

# Coursework essay



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The claimant will be entitled to enforce the full amount of any judgment in respect of the in personae liability of the ship-owner. Where no such liability has been incurred, however, the judgment will still be limited to the value of the rest. ” Simon Vaughan, Shipping Law (4th Edn, Rutledge-Cavendish 2009), p. 383 Critically assess the extent to which an action in ERM is the same as an action in personae following *The Indian Grace* (No.

2)? Retire that this piece of work is my own work, that it has not been copied from elsewhere, that have not colluded with another in the preparation Of this work (unless permitted) and that any extracts from books, papers or there sources have been properly acknowledged as references or quotations. Also certify that I have checked the SETI nags of my work before submission to ensure that I have complied with the template instructions. If this is untrue acknowledge that will have committed an assessment offence.

Signed: FRAILLY BIN ROSELLA Date: 19TH FEBRUARY 2012 The similarity between actions in ERM and actions in personae has been a point of contention following *The Indian Grace* No. 2.

In order to assess to what extent the two actions are the same, statute, precedent and legal development regarding these actions shall be discussed. History Before 1873, actions in ERM were directed against the ship, only because the writ had to be begun by naming the ship as the defendant, and ship-owners could not be named. Ships were personified by the courts, named as wrongdoers, and identified as the source and limit of liability. Conversely, actions in personae are directed towards responsible individuals, and can only be brought where the claim falls under certain categories

allowing permission from the courts; where the defendant has agreed to submit to English law; or where the claim is about salvage for seen, 'ices rendered within English law.

2 It was never possible to combine the two actions before the Admiralty. 3 After 1883, ship-owners could be named as defendants. The Dictator acknowledged two parallel actions – actions in ERM and in personae, usually directed against the same party but with different remedies. Common law judges abandoned the personification theory for the view that ships were inanimate beings and could neither make contracts nor commit torts.

6 This view, later called the 'procedural theory', argued that ship-owners were parties to actions in ERM, which were purely procedural and this goes against the understanding that an action in ERM is confined to the rest unless and until an owner liable in personae elects to appear. 7 The case Prior to proceedings under English law, in personae proceedings were brought against the ship-owners in India.

The House of Lords discarded the personification view indefinitely, relying on The Dictator in that " for the purposes of 5. 34 Civil Jurisdiction and Judgments Act 1982, an action in ERM is an action against the owners from the moment that the Admiralty Court is seized with jurisdiction.

" 8 In effect, a person having obtained a foreign judgment in his favor is barred from re-litigating the same cause of action through in ERM proceedings unless the judgment is not enforceable or entitled to be recognized in England and Wales. 9 S. 4 would not apply if the claim failed in foreign proceedings. 10 Effects Proceedings in ERM were a means of

obtaining security for the claim and a vehicle of founding jurisdiction on the merits of the claim where the ship was arrested within this jurisdiction .

11 The claimable value was limited up to the ship's value, and if the owner or character of the ship acknowledged service thin the proceedings, any unsatisfied balance of the claim above the ship's value could be enforced against him by a writ of seizure in an action in personae. 2 Actions in personae were flawed, as it was difficult to obtain permission to serve a defendant outside England and Wales. Judgments in personae would be empty shells unless a quasi-security was obtained for satisfaction of the judgment via freezing injunction. 13 After *The Indian Grace No.*

2, acknowledgement of service is no longer necessary for actions in ERM and in personae: the commencement of an action in ERM automatically mounts to an action towards the ship-owner as well-1 4 The ship's value is no longer the limit of liability for the satisfaction of maritime liens attached to the ship.

The only distinction between the two actions is when the current ship- owner is a bona fide buyer of the ship – here, an action in ERM would amount to the ship's value, whilst personal liability would be incurred towards the previous ship-owners if its value does not satisfy the claim. 15 The European Court of Justice (SEC) ruled in *The Menace Rattrap* that actions in ERM and in personae involved the same cause of action and the same parties for the repose of Article 21 of the Brussels Convention 1 968, suggesting the two are exactly the same. 7 Criticism Sarah Darlington argues that the procedural theory, applied in *The Indian Grace No. 2*, fails to explain many of the

accepted features of the action in ERM, including a claimant's access to the ship despite a change in its ownership.

It also neglects the historic disparity Of judgments in ERM and judgments in personae. She argues that if the procedural theory is correct and if a claimant who has obtained a judgment in ERM is precluded from proceeding in personae to recover the full amount of the claim, this would undermine the basis of the arrest regime as a means of obtaining security. 8 Despite agreeing with the ratio deciding in *The Indian Grace No. 2*, Tare argues that the reasoning of Steen L's judgment seems to have stripped the action in ERM from its unique characteristic of being against the ship before the defendant acknowledges service. 19 The problem with *The Indian Grace No. 2*, he argues, arises from the misapplication of cases using the word "appearance" (of the defendant), which the judges equated to "acknowledgement of service".

20 Legal development In the Singapore case of *Quo Fen Aching and Another v Dauphin Offshore*

*Engineering & Trading Pete Ltd*, the judges in the Court Of Appeal departed from *The Indian Grace No. 2*, stating that ' the in ERM action continues to proceed against the rest even though the real party to the action is the ship-owner as was indicated in *The Indian Grace...*

Otherwise the whole purpose of the in ERM action would be defeated in cases where the defendants turn out to be insolvent or if it proves difficult to enforce the judgment. " The rest is the ship or subsequent security, and judgment can be enforced against it in the claimants' favor, even if the

defendants are the ship-owners. 2 In the Australian case of *Commandant Marine Corp. v Pan Australia Shipping Pty Ltd*, also criticized *The Indian Grace No. 2*, maintaining that “.

.. An action in ERM, at least prior to the unconditional appearance of a relevant person, is an action against the ship, not the owner or demise character of the ship” 24, and that “to treat (in ERM proceedings) as the equivalent of the *in personae* claim risks making it a dangerous lottery, thereby diminishing its practical value”. 25 In his view, if within proceedings in ERM.

The claimant cannot begin proceedings *in personae* to recover the full amount of the claim because he is considered to have already had his opportunity against the owner through the *in ERM* action, then there is a clear opportunity for a party liable on a maritime claim to collude with others to undermine entirely the worth of the underlying cause of action. 26  
Analysis *The Indian Grace No. 2* specifically deals with *res judicialis* under S. 34 rather than the overall distinction between *in ERM* and *in personae* actions .

This decision is based on the facts before the case was presented to the Privy Council. The debate on the similarity between *in ERM* and *in personae* actions has been blown apart after this case, with the SEC] stating that they are the same, and courts outside the United Kingdom holding otherwise. Regardless, the law as it stands now, following every interpretation of *The Indian Grace No. 2*, is that actions in *ERM* and *in personae* are directed towards the same parties for the same cause of action, and there is no

specification on the claimable value in ERM, making the two essentially identical.

The only positive changes from this case are that ship-owners cannot escape liability even without acknowledging receipt or service, and that a slight distinction between the two proceedings lies where a bona fide purchaser of a ship is involved.

27 Actions in ERM and in personae are not meant to be one and the same because the intention behind these actions is to recover costs from the ship first and finally from liable individuals.