them wrong and are denied.

7. As shown in the Statement of Claim the plaintiff's claim exceeds D.M. 3,000,000.

8. It is true that by certain procedures the defendants might be entitled to reduce their liability to the Statutory Court in the German proceedings. However the defendants failed to limit their liabilities under the German Laws therefore the plaintiffs' claim in fact exceeds D.M. 3,000,000.

9. The agreement reached does not provide exclusive jurisdiction for the Courts of Germany and in fact the agreement provides that 'the parties agreed on German jurisdiction and the competence of the Bremen Court however this jurisdiction does not exclude any other'.

10. Even if defendants' liability were limited to D.M.1,100,000 then there should be a balance of D.M.500,000 which remains unsecured the bank guarantee being in the amount of D.M.600,000.

11. The bank guarantee granted in favour of the plaintiffs in consideration of releasing the vessel

"Ismini" and for refraining from further detention of the vessel and in no way excludes the right of the plaintiffs to obtain security for their full claim as same may be adjudged in any competent court.

12. Paragraph 16 of the Affidavit of Joseph Christou contains conclusions which are not supported by facts and so far as such paragraph relates to facts the said affiant is not the competent person to swear to such facts."

I find it convenient to state before dealing with the submissions of both counsel that section 30 of our own law, the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law, 1963 is in these terms :-

"The Supreme Court may, if the Court thinks fit (without prejudice to the exercise of any other power of the Court), on the application of any interested person make an order prohibiting for a time specified, any dealing with a ship or any share therein, and the Court may make the order on any terms or conditions the Court may think just, or may refuse to make the order, or may discharge the order when made, with or without costs, and generally may act in the case as the justice of the case requires; and the Registrar, without being made a party to the proceedings, shall on being served with an official copy thereof obey the same".

I think I should have added that the wording of our s. 30 was adopted from s. 30 of the English Merchant Shipping Act, 1894, and the first case decided under that section is the case *La Blanca and El Argentino*, [1908] 77 L.J. P.D. and A. 91. Bargrave Deane, J., exercising his powers under the aforesaid s. 30 in an application *ex parte*, made an order restraining the owners, mortgagees, or any other persons from dealing with the ships La Blanca and El Argentino, until further order.

In *Beneficial Finance Corporation, Ltd.* v. *Price*, [1965] 1 Lloyd's Rep. 557, Mr. Justice Moffitt, dealing with the purpose of s. 30 of the Merchant Shipping Act, 1894, had this to say (at pp. 561 - 562) in making the said order :-

"The procedure under Sect. 30 *prima facie* is intended to be summary, the order being temporary in nature, no doubt taking into account the probable rights of the parties to adjust their permanent rights by other procedures. The foundation of the order is to protect dealings for a specific time but leaving the Court to impose conditions which *prima facie* protect the person whose dealings are prohibited and confine the effect of the order so it will not put the applicant in an over-advantageous position.

The order I make is that the respondent is restrained until and including May 21, 1965, from dealing with the ship Lolita by selling, mortgaging, charging or otherwise dealing with the same or by binding himself by agreement so to do except with the prior consent in writing of the applicant, this order to be subject to the condition that the restraint imposed by it shall terminate upon the discharge of the mortgage from the respondent to the applicant of the said ship or upon the respondent duly tendering to the applicant all moneys required to be paid under the said mortgage to discharge the same or upon the said mortgage being duly registered under the provisions of the Merchant Shipping Act, 1894, or upon the expiration of 28 days from the respondent doing all acts, including the delivery to the applicant of a declaration of ownership in proper form as may be necessary to permit the applicant to have the said mortgage registered under the said Act. I order that the respondent pay the applicant's costs."

With this in mind, I now turn to the submissions of counsel, and having read the *exhibits* attached to the affidavit of Mr. Joseph Christou, it seems to me that the parties in the German action are exactly the same as the parties in the Cyprus case, and that the claim of the plaintiffs, both in the German and Cyprus actions, arises solely from the collision between the two ships on December 5, 1974.

Counsel on behalf of the defendants-respondents submitted that the order obtained under s. 30 of our law was made without the Court knowing all the facts and was, therefore, contrary to the general principles of law

and practice pertaining in the Admiralty Courts. She relies on the authority of an old case, which still remains a good law. *The Christiansborg*, [1885] 54 L.J. P.D. & A. 84. The headnote of this case reads as follows :-

> "A collision occurred on the high seas between the C. and the J., two foreign vessels. The C. was arrested in Holland in an action brought by the owners of the J. and her cargo, but was released with the consent of the agent of the J. on the guarantee of a firm of underwriters interested in the C. to answer judgment in the action. Cross proceedings were instituted in the Dutch Court by the owners of the C. and the J. An action was subsequently commenced in this country against the owners of the C. by the owners of the J. and her cargo, and the C. arrested in respect of the same collision. The plaintiffs expressed their willingness to abandon the action in Holland."

It was held by Sir James Hannen in the High Court, and by Baggallay, L.J., and Fry, L.J. (dissentiente Esher, M.R.), in the Court of Appeal, that the proceedings in this country must be stayed and the ship released.

Sir James Hannen, dealing with the principle of *lis alibi pendens* whether the proceedings were vexatious, said (at p. 85) :-

> "It is clear, then, that there is a *lis alibi pendens*, for a suit was instituted by the plaintiffs in the Dutch Court against this vessel which they found within the jurisdiction of the Dutch Courts. Of course they could have brought an action here, if they had good cause for so doing; but, as I have already pointed out, they do not shew any such good reason. It is true the plaintiffs have expressed their willingness to abandon the action which is pending in the Dutch Court; but in the meantime the defendants, who were compelled to come into the Dutch Court, have naturally taken cross proceedings, and the Dutch Court therefore is seized of the litigation, and without the consent of the Dutch Court, and until they have dismissed the action and have said that they cannot entertain it, it is a *lis alibi pendens* in Holland. The defendants' vessel was also held to bail

in Holland, the plaintiffs in so doing exercising a plain right. Security satisfactory to the plaintiffs' agent in that country was given, and thereupon the vessel was released. By that release it was plainly meant that the vessel was to continue on her voyage, and be useful in any part of the world to her owners, and not merely that she was at liberty to navigate Dutch waters. But the plaintiffs, by commencing another action, and arresting this vessel here, have set at nought this theory, though they have in Holland a security according to the law of that country. The plaintiffs seem to think that they may arrest this ship wherever they find her, and so defeat the object of giving security in Holland. It appears to me, therefore, that justice requires that both suits instituted in this country should be stayed, and that the vessel should be released. In so doing I am not, in my opinion, acting contrary to the authorities which have been cited. The order must be made with costs."

The plaintiffs appealed against that decision and Esher, M.R., in his dissenting judgment, dealing with the question as to whether the proceedings in England were *prima facie* vexatious, had this to say (at pp. 86 - 87) :-

> "In this case the Court has clearly jurisdiction to try this action; but it is asked that the action may be stayed, on the ground of the proceedings abroad. Admiralty Court in Holland is a municipal Court of a foreign country. The bringing of this action is *prima facie* not vexatious, because the other proceeding was in a foreign country. But Admiralty Courts in all countries, so far as I know, exercise their jurisdiction by seizing the ship. If bail be given in one Court, it would be vexatious, upon a suit being instituted in a second Court, for the party suing to insist on pressing bail in both Courts."

Later on he said :-

> "To stay the proceedings would, in my opinion, be to break away from the decisions of this Court, which has laid down a clear and workable rule."

Fry, L.J., in a separate judgment agreed with Sir James Hannen that this Order should be made, and said :-

"Without in any way infringing the principles laid down in *McHenry* v. *Lewis*, 52 Law J. Rep. Chanc. 325; Law Rep. 22 Ch. D. 397, and *The Peruvian Guano Company* v. *Bockwoldt*, 52 Law J. Rep. Chanc. 714; Law Rep. 23 Ch. D. 225, I am of opinion that it was against good faith to institute this action after what had taken place in Holland. The transaction may be viewed as in effect giving bail. The bail is a release, and the meaning of it is that the proceeding is not to go on against the res. Different considerations arise to the case of actions in personam. The result of giving bail is the release of the ship, and it means that the ship is released from the effect of the collision. That is the most cogent circumstance in the case. It would be an extreme inconvenience if the ship could be arrested afresh in every jurisdiction, although released in each in turn. If the effect of the guarantee was not equivalent to bail, it may be considered as a private convention and agreement, so that the release has been purchased by the guarantee. It has been suggested that the guarantee may be inoperative, but it is not suggested in the affidavit that it is inoperative. There was in any case a transaction or arrangement by which a release was purchased from the claims of the Jessica in all waters. My opinion, therefore, agrees with that of the Lord Justice, and the appeal must be dismissed."

See, also, the judgment of Baggallay L.J. who also agreed with the judgment of Sir James Hannen, P.

In *The Soya Margareta*, [1960] 2 All E.R. 756, Hewson, J., having dealt with the facts and, also, with the contentions of counsel that the Court should exercise its discretion and stay the action in England, after distinguishing in this case the case of *Christiansborg* (*supra*), had this to say (at pp. 761 - 762) :-

"As I have already said, I have been referred to a number of cases including *The Hartlepool*, [1950] 84 Lloyd's Rep. 145, and I propose to read a passage from the judgment of Willmer, J. There the learned judge said this, (1950), 84 Lloyd's Rep. at p. 146 :

'The fact that no security has been furnished in

the proceedings abroad distinguishes this case at once from that of *The Christiansborg* [1885] 10 P.D. 141; 5 Asp. M.L.C. 491, and the other cases, of which there are quite a number, in which attempts have been made in one form or another to initiate proceedings in rem in two countries at once. Over and over again it has been held that once a ship has been arrested and bail or security has been furnished, the ship's release has been purchased, and she is free from further arrest in any country in respect of the same claim. But that is something very different from the situation which has arisen in this case. Here it is merely a personal action which has been started abroad; and where a personal action has been started abroad, and it is desired to sue here as well, there is no doubt that it is a matter for the discretion of the Court whether to make an order in the action in his country'.

If I may say so, with respect, I adopt those words of the learned judge with the reminder that in this case the action initiated by the charterers in Italy was, so far as I have been able to discover at this hearing, purely in personam. They have, for reasons which they have doubtless considered, chosen to proceed in rem in this country and so obtain the security to which I have already referred. Though convenience is a matter, as I have already said, not lightly to be discarded, I do not think that there is such a preponderance of convenience in the getting together of the evidence necessary in this case as to make this action so vexatious that I ought to prevent the charterers from following the course which they have chosen.

In those circumstances I must refer myself to the three ways that are open to me to deal with this case, three ways which were suggested by Baggallay, L.J., in *The Christiansborg* [1885], 10 P.D. at p. 152, and which are referred to and set out in Willmer J's judgment in *The Hartlepool* [1950], 84 Lloyd's Rep. at p. 146. They are these :-

'First, (the court) may put the party seeking to sue in this country to his election as to whether he

will proceed in this country or abroad; secondly, it may stay the proceedings in this country... or, thirdly, it may grant an injunction restraining the plaintiffs from prosecuting their proceedings abroad'.

By their correspondence and through their counsel in court the charterers made it clear as to their election. They have made it clear, too, that but for the action of the shipowners in Italy they would have abandoned the proceedings there which they, the charterers, originated. It seems to me that they indicated their election and, in order to safeguard that so far as it lies in my power, I feel that I should adopt the third of Baggallay, L.J.'s methods, namely, to restrain them by injunction from prosecuting their claim abroad."

See, also, *Slough Estates Ltd.* v. *Slough B.C.* [1967] 2 All E.R. 270 where after considering the principle formulated in the *Soya Margareta, (supra)*, Ungoed Thomas J., applied the dicta of Lord Esher, M.R., in the *Christiansborg,* [1885] 10 P.D. 141, at p. 148.

In *The "Mansoor"*, [1968] 2 Lloyd's Rep. 218, Cairns, J. dealing with a motion to stay the proceedings as being vexatious and oppressive, after reviewing a number of authorities, particularly *Golaa,* [1926] P. 103, *Marinero,* [1955] P. 68, and *Peruvian Guano Co.* v. *Bockwoldt* [1883] 23 Ch. D. 225, having distinguished the *Christiansborg,* [1885] 10 P.D. 141, applied the *Peruvian Guano Co. (supra)*, and held that plaintiffs were entitled to bring an action in Court of another country notwithstanding their acceptance of the defendants' undertaking and that that did not, without more, amount to breach of faith; that the fact that the present action was an action in rem did not make it a breach of faith; that it could not be said in this case that remedy in Belgian Court was an equally effective remedy to that obtainable in Admiralty Court.

In the light of these authorities, it appears that an action in rem in England will be stayed if the plaintiffs have already begun an action in rem abroad and bail has been given to release the ship, because it would be oppressive to allow the ship to be arrested a second time; but an action in rem or in personam commenced in

England by plaintiffs who are defendants in the proceedings abroad will not necessarily be stayed. See *The "Monte Urbasa"*, [1953] 1 Lloyd's Rep. 587. Furthermore, proceedings in rem in England will be restrained when a ship has been arrested abroad and afterwards released on a guarantee being given for the amount of the damage, though no litigation was going on abroad between the parties. (See the *Jasep* [1896] 12 T.L.R. 434 following the *Christiansborg*, [1885] 10 P.D. 141); but where, though mutual guarantees had been given, the ship had never been arrested abroad, the English Court has refused to stay proceedings in England. See *The Mannheim*, [1897] P.D. 13 approved and applied in *The Juno*, [1922] 128 L.T. 671. In recent case, *Ionian Bank Ltd.* v. *Courveur*, [1969] 2 All E.R. 651, the Court of Appeal considered the question of stay of proceedings when proceedings started in England and France. Lord Denning, M.R. dealing with this problem had this to say (at pp. 654 - 655) :-

> "The first point is whether the English proceedings ought to be stayed in view of the proceedings in France. We have been referred to a few authorities on this point such as *McHenry* v. *Lewis* [1882] 22 Ch. D. 397, and *Peruvian Guano Co.* v. *Bockwoldt* [1883] 23 Ch. D. 225. The law is not in doubt. The court will not stay an action by a plaintiff in the English courts simply because he has also started proceedings in another country. He is entitled to come to the Queen's courts to enforce his right. No stay will be granted unless the defendant shows— and the burden is on him to show—that the continuance of the English proceedings is vexatious or oppressive. In *Peruvian Guano Co.* v. *Bockwoldt* [1883] 23 Ch. D. at p. 239, Bowen, L.J. said :
>
> 'If there is a fair possibility that he (the plaintiff) may have an advantage by prosecuting a suit in two countries, why should this Court interfere and deprive him of it'?
>
> Sir George Jessel, M.R., said [1883] 23 Ch. D. at p. 230) :
>
> '...it is not vexatious to bring an action in each country where there are substantial reasons of bene-

fit to the plaintiff. He has the right to bring an action, and if there are substantial reasons to induce him to bring the two actions, why should we deprive him of that right'?".

Later on he said :-

"But counsel for the defendant had a further argument for a stay. He based it on the order of saisie conservatoire. He said that by this means the bank had already got security in France. It was not right, he said, to let the proceedings go on in England when the bank held security already in France. He relied on the Admiralty cases of *The Christiansborg* [1885] 10 P.D. 141, and *The Marinero* [1955] 1 All E.R. 676. But those were very different. In each case plaintiffs brought an action in Holland and arrested a ship there. The defendants, in order to get the ship released, gave security on the understanding that the action was to be continued in Holland. Afterwards the plaintiffs brought another action and arrested the ship, or a sister ship, in England. The defendants sought to stay the English action and succeeded. It would obviously be oppressive to let the action go on in England. The defendants had already bailed the ship out in Holland. They ought not to be compelled to bail it out again in England. Those cases are very different. There was here only the saisie conservatoire in France. I see nothing oppressive in the English action. I think that the judge was right in refusing to stay the English action."

Having heard the contentions of both counsel, and having read the agreement reached between the parties on December 23, 1974, in Germany and in the light of the authorities, it seems to me that when I had decided to grant the order on May 6, 1975, under the provisions of s. 30 of our law, restraining the defendants from selling, mortgaging or otherwise disposing of the vessel "Ismini" or "Eteoklis II" pending an amicable settlement or arbitration award or Judgment of the Court of Bremen in respect of the collision between the two vessels, I must confess that had I been aware of all the facts I

now know, I might have found myself in a different frame of mind.

In the light of these facts, certainly, it is clear to me, that there is a *lis alibi pendens,* for a suit so instituted by the same plaintiffs in the Bremen Court against this vessel which they found within the jurisdiction of the German Courts. Of course, I want to make it quite clear that the plaintiffs could have brought an action here, if they had good cause for so doing. In doing so, indeed, counsel on behalf of the defendants did not, in any way, argue that the plaintiffs had no right to come in the Courts of this country. There is no doubt, of course, that once the collision took place within the jurisdiction of the German Courts and the Courts seized of the pending litigation, I would reiterate that until the Courts have decided what to do with the action, it remains a *lis alibi pendens* in Germany.

Furthermore, the defendants' vessel was, also, arrested in Germany, and no doubt the plaintiffs in so doing had exercised their rights given under the Admiralty Jurisdiction of every country. Although security for the arrest was filed by the plaintiffs on their application for the arrest of that ship amounting to DM200,000, nevertheless, that amount was increased to DM900,000 and the order provided that the ship would be kept under arrest until an amount of DM3,000,000 was given as security by the defendants for her release. It appears further that from the agreement reached between the parties dated December 23, 1974, before the ship was released, the defendants undertook to file a security of DM600,000 and that the plaintiffs should reduce the amount of DM900,000 to DM200,000, obviously obtaining a further benefit.

From the contents of the agreement reached, it appears further that the plaintiffs agreed that the amount of DM600,000 given by he defendants stood in the place of SS. "Ismini" and that the plaintiffs were obliged, both now and in the future, not to take any further steps against the said ship (see p. 2 of the translated agreement reached between the parties, marked 'C').

As I said earlier, the ship was released, but the plaintiffs, although they have agreed as to the security of

DM600,000 and in spite of the fact that they had further agreed not to take any further steps against the said ship, nevertheless, when they filed Admiralty Action 21/75 in this country, they had asked for an order under s. 30 of our law, and in fact I was persuaded to grant the order to which I have referred earlier, which was in effect a stricter order and, at the same time not only a double security for the plaintiffs, but it also defeats the object of giving security by the defendants in Germany.

There is no doubt, to quote the words of Fry L.J., that the security given is in effect giving bail. The bail is a release, and the meaning of it is that the proceeding is not to go on against the res. In my view the giving of bail is the release of the ship and certainly it means that the ship is released from the effect of the collision, but even if the effect of the guarantee was not equivalent to bail, it may be considered as a private agreement so that the release has been definitely purchased by the guarantee.

In the light of what I have said, and because it now appears that the granting of the order under s. 30 of our law has placed the plaintiffs in an over-advantageous position, I have reached the conclusion, exercising my discretionary powers, to discharge the said order made on May 6, 1975, because the facts and circumstances of this case are within the principle formulated in *The Christiansborg* case (*supra*).

Order accordingly, with costs in favour of the defendants. Bail of the plaintiffs-applicants also discharged.

*Order accordingly.*