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IS A CHARTERER'S INTEREST IN THE USE OF A VESSEL ATTACHABLE PROPERTY UNDER RULE B?

The ability under Rule B to attach a time charterer's bunkers or other property aboard a vessel to secure a claim against the time charterer is well-known. Are there circumstances, however, where a charterer's actual interest in the use of a vessel is attachable as security under Rule B? Somewhat surprisingly, there are no court decisions that directly answer that question. One older court decision has addressed this issue in *dicta*, and a few decisions have discussed related issues, but none have addressed this issue head on.

The beginning point of any analysis is the language of Rule B, which provides only that a defendant's "*tangible or intangible personal property*" in the hands of a garnishee may be subject to attachment. Rule B(1)(a). It does not define these terms and their interpretation is left for the courts to resolve on a case by case basis.

Historically, courts have typically given the terms "*tangible or intangible personal property*" under Rule B and its predecessor wording an expansive interpretation. For example, attachable property has included (a) real property, (b) goods, chattels, credits and effects, (c) unmatured or partially matured debts, including a charterer's obligation to pay charter hire, (d) bank accounts, and (e) as well as a variety of other contingent interests, such as a defendant's interest in an arbitration award.

In *Winter Storm Shipping, Ltd. v. TPI*, when considering the scope of Rule B's grasp in the context of electronic funds transfers, Judge Haight mused that:

> *It is difficult to imagine words more broadly inclusive than "tangible or intangible." What manner of thing can be neither tangible nor intangible and yet still be "property?" The phrase is the secular equivalent of the creed's reference to the maker "of all there is, seen and unseen."*

This expansive view of the terms "*tangible or intangible property*" has been confirmed by recent court decisions. *See, e.g., World Fuel Services, Inc. v. SE Shipping Lines Pte., Ltd.* ("*Rule B does not identify the specific legal interest in the property that defendant must have before it is subject to seizure. In its prior ruling, the Court concluded that defendant had at least a right of possession, a legal interest, in the bunkers.*"); *Aifos Trade SA v. Midgulf International Ltd.* ("*However, the evidence provided to the Court shows that at the time of the attachment, Midgulf retained at least some legal interest in the attached funds, and that is all that is required of Rule B…*"); *HBC Hamburg Bulk Carriers GMBH & Co. KG v. Proteinas y Oleicos S.A. de C.V.* (finding in context of competing interests in EFTs that …

"*Rule B is intended to impact any property in which the defendant has a legal interest. Nothing in the language of Rule B requires that the property attached be the exclusive property of the defendant.*")

Turning to the specific issue of whether a charterer's interest in the use of a vessel is attachable under Rule B, the journey begins with Judge Learned Hand's 1929 decision in *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, where he upheld an attachment of vessels based on a conditional buyer's possession of the vessels and "*equitable*" interest in them despite the fact that title to the vessels remained technically with the conditional seller until such time as the vessels had been paid for in full. He observed that *"[i]t would be curious if possession, coupled with a conditional right to title, should now be thought insufficient to support a seizure."* Thus, the conditional buyer who had possession, but not title to the vessels, had an attachable interest in the vessels.

A decade later in *McGahern v. Koppers Coal Co.*, the Third Circuit was faced with the attachment of a vessel for the debts of its bareboat charterer. While it essentially agreed with Judge Hand's reasoning in the *Kingston Dry Dock* case, the Third Circuit found the existence of a mere bareboat charter did not permit attachment of the vessel itself. Although a bareboat charterer is "*for many purposes treated as owner pro hac vice*," it merely confers a right to possession of the vessel and "*is not the equivalent of title and does not subject the vessel to the general debts of the charterer.*" The Third Circuit distinguished, however, between an attachment of the vessel itself, which it declined to permit based on a debt of the bareboat charterer, and an attachment of the bareboat charterer's interest in the vessel, which it did not decide since the issue before it was limited to an attempted attachment of the vessel.

The *McGahern* decision was followed some years later in *Applewhaite v. S.S. Sunprincess*, where the court vacated an attachment of a vessel based on the *McGahern* decision. In *dicta*, the district court answered the question left open by the Third Circuit. It said that a time charterer's interest in a vessel would not be attachable, reasoning that a charterer's interest is not subject to attachment because "*[t]he only asset available for judicial sale … would be the contract rights arising out of the charter*" and "*[t]he very nature of a charter agreement is a manifestation of the intent of the parties that it shall not be assignable.*" (The court's finding of the non-assignability of a charterer's interest in a vessel is of dubious validity in today's world given the presence of sub-let clauses in many form charter parties.)

Another instructive case is *Interpool Limited v. Char Yigh Marine (Panama) S.A.*, in which the Ninth Circuit held that a vessel could be validly attached to secure a claim against a time charterer, where the charter in question was not a true lease with a reversionary ownership interest, but was in fact a disguised security interest in connection with the purchase of the vessel. Applying commercial law under the UCC relating to leases of equipment and machinery, the *Interpool* court explained that "*if a document purporting to be a lease is in fact part of a security arrangement, the 'lessor' does not have a reversionary ownership interest in the subject of the 'lease' [and] [t]he 'lessee' rather than the 'lessor' is viewed as the owner.*"

What may be gleaned from these cases is that where a charterer has a right to purchase the vessel at the end of the charter period, this may be sufficient to establish an attachable interest in

the vessel under the reasoning of the *Kingston Dry Dock* and *Interpool* decisions.

It remains to be seen, however, whether and to what extent under the current expansive interpretations of Rule B a charterer's actual interest in the use of a vessel would be considered attachable "*tangible or intangible property.*" Certainly one could argue that *dicta* from one district court decision issued over fifty years ago (based on a dubious finding of non-assignability of that interest) should not be sufficient to provide a controlling answer to the issue left open by the Third Circuit in *McGahern, i.e.*, whether a charterer's interest in the use of a vessel is attachable under Rule B.

That does not, however, necessarily end the analysis. In circumstances where federal maritime law does not provide clear precedent on an issue, federal courts are permitted (and in fact quite often do) adopt state law precedent to answer the question. The adoption of New York state law was at the heart of the 2009 *Jaldhi* decision by the Second Circuit in which an electronic funds transfer passing through an intermediary (correspondent) bank was found not to be attachable property under Rule B. The *Interpool* decision discussed above also involved the adoption of state law in order to reach a decision on whether the vessel was subject to attachment under Rule B.

Although one would not expect the issue of whether a charterer's interest in the use of a vessel to have been directly addressed by a New York state court, New York state law does provide guidance in respect of analogous issues. For example, a lessee's interest in an automobile has been found to be seizable under New York state law. *Gleich v. Rose*, ("*Inasmuch as the interest of an automobile lessee, …, is present and possessory, it is a tangible interest in personal property 'capable of delivery by taking the property into custody' and this is subject to levy by, and only by, seizure…*"). A leading expert on New York state law has also commented: "*… a present right of possession may be levied on even if a right of repossession or outright title lies elsewhere, as long as the right, however limited, has anything of economic value that might entice a buyer.*" Siegel, NEW YORK PRACTICE. While not binding on a federal court, New York state law could offer persuasive authority in support of a Rule B attachment of a charterer's interest in the use of a vessel.

Going forward, we would not be surprised to find that maritime creditors seeking to secure their claims in this volatile chartering market may well seek attachments under Rule B based on a charterer's interest in the use of a vessel.